

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9788 OF 2014

Chhaya W/o Jagan Gaikwad,
Age-26 years, Occu-Anganwadi Karyakarti,
R/o Sawa, Post : Bhandegaon,
Tq. and Dist. Hingoli

PETITIONER

VERSUS

1. Smt.Renuka Vishnu Davande,
Age-27 years, Occu-Nil,
R/o Sawa, Post : Bhandegaon,
Tq. And Dist. Hingoli,
2. Divisional Commissioner,
Aurangabad Division,
Aurangabad
3. Chief Executive Officer,
Zilla Parishad, Hingoli,
Tq. And Dist. Hingoli,
4. Child Development Project Officer,
I C D S, Project Officer Hingoli,
Zilla Parishad, Hingoli,
Tq. And Dist. Hingoli

RESPONDENTS

Mr.P.S.Agrawal, Advocate for the petitioner.
Mrs.A.S.Rasal, Advocate for respondent No.1.
Mrs.V.A.Shinde, AGP for respondent No.1.
Ms.Pratibha Wankhede (Bharad), Advocate for respondent Nos. 3 & 4.

(CORAM : RAVINDRA V. GHUGE, J.)

RESERVED ON : 04/08/2015

PRONOUNCED ON : 12/08/2015

J U D G M E N T :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The petitioner is aggrieved by the impugned judgment and order dated 31/07/2014 delivered by the Divisional Commissioner, Aurangabad Division Aurangabad in Appeal No.18/2013. The appointment of the petitioner as an “Anganwadi Karyakarti” at Mini Anganwadi, Sawa, Tal. and Dist. Hingoli has been cancelled and respondent No.1 has been appointed in her place.
3. The petitioner submits as under :-
 - a. On 06/12/2010, an advertisement for appointment of “Anganwadi Karyakarti” was published by respondent Nos. 3 and 4.
 - b. Respondent No.1 applied.
 - c. Being the only candidate and being ineligible since she did not complete 25 years of age, the selection process was cancelled.
 - d. On 10/04/2013, the second advertisement was published.
 - e. The petitioner and respondent No.1 applied in pursuance to the second advertisement.
 - f. The petitioner, being under age, was not eligible which left only one candidate i.e. respondent No.1 before the said authorities

for selection as “Anganwadi Karyakarti”.

- g. The said selection process pursuant to the second advertisement dated 10/04/2013, was cancelled.
- h. Respondent No.1 has not challenged the cancellation of the selection process pursuant to the second advertisement before any authority.
- i. The respondents published a fresh advertisement for the third time on 22/05/2011, which was not challenged by respondent No.1.
- j. Several candidates including the petitioner and respondent No.1 have applied pursuant to the third advertisement.
- k. In the preliminary list published, the petitioner stood at Sr.No. 1 scoring 72.46% and respondent No.2 at Sr.No.5 scoring 53.70%.
- l. The interviews were conducted on 17/08/2013 and the results were declared on the same day.
- m. The petitioner was appointed as “Anganwadi Sevika” on 19/11/2013 and joined on 26/11/2013.
- n. The petitioner stood at Sr.No.1 in the merit list scoring 77.46% and respondent No.1 was not included even in the first 3 candidates and was, therefore rejected.
- o. Respondent No.1 filed a complaint before respondent No.3 Chief Executive Officer challenging the appointment of the petitioner on the ground that by virtue of the GR dated 05/08/2010, respondent No.1, as a sole candidate available and eligible, should have been appointed as “Anganwadi Karyakarti”.
- p. Respondent No.1, who had scored 53.70% in the initial rounds, was not even invited for the interviews and was declared rejected. Even then, she did not raise any challenge.

- q. By order dated 08/10/2013, the respondent No.3 C.E.O. rejected the appeal of respondent No.1.
- r. Respondent No.1 then approached respondent No.2 Appellate Authority by preferring Appeal No.18/2013.
- s. By the impugned order dated 31/07/2013, the respondent No.2 Divisional Commissioner allowed the appeal of respondent No.1 and set aside the appointment of the petitioner and further directed that respondent No.1 be appointed in her place.
- t. Respondent No.1 has raised a grievance only after participating in the entire selection process and raised a grievance in her complaint dated 11/09/2013.
- u. Though the GR dated 05/08/2010 provided for appointing an "Anganwadi Sevika" even if only one candidate was available, the respondents had given up the second advertisement and had cancelled the selection process, against which respondent No.1 did not raise any grievance.
- v. Though the GR dated 05/08/2010 applies to vacancies, which have occurred prior to the subsequent GR dated 15/09/2011, once the selection process was cancelled, the Divisional Commissioner could not have set aside the appointment of the petitioner, could not have set aside the entire selection process which was completed and could not have revived the selection process pursuant to the second advertisement dated 10/04/2013 which was already cancelled.

