

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI
ORIGINAL APPLICATION NO.930 OF 2014
WITH
MISCELLANEOUS APPLICATION NO.1 OF 2016**

DISTRICT : PUNE

Smt. Suvarna Aniruddha Joshi,)
Associate Professor, B.J. Medical College, Pune)
R/o Meghana Society, Aundh, Pune-7)
Address for service of notice:)
Shri A.V. Bandiwadekar, Advocate,)
9, Ram Kripa, Lt. Dilip Gupte Marg, Mahim,)
Mumbai 400016)..Applicant

Versus

1. The State of Maharashtra,)
Through Principal Secretary,)
Medical Education & Drugs Department,)
Mantralaya, Mumbai 400032)
2. Smt. Sarala Menon,)
Associate Professor,)



Department of Microbiology,)
The Grant Government Medical College &)
Sir J.J. Group of Hospitals,)
Byculla, Mumbai 400008)

3. Smt. Sae Satish Pol,)
Associate Professor,)
Department of Microbiology,)
B.J. Government Medical College,)
Near Pune Railway Station, Pune)..Respondents

Shri A.V. Bandiwadekar – Advocate for the Applicant

Shri K.B. Bhise – Presenting Officer for Respondent No.1

Shri C.R. Sadashivan with

Ms. Asha S. Chimadia – Advocate for Respondent No.2

Smt. Punam Mahajan – Advocate for Respondent No.3

CORAM : Rajiv Agarwal, Vice-Chairman

R.B. Malik, Member (J)

DATE : 8th March, 2016

PER : R.B. Malik, Member (J)

J U D G M E N T

1. This OA is preferred by an ad hoc Associate Professor holding the qualification of M.Sc. Ph.D. in Medical Microbiology



claiming entitlement to the promotional post of Associate Professor (said post) on regular basis from the date she secured Ph.D. i.e. 29.7.2002. The regular promotion is claimed w.e.f. 6.8.2003. Further relief of being placed ahead of the respondents no.2 and 3 who secured Ph.D. in November, 2006 and November, 2007 respectively is also claimed. There is an alternative prayer not to be removed from her present promotional position on ad hoc basis till a candidate regularly selected by the MPSC is duly appointed.

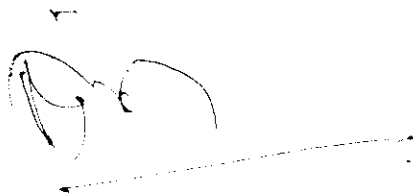
2. The respondent no.1 is the State of Maharashtra through Principal Secretary, Medical Education and Drugs Department. The respondents no.2 and 3 can be described as private respondents. Their promotions to the post of Associate Professor in the Department of Microbiology in Grant Government Medical College, Mumbai and B.J. Medical College, Pune over the head of the applicant has aggrieved the applicant. The private respondents came to be impleaded by way of an amendment when this OA had become part heard.

3. By way of the MA the applicant seeks the relief of directions to the respondent no.1 to allow her to work as Associate Professor in Grant Government Medical College, Mumbai till the final disposal of this OA.



4. We have perused the record and proceedings and heard Shri A.V. Bandiwadekar, the learned Advocate for the Applicant, Shri K.B. Bhise, the learned Presenting Officer for Respondent No.1, Shri C.R. Sadashivan with Ms. Asha S. Chimadia, the learned Advocate for Respondent No.2 and Smt. Punam Mahajan, the learned Advocate for Respondent No.3.

5. The applicant was born on 16.4.1964. She is from open category. She is M.Sc. in Medical Microbiology which she did in 1991. She did Ph.D. on 29.7.2002. On 5.5.1993 she joined the Government service as Lecturer-II in Medical Microbiology on the recommendations of the MPSC by nomination. In that connection there is reference to the recruitment rules dated 26.6.1986. It is a matter of common knowledge that the post of Associate Professor which is now so called was earlier known by the designation of Reader. In 1988 the recruitment rules for that post came to be enforced. It is the case of the applicant that in view of a large number of vacancies for permanent and substantive post of Readers it was decided by the respondent no.1 that those posts be filled up on ad hoc basis from amongst the eligible, qualified and suitable Lecturers. Therefore, the powers having been delegated to the respondent no.1 he gave the applicant ad hoc promotion vide order dated 13.7.2001. Some others too came to be appointed in the same capacity as Associate Professor in Microbiology. By and large these appointments would be for a period of 364 days



