

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.174 OF 2017

DISTRICT : PALGHAR

Shri Shrinivas Bhaskar Chavan.)
Age : 59 Yrs., Occu.: Retd. Superintendent,)
Office of Directorate, Industrial Safety &)
Health Kamgar Bhavan BKC, Bandra (E),)
Mumbai – 400 051 and residing at B-1,)
Pratik Palace, Near Chandresh Nagar,)
Patankar Park, Nallasopara (W),)
Palghar – 401 203.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary,)
Industrial Energy & Labour Department,)
Madam Cama road, Hutatma Chowk,)
Mantralaya, Mumbai 400 032.)
2. Director of Industrial Safety & Health,)
Through its Director, having office at)
5th Floor, Kamgar Bhavan, BKC,)
Bandra (E), Mumbai – 400 051.)...**Respondents**

Mr. M.D. Lonkar, Advocate for Applicant.

Mrs. A.B. Kololgi, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 21.06.2019

JUDGMENT

1. The Applicant is seeking relief of deemed date of promotion w.e.f. 31.01.2003 with consequential monetary benefits invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.
2. Briefly stated facts giving rise to this application are as under :-

The Applicant was initially appointed as Clerk-cum-Typist with the Respondents w.e.f.27.11.1080 and came to be promoted to the post of Senior Clerk w.e.f.08.08.1996. He contends that considering his seniority and performance, he was entitled to next promotion to the post of Superintendent w.e.f.30.01.2003. However, he was promoted belatedly w.e.f.13.07.2005. He retired from service at the end of January, 2017. Before retirement, he had approached this Tribunal by filing O.A.71/2003 challenging the promotion to the post of Superintendent given to Smt. Shubhangi Parshivnikar. O.A.71/2003 was disposed of by the Tribunal on 06.10.2003 giving direction to the Respondents to prepare fresh roster as per law and then to take further steps to fill in the post of Superintendent. In O.A.71/2003, it was revealed that Smt. Palshivnikar was promoted to the post of Superintendent from the reserved category of Special Backward Class (SBC). However, she had failed to produce Caste Certificate that she belongs to SBC. Therefore, she was reverted to the post of Senior Clerk by order dated 03.10.2003. Therefore, while deciding O.A.71/2003, the Tribunal observed that the relief claimed by the Applicant challenging the promotion of Smt. Palshivnikar had become infructuous in view of her reversion to the post of Senior Clerk. The Tribunal observed that as per Roster prepared on 31.12.2000, there were 19 posts of Superintendent in Bombay cadre and 18 were filled, but 2 posts were found filled from Scheduled Caste Category in excess and there was backlog of one post from Scheduled Tribe and one post from SBC and one post

from Open Category. However, these 3 posts were found transferred out of Bombay leaving with 16 posts of Superintendent in Bombay cadre. With this observation and finding, the Tribunal disposed of the application with direction to Respondents to prepare fresh Roster in accordance to law and then to take further steps to fill in the post of Superintendent. However, the Respondents did not take any steps for preparation of fresh Roster.

3. The Applicant, therefore, made representations dated 27.08.2012 and 11.01.2013 for promotion to the post of Superintendent w.e.f.30.01.2003. On receipt of representations, the Respondent No.1 called for information by letter dated 14.08.2004 from Respondent No.2 and it was further directed to find out the reasons for not considering the Applicant for promotion while promoting Smt. Palshivnikar, who was junior to the Applicant. The Respondent No.2 by letter dated 15th September, 2014 informed to Respondent No.1 that the case of the Applicant at the relevant time was not considered for promotion as the then DPC decided to fill in the posts earmarked for Open Category to be filled in from the category of SBC, and therefore, the Applicant could not be promoted to the post of Superintendent. It was further informed that while giving promotion to Smt. Palshivnikar, there was no backlog for SBC. Besides, later for non-submission of Caste Validity Certificate of SBC, Smt. Palshivnikar was reverted to the post of Senior Clerk and eventually, she took voluntary retirement on 12.02.2012. Thereafter, in next DPC meeting, the case of the Applicant was examined and having found that he was entitled to promotion on 20.01.2013 itself and accordingly, promoted to the post of Superintendent w.e.f.13.07.2005. Thereon the Respondent No.1 by letter dated 12.02.2015 directed Respondent No.2 to consider the case of Applicant for grant of deemed date of promotion by convening the meeting of DPC. Accordingly, meeting of DPC was convened. However, the Applicant was informed by impugned order dated 23rd August, 2016 that the Applicant was not entitled to promotion to the post of

Superintendent on 30.01.2003 as per Roster Reservation and his ACRs for preceding five years were not fulfilling the eligibility criteria. Being aggrieved by the order dated 23.08.2016, the Applicant has filed the present O.A. for denial to grant deemed date of promotion w.e.f.31.01.2003.

