

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH  
ORIGINAL APPLICATION NO.977 OF 2017**

**DISTRICT : MUMBAI**

Mrs Vidya Nitin Pondkule	)	
Occ : Govt. service working as	)	
Internal Audit Officer,	)	
Mahatma Phule Backward Class	)	
Corporation, Supreme Shopping	)	
Centre, Juhu, Vile Parle [W],	)	
Mumbai.	)	
R/o: Flat No. 19, Bldg No. 4/A,	)	
Seema Society, N. Datta Marg,	)	
Four Bungalow, Andheri [W],	)	
Mumbai 400 053.	)	<b>...Applicant</b>

**Versus**

- |    |   |   |  |
|----|---|---|--|
| 1. | The Addl. Chief Secretary,                        | ) |  |
|    | Finance Department,                               | ) |  |
|    | 5 <sup>th</sup> floor, Main Building, Mantralaya) |   |  |
|    | Mumbai 400 032.                                   | ) |  |
|    |   |   |  |
| 2. | The Addl. Chief Secretary,                        | ) |  |
|    | G.A.D, 6 <sup>th</sup> floor, Main Building,      | ) |  |
|    | Mantralaya, Mumbai 400 032.                       | ) |  |
|    |   |   |  |
| 3. | Mr M.V Pawar,                                     | ) |  |
|    | Govt. service, promoted as                        | ) |  |

Assistant Director, presently )  
 Working as Accounts Officer, )  
 [Class-I], Maharashtra Real Estate )  
 Regulatory Authority, 3<sup>rd</sup> floor, )  
 A-Wing, SRA Administrative Bldg, )  
 Anant Kanekar Marg, Bandra [E], )  
 Mumbai 400 051. )...Respondents

Shri M.D. Lonkar – Advocate for the Applicant

Smt. Archana B.K. – Presenting Officer for the Respondents.

CORAM : Shri Justice A.H. Joshi, Chairman

DATE : 03.01.2018

### **J U D G M E N T**

1. This Tribunal has issued notice for final disposal on 16.10.2017, returnable on 17.11.2017. Applicant has filed service report. Office endorsement shows that Respondents no.1 & 2 have been served on 16.10.2017 and Respondent no.3 is served on 3.11.2017.

2. Today State Government has filed affidavit answering the OA. Respondent no.3 has chosen to remain ex-parte. Learned Presenting Officer has tendered copy of the office note which was furnished by G.A.D. and subsequent note on the basis of which decision to promote Respondent no.3 is taken.

3. Heard Shri M.D Lonkar, learned advocate for the applicant and Smt. Archana B.K, learned Presenting Officer for Respondents No.1 and 2. None for the Respondent No.3.

4. Applicant as well as respondent no.3, were initially appointed on the post of Internal Auditor in the cadre of Accounts Officer, Class-II.

5. Facts of the case and background are based on following facts:-

(i) D.P.C. was held on 29.8.2016.

(ii) D.P.C. disapproved proposal for promotion of Respondent no.3 on the ground that on the date of D.P.C, Respondent no.3 was facing trial, furtherance to Crime No.11/2011 for offences punishable under Section 13(1)(d) and 7 etc. of Prevention of Corruption Act.

(iii) The matter was forwarded to G.A.D. and G.A.D. returned the case to the Finance Department for taking "conscious decision", as per policy in vogue, in view of pendency of criminal offence/case.

6. In the process of promotions and consequent postings after promotions, options for cadre allotment were called from various officers including applicant.

7. During the pendency of the proposal before the department, Respondent no.3 was acquitted from the charge under P.C. Act. The Department of Law & Judiciary did not approve department's proposal for an appeal against acquittal, since it is not a fit case for appeal.

8. Based on the judgment of respondent no.3's acquittal dated 3.1.2017, the Finance Department took a decision and considered that Respondent no.3 is eligible for promotion, and his option for cadre allotment was called from him.

9. Along with many candidates, including the applicant, respondent no.3 is promoted and posting orders are issued. In this posting order Respondent no.3 is posted as Accounts Officer, Class-I, Maharashtra RERA, Mumbai and the respondent no.3 has joined. The applicant has been transferred as Senior Accounts Officer, Gondia and she has not yet joined the posting on promotion.