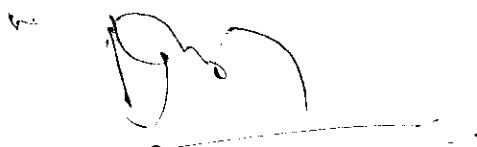
and subject to the other terms and conditions. The applicant continued to get this ad hoc promotion and the last one was dated 3.10.2013. Copies of the first and the last orders are to be found at Exhibit 'C' Collectively page 34 and 37 of the paper book. There were some terms and conditions and the gist thereof was that those orders would not confer the right to claim regular promotion. The ad hoc promotion order was liable to be terminated without any advance notice at any time. If the applicant was transferred anywhere during the currency of the said order the said ad hoc promotion would continue to be in force. This ad hoc promotion would not be counted for the purpose of fixing or determination of seniority. The exact Marathi words being "सदर पदोन्नतीच्या कालावधीत संबंधित पदाकरीता त्याच्या ज्येष्ठतेसाठी ग्राह्य धरता येणार नाही". It was further provided that the said ad hoc promotion would stand terminated ipso facto if the regular candidate either from MPSC or Establishment Board came to be appointed. The unsatisfactory performance would also entail termination. The other two conditions inter alia provided that if the post held by the applicant became surplus then she would be liable to be transferred and if the regular appointee was to be posted then this ad hoc promotion would come to an end ipso facto. The ad hoc promotion was for 364 days.

6. It is the case of the applicant that after having worked for so long on the promotional post on ad hoc basis she



expected that she would be regularized on that promotional post. However, in the list published on 16.9.2008 and 28.7.2011 her name did not appear and instead the respondents no.2 and 3 came to be promoted on regular basis. The applicant was transferred from Pune to Aurangabad again on ad hoc basis. She was, by the order dated 4.8.2012 transferred back to Pune from Aurangabad again on the adhoc promotional post of Associate Professor. Further as a result of an interim order made in this OA on 26.9.2014 the applicant was given extension on the post of ad hoc Associate Professor. The terms and conditions were the same. She came to be transferred from Pune to Grant Medical College, Mumbai. The applicant joined there on 12.11.2014 (page 101 of the paper book).


7. It is not in dispute that the respondents no.3 and 4 were senior to the applicant in the seniority list of Lecturers. Perusal of para6.7 of the OA will show that in the seniority list of lecturers even as on 1.1.2009 the positions of applicant, respondents nos.3 and 4 were 10, 5 and 8 respectively. However, the applicant obtained Ph.D. in Medical Microbiology on 29.7.2002 while the respondent no.3 and 4 obtained Ph.D. in 2006 and 2007 respectively. It is equally an indisputable position that while the applicant has been languishing by holding the temporary post as discussed above the respondents nos.3 and 4 were given regular promotions as Associate



Professor (Readers) in the DPCs held in 2008 and 2011 w.e.f. 16.9.2008 and 28.7.2011. Neither the applicant nor the private respondents have the qualification in medicine. They hold non-medical doctorate qualifications.

8. Recruitment Rules of 20.6.1988 have figured above. They are at Exhibit C pages 24 onwards. They were framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India. They are called Reader in Government Medical Colleges (Recruitment) Rules, 1978 (the said Rules). Rule 3 provides that the appointment to the post of Reader would be made either by way of promotion on the basis of seniority subject to fitness from amongst the persons holding the post of Lecturers in Govt. Medical Colleges with not less than 5 years experience as such Lecturers. They should also hold the scheduled qualification. Rule 3(c) reads as follows:

“3(c). If candidate with requisite medical qualification are not available for appointment, either by promotion or by nomination, appointment of person possessing non medical Doctorate qualification, as mentioned in the schedule, to the post of Reader in Anatomy, Physiology, Pharmacology, Microbiology and Biochemistry shall be made to the extent that the total number of posts of Readers in such a subject held by such persons, shall not exceed 30 percent of the total number of existing posts of



Readers in case of Anatomy, Physiology, Pharmacology and Microbiology and 50 percent of the total number of existing posts of Readers in case of Bio-chemistry.