4. The Respondents resisted the application by filing Affidavit-in-reply (Page Nos.47 to 54 of Paper Book) *inter-alia* denying the entitlement of the Applicant to the relief claimed. The Respondents sought to contend that the application is barred by limitation as cause of action arose in 2005 itself when the Applicant got promotion to the post of Superintendent, and therefore, the present O.A. filed in 2017 is barred by limitation. The Respondents sought to justify the impugned order dated 23.08.2016 contending that the Applicant was not entitled to promotion when Smt. Palshivnikar was promoted w.e.f.30.01.2003 as per the availability of Roster. Thereafter, his case was considered in next DPC meeting and he was promoted to the post of Superintendent w.e.f.13.07.2005. With this pleading, the Respondents sought to justify the impugned order and prayed to dismiss the O.A.

5. Heard Shri M.D. Lonkar, learned Advocate for the Applicant and Smt. A.B. Kololgi, learned Presenting Officer for the Respondents.

6. The crux of the matter is whether the Applicant is entitled to deemed date of promotion to the post of Superintendent w.e.f.31.01.2003. Admittedly, he got promotion to the post of Superintendent w.e.f.13.07.2005. He claims to be entitled to the promotion to the post of Superintendent on 31.01.2003 itself, but in his place, the promotion was given to Smt. Shubhangi Palshivnikar. Now, it is to be seen whether Smt. Shubhangi Palshivnikar was legally entitled to promotion before giving promotion to the Applicant. Undisputedly, the Applicant is senior to Smt. Shubhangi Palshivnikar.

7. The perusal of record makes it quite clear that when meeting of DPC was convened on 20.01.2003, that time post of Superintendent from Open Category was vacant as per roster. However, then DPC Committee decided to fill-in backlog from Scheduled Caste Category. As no candidate from SC category was available, the Committee examined the case of Smt. Palshivnikar and decided to promote her from the category of SBC, and accordingly, she was promoted. Later, she was reverted because of non-submission of Caste Certificate of SBC. Here, material to note that at the relevant time, one post of Superintendent was vacant from Open Category as per availability of Roster and there was no backlog of SBC on the promotional post of Superintendent. Despite this position, the then DPC surprisingly took decision to fill-in the promotional post which was from Open Category by promoting Smt. Palshivnikar from SBC Category. This exercise done by Committee itself is unsustainable in law, as it had deprived the Applicant from getting promotion to the post of Superintendent, though qualified and entitled even as per available roster point.

8. In the above reference, it would be useful to refer letter dated 15th September, 2014 whereby explanation was submitted by Respondent No.2. This explanation was called by Respondent No.1 about the irregularities committed in the matter of giving promotion to Smt. Palshivnikar. In explanation letter dated 15th September, 2014, the Respondent No.2 categorically stated that at the relevant time, the post of Superintendent from Open Category was to be filled-in and there was no backlog of SBC category. In explanation, he further stated that 5 years preceding ACRs of the Applicant were of grading 'B' and was fulfilling the requirement of promotion to the post of Superintendent. Thus, he was eligible and qualified for the promotion to the post of Superintendent. Therefore, the irregularity occurred by denying promotion to the Applicant was later corrected by giving him promotion w.e.f.13.07.2005.

9. Indeed, the note at Page No.44 of P.B. reveals that the Respondent No.1 had issued direction for taking appropriate action on the concerned official who had committed irregularities by giving promotion to Smt. Palshivnikar. However, in this behalf, it was informed the then President of DPC is already retired and passed away. Therefore, no further action seems to have taken about the officials who have committed irregularity. Be that as it may, there is no denying that the Applicant was wrongly deprived of getting promotion to the post of Superintendent on 30.01.2003 and in his place wrongly promotion was given to Smt. Palshivnikar, who was junior to the Applicant from SBC category though there was no backlog of the said Category.

10. Now, let us see the impugned order dated 23rd August, 2016, which is in contrast of the Department's own record and factual aspects. As stated above, the Director of Industrial Safety & Health i.e. Respondent No.2 in his explanation dated 15th September, 2014 had clearly stated by the then DPC Committee given promotion to Smt. Palshivnikar though the post was to be filled-in from Open Category and the Applicant was eligible for the same in all respect. However, in the impugned order, the Respondents have taken totally contrary stand stating that the Applicant was not entitled to promotion from the point of roster availability and further stated that his gradation of ACR for preceding last 5 years were not in consonance for the promotional post. This reasoning in impugned order is totally in contrast of the factual aspect as admitted by Respondent No.2 in his explanation dated 15th September, 2014. This being the position, the impugned order is absolutely erroneous and based upon total incorrect reasoning is not at all sustainable in law.

11. For the aforesaid reason, there is no escape from the conclusion that the Applicant was wrongly superseded by giving promotion to Smt. Palshivnikar, and therefore, his claim for deemed date of promotion w.e.f.31.01.2003 deserves to

be accepted. Now, the question comes whether the Applicant is entitled for service benefits w.e.f. 31.01.2003.

