

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 8327 OF 2013

Mrs. Kunda W/o Ramchandra Lakhkar,
(Nee Kunda D/o Sriram Varudkar)
Aged : 57 Years, Occu. : Govt. Service,
At Present at Govt. Medical College,
at Aurangabad. .. Petitioner

Versus

1. The State of Maharashtra,
Medical Education and Drugs
Department, Mantralaya Annexe,
Mumbai-32, through its Secretary.
2. The Director of Medical Education
and Research, Dental College Building,
St. Goerge Hospital Compound,
Mumbai - 400 001.
3. The Dean,
Govt. Medical College & Hospital,
Ghati, Aurangabad.
4. The Dean,
Shri Bhausahab Hire Govt.
Medical College & Hospital,
Dhule. .. Respondents

Shri B. B. Lakhkar, Advocate for the Petitioner.
Shri V. H. Dighe, A.G.P. for All Respondents.

**CORAM : S. V. GANGAPURWALA AND
V. K. JADHAV, JJ.**

DATE ON WHICH RESERVED FOR JUDGMENT : 10.12.2014

DATE ON WHICH JUDGMENT PRONOUNCED : 10/02/2015

JUDGMENT (PER S. V. GANGAPURWALA, J.) :-

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. The petitioner is appointed on 24.10.1977 as a lecturer in biophysics at Government Medical College, Aurangabad. The same is reflected in Government Resolution dated 25.06.1979. On or about 04.01.2012 and 17.03.2012 orders were issued by respondents cancelling and/or withdrawing the benefit of revision of pay scale as per the recommendations of the VIth Pay Commission, so also ordering recovery of the entire service benefits vide Government Resolution dated 04th May, 2009. The services of the petitioner were sought to be regularized on and from the said date. The petitioner filed Original Application No. 1192 of 2009 claiming various reliefs. Thereafter vide amendment in the original application also pleaded about the illegality of the Government Resolution dated 04th May, 2009 and 25th September, 2009. The petitioner had assailed the orders dated 15.12.2008 and 14.09.2009. The said original application is partly allowed. The orders dated 15.12.2008, 14.09.2009 and communication dated 17.03.2012 are quashed and set aside. The Maharashtra Administrative Tribunal directed the authorities to issue show cause notice within one month.

Thereafter gave one months time to the petitioner to reply the show cause notice and the respondents shall take further decision on the said show cause notice within two months. The petitioner aggrieved by the said order to the extent of non grant of relief of quashing all other communications and the Government Resolution dated 04.05.2009 has filed the present writ petition.

3. Mr. Lakhkar, the learned counsel for the petitioner during the course of his arguments canvassed following propositions.

A. The petitioner is appointed in the year 1977 by duly constituted selection committee. Though the appointment order and the Government Resolution dated 25.06.1979 confirming her appointment states that, the said appointment is temporary for a period of one year till 24th October, 1977 or till the post is filled in on long term basis through the Maharashtra Public Service Commission whichever is earlier, still the petitioner was continued all these years. For last 35 years the post was never advertised by the M. P. S. C. with the result the petitioner is continued. Upon completion of eight years service, the petitioner was granted senior scale as admissible and enjoyed the same. The said senior pay scale which was granted with effect from 1986 is suddenly cancelled by respondents on the ground that the petitioner is not eligible for the same. The recovery

was ordered for a period from 01.01.1986 till 15th December, 2008.

B. The learned counsel submits that, continuous service of 35 years with all benefits such as annual increments, revision of pay scale and other monetary benefits is treated as regular service and it was never informed to the petitioner during last 35 years that the petitioner's service is not regular. During the pendency of the original application by communication dated 17.03.2012 order was passed for recovery of entire service benefits. The said orders were stayed. The Government Resolution as asserted by respondents dated 04.05.2009 was referred for the first time in the affidavit in reply of the Government. The said Government Resolution was never supplied to the petitioner earlier. A rejoinder was filed to the said reply by the petitioner challenging the legality of the said Government Resolution dated 04.05.2009, however, the same is not considered. It is an integral part of the pleadings. The Tribunal erroneously concluded that there is no pleading and prayer challenging the Government Resolution dated 04th May, 2009 regularizing the services of the petitioner on and from the said date. The pleadings were very much incorporated by an amendment. The petitioner had never requested for the so called regularization of services. The Government *suo motu* in the year 2009 regularized service, with onerous condition that the petitioner was regularized in