Explanation-(a) The qualification mentioned in the Schedule shall be the qualifications mentioned in Schedules to the Central Act.

(b) A post-graduate qualification mentioned in the Schedule shall stand amended in accordance with the recognition or de-recognition as the case may be of such post-graduate qualification by the Medical Council of India, from time to time.”

9. In the schedule (Qualifications and Experience) for the post of Reader in Microbiology the following is the educational qualification-

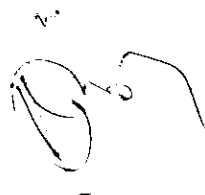
- 1) M.D. (Bacteriology) or
- 2) M.D. or
- 3) M.D. or
- 4) MBBS or
- 5) Ph.D. (Medical Bacteriology) or
- 6) Ph.D. (Medical Microbiology) or
(The Applicant holds it)
- 7) D.Sc. or



- 8) D.Sc.
- 9) M.D. (Microbiology).

The experience required was five years as Lecturer in Microbiology or Pathology or Pathology and Bacteriology or Medical Bacteriology in a Medical College.

10. Therefore, inasmuch as we are, in this OA not concerned with medicos and are concerned with those that hold the qualification of non-medical doctorate, for them to vie for the post of Reader relevant herefor one must hold the qualification of Ph.D. Some more discussion is in store. But here itself it can safely be mentioned that the applicant became qualified by obtaining Ph.D. on 29.7.2002. Therefore, the private respondents having secured doctorates in 2006 and 2007 would become qualified for the post of Reader in those years as against the applicant who became qualified in 2002. Going by the said rules, for being appointed as Reader one would not be qualified if one was not Ph.D. And therefore the seniority inter se in the cadre of Lecturers would not, in the facts and circumstances, push down the claim of the applicant for the post of Reader even if she was below them in the seniority list of lecturers. No such provision came to be cited by the respondents. In fact in this matter although applicant's Ph.D. in 2002 would not affect the seniority of Lecturers but she undoubtedly became eligible for the post of Reader in 2002



and the private respondents became entitled in 2006 and 2007. It is a fact that during 2003 and 2007 DPC was not held and when it was held the applicant did not get her due.

11. Therefore the issue at the heart of the matter is as to the position that obtained from August, 2002 and later on in so far as the claim of the appointment to the regular post of Reader is concerned.

12. Let us at this stage examine the legal position in the context of the fact that the State did nothing in case of the applicant. Let us see what they were required to do. In that regard we are aware of a judgment of the Supreme Court in **UNION OF INDIA AND OTHERS VERSUS N.R. BANERJEE AND OTHERS 1997 SCC (L&S) 1194**. This judgment was followed by Madras High Court in **V.P. KAMALAMMA VERSUS UNION OF INDIA AND 4 OTHERS, W.P. NO.11256 OF 2003 (D.B.) dated 6.1.2005**.

13. It is held by the above referred two judgments that the action for promoting the public servants should be initiated in advance by preparing the names for the panel. Not only existing but even anticipated vacancies must be taken into account. That must be, and it is important, year wise. That requirement can be dispensed with only after it is certified by the appointing authority that there were no vacancies for being



filled up by promotion or no officers were due for confirmation during the year in question (Para 6 of *N.R. Banerjee*).

14. Now, no doubt in both the rulings under reference the governing rules were peculiar to the posts and departments therein. We have however carefully perused the two judgments and are satisfied that they lay down the principles which are generally applicable to all the departments and public servants. *N.R. Banerjee* by Constitution of India is law declared by the Supreme Court. And one wonders how any State bound by the Constitution can claim to be either empowered to or entitled to not act in a fair, transparent and honest manner in matters of promotion. And why? In fact even if such a requirement is not expressly there in the relevant rules it must be read there without doing any violence to the spirit behind it.

