

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI
ORIGINAL APPLICATION NO.623 OF 2017**

DISTRICT : MUMBAI

Shri Sanjay Gangaram Shinde,)
X-Ray Technician, Urban Health Centre,)
Bandra Govt. Colony, Opp. Community Hall,)
Bandra (E), Mumbai 400051)
R/at L-1901, New P.M.G. Colony, Opp. Navghar Police)
Station, Mulund (E), Mumbai 400081)..Applicant

Versus

1. The State of Maharashtra,)
Through the Principal Secretary,)
Medical Education & Drugs Department,)
Mantralaya, Mumbai 400032)
2. The Director,)
Medical Education & Research, M.S.,)
4th floor, Govt. Dental College & Hospital Bldg.,)
St. George's Hospital Compound, P.D'Mello Road)
Fort, Mumbai 400001)
3. The Dean,)
Sir J.J. Group of Hospitals, Byculla, Mumbai-8)

4. The Professor,)
The Urban Health Centre & Govt. Dispensary,)
Govt. Colony, Bandra (E), Mumbai 400051)..Respondents

Shri M.R. Patil – Advocate for the Applicant

Shri A.J. Chougule – Presenting Officer for the Respondents

CORAM : Shri P.N. Dixit, Vice-Chairman (A)
Shri A.D. Karanjkar, Member (J)
RESERVED ON : 19th June, 2019
PRONOUNCED ON : 21st June, 2019
PER : Shri P.N. Dixit, Vice-Chairman (A)

J U D G M E N T

1. Heard Shri M.R. Patil, learned Advocate for the Applicant and Shri A.J. Chougule, learned Presenting Officer for the Respondents.

Brief facts of the case:

2. The Applicant was working as Kidney Dialysis Technician in the Department of Nephrology on temporary basis from 9.10.1987. After working for 29 days, break was given in his service, though he remained present. On 29.10.1990 Hon'ble Bombay High Court restrained the Respondents from terminating his services along with two other similarly situated persons. After establishment of the Tribunal the matter was transferred to the Tribunal. On 21.1.2999 the Tribunal did not issue directions to regularize his services. However, the Tribunal permitted the Applicant to participate in the selection process. Against this order the Applicant moved the Hon'ble Bombay High Court and on 26.11.1999 the Hon'ble High Court granted injunction from terminating his services.

3. On 8.3.1999 the Government issued a GR and regularized the services of 3761 employees who were working on temporary basis. However, as the Applicant was before the Hon'ble High Court, his services were not regularized. When the writ petition filed by him came up for final hearing, the Government of Maharashtra issued a circular on 25.8.2005 on the basis of the judgment of the Hon'ble Supreme Court in the case of Uma Devi. The Applicant, therefore, withdrew his writ petition on 1.8.2006.

4. On 23.9.2006 Respondent no.2 issued advertisement to fill in Group 'C' post in medical colleges. Applicant participated in the same and was recommended for the post of X-Ray Technician on 29.8.2008. Since then he is working as X-Ray Technician. On 26.11.2008 he made a representation to grant him the benefit of his earlier services as Kidney Dialysis Technician from 10.11.1987 to 14.9.2008. As there was no favourable response to his representation he has approached this Tribunal in the present OA with the prayer:

“To give him benefits for his earlier temporary service as Kidney Dialysis Technician from 10.11.1987 to 14.9.2008 and treat the same as qualifying service as per provisions of the rule 30 of the Maharashtra Civil Services (Pension) Rules, 1982 and accordingly to give him benefits of pay fixation and assured career progression scheme and pension.” (para 10(a) (b) page 15 of OA)

(Quoted from page C of OA)

5. His arguments are based on following grounds:

“a. That he is entitled for benefit of the rule 30 of the Maharashtra Civil Services (Pension) Rules, 1982 and his temporary service as Kidney Dialysis Technician from 10.11.1987 to 14.9.2008 needs to be treated as qualifying service and he needs to be granted benefit of the same for the purpose of pay fixation, benefits of assured career progression scheme as well as pension.

b. That the barrier of alleged breaks in his temporary service can be overcome by application of provisions of the rule 48 of the Maharashtra Civil Services (Pension) Rules, 1982. The said rule empowers the appointing authority to condone the interruptions in service of the Govt. servant upto a period of five years.”