the service and shall not be eligible for any monetary benefit of their past service. The said action is unjust, illegal and the same is a matter of challenge in the original application. According to the learned counsel, the show cause notice under challenge is also illegal. It was for the Court to decide the illegality of the same. There was no purpose for directing the respondents to again issue show cause notice, wherein *de novo* litigation would start. It would again create another round of litigation.

04. Mr. Lakhkar, the learned counsel relies on the judgment of the Apex Court in a case of **Nagpur Improvement Trust Vs. Yadaorao Jagannath Kumbhare and others** reported in **AIR 1999 SC 3084**, so also judgment in a case of **Dr. R. K. Goyal Vs. State of U. P. and others** reported in **AIR 1997 SC 1567** and judgment of the learned Single Judge of this Court in a case of **Deokabai Ganpatsingh Solanke and others Vs. Miraj Hiranman Ingle and others** reported in **2001(1) Mh.L.J. 600**.

05. The learned Assistant Government Pleader for respondents submits that, the order passed by the Tribunal is well reasoned one. The petitioner was appointed in the year 1977 as lecturer for subject of biophysics purely on adhoc and temporary basis. The Divisional Selection Board interviewed the petitioner on 19.01.1978 and the petitioner was reappointed by order dated 25.06.1979 by the Medical Education Department,

Government of Maharashtra, Mantralaya, Mumbai as open candidate. In the appointment order a specific condition was laid down that, the petitioner should apply to the Maharashtra Public Service Commission for regular appointment. According to the Government Resolution dated 26.02.1991, the petitioner was given the benefit of higher pay scale. In the year 2009 the Government has taken policy decision to regularize the lecturers who were selected by Divisional Selection Board and appointed on adhoc basis on certain terms and conditions. The petitioner is not regularized in the Government service. The appointment order is very clear. Even the petitioner does not possess the necessary qualification for holding the post of lecturer in biophysics. The regularization of the petitioner from 2009 was part of the policy. The petitioner is insisting for the benefit of which the petitioner is not entitled. The learned Assistant Government Pleader relies on the judgment of the Apex Court in a case of **State of Rajasthan and others Vs. Daya Lal and others** reported in (2011) 2 SCC 429, so also the judgment in a case of **Alka Oza Vs. Rajasthan Public Service Commission and another** reported in (2011) 9 SCC 438 and a judgment in a case of **State of U. P. and others Vs. Rekha Rani** reported in (2011) 11 SCC 441 and submits that regular appointment can only be made after the selection by the Maharashtra Public Service Commission. According to the learned A. G. P. the petitioner in all these years never appeared before the M. P. S. C., although there were other candidates who had appeared

before M. P. S. C. and it is wrong on the part of the petitioner to state that, M. P. S. C. has not held any exam in respect of lecturer for biophysics.

06. We have considered submissions canvassed by learned counsel for respective parties. It is not a matter of debate that the petitioner was initially appointed vide appointment order dated 24.10.1977 by the Government Medical College. Thereafter, the petitioner was interviewed by the Divisional Selection Board on 19.01.1978 and was reappointed by order dated 25.06.1979 with effect from 24.10.1977. The Government Resolution dated 25.06.1979 makes the said fact ample clear. The same is also contended by respondents in para 3 of their affidavit in reply filed in this Court on 31.01.2014. In the light of that, it is clear that, the petitioner was appointed by following due selection process by the duly constituted Divisional Selection Board, on clear vacant and sanctioned post.

07. It is also not a matter of dispute that, the petitioner was awarded senior scale after completion of eight years regular service and completing two refresher courses. This shows that, the Government treated the services of the petitioner as regular one and the appointment of the petitioner was treated with effect from 19.01.1977. The higher pay scale is granted to the petitioner with effect from 01.01.1986, as is granted to regular candidate.

