

THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

**ORIGINAL APPLICATION NO.44 OF 2017
(Subject : Regularization in service)**

DISTRICT: MUMBAI

Dr. Subhash Kashinath Mahajan)
 Director, Directorate of Technical Education,)
 Having office at 3, Mahapalika Marg,)
 Dhobitalao, Mumbai 400 001) **.. Applicant**

Versus

1) State of Maharashtra,)
 Through Chief Secretary,)
 Mantralaya, Mumbai 400 032.)

2) The Principal Secretary,)
 General Administration Department,)
 Mantralaya, Mumbai 400 032)

3) The Principal Secretary,)
 Higher and Technical Education Department,)
 Mantralaya, Mumbai 400 032.) **..Respondents**

Shri M.S. Topkar, the learned Advocate for the Applicant.

Shri A.Y. Sakhare, the learned Senior Advocate appearing with Smt. Archana B.K., the learned Presenting Officer for the Respondents.

CORAM : JUSTICE SHRI A.H. JOSHI, CHAIRMAN

RESERVED ON : 16.02.2017

PRONOUNCED ON : 10.03.2017

J U D G M E N T

1. Heard Shri M.S. Topkar, the learned Advocate for the Applicant and Shri A.Y. Sakhare, the learned Senior Advocate appearing with Smt. Archana B.K., the learned Presenting Officer for the Respondents.
2. On 25.01.2017 parties agreed that Original Application be listed for Final Hearing. Accordingly, today, the O.A. is taken up for Final Hearing.
3. At the time of hearing, Shri A.Y. Sakhare, the learned Senior Advocate for the Respondents had tendered three paper books consisting of compilation of certain documents. It is informed that copies of these paper books were served on learned Advocate for the Applicant on 06.02.2017. Learned Advocate for Applicant states that the Applicant has no objection for taking these three paper books on record. Those paper books are taken on record. Both parties have referred to these documents in the course of hearing.
4. Admitted facts are summarized as below :-
 - (a) Applicant was appointed on 02.03.1991 as Workshop Superintendent in Government Polytechnic of Higher and Technical Education Department.
 - (b) Applicant was promoted to the post of Head of the Department of Mechanical Engineering in the Department of Technical Education on 07.10.1995 and thereafter as Assistant Director (Technical) on 17.07.1999.
 - (c) The Applicant was nominated as Joint Director, Technical Education from 15.10.1999 upon being selected by Maharashtra Public Service Commission.
 - (d) The Department of Education and Youth Services had issued Government Resolution (G.R.) dated 16.02.1978 and directed that appointment to the posts of Maharashtra Education Services, Class-I and Directorate of Technical Education, Class – II which would be filled in with the ratio of 50:50 by nomination and by promotion.
 - (e) As per the 1978 Government Resolution and the Recruitment Rules of 1991, Mr. N.B. Pasalkar was appointed by nomination to the post of Director of Technical Education.

- (f) Vide G.R. dated 09.09.2004, Government took decision to bifurcate the existing single cadre comprising of teaching as well as administrative services in Maharashtra Technical Education and Administrative Services, Class I.
- (g) In the seniority list of the cadre of Joint Directors was finalized as on 01.01.2009. In the said list Applicant was included as Joint Director.
- (h) Upon retirement of Mr. N.B. Pasalkar, the incumbent who was serving as Director, due to superannuation on 31.12.2007, the applicant was put in to additional charge of the post of Director of Technical Education, till further orders.
- (i) The Departmental Promotion Committee (D.P.C.) considered the matter of temporarily filling in the post of Director till receipt of nomination of a candidate, duly selected from MPSC, and recommended Applicant's name for temporary promotion to the post of Director aforesaid.
- (j) The Government took decision to bifurcate the administrative service from teaching branch and it became necessary to frame new Recruitment Rules for these newly created posts upon bifurcation.
- (j) Respondent No.1 temporarily appointed the Applicant to officiate as Director, Technical Education, on purely temporary basis for a period of 11 months or till the availability of candidate from MPSC, whichever is earlier. Said temporary appointment is continued from time to time and by giving technical brakes, on same terms and conditions.