15. *N.R. Banerjee* holds that in cases where there has been a delay in DPCs for a year or more vacancies should be indicated year wise separately (Para 7). In this OA therefore even if there was delay in holding DPC it was incumbent upon the authorities to ensure that the applicant was shown to have become qualified from 29.7.2002 whenever the DPC was held post 2002. That was not done and has not been done till date.

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16. In Para 10 of N.R. Banerjee there is an extract from an earlier Supreme Court judgment which is approvingly quoted. It reads as follows:

"We, therefore, hold that preparation of the select list every year is mandatory. It would subserve the object of the Act and the rules and afford an equal opportunity to the promotee officers to reach higher echelons of the service. The dereliction of the statutory duty must satisfactorily be accounted for by the State Government concerned and this Court takes serious note of wanton infraction".

17. We may as well reproduce Para 12 of N.R. Banerjee:

"12. Considered from that perspective, the question arises whether the view taken by the Tribunal is justified in law. It is true that filling up of the posts are for clear or anticipated vacancies arising in the year. It is settled law that mere inclusion of one's name in the list does not confer any right in him/her to appointment. It is not incumbent that all posts may be filled up. But the authority must act reasonably, fairly and in public interest and omission thereof should not be arbitrary. In Shankarasan Dash v. Union of India [(1991) 2 SCR 567], the Constitution Bench had held that inclusion of the



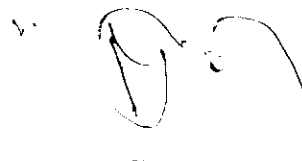
name of a candidate in a merit list does not confer any right to be selected unless the relevant recruitment rules so indicate. The State is under no legal duty to fill up all or any of the vacancies even though the State acts in arbitrary manner. In *Babita Prasad & Ors. v. State of Bihar & Ors.* [(1993) Supp. 3 SCC 268] it was held that mere inclusion of one's name in the panel does not confer on him/her any indefeasible right to appointment. It was further held that the purpose of making panel was to finalise the list of eligible candidates for appointment. The preparation of the panel should be to the extent of the notified or anticipated vacancies. Unduly wrong panel should not be operated. In *Union Territory of Chandigarh v. Dilbagh Singh & Ors.* [(1993) 1 SCC 154] it was held that the mere fact that a candidate's name finds a place in the select list as a selected candidate for appointment to a post, does not confer on him/her an indefeasible right to be appointed in such post in the absence of any specific rule entitling him to such appointment. In *State of Bihar & Ors. v. Secretariat Assistant Successful Examinees Union 1986 & Ors.* [(1994) 1 SCC 126] it was held that a person who is selected and empanelled does not on account of empanelment alone acquire any indefeasible right to appointment. Empanelment is, at the best, a condition of eligibility for the purposes of appointment and that by itself does not amount to selection or creation of a

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vested right to appointment unless relevant rules state to the contrary. However, in the light of the above principles and in the light of the clear rules extracted hereinbefore, it is seen that the exercise of preparation of the panels is undertaken well in advance to fill up the clear vacancies of anticipated vacancies. The preparation and finalisation of the yearly panel, unless duly certified by the appointing authority that no vacancy would arise or no suitable candidate was available, is a mandatory requirement. If the annual panel could not be prepared for any justifiable reason, year wise panel of all the eligible candidates within the zone of consideration for filling up the vacancies each year should be prepared and appointment made in accordance therewith. In *Nagar Mahapalika, Kanpur v. Vinod Kumar Srivastava* [AIR 1987 SC 847], this Court had pointed out with respect to the prescription of the limitation of one year of the waiting list thus:

"The reason underlying the limitation of the period of list for one year is obviously to ensure that other qualified persons are not deprived of their chances of applying for the post in the succeeding year and being selected for appointment."

