

MAHARASHTRA ADMINISTRATIVE TRIBUNAL
NAGPUR BENCH NAGPUR
ORIGINAL APPLICATION NO. 138 /2013

Ashok Kawduji Awachat,
Aged about 53 years, Occ. Service,
R/o Quarter No. D 11/2 Apparwardha Irrigation Colony,
Arvi Road, Piprimeghe, Wardha-442 001.

Applicant.

Versus

- 1) The State of Maharashtra,
through its Secretary,
Water Resources Department, Mantralaya,
Mumbai-32.
- 2) Superintending Engineer,
Irrigation Project, Investigation Circle,
Sinchan Seva Bhawan, Civil Lines,
Nagpur-440 001.

Respondents

Shri P.S. Wathore, Advocate for the applicant.

Smt. S.V. Kolhe, Id. P.O. for respondent no.1.

Shri P.V. Thakre, Advocate for respondent no.2

**Coram :- Hon'ble Shri J.D. Kulkarni,
Vice-Chairman (J).**

JUDGEMENT

(Delivered on this 11th day of April,2017)

Heard Shri M.V. Joshi, Id. Counsel holding for Shri P.S. Wathore, Id. Counsel for the applicant and Smt. S.V. Kolhe, Id. P.O. for respondent no.1. None for respondent no.2.

2. The applicant in this case is a Civil Engineering Assistant. He was appointed as a Technical Assistant on 01/07/1986 on workcharged establishment and had subsequently acquired status of Civil Engineering Assistant. He was appointed as Civil Engineering Assistant on 22/10/1993.

3. On 18/01/2012 the respondent no.2 issued an order whereby granting exemption to the applicant from passing qualifying professional examination as the applicant has completed the age of 45 years on 01/10/2004. The applicant was therefore granted exemption from passing professional examination for the post of Junior Engineer. On 20/06/2012, the Govt. had accordingly given the higher pay scale to the applicant to avoid stagnation of service at one post. The pay fixation was accordingly made by the Executive Engineer, Hydro Electric Project Investigation Division, Nagpur.

4. All of a sudden on 11/01/2013, the respondent no.2 issued an order cancelling the exemption granted to the applicant from appearance in the professional examination for the post of Junior Engineer and cancelled the benefit of the order under time bound promotion scheme to the employees. The applicant made representation lamenting his grievance but for no use. The applicant was therefore constrained to file this O.A. in which he has claimed that

the impugned order dated 11/01/2013 passed by respondent no.2, i.e., the Superintending Engineer, Irrigation, Project Investigation Circle, Nagpur be quashed and set aside and the applicant be granted all the service benefits. He has also claimed cost of Rs.20,000/-.

5. The respondent nos.1&2 resisted the claim. It is stated that the exemption was granted to the applicant on the basis of the circular which is not applicable to the applicant. The applicant is working in the Water Resources Department which is a separate administrative Department of Government of Maharashtra having different nature of duties and work and service conditions. The circular dated 06/11/2000 and 23/02/2005 issued by the Water Resources Department is applicable to the applicant which makes it clear that no exemption can be granted from passing the professional examination for being eligible to get entry in cadre of Junior Engineer after passing age of 45 years. As per recruitment rules, it is necessary to clear the professional examination of Junior Engineer and said examination is qualifying examination. Since the applicant did not pass that examination, his exemption which was wrongly granted was re-considered and was cancelled. It is stated that the said issue has been considered by the Hon'ble High Court of Judicature at Bombay in W.P.No.6329/1997 **Shri Mukund Pandurang Varkat Vs. Executive Engineer, Sangli & Ors.** and

also in O.A.No.472/2011 in the case of **Kawadu Nilkanth Kamble Vs. State of Maharashtra & Ors.**

6. From the admitted facts it is clear that the applicant was earlier granted exemption from appearing the professional examination vide order dated 18/01/2012. The said order is placed on record at P.B. of page no.22 and the same order is based on the G.Rs. under reference. Vide impugned order dated 11/01/2013 which is at P.B. of page no.18, the exemption granted has been cancelled. The cancellation order refers the various G.Rs. which reads as under:-

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egjk"V^a 'kkl u] tyl ank foHkkx] e#ky;] epb&32 dkd ifj{kk 1002@%513@2002½ vk ¼i f'k½ fnukd 23@5@2005 vUo; s 'kkl u ifji=d] i kVc/kksfoHkkx dkd ifj{kk 1000@%296@2000½ ; k ¼i f'k½ fnukd 6@11@2000 e/khy rjrmhuu kj o; kF/kD; kP; k dkj.kkLro LFkki R; vfHk; kf=dh I gk; d ; kauk dfu"B vfHk; ark inkph 0; kol kf; d@vgzrk ifj{kk mRrh.kz gks; ki kl uu I W vuks ul Y; keGs I mfHkz vkskkUo; s ¼1½ Jh-j-fd-cjMdj]LFkk-vfHk-I gk- ¼2½ Jh-v-dz vopV]LFkk-vfHk- I gk- ¼3½ Jh-fc-ts frMdj] LFkk- vfHk- I gk- ; kauk fnysyh dfu"B vfHk; ark inkph 0; kol kf; d@vgzrk ifj{kk mRrh.kz gks; ki kl uu fnysyh I W ¼1 mfHkz vkskkjnn dj.; kr ; r vkgs

rl p I mfHkz vkskkUo; s fnys; k I W eGs eMG dk; k; kus ojhy depk&; kauk dkyc/n inkLurh I cdkh fuxTer dsysy [kkyhy vksk jnn dj.; kr ; r vl uu I cdk/kr depk&; kauk ns; kr vkysyh Fkdckdh ol W dj.; kr ; r vkgs*-