5. The office notes put up and the proposal prepared by the Higher and Technical Education Department from time to time, proposing draft rules, indicates that the Department had suggested / proposed that the post of Director be filled in by adopting the ratio of 50% each for nomination and for promotion.

6. The Applicant who was party to various proposals sent to the Government, proposing that 50% ratio for nomination and 50% for promotion be maintained, while filling the vacancy of the post of Director.

7. It appears that the Applicant came to know that the Government was likely to take decision for reserving the post exclusively for nomination while framing new Recruitment Rules and therefore, Applicant has submitted representation dated 01.04.2015, copy whereof is placed on record by Applicant as Exhibit- Q of the O.A. paper book.

8. The draft Recruitment Rules were approved by the Government on 13.01.2017. None amongst the parties have brought copy of said rules on record of this O.A..

9. Both parties are concurrent on the point and they proceed on the foundation that new rules provided for the post of Director be filled-in exclusively by nomination, and the in service eligible candidates are entitled to apply.

10. Applicant's claim and prayer in present O.A. is that he be promoted to the post of Director on substantive basis and that he be regularized in the post of Director, Technical Education, furtherance to Rules of 1991, notified through notification dated 07.09.1991, Exhibit B (wrongly mentioned in the prayer as Exhibit-A).

11. This O.A. is opposed by the State by filing affidavit-in-reply. The facts of the case, as averred by the Applicant are not in dispute.

12. Respondent State has opposed applicant's claim and contention namely :-

"The post of Director was filled in once by nomination and once by promotion as imperative practice, before appointment of Shri N.B. Pasalkar and therefore Shri N.B. Pasalkar was appointed as candidate from the category of nomination i.e. a direct recruit."

13. In view of rival pleadings, questions which arise for decision are as follows :-

- (a) Did the Government fill in the post of Director before bifurcation of cadre, alternatively by nomination and promotion ?
- (b) Whether would this practice of appointment by promotion & nomination, one followed by another, if adopted, operate as a rule of precedent ?
- (c) Does the applicant have a right to claim that the post of Director be filled in, in accordance with the Recruitment Rules of 1991 and not in accordance with the Recruitment Rules of 2017 ?
- (d) In case, the Recruitment Rules of 1991 are to be followed for filling in the post of Director, is the Applicant entitled to claim that due to the practice of rotation, now the post of Director is required to be filled in only by promotion and not by nomination ?

14. Discussion as to Questions (a) and (b), contained in foregoing paragraph is as follows :-

- (i) The Applicant has pleaded existence of a practice or precedent of practice that the post of Director was filled in, once from amongst candidates in Government service i.e. by promotion and once by nomination i.e. one category was followed by another.
- (ii) The State has categorically denied the applicant's claim that the practice or precedent of filling in the vacancy alternatively by nomination and by promotion existed.
- (iii) In this situation, it was the duty of the Applicant, to prove the fact, practice and precedent pleaded by him.
- (iv) The Applicant has not placed on record any material, whatsoever, in the form of evidence to support his plea.

15. In view of the discussion & summary noted in foregoing paragraph, in the result the Questions (a) and (b) have to be answered in negative and adverse to the Applicant.

16. Now, this Tribunal has to proceed to deal with the Questions (c) and (d) contained / framed in foregoing paragraph no.13.

17. Next contention which is second plank or foundation of the claim in the O.A. is on which foregoing Questions (c) and (d) have to be decided is summarized as follows :-

The matter of appointment of promotion will be governed by the Rules in vogue on the date on which vacancy has arisen and would not be governed by any Rules which claim to be amended later.

18. In order to substantiate applicant's second plank of submission, learned Advocate Shri M.S. Topkar has placed reliance on following judgments :-

- (i) Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852.
- (ii) P. Ganeshwar Rao & Ors. Versus State of Andhra Pradesh & Ors., 1988 (Supp) SCC 740.
- (iii) State of Rajasthan Versus R. Dayal, 1997 SCC (L&S) 1631.
- (iv) B.L. Gupta & Anr. Versus M.C.D., (1998) 9 SCC 223.