18. As far as *V.P. Kamalamma Versus Union of India* supra is concerned Paras 4 and 5 thereof are extremely



apposite and fully applicable to the present facts. In fact this has been the argument of the applicant inter alia in Para 2B in affidavit in rejoinder filed on 17.12.2015 and for answer we can usefully take guidance from the Hon'ble Madras High Court. The two Paras read as follows:

4. The contention of the petitioner is that she completed five years as Deputy Registrar and became eligible for next promotion as Joint Registrar in the year 1997. Therefore, for the vacancy which arose in the year 1997, had the panel been prepared in the year 1997 itself, the petitioner would have been selected and appointed as Joint Registrar. The Tribunal, which considered this aspect, has held that Bhattacharjee when promoted did not join that post, but, retired on attaining superannuation on 31.12.1997, therefore, no vacancy in the cadre of Joint Registrar had arisen in the year 1997. Since the Order of promotion issued to Bhattacharjee was not cancelled, the Tribunal held that the contention that there was a vacancy in the year 1997 was without any basis. The Tribunal further observed that the applicant could only aspire to be considered for promotion to the rank of Joint Registrar during 1998 and 1999. But, no DPC meeting was held in 1998 and 1999; only in



2000 the meeting was held. On that date, the revised Rules relating to the promotion were followed; and as per the petitioner's merit she was placed at No.8 in the Order published in 1997. The Tribunal held that in view of the Note 2 to the Recruitment Rules, the claim of the petitioner was to be rejected.

5. The case of the petitioner was that had the year-wise panel been prepared in 1997, R3 and R4 would not have come within the zone of consideration. Further, when the vacancy arose in the year 1998, the panel should have been prepared to fill up the post of the Joint Registrar. As per the relevant Rules, the panel for promotion shall be prepared for every year when there was a vacancy. May be that promotions were not made immediately. Since a vacancy had arisen in June, 1988, the panel should have been prepared to fill up the post in the year when the vacancy had arisen. If such a panel had been prepared in 1998, the petitioner would have been qualified to be included in the panel since there were no adverse remarks against her nor any enquiry was pending against her. Since DPC did not meet till 2000, no year-wise panel was not prepared either for 1998 or for 1999. Only in 2000, a panel was prepared and in that the petitioner, in



view of ACR Report, the petitioner became less meritorious viz-a-viz. R3 and R4. On the other hand, had the panel been prepared in the year 1998 itself the petitioner would have become eligible; R3 would become eligible only in the year 1999 and R4 would become eligible in the year 1998.”

19. The Hon'ble Madras High Court has deplored the prevailing tendency in the Government offices of not preparing and publishing promptly the seniority list.


20. It is therefore quite clear that the stand of the respondents in the manner in which they dealt with the case of the applicant is completely untenable and, therefore, a direction will not only be in order but imperative for them to do the needful.

21. Now in matters like this one, one argument that is advanced in various ways particularly on behalf of the State is that the concerned employee was guilty of delay in moving in the matter. As far as that argument is concerned we do not think that we have to say much of our own. The judgment of the Hon'ble Supreme Court in **K. THIMMAPPA AND OTHERS VERSUS CHAIRMAN, CENTRAL BOARD OF DIRECTORS, STATE BANK OF INDIA AND ANOTHER, 2001 SCC (L&S) 374** is a complete answer to such a submission. It will be very



clear from the observations in *K. Thimmappa* supra that in so far as the employees yearning for promotion and the corresponding duty on the employer to come true to the test of Article 14 of the Constitution is such that it acquires a constitutional hue which cannot be defeated only on the argument of delay or laches.

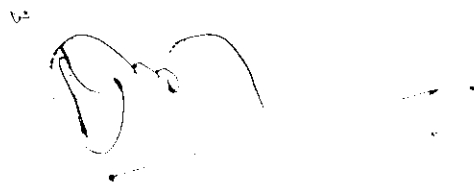
22. **In NAR SINGH PAL VERSUS UNION OF INDIA AND OTHERS 2000 SCC (L&S) 362**, it was held that rights such as the one under consideration is a constitutional right. It can neither be waived nor can the doctrine of estoppel be invoked against the said employee. It appears that the Hon'ble Supreme Court was pleased to hold so because generally the employees are in a vulnerable position vis-a-vis their employers and it might come handy for the employers to create or contrive situations which might give rise to an impression of waiver by the employee. Two other judgments that came to be cited at the bar were **UNION OF INDIA VERSUS M.K. SARKAR, AIR 2009 SC 2158**. It laid down that a past illegality in case of another employee cannot be cited in support of a claim by another employee. **UNION OF INDIA VERSUS A. DURAIRAJ, AIR 2011 SC 1084** (Para 6 and subsequent paras) was cited in support of the proposition that the aggrieved must act with despatch without causing delay).



