

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI

ORIGINAL APPLICATION NO. 1022 OF 2013

DISTRICT :MUMBAI

Shri Diwansing Jibhau Patil,)
Clerk, Raj Bhavan, Mumbai 400 035,)
and residing at 5, Neel Ratan Building,)
Raj Bhavan Compound, Walkeshwar)
Road, Mumbai – 400 035.)...**Applicant**

VERSUS

1) Government of Maharashtra)
Through Principal Secretary,)
General Administration Department,)
Mantralaya, Mumbai – 400 032.)

2) The Comptroller of Household to the)
Hon'ble the Governor of Maharashtra)
Raj Bhavan, Mumbai – 400 035.)....**Respondents**

Shri M.D. Lonkar, learned Advocate for the Applicant.

Ms. N.G. Gohad, learned Presenting Officer for the Respondent No.1.

Shri Narendra Walawalkar, learned Special Counsel for the Respondent No.2.

CORAM : Shri Rajiv Agarwal, Vice-Chairman

Shri R.B. Malik, Member (J)

DATE : 10.032016

PER : Shri Rajiv Agarwal, Vice-Chairman

ORDER

1. Heard Shri M.D. Lonkar, learned Advocate for the Applicant, Ms. N.G. Gohad, learned Presenting Officer for the Respondent No.1 and Shri Narendra Walawalkar, learned Special Counsel for the Respondent No.2.

2. This Original Application has been filed by the Applicant challenging the order dated 15.10.2013 reverting him from the post of Clerk to that of Driver.

3. Learned Counsel for the Applicant argued that the Applicant was initially appointed by the Respondent No.2 as Tennis Boy on 11.6.1984. He was promoted as Driver on 28.1.1989. The Applicant was appointed as Clerk by transfer in accordance with the Recruitment Rules applicable to the posts in the office of the Respondent No.2. After completion of 12 years of service, the Applicant was granted Time Bound Promotion w.e.f. 8.5.2006. A notice was given to the Applicant on 4.7.2011 by the Respondent No.2 asking why he should not be posted back as Driver as his appointment as Clerk was not in accordance with the recruitment rules. The Applicant submitted his reply on 25.7.2011, but the Respondent No.2 issued order dated 15.10.2013 reverting him to the post of Driver. Learned Counsel for the Applicant

argued that he was appointed as Clerk by transfer from the post of Driver. The transfer of the Applicant was in accordance with Rule III (2) (a) of the Recruitment Rules for various posts in the office of the Secretary to the Governor of Maharashtra and the Comptroller of Household to the Governor of Maharashtra. This order was issued on 7.12.1992. The Applicant was granted Time Bound Promotion from 7.12.2004 on completion of 12 years of service, by order dated 8.5.2006. Learned Counsel for the Applicant argued that the impugned order is violation of the doctrine of legitimate expectation. His service has always been treated as regular. He has been granted all benefits available to a regular Government Servant, including the Time Bound Promotion which is granted on completion of 12 years of regular service. The doctrine of promissory estoppel is also attracted in this case. The Applicant was appointed as Clerk on 7.12.1992 and has continued to discharge his services uninterrupted till date. No objection was raised by any of the departmental authority to his appointment as Clerk. Learned Counsel for the Applicant prayed that the impugned order dated 15.10.2013 may be quashed and set aside.

4. Shri Walawalkar, learned Special Counsel for the Respondent No.2 argued that the doctrine of promissory estoppel does not apply in the present case. In *Monnet Ispal and Energy Limited Vs. Union of India & others*, (2012) 11 SCC 1, Hon'ble S.C. has held that the Government or even a

private party under the doctrine of promissory estoppel cannot be asked to do an act prohibited in law. Learned Special Counsel argued that in the present case, the appointment of the Applicant as Clerk was not in accordance with law. Also doctrine of legitimate expectation could not be invoked which could block public interest for private benefits. The doctrine of promissory estoppel and legitimate expectation will not apply in the present case. Learned Special Counsel also cited judgment of Hon'ble Supreme Court in Secretary of State, Karnataka and others Vs. Umadevi & others, (2006) 4 SCC 1. Learned Special Counsel argued that Hon'ble S.C. has rejected the argument in Umadevi's case that right to life protected by Article 21 of the Constitution would include the right to employment. It is held by Hon'ble Supreme Court that in the name of individualising justice, Constitutional Scheme cannot be ignored. Learned Special Counsel argued that both the orders appointing the Applicant as Driver from the post of Tennis Boy on promotion and order transferring him from the post of Driver to that of Clerk were ad-hoc appointments. Learned Special Counsel argued that the Applicant was promoted as Driver merely on his application dated 10.9.1990. No procedure was followed, there was no open competition. Similarly, his transfer to the post of Clerk was also based on simple application dated 7.12.1992. Learned Special Counsel argued that order dated 15.10.2013 is proper and legal and the Applicant has no reason to feel

aggrieved. Learned P.O. adopted the arguments of learned Special Counsel.

5. We find that the Applicant was appointed as Driver by order dated 28.1.1989. It was mentioned that he was promoted to the post of Driver from the post of Tennis Boy on temporary basis. This order is not before us for consideration, whether it is valid or otherwise. The Applicant has challenged order dated 15.10.2013 by which he has been repatriated (प्रत्यार्पित) from the post of Clerk to the post of driver. The Applicant was appointed to the post of Clerk by order dated 7.12.1992 on transfer. The claim of the Applicant is that his appointment is valid and in accordance with the relevant recruitment rules. He has appended the recruitment rules as Exhibit 'F' in his O.A. This is stated in para 6.7 of the O.A. In the affidavit-in-reply, of the Respondent No.2 dated 2.1.2014, it is stated in para 9, that 'transfer' in Rule 2(A) means transfer of a Clerk, working in some other office in the Government and not transfer of a Driver, which is a totally different cadre. Similar stand is taken by the Respondent No.1 in the affidavit in reply dated 14.3.2014. The relevant rules are called "Recruitment rules for various posts in the office of the Secretary to Governor of Maharashtra and the Comptroller of Household to the Governor of Maharashtra". Part II of the Rules deals with the appointment to Ministerial posts viz. Superintendent, Assistant Superintendent, Assistant, i.e. First Assistant,

Senior Assistant, Junior Assistant, Tour Clerk, Junior Clerk and Clerk Typist.