- (v) State of Tripura Versus K.K. Roy, 2004 SCC (L & S) 651.
- (vi) A. Manoharan Versus Union of India, 2008 (3) SCC 641.
- (vii) State of Madhya Pradesh & Ors. Versus Yogendra Shrivastava, (2010) 12 SCC 538.
- (viii) Kulwant Singh and Ors. Versus Daya Ram & Ors. (2015) 3 SCC 177.

19. It is seen that the Judgment in case of **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852** is consistently followed in most later judgments. Ratio as laid down in case of **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852** is reiterated in the recent judgment, relied upon by the Applicant in **Kulwant Singh and Ors. Versus Daya Ram & Ors., (2015) 3 SCC 177.**

The dictum as reiterated in **Kulwant Singh's** case supra, can be referred to by Quotation, which is nutshell, as follows :-

"41. In B.L. Gupta the Court reiterated the principle stated in *Y.V. Rangaiah, P. Ganeshwar Rao and A.A. Calton Vs. Director of Education* wherein it had been held that the vacancies which had occurred prior to the amendment of rules were governed by the old rules and not by the amended rules. In *Arjun Singh Rathore* the views stated in *Y.V. Rangaiah and R. Dayal* were reiterated."

(Quoted from page 65 of additional book of SCC (2015) 3 SCC.)

20. The proposition argued for and on behalf of applicant is vehemently opposed by Shri A.Y. Sakhare, the learned Senior Advocate for the Respondents, by placing reliance on following judgments :-

- (i) Dr. K. Ramulu and Another Versus Dr. S. Suryaprakash Rao and others, (1997) 3 Supreme Court Cases 59, Civil Appeals Nos.404-407 of 1997, decided on January 15, 1997.
- (ii) State of Punjab and Others Versus Arun Kumar Aggarwal and Others (2007) 10 Supreme Court Cases 402, Civil Appeals No.2336 of 2007 with Nos.2337-38 of 2007 decided on May 4, 2007.
- (iii) CMD/CHAIRMAN, Bharat Sanchar Nigam Ltd., and Others Versus Mishri Lal and Others. (2011) 14 Supreme Court Cases 739, Civil Appeal No.1405 of 2007.

21. Shri A.Y. Sakhare, the learned Senior Advocate for the Respondents has argued that in the judgments relied upon by him, an exception has been carved out to the rule enunciated in the judgment in case of **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852** as relied in various cases till the recent and reiterated as in case of **Kulwant Singh and Ors. Versus Daya Ram & Ors. (2015) 3 SCC 177.**

Shri A.Y. Sakhare, the learned Senior Advocate for the Respondents, therefore, argues that due to three precedents relied on by him a strong exception is carved out and now old rules ought not be followed or applied in certain circumstances, namely :-

- (i) Where a decision to fill in the post as per new rules is taken.
- (ii) Where a right to the post is not vested in a Government servant claiming that post in existence before issuance / framing of new rules.

22. In order to substantiate the plea of the State, and to fit the case of the State within exception, to the applicability of ratio in **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852,** learned Senior Advocate has drawn attention of this Tribunal to facts namely :-

- (i) Admittedly at no point of time the decision was taken to fill in the posts as per extent Recruitment Rules (i.e. Rules of 199, Exhibit-B).
- (ii) The vacancy of the post of Director remained unfilled till 2004.
- (iii) Thereafter, the cadre was bifurcated, and the vacancy which had arisen upon bifurcation had to be filled-in, only after the framing of new Recruitment Rules which would govern the filling in of newly created post.
- (iv) New rules were framed only in 2017.
- (v) No rules existed to fill in the post of Director upon bifurcation of the cadre and creating of two new cadres.
- (vi) Initially after retirement of Shri N.B. Pasalkar, the Applicant, was simply put into charge and was not rather was never actually 'appointed' as Director.

