

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO 1306 OF 2010

DISTRICT : THANE

1. Shri Achyut Rambhaji Dughad,)
w/a Sub Auditor in the office of)
District Special Auditor, Class-I,)
Co-operative Societies, Thane,)
Beturkarpada, Kalyan [W],)
Dist-Thane.)
2. Shri Manohar Kashinath Vani)
w/a Sub Auditor in the office of)
Special Auditor Class-I,)
Cooperative Societies [Marketing],)
Thane. R/o: 104, Navi Riddhi)
Siddhi C.H.S, Murbad Road,)
Opp ICIC Bank, Kalyan [W],)
Dist-Thane.)
3. Shri Sanjay Dhondu Awari)
W/a Sub Auditor in the office of)
5th Additional Special Auditor,)
Co-operative Societies, Mumbai.)
Contractor Building, 2nd floor,)
Ballard Estate, Mumbai 400 038.)

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4. Shri Tanaji Laxman Gavhane)
W/a Sub Auditor, Co-operative)
Societies, Shahapur,)
R/a: 102-B, Shantaram Park,)
Shahapur, Vafegaon, Dist-Thane.)
5. Shri Digambar Shriram Bhamare)
W/a Auditor Gr.II,)
Cooperative Societies, Kalyan,)
R/a: 403/B-1 Nilkanth Park,)
Dwarkanagar, Valyenagar,)
Khadakpada, Kalyan [W],)
Dist-Thane.)
6. Shri Shivaji Shantu Mate,)
W/a Clerk in the office of the)
District Special Auditor Class-I,)
Co-operative Societies, Thane.)
R/a 102, L Wing, Vanashri Gajanan)
C.H.S, Khadakpada, Kalyan [W],)
Dist-Thane.)
7. Shri Pradeep Bhimrao Ghusale)
W/a Sub Auditor in the office of)
Additional Special Auditor Class-I,)
Cooperative Societies, Mumbai.)
Contractor Building, 2nd floor,)
Ballard Estate, Mumbai 400 038.)
R/a : 102, B-Wing.)
Tarabai Society, Katrap,)
Badlapur [E], Tal-Ambernath,)



Dist-Thane.

)...**Applicants**

Versus

1. The State of Maharashtra)
Through the Secretary,)
Co-operation, Marketing and)
Textiles Department, Mantralaya,)
Mumbai 400 032.)
2. The Commissioner,)
Co-operation and Registrar for)
Co-operative Societies, M.S,)
Central Building, Pune-1.)
3. The Divisional Joint Registrar,)
Co-operative Societies [Audit],)
Mumbai Division, 6th floor,)
Konkan Bhavan, Navi Mumbai.)...**Respondents**

Ms Swati Manchekar, learned advocate for the Applicant.

Shri K.B. Bhise, learned Presenting Officer for the Respondents.

CORAM : Shri Rajiv Agarwal (Vice-Chairman)

Shri R.B. Malik (Member) (J)

DATE : 28.03.2016

PER : Shri Rajiv Agarwal (Vice-Chairman)




ORDER

1. Heard Ms Swati Manchekar, learned advocate for the Applicant and Shri K.B. Bhise, learned Presenting Officer for the Respondents


2. This Original Application has been filed by the Applicants challenging the final seniority list published on 10.12.2010 by the Respondent no. 3 on the ground that long established seniority cannot be disturbed by applying Rule 13-b of the Post Recruitment Training and Examination (for Clerks in the Cooperative Department of Government of Maharashtra) Rules, 1983, which was not applied till 2010.