(Quoted from page C of OA)

6. The Applicant has, therefore, submitted that the impugned inaction is illegal and arbitrary.

7. The Respondents no.1 to 4 have filed their reply and resisted the claim made by the Applicant in the OA. The Respondents have stated as under:

“3(i) The GAD of the State had taken policy decision vide GR dated 8.3.1999 to regularize services of 3761 employees working in various establishments of the State Government on purely temporary basis as one time measure subject to fulfillment of certain conditions. The first and foremost condition was that the candidate should possess educational qualification as prescribed in Recruitment Rules of relevant posts. The Applicants in OA No.1086 of 2012 possessed requisite educational qualification as prescribed in draft rules published on 19.4.1991 for the post of Generator Operator to which they were temporarily appointed. The present Applicant never possessed requisite educational qualification as prescribed in draft rules published on 2.6.1984 for the post of Dialysis Technician to which he was temporarily appointed. As per the provision of

draft rules for the posts of Dialysis Technician a candidate should possess Degree in Science and DMLT certificate issued by recognized institute. The present Applicant though possessed Degree in Science, he never possessed DMLT Certificate of the recognized institute. As the Applicant did not possess requisite basic qualification, it is obvious that he could not fulfill the first and foremost condition of the GR dated 8.3.1999.

3(ii) The then Superintendent, St. Georges Hospital, Mumbai vide letter dated 20.3.1999 strongly recommended regularization of temporary service of the Applicants in OA No.1086 of 2012. It is obvious, that the Applicants in OA No.1086 of 2012 being eligible as per provisions of draft rules, were fulfilling conditions of GR dated 8.3.1999. Therefore, Superintendent, St. Georges Hospital strongly recommended regularization of their temporary service, as it was well known to him that they were competent to perform duties and responsibilities by virtue of educational qualification they possessed. The present Applicant never possessed requisite qualification for the post of Dialysis Technician on which he was temporarily appointed and therefore he could not produce any record regarding recommendation of any authority for regularization of his temporary service.

3(iii) The Hon'ble Supreme Court in the case of Umadevi has held as under:

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (1967(1) SCR 128), R.N. NANJUNDAPPA (1972(1) SCC 409), and B.N. NAGARAJAN (1979 (4) SCC 507), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union

of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date.”

The present Applicant was appointed on duly sanctioned post and worked for 10 years and more but he was continued in the service by orders of the Hon’ble High Court. As the Applicant never possessed requisite basic qualification to get appointed to the post of Dialysis Technician as per provisions of draft rules for the said post, his initial appointment which was made locally was in violation of statutory rules. It is pertinent to note that the Applicant approached the Hon’ble High Court after rendering service merely of 2.5 to 3 years and continued to be in the service by order of the Hon’ble High Court. Therefore, temporary service rendering by the Applicant cannot be considered valid for any purpose.

3.1(c) This Hon’ble Tribunal and the Hon’ble High Court in case of similarly situated colleagues of the present Applicant vide orders and judgments dated 18.3.2014 and 30.9.2016 respectively gave considerable importance to the provisions of draft rules and concluded that the initial appointments of the Applicants were not in violation of any statutory rules. The Hon’ble Supreme Court in case of Abraham Jacob and others Vs. Union of India vide judgment dated 11.2.1998 held that service conditions of the employees, in the absence of statutory rules could be governed by administrative instructions. Therefore, it is clear that there is no illegality to make appointments as per the provisions of draft rules which clearly specify requisite qualification essential to perform duties and responsibilities of that particular post. Therefore, it can be firmly said that as the present

Applicant never possessed requisite educational qualification as prescribed by draft rules, his initial appointment was in violation of statutory rules.”

(Quoted from page 78-82 of OA)

8. The Respondents have mentioned that temporary services rendered by the Applicant cannot be considered valid for any purpose. The Respondents have, therefore, prayed to dismiss the OA. The Respondents have enclosed draft rules for Dialysis Technician in Exhibit R-2 page 95 of OA.

9. However, in the rejoinder the Applicant has stated as under:

“6. In this connection, attention is invited to the copy of said Draft Rules published on 2.6.1984 which is annexed as Exh. R-2 to the reply of the Respondents. Whereas the Respondents have claimed in the reply that the said draft rules was published on 2.6.1984, a perusal of the Exh.R-2 to the said reply does not support the claim that it was published on 2.6.1984. First of all the said draft does not bear any date at the top. There is no signature of the Under Secretary whose designation has been mentioned at the bottom of the said Draft. There is merely an endorsement at the bottom by the then Joint Director of Medical Education & Research as follows:

“Draft Recruitment Rules proposed”.

7. I, therefore say and submit that there is no material to support the claim of the Respondents that the said Draft Rules were published on 2.6.1984. There is no mention of the date of 2.6.1984 anywhere in the said Exhibit R-2 annexed by the Respondent in their reply.

8. I further say and submit that even though I have worked in the post of Dialysis Technician in the Sir J.J. Group of Hospital right from 9.10.1987 to 14.9.2008, (where after I resumed the duties of my regular appointment to the post of X-ray Technician) according to my knowledge the so called

draft rules of 1984 were never finalized and published and formally promulgated so as to acquire the status of statutory provisions under proviso to Article 309 of the Constitution.