08. The said senior pay scale which is awarded was

cancelled on 07.07.2009 after about 23 years. The same is also subject matter of challenge in the original application wherein the recovery is also sought to be made. It is almost after 33 years from the date of appointment of the petitioner the respondents are now saying that the petitioner's appointment is not regular and in the year 2009 sought to regularize the service of the petitioner on and from the said date of Government Resolution without giving any past benefit of the service.

09. Even the Tribunal while passing the judgment impugned in the present petition has observed that, though the condition No. 2 of the appointment order dated 25.06.1979 lays down that the applicant has to apply to M. P. S. C. in response to the advertisement for the post of substantive appointment but during the intervening period that is from 1979 to 2009, such advertisement was not published by the M. P. S. C., as such, the applicant did not have opportunity to get through M.P.S.C.

10. The Tribunal has observed that, the order dated 22.01.2009 of regularization has not been challenged by the petitioner and has not claimed that her services should be regularized from the date of her joining in the year 1977. It would be seen that, the applicant had prayed to restore all the benefits of her past service namely pay as before and pension and other benefits. In affidavit in rejoinder has also claimed that said Government Resolution dated 22.01.2009 is illegal, as it is only after the filing of affidavit in reply by the Government, the

petitioner got the knowledge of the said Government Resolution. Para No. 8 of the affidavit in rejoinder filed by the petitioner before the Tribunal reads as under :

"8) With regard to contents of para No. 8 of the affidavit in reply, I say that it is complete misconception on the part of the respondents, to say that my appointment is temporary; it smacks of complete ignorance in as much as it cannot be said that an employee who is in continuous service for the last 32 years or so is in temporary service and this is so having regard to definition thereof in MCS General Conditions of Service Rules, I say that I could not have applied to the MPSC, of my own unless the Govt. had betimes filed requisition with the MPSC, it had advertised the post inviting applications therefore and I had failed to take chance along with the other candidates, as was said in my appointment letter dated 25.06.1979. I say I cannot be meted out with this unjust treatment as during the last 33 yrs the govt. and the MPSC failed to advertise the said post of Lecturer in Bio-physics and further, for no fault on my part, I cannot be victimized at the alter of the inaction on the part of the Govt. having regard to the total silence and inaction on the part of the respondents in this behalf, The govt. is estopped from taking a stand prejudicial to my interest. I say that the govt. had on a number of occasions recommended my and other similar cases for so called regularizations though at all times my stand had been that my appointment and services are regular. I annex hereto letters written by the Director to the govt. recommending the so called regularization sans the MPSC clearance. (i.e. In the cases of Sarvashri Divekar, Deshpande, Dhus, Shaikh etc.) The respondents had given all service benefits without their being MPSC selected candidates It is quite unfortunate that in my case only a hostile stand is

taken by the respondent for the obvious reason that I had protested against the discrimination done towards me. The said letters dated 11/08/2004, 25/01/2005, 31/10/2006, 07/03/2007, 14/03/2007 are annexed hereto as Exhibit-A-II, colly. I say that my services are not temporary, and since they were regular in the sense that I was performing my duties regularly, getting the proper pay as per rules, leave and other benefits, there was no need at all to do anything for so called regularization. In fact the govt. had held out that my services were regular enough in all respects. I say that I had no grievance nor I had asked for so called regularization. It is the theory out of the perverse thinking of the respondents to characterize it as not regular appointment even assuming for argument's sake that the govt. had done a proper act in having so called regularization of the services of the employees and issued a GR to that effect dated 22/01/2009, the said circular is perverse and illegal in as much as it fixes the date of so called regularization as 22/01/2009 and still more is the GR dated 04/05/09 in as much as it purports to deprive the incumbents of their service benefits enjoyed by them from the inception of their appointments. (vide exh. R-7 and R-8) since the so called regularization was subjected to the terms and condition which are depredatory in nature, I had not succumbed to the pressure of accepting the same and therefore it cannot be said that I am not I am not interested in having the so called regularization of my service. This allegation is most irresponsible and deserves to be deplored; I hereby challenge the constitutionality and legality of the said two G.R's dt. 22.01.2009 and 04.05.2009 (Exh. R-VII and VIII hereto). The allegations are totally unjustified. I say that the govt. is bound to treat me in regular employment since the post to which I had been appointed was a permanent one, was a clear vacancy and my appointment was according tot he rules, procedure and practices in

