

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI

ORIGINAL APPLICATION NO.733 OF 2012

DISTRICT : NASHIK

1. Shri Vidyadhar S. Saraf.)
Working as Senior Clerk in Civil)
Hospital, Nashik.)

2. Shri Sandeep B. Metkar.)
Working as Senior Clerk in the)
Office of Deputy Director of Health)
Service, Nashik.)

Address for Service of Notice :)
Shri A.V. Bandiwadekar, Advocate,)
9, "Ramkripa", Dilip Gupte Marg,)
Mahim (W), Mumbai 400 016.)...Applicants

Versus

1. The Director of Health Services,)
M.S. Mumbai, having office in the)
Compound of St. George Hospital,)
Aarogya Bhavan, Fort, Mumbai - 1.)

2. The Deputy Director of Health)
Services, Nashik Circle having office)
in the Compound of Civil Hospital,)
Tryambak Road, Nashik 411 001.)...Respondents

Shri A.V. Bandiwadekar, Advocate for Applicants.

Shri A.J. Chougule, Presenting Officer for Respondents.



CORAM : **RAJIV AGARWAL (VICE-CHAIRMAN)**
R.B. MALIK (MEMBER-JUDICIAL)

DATE : **29.01.2016**

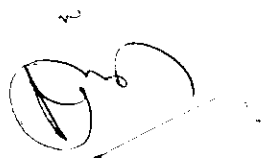
PER : **R.B. MALIK (MEMBER-JUDICIAL)**

JUDGMENT

1. The Applicants by this Original Application (OA) seek deemed date of promotion in the cadre of the Senior Clerk alleging the violation of the quota rule for promotees and appointees by nomination whereby a number of direct appointees on compassionate ground came to be placed over the heads of the Applicants.

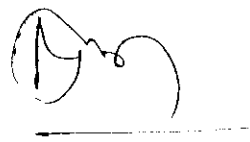
2. We have perused the record and proceedings and heard Mr. A.V. Bandiwadekar, the learned Advocate for the Applicant and Shri A.J. Chougule, the learned Presenting Officer for the Respondents.

3. The Applicants before us are Hindu Brahmin and Hindu Shimpi (Open and OBC respectively). They have studied upto 2nd year of B.Com and B.A. respectively. They came to be appointed as Junior Clerks on 17.11.1991 and 10.5.1991 and were promoted as Senior Clerks on 6.11.2007 and 1.10.2007 respectively.



4. At this stage, we may usefully refer to the Recruitment Rules for the post of Senior Clerks (in the Directorate of Health Services (Recruitment) Rules, 1985 (the said Rules). These Rules have been framed under the proviso to Article 309 of the Constitution of India. Rules 3 and 4 deal with the appointment to the post of Senior Clerk in the Directorate. There are two sources for the said appointments viz. promotion on the basis of seniority, subject to fitness from amongst the Junior Clerks and by nomination from candidates answering the requirements of sub-clause (b) thereof and a degree in the discipline of Arts, Science, Commerce or Law. Now, it is not in dispute that even the direct appointees whose appointments have stung the Applicants possess the qualifications for being appointed by nomination. Further, the ratio of appointment to the post of promotion and by nomination would be 75 : 25 meaning thereby that 75% of the vacancies would be filled by promotion and 25% by nomination.

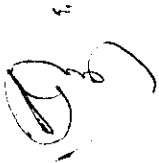
5. The case of the Applicants is that on 24.8.2004 and 30.3.2007, the Respondent No.2 – Deputy Director of Health Services, Nashik Circle gave appointments on compassionate ground by nomination to certain candidates directly to the post of Senior Clerks even when there were



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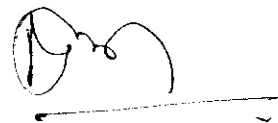
available vacancies for being filled up by way of promotion. Some of them have been named in Para 3 of the OA viz. S/Shri L.D. Thakare, S.K. Suryawanshi, Smt. M. More and Smt. P.M. Lad. Some other candidates whose names have been mentioned in Para 4 also came to be appointed in this manner directly to the post of Senior Clerk. None of them has been made a party hereto by the Applicants, although in the ultimate analysis, they are likely to be affected by an order such as the one Applicants expect to be made.

6. According to the Applicants, in fact, further promotion from the post of Senior Clerk to Assistant Superintendent on 31.5.2010 were also effected in a manner whereby direct recruits were placed ahead of the promotees. At this stage, however, it needs to be noted that in one of the several Affidavits-in-reply and/or Sur-rejoinder filed on 27.7.2015, in Para 7, it is made clear that the Applicants were now working on the post of Assistant Superintendent at Rural Hospital, Rahuri in Ahmednagar District and Sub-District Hospital, Yeola in Nashik District respectively. This fact will have to be borne in mind even as the discussion progresses. It appears to be an indisputable factual position that as per the seniority list of 1.1.2007, 22 posts of Senior Clerk were vacant. Out of the same, 11 posts along with the expected vacant promotional



posts, the promotees could have been given the promotion. However, as per the approved Office Note dated 30th March, 2007, the direct recruits from the category of compassionate appointment based on the seniority list as on 1.1.2009 came to be appointed on 30th March, 2007 and 1st April, 2007 and about 10 days thereafter, on 10th April, 2007, the Regional DPC was convened and 5 Junior Clerks came to be promoted as Senior Clerks w.e.f. 24th April, 2007.