23. We have carefully perused both the judgments and we find that in the first place they do not conflict with the other judgments cited above. The general principles that the litigant must not allow the time to pass which conduct is prone to create third party interest and further that needless and inexplicable indolence will even otherwise make things difficult inter alia because the records etc. might not become available after passage of time. Quite pertinently this is not the state of affairs in the present matter. Here the applicant has been agitating about her rights and the events are not that old also. Significantly no third party rights have been created by her conduct. In fact in the present set of circumstances it cannot even be successfully argued that the applicant had been indolent.

24. A number of GRs etc. came to be cited before us. The facts have been discussed hereinabove and on application of law to the same in our view the claim of the applicant will have to be upheld in the manner it shall be indicated in the final order.

25. The learned advocate for the private respondents extensively argued their case in accordance with the brief that they held and which impelled them to assail the case of the applicant. However, we make it clear that there is no answer, and this answer should have been given by the State as to why



compliance was not made with the requirements emanating from the above referred judgments of the Hon'ble Supreme Court. It was contended by the Ld. CPO inter alia relying upon the affidavits filed on behalf of the respondents that there was a stay by the Hon'ble Constitutional Courts to the matters of promotion in W.P. No.8452 of 2004. In that regard at Exhibit R-4 page 99 there is a communication from the State to all the departments. As a matter of fact the Hon'ble High Court was in fact pleased to relax the conditions of stay later on. It is not necessary in this OA to discuss the facts involved therein but it would be suffice to mention that therein the issue of reservation in promotion in Government jobs was involved.


26. Granting all latitude to the State and going by the principles of law discussed hereinabove we find that once the stay was vacated or at any rate the promotions became possible because of which the private respondents were promoted then in that event at that time the mandate of the Hon'ble Supreme Court in *Banerjee* supra and of the Hon'ble Madras High Court ought to have been obeyed and year wise list should have been prepared. Had that been done then the applicant's claim would have been considered from 29.7.2002. And the private respondents would have got their due which they in any case got. Therefore, the State cannot hide behind the stay aspect of the matter.

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27. We make it very clear that in this particular OA we do not necessarily direct that the private respondents should be affected but in no case can we countenance the perpetuation of injustice against the applicant. If all the three can get promotions from the respective dates of their acquiring Ph.D. so be it. But in this OA applicant must get relief.

28. In so far as the MA is concerned, the applicant thereby seeks a direction to the respondent no.1 to allow her to continue to work as Associate Professor (Microbiology) in Grant Medical College, Mumbai till final disposal of this OA. Now the main OA has been disposed off and the result has become clear. The respondents will have to act in accordance therewith and, therefore, it will not be necessary to make any order on the MA and the same will get concluded with the OA.

29. The respondents are, therefore, directed to convene even a Special Departmental Promotion Committee to consider the case of the applicant for regular promotion by treating the applicant as eligible for regular appointment as Associate Professor from 29.7.2002 and if found fit then to regularise her services as such accordingly. The compliance be made within two months from today and the result be communicated to the applicant within one week. If the applicant moves for deemed date within one month of her regular appointment as Associate Professor a decision be taken within two months of the receipt



thereof and communicate to the applicant within one week thereafter. OA is allowed to this extent and the MA gets concluded herewith. No order as to costs.

Sd/-
(R.B. Malik)
Member (J)
8.3.2016

Sd/-
(Rajiv Agarwal)
Vice-Chairman
8.3.2016

Date : 8th March, 2016

Dictation taken by: S.G. Jawalkar.