- (vii) Applicant is not entitled to claim right for appointment, or permanency to a post which is to be filled in by MPSC, in the background that initially Applicant was simply put in to the charge and later on Applicant's appointment was made only on adhoc basis and for fixed duration with a condition that the appointment was made purely on adhoc basis and until regularly selected candidate would be received from MPSC.
- (vii) Applicant's appointment on adhoc basis was made in the background and the fact of the process of drafting of the Recruitment Rules was in process / was pending.
- (ix) Conscious decision was taken to fill in the vacancy only on temporary basis till the candidate duly selection from MPSC and therefore, it was not possible to take a conscious decision to fill in the post in accordance to old rules.
- (x) Necessary corollary of decision to appoint the applicant purely on adhoc basis and only till regularly selected candidate would be received from MPSC, is that a conscious decision to wait to fill in the post only after framing new recruitment rules was taken.
- (xi) In the background that the cadre of Director was bifurcated, newly created post carried new duties and could be filled in only furtherance to new rules for recruitment to the post / cadre of Director, which were yet to be framed.
- (xii) Applicant had signed an undertaking on the stamp paper and accepted the conditions on which he was appointed as Director on ad hoc basis, and now he cannot take a plea to topsy-turvy.
- (xiii) Applicant's temporary appointment was continued by giving 11 months appointment and artificial breaks for different spells.
- (xiv) Applicant was all throughout a party to and was involved in the process of drafting of Recruitment Rules, being put incharge, adhoc appointment continuation from time to time etc.. and he was fully aware of the fact, and all that was in the offering and in the process therefore applicant's claim is barred by estoppel.

23. Shri A.Y. Sakhare, the learned Senior Advocate for the Respondents State has analyzed his legal submission as follows :-

- (i) The ratio in **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852** case will not apply in present case on the facts, since though the vacancy existed, it was decided only to give additional charge of the post, to the applicant, till the vacancy would be filled in after framing Recruitment Rules.
- (ii) While every time the lower ranks in the Higher and Technical Education Department had proposed that the vacancy of Director be reserved for 50% nomination and 50% promotion, yet at the decision of the Government to fill in the posts by promotion only was not/ never taken finally.
- (iii) Therefore, a conscious decision as is claimed by the Applicant could not have been arisen because the process of framing the recruitment rules was in progress.
- (iv) It is a fact that the judgment of Hon'ble Supreme Court case in case of **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852** is followed in the later judgments up to the case of **State of Punjab and Others Versus Arun Kumar Aggarwal and Others (2007) 10 Supreme Court Cases 402, Civil Appeals No.2336 of 2007 with Nos.2337-38 of 2007 decided on May 4, 2007**. However, Hon'ble Supreme Court has taken a different view in the judgment in **CMD/CHAIRMAN, Bharat Sanchar Nigam Ltd., and Others Versus Mishri Lal and Others, (2011) 14 Supreme Court Cases 739, Civil Appeal No.1405 of 2007** and now it is laid down that the ratio in **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852** case would not apply, if a conscious decision is taken by the Government not to fill in the posts as per old rules, and it has also to be seen whether the employee arguing the proposition that old rules be followed has a vested right to the post, and if a vested right does not exist, it is open to govern the situation by amended rules.

24. This Tribunal has examined respective submissions on facts as well on law laid down in precedents cited at bar.

25. This Tribunal has come across the reported judgment in case of **State of Maharashtra & Ors. Vs. Anita & Another (2016) 2 SCC (L&S) 384, (2016) 8 SCC 293**, and hence both sides were directed to read this judgment and address this Tribunal. Learned Senior Advocate Shri A.Y. Sakhare submitted that the applicant is bound by his undertaking, squarely fits into this recent judgment of Hon'ble Supreme Court.