4. Mrs.Rasal, learned Advocate appearing on behalf of respondent No.1 submits as under :-

- a. The GR dated 05/08/2010 could not have been overlooked. It

mandated that a single candidate available should be appointed as “Anganwadi Karyakarti”.

- b. The cancellation of the selection process pursuant to the second advertisement by itself is unsustainable.
- c. Though respondent No.1 did not challenge the cancellation of the selection process pursuant to the second advertisement, it does not preclude her from staking a claim for appointment as she was the only eligible candidate.
- d. Though respondent No.1 did not challenge the third advertisement and subjected herself to the selection process, does not preclude her from seeking an appointment order pursuant to the second advertisement based on the GR dated 05/08/2010.
- e. The GR dated 15/09/2011 would also enable respondent No.1 to make a claim for appointment as she was the only eligible candidate pursuant to the second advertisement.
- f. The Divisional Commissioner / respondent No.2 Appellate Authority has rightly noted that there was no necessity to advertise the post for the third time.
- g. Respondent No.2 has rightly set aside the appointment of respondent No.1 owing to the challenge posed by respondent No.1.
- h. Respondent No.1 has been desperately trying to secure an appointment and is in great need of a source of earning.
- i. Though respondent No.1 was at Sr.No.5 in the merit list securing 53.73 marks as against the score of the petitioner 72.46 marks, yet she was entitled to be appointed pursuant to the second advertisement.
- j. If the selection process pursuant to the third advertisement

was not necessary, it needs to be set aside and the cancelled second selection process needs to be revived so as to enable respondent No.1 to be appointed.

- k. The respondent / Department has filed an affidavit in reply and they have supported respondent No.1.
- l. The petition be dismissed with costs.

5. The learned AGP on behalf of respondent No.2 and Mrs.Wankhede (Bharad) have submitted as under :-

- a. Pursuant to the second advertisement, respondent No.1 was the only eligible candidate as the petitioner was short of few days in completing 25 years of age which was the eligibility criteria.
- b. She became 25 years old immediately after the second advertisement dated 10/04/2013 (which selection process was cancelled) and prior to the third advertisement dated 22/05/2013, which was published within 40 days.
- c. Respondent No.1 was the only eligible candidate and therefore deserved to be appointed under the second advertisement.
- d. The GR dated 15/09/2011 is applicable to the posts which have fallen vacant after the introduction of the GR.
- e. GR dated 05/08/2010 should have been followed.
- f. Respondent No.1 has been rightly appointed and no interference is called for.
- g. Respondent No.1 was not called for interviews by the third advertisement since in the selection process, she was at Sr.No. 5 in the merit list.
- h. Interviews were conducted on 17/08/2013 for which

respondent No.1 was not invited.

- i. She raised a grievance on 16/08/2013 and therefore respondent No.4 called for a guidance from respondent No.3 by letter dated 17/08/2013.
- j. Respondent No.4 appointed the petitioner after receiving guidance from respondent No.3.

6. I have considered the submissions of the learned Advocates for the respective sides and have gone through the petition paper book with their assistance.

7. It is undisputed that respondent No.1 did not challenge the cancellation of the selection process pursuant to the second advertisement. She did not raise any demand or claim for seeking appointment. In between 10/04/2013 and 22/05/2013, the petitioner completed 25 years of age within that period of 40 days. It means that she was marginally short of completing 25 years pursuant to the second advertisement, by few days.

8. It is also undisputed that respondent No.1 did not challenge the third advertisement. In fact, she applied pursuant to the third advertisement. The merit list prior to the interviews was published and it indicated that the petitioner had scored 72.46 marks and was

at Sr.No. 1. Respondent No.1 scored 53.73 marks and was at Sr.No.5. Only 3 candidates were invited for interviews as per rules. The petitioner stood first in the final merit list scoring 77.46 marks. Respondent No.1, therefore, raised a grievance on 16/08/2013, which is one day prior to the declaration of results.

9. The respondents have heavily relied upon the communication dated 25/05/2001 addressed to the Chief Executive Officers of all Zilla Parishads by the Secretary, Women and Child Development Department, State of Maharashtra. It was stated in the said communication which the respondents have vehemently pressed into service, that if only one candidate has applied and is eligible, the said candidate should be appointed. In my view, the respondents have conveniently avoided pointing it out to this Court that, if no candidate applies or is eligible pursuant to the first advertisement, a second advertisement should be published and the age limit of 25 years could be relaxed and brought down to 21 years.

10. In the light of the above communication, when not a single candidate was eligible pursuant to the first advertisement dated 06/12/2010, the age limit of 25 years could be relaxed to 21 years while issuing the second advertisement dated 10/04/2013. The

petitioner, pursuant to the second advertisement dated 10/04/2013 was 24 years, 11 months and few days of age. She was, therefore, eligible as the age limit could be relaxed to 21 years. The respondent No.2 has conveniently disregarded this aspect and which is obviously not highlighted by respondent No.1.