12. Shri M.D. Lonkar, learned Advocate for Applicant referred to various decisions of Hon'ble Supreme Court in support of his contention that where the employee is illegally deprived of the opportunity to work upon the promotional post, the principle of 'no work no pay' embodied in Rule 32 of Maharashtra Civil Services (General Service Conditions) Rules, 1981 would not apply. In this behalf, he referred to the following decisions :-

(a) ***AIR 2015 SC 2904 (Ramesh Kumar Vs. Union of India)*** wherein the Hon'ble Supreme Court held that in normal circumstances when retrospective promotions are effected, the benefit flowing therefrom including monetary benefits must be extended to an employee who has been denied promotion earlier and the principle of 'no work no pay' cannot be accepted as a rule of thumb and matter needs to be considered on case to case basis. In that case, the Army Personnel was discharged from service and disciplinary proceedings were initiated before discharging him from service. However, he was reinstated and then promoted in the year 2000. His claim for arrears for promotional post from 01.08.1997 was the subject matter before the Hon'ble Apex Court. The Hon'ble Supreme Court held that when the Applicant was granted anti-dated seniority along with his batch-mates, there is no reason for denying pay and allowances in the promotional post.

(b) ***(1991) 4 SCC 109 (Union of India Vs. K.V. Jankiraman)*** wherein again the issue pertaining to principle 'no work no pay' was in consideration in the matter where the employee was completely exonerated from departmental proceedings. The Hon'ble Supreme Court held that the normal rule of 'no work no pay' could not apply to

the cases where the employee was willing to work but kept away for the same by authorities for no fault on his part and if the employee did not keep himself away from the work, the principle of 'no work no pay' cannot be used against him.

13. As such, the legal principles enunciated in the aforesaid Judgments are attracted in the present situation with greater force as in the present matter, the Applicant was wrongly deprived of working on the post of Superintendent by giving promotion to Smt. Palshivnikar by promoting her from SBC category though there was no such backlog. The said post was to be filled-in from Open Category and the Applicant being qualified and eligible ought to have been promoted in her place w.e.f.31.01.2003.

14. Now turning to the point of limitation, I find no substance in the submission of learned P.O. that there is any lapses or latches on the part of Applicant in approaching the Tribunal. He is litigating for his entitlement since 2003. Earlier, he had filed O.A.No.71/2003 challenging the promotion of Smt. Palshivnikar. The said O.A. was disposed of on 06.10.2013 having found that the promotion given to Smt. Palshivnikar was already cancelled, and therefore, the O.A. had become infructuous. In fact, the directions were also given to prepare fresh roster as per the provisions of law and then to take further steps for filling the post of Superintendent. There was one more development in the matter as subsequently, Smt. Palshivnikar was again promoted on 06.11.2008 which was challenged by one of the employee viz. Nandkishor Gowalkar by filing O.A. 50/2009. The O.A was allowed on 01.04.2010 and order of her promotion dated 06.11.2008 was set aside. Thereafter, the Applicant made representations on 27.08.2012 and on 11.01.2013 which came to be rejected by impugned order dated 23.08.2016. Whereas, the O.A. has been filed on 27.02.2017. This being

the position, it cannot be said that there has been lapses or latches on the part of Applicant.

15. Shri M.D. Lonkar, learned Advocate for the Applicant in this behalf rightly referred to the decision of Hon'ble Supreme Court in **1995 SCC (L & S) 1273 (M.R. Gupta Vs. Union of India)** and **2008 (8) SCC 648 (Union of India and Another Versus Tarsem Singh)**. The principle enunciated in these authorities is where there is a continued wrong giving rise to the recurring cause of action, the claim of employee for service benefit cannot be rejected on the ground of limitation. In the present case, the Applicant is deprived of service benefits of the promotional post of Superintendent and is getting lesser pension than the pension which he ought to have received, if promoted at appropriate time. As such, it is recurring cause of action. Therefore, the meritorious claim of the Applicant cannot be rejected on the ground of lapses or latches, as contended by the learned P.O. The O.A. having filed within one year from the date of impugned order, is well within limitation. There is nothing to suggest that the Applicant had acquiesced his claim of promotion. Therefore, the submission advanced by the learned P.O. on the point of limitation holds no water.

16. The totality of aforesaid discussion leads me to sum-up that the Applicant is entitled to deemed date of promotion w.e.f.31.01.2003 and O.A. deserves to be allowed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The Applicant is declared entitled to deemed date of promotion w.e.f. 31.01.2003.
- (C) The Respondents are directed to extend the monetary benefits to the Applicant considering his deemed date of promotion

w.e.f.31.01.2003 and the actual monetary benefits be extended within two months from today, failing which the Respondents will be liable to pay interest at the rate of 9% p.a. from the date of impugned order till actual payment.

(D) No order as to costs.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai

Date : 21.06.2019

Dictation taken by :

S.K. Wamanse.

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