In reply, learned Advocate for the Applicant has argued that this case i.e. **State of Maharashtra & Ors. Vs. Anita & Another (2016) 2 SCC (L&S) 384, (2016) 8 SCC 293** would not apply to present case, because applicant's undertaking shall not come in his way because applicant is relying on **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao, AIR 1983 SC 852**, which is altogether different precedent.

26. After examining facts as borne on record and the law, in the considered view of this Tribunal, what has emerged after examination of rival submissions is as follows :-

- (a) On facts of present case, admitted by applicant, initially the Applicant was simply directed to hold the charge.
- (b) Thereafter he was temporarily promoted on adhoc basis for fixed duration and by giving brakes.
- (c) Aforesaid course of giving charge and then appointing on adhoc basis was adopted by the Government, in the background that process of framing of recruitment rules of the bifurcated cadre, was pending / was in process.
- (d) The applicant has signed undertaking thereby notifying that he knows that his appointment is on purely temporary & on adhoc basis in peculiar background, that the Recruitment rules are not framed after bifurcation of cadre.
- (e) Apart from reliance on old rules, applicant has failed to show any other fact which could show that a right to the post of Director either existed or had crystalized in favour of the applicant.
- (f) The aspect of vested right laid down in case of **CMD/CHAIRMAN, Bharat Sanchar Nigam Ltd., and Others Versus Mishri Lal and Others, (2011) 14 Supreme Court Cases 739, Civil Appeal No.1405 of 2007** has to be seen with further illumination.
- (g) The employee could be said to have a vested right to the post if in the background of extant recruitment rules (old rules), had the decision to fill in the posts been already taken.
- (h) Admittedly to Applicant any such decision was never taken by the Government.

- (i) Had the process of recruitment begun and later, an employee is being told that in view of the subsequent change in the recruitment rules, he shall not be entitled to the post which he is holding or the posts for which he is selected, it could have been said that a right had crystalized in favour of the claimant. In such situation, it may have been possible to hold that a right was thereby vested in the employees, while no such fact or circumstances exists in present case.
- (j) It is thus crystal clear that a right for promotion or appointment was not vested in the applicant.
- (k) An opportunity for being considered/ for offering candidature for the promotion is available to the Applicant under new Rules.
- (l) Whenever the post is to be filled in by promotion, it would be hard rather impermissible to say that by virtue of seniority alone the post is to be filled in. The promotion has to involve selection process.
- (m) The process of selection for filling in posts of Director on regular basis had never begun and therefore applicant cannot claim by any punitive and / or civil consequences.
- (n) While the ratio has laid down in **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao AIR 1983 SC 852** case holds good as law of precedent, it is not a rule without proviso or exceptions etc. The reported judgment relied upon by the Respondents and in particular the latest judgment in case of **CMD/CHAIRMAN, Bharat Sanchar Nigam Ltd., and Others Versus Mishri Lal and Others, (2011) 14 Supreme Court Cases 739, Civil Appeal No.1405 of 2007**, carves out an exception by way of need of existing vested right to be the condition precedent governing any relator's case solely by the judgment in **Y.V. Rangaiah & Ors. Versus J. Sreenivasa Rao AIR 1983 SC 852**. Hence, Applicant's case is not governed by **Y.V. Rangaiah's** case supra, rather it is governed by the precedent of **CMD/CHAIRMAN, B.S.N.L.'s** case supra.
- (o) Considering totality of circumstances applicant's case is also covered by the **State of Maharashtra & Ors. Vs. Anita & Another** case supra, and collective effect is that the applicant has failed in establishing his claim.

27. The question (c) and (d) of paragraph 13 have to be answered in negative i.e. adverse to the Applicant. In the result O.A. fails.

28. On facts, this Tribunal holds that :-
- (a) The appointment to newly created posts would be governed by new rules.
 - (b) Old rules would not govern newly created posts.
 - (c) The applicant does not have any vested right to be governed by old rules for being appointed as Director.

Hence, O.A. does not merit ground of any relief.

29. For the foregoing reasons and findings, O.A. is dismissed.

30. Parties are directed to bear their own costs.

(A.H. Joshi, J.)
Chairman

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