10. According to the applicant, since initially respondent no.3's candidature was not cleared by DPC due to pendency of criminal trial, in absence of conscious decision to promote the respondent no.3 he could not have entered the zone of consideration of cadre allotment. Despite the fact that the acquittal is later in date, based on the acquittal of respondent no.3 his candidature was considered to be eligible and he has been promoted.

11. According to applicant her option of cadre allotment and consequent posting at Mumbai which she could have got has been disregarded since respondent no.3 has been promoted and came into zone of consideration for cadre allotment.

12. In the aforesaid premises applicant has challenged the consideration of respondent no.3 for promotion and his actual promotion and consequent cadre allotment and the applicant prays that the order of promotion of respondent no.3 to be quashed and set aside and cadre allotment to be reconsidered for securing cadre allotment and posting near or at Mumbai.

13. Learned Advocate for the applicant has pointed out the pleadings wherein the challenge is narrated in the OA. Relevant pleading reads as follows:-

“6.8 The Applicant states that the Respondent No.1 has promoted Mr. M.V. Pawar, Respondent No.3 who was declared unfit by the DPC. There was a criminal case and a departmental enquiry pending against Respondent no.3. Moreover, the Confidential Reports for preceding 5 years were also not available. As per para 2(c) of GAD G.R dated 2<sup>nd</sup> April, 1976, if an employee is not found fit for promotion on the basis of his record then the question of considering him for promotion does not arise. Since Mr. M.V. Pawar, Respondent no.3 was declared unfit for promotion by the DPC, granting promotion to Mr M.V Pawar without placing his case before the DPC afresh is irregular.”

(Quoted from page 8 of OA)

14. The averment contained in para 6.8 of OA has been replied by the Respondent No.1 in an evasive manner. However, aspect of conscious decision which is touched in para 8(1) of the reply is appearing at page 23 of the paper book of OA reads as follows:-

“8(i) The average gradation of Confidential Reports for 3 years and 4 months out of 5 preceding years of available confidential reports in respect of Shri Pawar was ‘B+’. Considering this and in view of provisions in GR dated 2.4.1976, General Administration Department has included the name of Shri Pawar in final select list subject to the conscious decision to be taken regarding his pending departmental inquiry and criminal case. The Hon’ble Court has exonerated Shri Pawar in criminal case and on the basis of that, the Government in Finance Department has closed his departmental inquiry also. Therefore, the Government has taken the conscious decision and decided to promote Shri Pawar.”

(Quoted from page 23 of OA)

15. In view of rival pleadings it is clear that the Government was expected/required to take a conscious decision about respondent no.3’s candidature. The reference date for consideration has and was to be the position as was prevailing on the date of meeting of D.P.C, i.e. 29.8.2016, on the basis of necessary implication of the directions contained in G.R. dated 2.4.1976 which guides and

modulates the manner in which 'conscious decision' is to be taken whenever a criminal case is pending.

16. Text of office note through which respondent no.2's candidature inter alia few other candidates was processed by Finance Department on which the proposal to promote the applicant was decided, reads as follows:

“७. निवडसुचीतील जाणीवपूर्वक निर्णय घेण्याच्या अधीन पात्र ठरविलेल्या एकूण ६ अधिकाऱ्यांच्या प्रकरणाबाबतची वस्तुस्थिती पुढील प्रमाणे आहे.

(i) श्री.म.वि. पवार (ज्ये.क्र.५४, खुला) :- श्री. पवार यांच्या विरुद्धच्या लाचलूचपत प्रकरणी विशेष खटला क्र.११/२०११ दाखल करण्यात आला होता. सदर खटला विशेष न्यायाधिश अतिरिक्त सत्र न्यायाधिश, ठाणे यांच्याकडे प्रलंबित असल्याच्या पार्श्वभूमीवर त्यांना विभागीय पदोन्नती समितीने अपात्र ठरविण्याचा निर्णय घेतला होता. तथापि, श्री. पवार हे गोपनीय अहवालाच्या आधारे पात्र ठरत असल्याने, त्यांचा निवडसुचीत समावेश करून सा.प्र.वि. शासन परिपत्रक दि. २/४/१९७६, नुसार त्यांना पदोन्नती द्यावी किंवा कसे याबाबत शासन मान्यतेने निर्णय घेणे आवश्यक राहिल.