11. In the light of the above, even if it is presumed that the selection process pursuant to the second advertisement deserves to be restored, the petitioner would be rendered eligible alongwith respondent No.1 and therefore the complete selection process would be required to be undertaken inclusive of conducting interviews. This has not been done. I, therefore, find that the second selection process pursuant to the second advertisement, was rightly cancelled.

12. The Hon'ble Supreme court in the case of Dhananjay Malik and others Vs. State of Uttaranchal and others, 2008 AIR SCW 2158 has held in paragraph No.7 and 8 as under :-

“7. It is not disputed that the writ petitioners- respondents herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as B.P.E. or graduate with diploma in physical education. Having unsuccessfully participated in the process of selection without any demur they are estopped

from challenging the selection criterion *inter alia* that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.

8. In **Madan Lal** vs. State of J & K, [1995]3 SCC 486, this Court pointed out that when the petitioners appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the present case, as already pointed out, the writ petitioners-respondents herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.”

13. In a similar case of Amlan Jyoti Borooah Vs State of Assam and

others, (2009) 3 SCC 227, the Apex Court has held in paragraph Nos. 29,30 and 32 as under :-

“29. The question which, however, arises for consideration is as to whether despite the same, we, in exercise of our jurisdiction under Article [136](#) of the Constitution of India, should interfere with the impugned judgment.

30.The appellant concededly did not question the appointment of 160 candidates. It is idle to contend that he was not aware thereof. If he was to challenge the validity and/or legality of the entire select list in its entirety, he should have also questioned the recruitment of 169 candidates which took place as far back as on 04/07/2000.

32. The appellant, in our opinion, having accepted the change in the selection procedure sub silentio, by not questioning the appointment of 169 candidates, in our considered opinion, cannot now be permitted to turn round and contend that the procedure adopted was illegal. He is estopped and precluded from doing so.”

14. Once again, the Apex Court, in the case of K.A. Nagamani Vs. Indian Airlines and others, (2009) 5 SCC 515 in paragraph no.54 as under :-

“54. The Corporation did not violate the right to equality guaranteed under Articles 14 and 16 of the Constitution. The appellant having participated in the selection process along with the contesting respondents without any demur or protest cannot be allowed to turn round and question the very same process having failed to qualify for the promotion.”

15. In the light of the above crystallized position of Law, the challenge posed by respondent No.1 was rightly dismissed by respondent No.3 vide its order dated 08/10/2013. The appeal preferred by respondent No.1 should have been dismissed by respondent No.2. The appeal authority has failed to consider the position in law and should not have entertained the challenge of respondent No.1 after she had taken her chances pursuant to the third advertisement. The impugned judgment of respondent No.2 dated 31/07/2014 is against the tenets of law and has resulted in taking away the employment of the petitioner who was appointed by order dated 19/11/2013 and had joined service on 26/11/2013.

16. While issuing notice on 17/11/2014, this Court had directed respondent Nos. 2 and 3 to maintain status-quo in the event the appointment of the petitioner is not cancelled and respondent No.1 has not been appointed.

17. The petitioner submits that she had served the copy of the order on respondent No.4. It is admitted by respondent No.4 in the affidavit in reply dated 05/01/2015 that the order of this Court was served upon the said authority at 3.30 p.m. on 27/11/2014. Respondent No.1 was appointed in place of the petitioner and she took charge on 27/11/2014 at 9.30 a.m. Order of cancellation of appointment could not be served upon the petitioner.

18. The petitioner makes a grievance as to how did the respondent Office start its functioning for the day at 9.30 a.m. which is not the normal time. So also, what was the occasion for carrying out a panchnama to suggest that respondent No.1 reported for duties on 27/11/2014 at 9.30 a.m. He submits that these documents are prepared for frustrating the rights of the petitioner and for rendering the order of this Court inoperable.

19. I am not required to go into this controversy since I have observed in order dated 07/01/2015 in paragraph No.4 as under :-

“4. S.O. To 23/01/2015. Cancellation of the appointment of the petitioner and respondent No.4 taking over charge as Anganwadi Karyakarti shall be subject to the result of the Writ Petition.”

20. In the light of the conclusions arrived at in this judgment, by setting aside the impugned judgment of respondent No.2 dated 31/07/2014, the order of respondent No.3 dated 08/10/2013 stands restored. The petitioner, therefore, is reinstated with continuity and 50% of the back wages to soften the rigours of unemployment and litigation.

21. This petition is, therefore, allowed and Rule is made absolute in the above terms.

(RAVINDRA V. GHUGE, J.)