9. *On the other hand, as against the insistence on the part of the Respondents to contend that DMLT certificate is an essential qualification as per the 1984 Draft rules, and their further contention that since I do not possess DMLT certificate, I do not fulfill the qualifications prescribed in Recruitment Rules and I do not fulfill the first condition laid down in the GR dated 8.3.1999, I am submitting herewith a copy of letter written on 25.4.1985 (i.e. after the date of 2.6.1984 which the Respondents claim as a date of publication of draft rules) by no less a person than Dr. A.L. Kriplani, Professor and Head of the Department of Nephrology, Grant Medical College and J.J. Group of Hospitals addressed to the Dean of J.J. Group of Hospitals. I say the relevant portion of the contents of the said letter by the Head of the Department of Nephrology is reproduced hereinafter:*

“Also in the rules for Dialysis Technician, DMLT is made compulsory requirement. There is no need for Dialysis Technician to have Laboratory experience as Laboratory is not connected with Dialysis. These unnecessary stiff requirements are detrimental to our working. I have already stated in my earlier letter No.AKD/NEPH/51 dt. 11th March, 1985.”

10. *Further, in support of my contention that the so called draft rules of 1984 for the post of Dialysis Technician were never put into application, I am annexing hereto as Exhibit RJ-2 a copy of letter dated 19.12.1989 (i.e. after lapse of 5 and ½ years from 2.6.1984) written by the then Head of the Department of Nephrology and addressed to the Dean, Sir J.J. Group of Hospitals. A perusal of the contents thereof would disclose that there is a specific mention of GR No.JJH/081/1225/PH-10 dated 17.10.1981 and Medical Education and Drugs Department Resolution NO>JJH-1085/262/MEPL-4 dated 4.9.1986. However, there is no mention of the 1984 Draft rules in the said letter from the Head of the Department of*

Nephrology to the Dean, Sir J.J. Group of Hospitals. The Head of the Department has referred to one Miss Manisha Naik and the Applicant and has specifically mentioned that both these technicians were fulfilling the basic qualification according to GR mentioned above. It is also mentioned that both of them are trained by the department and are handling the machines efficiently and independently and the head of the department therefore puts in a request to make them permanent for smooth and efficient working of the department.

11. *I say and submit that when the very head of the Nephrology Department while he mentions in his letter of the year 1989 that his department is rendering super speciality service to the public, does not treat DMLT as the basic qualification for the post of Dialysis Technician, it would be too farfetched to believe that the draft rules of 1984 were still applicable. Thus, it is established that no action was taken to finalise and promulgate the recruitment rules on the basis of the 1984 Draft rules and the provisions therein cannot be relied upon by the Respondents to hold that I did not fulfill the first and foremost condition as regards qualification as required by the GR dated 8.3.1999.*

12. *I say and submit that my contention that the 1984 draft rules were never put into operation is further strengthened by the fact that even as late as on 5.2.1999, the then Head of the Department of Nephrology, Sir J.J. Group of Hospitals, Dr. N.M. Dedhia submitted to the then Dean, Sir J.J. Group of Hospitals his specific proposal to discard the 1984 draft rules and to frame revised Recruitment Rules for the post of Dialysis Technician. A perusal of the said proposal would disclose that the Head of the Department of Nephrology in Sir J.J. Group of Hospitals, which was the only Govt. hospital in the entire State having the Hemodialysis Unit at that point of time, had in no uncertain terms expressed the view that for the post of Dialysis Technician the possession of DMLT certificate is not necessary. I say and submit that it would not be reasonable in the face of such expert views and recommendations, not by one person, but by two persons on different occasions who were occupying the post of the Head of the*

Department of Nephrology, to take up the stand that I do not possess the DMLT certificate and therefore I do not fulfill the requirements of GR dated 8.3.1999.

14. *With reference to para 3.1(b)(iii) of the affidavit in reply, I say that the Respondents have referred to a decision of the Hon'ble Supreme Court in Umadevi case. As regards the contention that I did not possess the requisite qualification as per provision of Draft Rules, I have already dealt with earlier and sufficiently established that the Respondents are misleading this Hon'ble Tribunal by reference to Draft Rules which were not only never acted upon but consistently the very department in which I was working had repeatedly being pointing out that the DMLT is not at all a requisite qualification for the post of Dialysis Technician.*

15. *As regards the contention that my initial appointment was made locally, I say that the same is totally misleading and distorting the true facts. I say at that point of time in the first place there was a ban on regular appointments by reason of Zero Based Budget. However, for my initial appointment I was interviewed and selected by the then Professor and Head of the Department of Nephrology, who after my selection and appointment ensure that necessary training for discharging duties of my job were imparted and it was only after he was himself satisfied that I would be able to discharge duties of my job that my services were continued. Hence, it is not at all correct to say that it was a local appointment made in violation of statutory rules."*

(Quoted from page 102-109 of OA)

10. Respondent no.1 in his affidavit in sur-rejoinder has resisted the contentions raised by the Applicant. The relevant portion of the same is summarized as under:

(1) *As stated in the letter dated 1.2.2018, Respondent no.1 is prepared to take into consideration the temporary services by the Applicant for*

pensionary and terminal benefits. But Applicant however insisted that he is entitled for all the benefits as mentioned in prayer of the OA.