3. Learned Counsel for the Applicants argued that the Applicants joined service as Clerks during 1991 to 1997 on the establishment of the Respondent no. 3. The State Government notified the Post Recruitment Training and Examination (for Clerks in the Cooperative Department of Government of Maharashtra) Rules, 1983 (Rules of 1983) on 16.12.1983. Rule 4 of the Rules of 1983 provides that every Clerk has to pass the Post Recruitment Examination (the Examination) within four years from the date of appointment and within three chances. For those appointed before the date of notification, the relevant date will be the date of notification. Rule 13(b) of the Rules of 1983 deals with



consequences of failure to pass the Post Recruitment Examination (the Examination) within four years from the date of appointment/before the date of notification. A person who fails to pass the Examination within time and given chances loses the seniority to those who pass the Examination before him. Learned Counsel for the Applicants stated that this Rule 13(b) was not applied and the seniority lists published up to 2010 were based on the date of appointment. Learned Counsel for the Applicants argued that to apply the said provision after a gap of 26 years with effect from 1.1.1984 and to disturb the established seniority is clearly arbitrary and unjust. The seniority list of Clerks published on 10.12.2010 is without application of mind. The earlier seniority lists were not challenged by other Clerks. Some of the Applicants have been given two promotions as Sub Auditors and Auditor Grade-II. They may now be reverted to junior posts. Learned Counsel for the Applicants stated the Respondents woke up after the judgment of this Tribunal dated 22.11.2006 in O.A nos 357/2005 and 358/2005. However, that judgment is not to be applied retrospectively. Learned Counsel for the Applicants prayed that Rule 13(b) of the Rules of 1983 may be declared ultra vires to the Constitution of India.

4. Learned Presenting Officer (P.O) argued on behalf of the Respondents that the Respondent no. 3 revised the seniority lists of Group 'C' employees from



1.1.1984 to 1.1.2008 as per instructions contained in circular dated 23.10.2008 issued by the Respondent no. 2. This circular has been issued by the Respondent no. 2 pursuant to the decision of this Tribunal dated 19.12.2008 in O.A nos 761/2007, 4/2008, 681/2008 and 688/2008. These Original Applications were filed by Clerks working in different departments and were claiming that they were entitled to Time Bound Promotion after 12 years of service, regardless of the fact whether they had passed Post Recruitment Examination in given time or chances or not. This Tribunal has held that those who fail to pass the examination within four years and three chances, lose their functional seniority and are entitled to obtain benefits of time bound promotion from their revised seniority date only. Learned Presenting Officer argued that based on this circular, provisional seniority lists, for 1.1.1984 to 1.1.2008 were issued on 18.6.2010 and the final seniority list was published on 10.12.2010, which is challenged in the present Original Application. Learned Presenting Officer argued that Rule 13(b) of the Rules of 1983 is not arbitrary or reasonable. A rule cannot be held ultra vires the Constitution only because it was not applied for 26 years. Similar rules are there in every department, and have been upheld by this Tribunal. Learned Presenting Officer argued that present Original Application is filed by the Clerks working in Audit Wing of Cooperation Department. The Applicants have themselves admitted

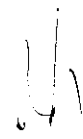
in para 7(k) of the Original Application that in O.A no 357/2015 and 358/2015 by order dated 22.11.2006, this Tribunal had directed the Cooperation Department in the context of Clerk in administration wing to apply Rule 13(b) of Rules of 1983 strictly. There is no way Clerks in Audit wing can be exempted from application of the Rules which are applicable to all. Learned Presenting Officer argued that this Tribunal has already directed the Cooperation Department to implement the Rules of 1983 and there is no reason to take a different view in the present Original Application.

5. We find that the Applicants have themselves admitted that this Tribunal in O.A nos 357/2005 and 358/2005 by order dated 22.11.2006 had directed the Cooperation Department to prepare seniority lists in accordance with Rule 13(b) of the Rules of 1983. The Respondents have also cited another judgment of this Tribunal dated 19.12.2008 in O.A no 761/2007 and other O.As where this Tribunal has held that Clerks working in various Departments of the State Government lose seniority if they fail to pass Post Recruitment Examinations within four years and three chances from the date of appointment. They are eligible for functional as well as Time Bound Promotion on the basis of revised seniority only. Learned Presenting Officer has cited another judgment of Aurangabad Bench of Hon'ble Bombay High Court in W.P no 6461 of 2007 in the case