यासंदर्भात नमूद करण्यात येते की, श्री. पवार यांनी उपरोक्त नमूद खटल्यामध्ये निर्दोष मुक्तता झाली आहे. तसेच सदर प्रकरणी वरिष्ठ न्यायालयात अपील करण्याच्या अनुषंगाने विधी व न्याय विभागाचे अभिप्राय घेण्यात आले होते. विधी व न्याय विभागाने सदरचे प्रकरणे अपील करण्याकरीता योग्य नसल्याचे कळविले आहे. श्री. पवार यांच्याविरुद्ध विभागीय चौकशी प्रस्तावित करण्यात आली आहे. सदरचे प्रकरणे मा. मंत्री स्तरावर निर्णयार्थ सादर करण्यात आले आहे. श्री. पवार यांना सदर चौकशीअंती शिक्षा झाली, तर सदर शिक्षा ते पदोन्नतीच्या पदावर भोगण्यास तयार आहेत. त्यामुळे श्री. पवार यांना सहायक संचालक संवर्गात पदोन्नती देणे उचित होईल”

(Quoted from note of Finance Department dated 7.7.2017)

17. It is evident from the note text (part) whereof is quoted in foregoing para that the decision was taken on the basis of acquittal, which in fact is a later event.

18. The Government ought to have taken the decision on the basis of material as was required to be taken on the basis of

material, the facts and circumstances as existed on the date of DPC. However, what is considered is later event or development.

19. Applicant's grievance against promotion of Respondent no.3 is particularly in the light of the fact that because applicant who was not eligible for promotion with reference to the date on which he was considered, the conscious decision as required was not taken and due to said error on the part of the Government, the respondent no.2 has entered the zone of consideration for cadre allotment, and consequently applicant has lost opportunity of being chosen for the posting according to the Divisional Cadre Allotment Rules according to applicant's preference.

20. Applicant's grievance is supported by facts and record rather than bare expectation, since respondent no.3's candidature is considered which are irrelevant or rather those are not due to be considered with reference to relevant date.

21. In the result, Government decision to promote the respondent no.3 based on his acquittal is contrary to the policy of Government which is proclaimed through the Government decision dated 2.4.1976 apart from it being contrary to principles of law and equity both.

22. The impugned order therefore, deserves to be quashed and set aside to the extent of the promotion and posting of the respondent no.3.

23. In view that respondent no.3's promotion and posting is set aside and his posting has come to an end, the respondent no.3 shall have to suffer reversion.

24. The Government shall effect to do adhoc cadre allotment afresh and post the applicant on any available post, until fresh decision of cadre allotment and consequent posting as per rules and after taking into account the choice of the candidates and till decision thereon is arrived within two weeks from the date of receipt of this order, until decision for final cadre allotment is done.

25. In the context that Government has taken a decision on totally wrong footing, it would be open for the Government to reconsider and take a "conscious decision" as to the matter of eligibility of respondent no.3 for promotion, de novo, on the basis of the situation and circumstance as was prevailing and existed with reference to the said date on which the D.P.C was held i.e. 29.8.2016 or any relevant date, prior thereto.

26. Applicant's other prayer for direction to fill in all 18 posts does not have the foundation of a legally enforceable right. Therefore said prayer cannot be granted, it being a matter of executive decision based on numerous factors. The decision in this regard has to be taken by the Government according to need as perceived by the Government.

27. Original Application is accordingly allowed with directions as indicated in foregoing paras 20 to 23.

28. Parties are directed to bear their own costs.

**Sd/-**  
**(A.H. Joshi, J.)**  
**Chairman**  
**3.1.2018**

Dictation taken by : S.G. Jawalkar

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