7. Before we proceed further, it will be appropriate to note down the gist of the case of the Respondents as a result of a combined reading of various Affidavits filed by them from time to time. We have already mentioned above that the Respondent No.2 is the Deputy Director of Health Services, Nashik Circle. The Respondent No.1 is the Director of Health Services, M.S, Mumbai sitting in Mumbai. Common Affidavits have been filed on behalf of the Respondents, generally by a Chief Administrative Officer of Respondent No.2. It is denied by them that there is any case for the Applicants either to seek promotion from any anterior date as compared to when they were actually promoted and consequently, for the grant of the deemed date. They have clearly mentioned that there is a difference between promotion and direct appointment. The

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Applicants, according to the Respondents are clearly junior to those who have been directly appointed. It is sought to be pointed out that those who could have claimed entitlement from the category that the Applicants belonged to in the context of the communication from the 2nd Respondent which we shall presently turn to, have not moved the Tribunal and Applicants are not the persons who can claim to have any *locus-standi*. According to them, the question of deemed date would not arise because the direct appointees are admittedly senior to the Applicants. This plea has been amplified in what has been described as reply in short Affidavit filed on 1.4.2015 where the Paragraphs are not properly numbered. In another Affidavit-in-reply filed on 15.4.2015 at Page 115 of the paper book, it is pleaded that the 2nd Respondent was the appointing authority of the Applicants and if the Applicants had made any application for grant of deemed date, they would have received an appropriate reply. In other words, according to the Respondents, the Applicants should have exhausted the intra-departmental remedy before rushing to this Tribunal.

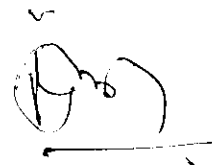
8. Before proceeding further, we make it very clear that regard being had to the scope of this OA such as it is, we do not feel called upon to scrutinize the factum of

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appointments on compassionate ground. The cancellation thereof is not even the prayer of the Applicants, and therefore, in this OA, we simply have to proceed on the basis of the appointments by nomination having been made on compassionate ground.

9. In another Affidavit-in-sur-rejoinder filed by the Respondents on 27.7.2015, it is pleaded that at the time relevant hereto, the Applicants themselves were not qualified for being promoted. It is then pleaded that the principles underlying the grant of deemed date are such that the Applicants have not been able to demonstrate as to how they are entitled thereto. Nobody junior to them has been promoted and those senior to him were from other sources or stream for which no grievance can be made by the Applicant. Therefore, the Applicants cannot question their appointment by nomination. As already noted above, it is highlighted that the Applicants are already working as Assistant Superintendents now.

10. Quite pertinently to that Affidavit-in-rejoinder, there is an exhibit showing the detailed position of vacancy and appointments by both the modes from 1995 right up to 2014. The columns therein are sanctioned posts, posts filled up, posts vacant. Next column shows the fact



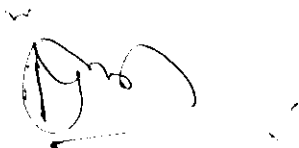
situation with regard to the promotees and the next one showing the position with regard to appointees by nomination. Taking a bird-eye view of the said chart, we find that from 1995 to 1999, there were no vacancies in the promote cadre because 48 of the posts were filled up. As in the year 2000, 48 posts of promotees were filled up, but there were 4 vacancies in the category of candidates appointed by nomination. The chart shows the position year-wise. It is not necessary to set out in detail the said position, but at the end of the day, taking the state of affairs in the year 2012 when this OA was brought, the posts by promotion had been filled up and in the category of nomination, there was one vacancy. More or less the same position obtains in the year 2014. It is, therefore, quite clear that the basis of the case of the Applicants does not appear to be sound in the matter of the appreciable disparity in so far as of the ratio of 75 : 25 is concerned. The same chart is to be found at Page 118 of the paper book.

11. However, assuming that there was some arguable case in that behalf and this we must emphasize is only an assumption. The appointments were made from the stream of promotion and nomination in 2003, 2007 and thereafter and still, on Applicants' own showing those who



were affected, did not question the said move of the Respondents. This delay is required to be emphasized not just as a pointless nit-picking, but for a substantial reason that those who were appointed by nomination came to be appointed by a process established in that behalf. They cleared the tests and got appointed, and therefore, in the absence of compelling circumstances, the said position cannot be disturbed.

12. In the above background, when we turn to the recommendation of the Respondent No.2 to the Respondent No.1 for granting relief to the Applicants which is at Exh. 'A', Page 19, we in the first place, find it a little perplexing. That is because having strongly recommended the case of the Applicants, the Respondent No.2 joined forces with the 1st Respondent and in the Affidavit-in-rely stoutly opposed the case of the Applicants. Secondly, as rightly pointed out by the Respondents, the said recommendation cannot disturb by itself the position that obtains as a result of the principles of law and rules when applied to the facts. Beyond that, we do not think, it is necessary for us to dwell on this particular aspect of the matter.

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13. The upshot therefore is that examining the matter from any angle and we find no reason to grant any relief as such to the Applicants much less can we disturb the position of the appointees by nomination. We may only place on record a direction for the Respondents to meticulously maintain the 75 : 25 ratio in future, but in as much as we cannot grant any relief to the Applicant, this Original Application is dismissed with no order as to costs.

Sd/-

(R.B. Malik)
Member-J
29.01.2016

Sd/-

(Rajiv Agarwal)
Vice-Chairman
29.01.2016

Mumbai

Date : 29.01.2016

Dictation taken by :

S.K. Wamanse.

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