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of **ULHAS Y. SOMWANSHI Vs. STATE OF MAHARASHTR.** It was held by Hon'ble High Court that:

"It was vehemently argued that impugned circular is discriminatory and therefore violative of Article 14. In fact, there is no substance in the argument that the Circular is violative of said Rules, which submission was also tried to be advanced. In fact, the circular insists for application and strict compliance of the said Rules. So far as the argument that the Circular and implementation of said Rules thereby discriminates, it must be remembered that when equals are treated as unequally, that would amount to discrimination. Similarly, when unequals are treated at par, even that may be possibly branded as discrimination. It is not possible to say that a provision is discriminatory, if unequals are treated on different footing. Petitioners who have exhausted all their chances before reckoning age of 45 years, therefore, cannot claim parity with those who have passed the Examination before reaching the age of 45 years or who have attained the age of 45 years or who have attained the age of 45 years before exhausting all their chances. We may hasten to repeat that as harmonious interpretation of Rules 5(a) and 7(a) of the said Rules, only those persons who enter class-II after attaining age of 45 years or one who attains



age of 45 years before exhausting all his chances to pass Departmental Examination, upon entry in Class-II (before attaining age of 45 years), will be the individuals entitled to declaration of exemption. At the same time, it must be reminded that without passing the Departmental Examination while in Class-II, there cannot be promotion to Class-I. It was tried to be argued that petitioners are being discriminated because the rules have never been implemented with strictness and there have been cases of undeserving retentions in Class-II and promotion to Class-I. In order to grant parity to the Petitioners, therefore, they ought to be considered for promotion as they were already in the select list. We are afraid, this court cannot grant benefit to the petitioners on the ground of equality and parity, which others have earned in breach of the act or the Rules. On the contrary, we are indicating desirability of re-opening the cases of underserving retention/promotion, in the operative order.”

This judgment has been given in the context of promotion of Class-II officers in the Maharashtra Development Service to Class-I. Unless an officer in M.D.S, Class-II passes Departmental Examination within given chances, he cannot be retained in Class-II after exhausting those chances and cannot be promoted to Class-I. Facts are remarkably similar in the present Original Application.

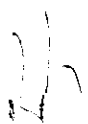


The Applicants do not get protection in promotion, if the promotions are in violation of Rules. Similarly, Rules cannot be held to be arbitrary just because they were not applied in the past. The challenge of the Applicants to the Constitutional validity of Rules of 1983 has to be firmly rejected. Similarly, the seniority list published by the Respondent no. 3 by impugned order dated 10.12.2010 has to be held valid.

6. Learned Counsel for the Applicants has contended that Nagpur Bench of Hon'ble High Court in W.P no 4402 of 2011 has granted interim stay in terms of prayer clause (ii) which reads:-

“(ii) stay the effect and operation of impugned order dated 5.5.2011, Annexure IX passed by the learned Tribunal further directing the Respondent no. 3 not to revert the Petitioners during the pendency of the present Petitions.”

The order dated 5.5.2011, (Annexure IX) was passed by the Nagpur Bench of this Tribunal rejecting the Civil Application nos 191 to 198 of 2011 for interim reliefs in O.A nos 41, 43 to 49 of 2011. It appears that Original Applications were filed challenging seniority in Nagpur Division in respect of Clerks in Cooperation Department on the basis of Rule 13 (b) of the Rules of 1983. Obviously, if there are interim orders of Hon'ble High



Court, they will be applicable. However, there is no stay to the present proceedings before us.

7. We have not found any merit in the present Original Application and it is dismissed with no order as to costs.

Sd/-
(R.B. Malik) 28/03/16
Member (J)

Sd/-
(Rajiv Agarwal)
Vice-Chairman

Place : Mumbai

Date : 28.03.2016

Dictation taken by : A.K. Nair.