6. For the post of Clerk, the rules read:-

(2) Clerk-

The appointment to the post shall be made by the Secretary to the Governor of Maharashtra/Comptroller of Household to the Governor of Maharashtra either-

- (a) by transfer of a person in any Government offices possessing qualifications mentioned in Clause (b)".

The claim of the Applicant is that any person, who has qualification mentioned in clause (b) can be transferred as Clerk, provided he possesses prescribed qualifications. The Respondent's case is that 'person' in the rule means a person who is already working as a Clerk and as the posts of Driver and Clerk belong to two different cadres, there is no question of transfer between these two posts. These rules do not provide for transfer from one cadre to another for which there may be separate provisions. It appears that the Applicant was appointed as Clerk on transfer, as the pay scales of both the posts were identical. However, it is true that the word transfer connotes posting of a person on the same post from one department to another or from one place to another in the same department. Normally a person belonging to one cadre cannot be transferred to a post in another cadre. The claim of the Respondents that the Applicant was wrongly appointed as Clerk by transfer from

the post of Driver appears to be logical. This, however, has to be weighed against the claim of the Applicant that he has been working as Clerk since 7.12.1992, when he was so appointed. There appears to be no dispute that he fulfils the qualifications for the post of Clerk. The Applicant has been functioning for 19 years, in a clear and substantive vacancy and he was treated as regular employee which is confirmed by the fact that he was granted Time Bound Promotion w.e.f. 7.13.2004 on completion of 12 years of service. The Applicant has cited various judgments in support of his claim that he cannot be repatriated to the post of Driver on the doctrine of Legitimate Expectation and Promissory Estoppel. Ordinarily, if his appointment to the post of Clerk was made in accordance with rules, the doctrine of Legitimate Expectation and Promissory Estoppel will protect the Applicant. In fact, in such a case, there would be no challenge to his appointment. Hon'ble Supreme Court in the case of Monnet Ispal & Energy Limited (supra) has decided as follows:-

“188.5 The protection of Legitimate Expectation does not require the fulfilment of the expectation where on overriding public interest requires otherwise. In other words, personal benefit must give way to public interest and the doctrine of legitimate expectation would not be involved which could block public interest for private benefit.”

In para 182.5, it is held that “No promise can be enforced which is statutorily prohibited or is against public policy.”

If the appointment of the Applicant as Clerk is held to be against the law, obviously, the doctrine of promissory estoppel and legitimate expectation will not apply. In Umadevi's case, (supra) Hon'ble S.C. has held in para 46 that:-

"Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employee to claim that they must be made permanent or they must be regularised in the services though they had not been selected in terms of the rules of appointments."

7. The Applicant has cited judgment of Hon'ble Supreme Court in M/s M.P. Sugar Mills Co. Ltd. Vs. The State of Uttar Pradesh & Others reported in AIR 1979 SC 621 regarding the applicability of the doctrine of promissory estoppel against the Government. However, in this case also, the right to promissory estoppel has not been held to be absolute against the Government. It has to be weighed against the public interest.

8. Learned Counsel for the Applicant has cited the judgment of Hon'ble Bombay High Court, Nagpur Bench in Sachin Ambadas Dawale Vs. State of Maharashtra & another. He argued that in that case the appointment of the Applicants were ordered to be regularised, though they were not appointed on the recommendations of the Maharashtra Public Service Commission. We are afraid,

that this is a simplistic appreciation of the judgment of Hon'ble H.C. Hon'ble H.C. has held in Sachin's case (supra) that the Applicants were not backdoor entrants as they were selected pursuant to open advertisement and all interested candidates had applied for the posts for which the petitioners were selected. However, we find that in Umadevi's case, Hon'ble S.C. has held in para 53 that:-

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.U. Narayanappa, R.N. Nanjanbappa and B.N. Nagarjan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of the court or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Government and their instrumentalities should take steps to regularise as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of Tribunals and should further ensure that regular appointments are undertaken to fill these vacant sanctioned posts that require to be filled up in cases where temporary employees or daily wagers are being employed. The process must be set in motion within six months from the date.”

9. The Applicant is working for more than 10 years as Clerk in a sanctioned post it is not denied that he is duly qualified to hold the post. He is not continued in that post under cover of order of any Court or Tribunal. It appears that his services as Clerk can be regularised on the basis of judgment of Hon'ble Supreme Court in Umadevi's case (supra). We get fortified in this behalf by the later judgment of the Supreme Court in Kesari's case viz. **State of Karnataka and Others Vs. M.L. Kesari & Others : (2010) 9 SCC 247.**

10. We, therefore, direct the Respondent to consider the case of the Applicant for regularisation of his services to the post of Clerk in the light of the judgment of Hon'ble S.C. in Umadevi's case (supra) and M.L. Kesari's case (supra) within a period of three months from the date of this order. Till a decision in this regard is taken, the Applicant's status will not be changed. This O.A. is disposed of accordingly with no order as to costs.

Sd/-

**(R.B. MALIK)
(MEMBER) (J)**

Sd/-

**(RAJIV AGARWAL)
(VICE-CHAIRMAN)**

Date : 10.03.2016

Place : Mumbai

Dictation taken by : SBA

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