7. The learned P.O. has invited my attention to the Recruitment Rules for appointment to the post of Junior Engineer, which are called "Junior Engineer (Civil) Group-B" non-gazatted in Public Works Department and Irrigation Department (Recruitment) Rules 1998. Rule 3 is material which is as under :-

" (3) Appointment to the post of Junior Engineer (Civil), Group 'B' non-gazatted in the Public Works Department and the Irrigation Department shall be made either –

(a) by promotion of a suitable person on the basis of seniority subject to fitness from amongst the persons holding the post of Civil Engineering Assistant who have passed the qualifying examination for the post of Junior Engineer conducted by the Engineering staff College, Nasik having not less than three years regular service in that post or

(b) by nomination from amongst candidates who –

(i) Are not more than 30 years of age;

(ii) Possess a three years diploma in Civil Engineering recognised by Government or any other qualification recognised as equivalent thereto".

8. The plain reading of the aforesaid rule clearly shows that for holding the post of Junior Engineer (Civil) Group-B it is necessary that the Civil Engineering Assistant shall pass the qualifying examination for the post of Junior Engineer conducted by the Engineering Staff College, Nashik. Even if for argument it is accepted that the order of exemption from such examination was issued by the

respondent department still that order is against the rules which are framed under Article 309 of the Constitution of India and therefore such order will not entitle the applicant for exemption from such examination and merely because the applicant has been exempted, he cannot be appointed to the post of Junior Engineer (Civil) Group-B unless he clears the qualifying examination. The impugned order dated 11/01/2013 so far as it relates to cancellation of exemption is concerned, therefore cannot be questioned.

9. The learned P.O. has relied on the Judgment delivered by Hon'ble High Court of Bombay in W.P.No.6329/1997 **Shri Mukund Pandurang Varkat Vs. Executive Engineer, Sangli & Ors.** delivered on 18th June,2009. In the said Judgment similar point has been considered by the Hon'ble High Court and the Hon'ble High Court has observed as under :-

“ Counter affidavit has been filed in which the respondents have stated that the resolution to which reference has been made by the petitioner allows the government to grant exemption from passing department examination to those who have completed age of 45 years but this resolution would not apply in case of the petitioner because the examination which needed to be passed by the petitioner had to be passed and the respondents had no power to grant any exemption. It is further submitted that the departmental examination referred to in the resolution dated

1st November, 1977 and professional examination referred in resolution dated 16th September, 1964 are dealing with two different situations and cannot be mixed with one another. It is further stated that the petitioner was appointed as a Civil Engineer Assistant which falls in the category of Technical Assistant and as per Government Resolution, the petitioner could be promoted to the post of Junior Engineer provided he had passed the professional examination. Since the petitioner had not passed the professional examination and even if exemption was granted to him from appearing in departmental examination, even then, he could not be promoted because of not having passed the professional examination. For these reasons, we do not find merit in the petition. Petition is accordingly dismissed”.

10. The learned counsel for the applicant submits that vide impugned order dated 11/01/2013 the respondent had directed recovered of the amount already paid to the applicant and the same is against law. He placed the reliance on the Judgment delivered by the Hon’ble Apex Court in the case AIR 2015 SC, 696 in the case of **State of Punjab Vs. Rafiq Masih (White Washer)** etc. In the said case the Hon’ble Apex Court in para 12 has observed as under :-

“(12) It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready

reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

11. The learned P.O. however placed reliance on the Judgment delivered by the Hon'ble Apex Court in the case of **High Court Punjab & Haryana Vs. Jagdev Singh** reported in **2016 SCC Online SC,748** and submitted that the applicant has given undertaking that he will be liable to pay arrears if the fixation is wrong.

12. I have gone through the Judgments delivered by the Hon'ble Apex Court. In the present case admittedly the applicant is

Class-III employee. There is nothing on record to show that he was instrumental for grant of exemption from appearing for the exemption or for getting the financial benefits. Considering this fact it would not be proper to recover the arrears if paid to the applicant and such recovery may cause hardship to the applicant. In view thereof, the following order :-

ORDER

- (i) The O.A. is partly allowed.
- (ii) The impugned order rejecting exemption granted to the applicant from passing qualifying examination for the post of Junior Engineer is held legal. The respondents are however directed not to recover the arrears if paid in view of the order of exemption granted to the applicant. In view thereof, the directions regarding recovery of the amount due to time bound promotional scale granted to the applicant in view of exemption order dated 18/01/2012, in the impugned order dated 11/01/2013 is quashed. No order as to costs.

(J.D. Kulkarni)
Vice-Chairman (J).