(2) The Applicant never possessed requisite qualification prescribed in draft rules for the post of Dialysis Technician.

(3) GAD has accorded sanction to consider temporary services of the Applicant only for pensionary and terminal benefits. The Finance Department has asked the department to take appropriate decision and accordingly in the letter dated 1.2.2018 has communicated that temporary services of the Applicant can be considered only for pensionary and terminal benefits.

(4) As per the judgment by the Hon'ble Supreme Court in the case of Abraham Jacob & Ors. Vs. Union of India service conditions of the employees, in the absence of statutory rules could be governed by administrative instructions and there is no illegality to make appointments as per the provisions of draft rules.

(5) The rules cited are draft rules dated 2.6.1984. The recruitment for the post of Dialysis Technician is being carried out as per aforesaid draft rules.

(6) The recommendation of the HOD of Nephrology of Grant Government Medical College and J.J. Hospital was never forwarded to the Government and this may be due to the reason that the Deans did not find any merit in the said recommendation. The same was also never accepted by the Directorate of Medical Education and Research nor by the Government.

(7) Since 1984 the recruitment to the post of Dialysis Technician is governed by these draft rules, recruitment have been made through competitive examination for the said post in the year 2006 and 2012 as per these draft rules.

(8) *The Applicant was selected as admitted by him by the HOD, Nephrology Department, Grant Government Medical College and J.J. Hospital. The HOD of Nephrology is not administrative head of that institute. Another candidate possessing DMLT certificate could not be appointed to replace the Applicant due to interim relief granted by the Hon'ble High Court.*

(9) *The GR dated 8.3.1999 did not contain the name of the Applicant as he did not possess requisite qualification prescribed by the relevant rules which was prerequisite condition for regularization of temporary service as per GR.*

(10) *The Applicant even after having an opportunity to get selected to the post of Dialysis Technician in the year 2006 where he was working on temporary basis did not apply for the said post but applied for different post viz. X-Ray Technician. This confirms that he did not possess requisite qualification for the post of Dialysis Technician.*

(11) *The initial temporary appointment was made locally as stop gap arrangement in violation of provisions of statutory rules and continued in service due to interim relief granted by the Hon'ble High Court.*

11. Issues for consideration:

(1) Rule 30 of the MSC (Pension) Rules, 1982 reads as under:

“30. Commencement of qualifying service.- Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity.”

As stated in the above rule, the Respondents after consulting the Finance Department have stated that they are prepared to consider his temporary services for the purpose of pensionary and terminal benefits. The issue therefore for consideration is whether the Applicant can be considered eligible for the period from 10.11.1987 to 19.9.2008 as qualifying service for the purpose of pay fixation and benefits of Assured Career Progression Scheme (ACPS)?

12. As is clear from the affidavit filed by the Respondents, the Applicant was in temporary service against all the statutory rules on temporary basis selected by the HOD in the hospital and not by administrative head/Dean of the Medical College. He continued in service following an interim relief granted by the Hon'ble High Court. When he had the opportunity to get himself selected, he preferred on his own to appear for the examination for selection as X-Ray Technician rather than being Kidney Technician. He did this as he was aware that he did not possess the requisite necessary qualification for being the Dialysis Technician. As his service was on temporary basis as a stopgap arrangement and as he did not possess necessary qualification the GR which regularized services of more than 3000 temporary employees did not cover him.

13. However, as the Applicant has rendered the services from 10.11.1987, as per rule 30 of MCS (Pension) Rules, 1982 he should be considered eligible for pensionary benefits. His prayer to make him entitled for pay fixation and benefit of ACPS would be injustice to the persons who are qualified and entitled for the same. In view of the long chequered history, we do not consider it appropriate to concede his prayer.

14. We, therefore, direct the Respondents to provide him pensionary benefits after considering his services from 10.11.1987 as mentioned by the Respondents.

15. Original Application is, therefore, partly allowed. No order as to costs.

Sd/-

(A.D. Karanjkar)
Member (J)
21.6.2019

Sd/-

(P.N. Dixit)
Vice-Chairman (A)
21.6.2019

Dictation taken by: S.G. Jawalkar.