vogue then, and it can not be defaulted on any grounds much less on a non MPSC candidate when the govt./MPSC did not advertise the vacancy fro the last 33 years so. The State must act in a fair manner when it concerns with the rights of citizens. I say, that by now, I have completed 33 years service and in terms of the norms for getting selection grade, I say and I fulfill the same because I have completed 2 more refresher courses of 4 weeks duration each, and my request for the grant of said selection grade is pending with the govt. I annexe hereto my recent request made vide letter dated 01/02/2010 copy of which is also annexed herewith, as Exh. A-III. I say I am entitled to get the said selection grade of pay, as well.

To conclude, I say in nutshell, that with my continuous 33 years service I aught to be treated in regular and permanent Govt. Service which it has so for treated me, See page 17 of the compilation, has after full thought granted me the senior scale which I have been enjoying since 1.1.86, that I am not to be blamed at all for not being MPSC, clear candidate for the simple reason that the govt./MPSC did not advertise the said post of Lecturer in Biopysics betimes. Further, I challenge the validity of the said 2 GR's exh. VII and VIII of affidavit in reply. I say the recovery sought to be made from my salary is totally unjust and illegal and therefore, it needs to be stopped, allowing this O.A.."

11. The respondents themselves *suo motu* have taken decision to regularize the services of the petitioner with effect from 22.01.2009. Now in the present petition, the respondents are taking up the case that the petitioner was not qualified that is the petitioner did not possess the necessary qualification. In fact, the petitioner was appointed by duly constituted Divisional

Selection Board and when they are intending to regularize the service of the petitioner since 2009, then the stand that the petitioner is not qualified cannot be accepted. All along the petitioner has been treated as a permanent and regular employee. At no material point of time the petitioner was ever given an understanding that the petitioner is not in permanent and regular employment. On the contrary, after completion of 8 years of service, the petitioner is given senior/higher pay scale as is given to other permanent employees. The petitioner is also given increments as is given to employee appointed on permanent post. For all purposes the petitioner is treated as regular employee, atleast after completion of eight years of service as was given higher pay scale and all other benefits which were available for a person holding permanent and regular post. After 33 years of service, it would be too late in the day for respondents to contend that, the petitioner would stand regularized from the year 2009 and the petitioner would not be entitled for any benefits of past service. The said action would be unjust. It is not a case of back door entry of the petitioner. The petitioner initially in the year 1977 was appointed by Dean, Medical College and thereafter in the year 1978 was interviewed and selected by duly constituted Divisional Selection Board and was issued appointment order in the year 1979 with effect from 24.10.1977. All the aforesaid facts would unequivocally go to show that the petitioner was treated as an employee holding a permanent post. Even the Tribunal has observed that for all

these 33 years not a single advertisement was given by the M.P.S.C. for the said post. Be that as it may, the petitioner was not once given notice during all these years that the petitioner is not qualified or that petitioner is not regularly appointed. The respondents could have discontinued the petitioner. It is also a fact that, for all these years the respondents could not appoint a candidate who has come through M.P.S.C. for the said post. In view of the above, the act of respondents in treating the petitioner as regular since 2009 only is illegal.

12. In the light of the above, the impugned order of tribunal is set aside and modified. The impugned show cause notices are quashed and set aside. So also the Government Resolution dated 22.01.2009 and 04.05.2009 shall be held not binding on the petitioner and the petitioner shall be treated as regular employee as was treated earlier and shall be entitled to all the benefits of her service as that of regular employee since the date of her initial appointment.

Rule accordingly is made absolute in above terms. No costs.

Sd/-

[**V. K. JADHAV, J.]**

Sd/-

[**S. V. GANGAPURWALA, J.]**