

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

WRIT PETITION NO. 3357 OF 2014

Munishwar s/o. Bhajandas Shende .. Petitioner

Versus

The State of Maharashtra & Anr. .. Respondents

Mr.Avinash Deshmukh, Advocate for the petitioner.
Mr.P.S. Patil, AGP for respondent/State.

**CORAM : S.V.GANGAPURWALA &
S.M.GAVHANE, JJ.
DATED : 23.11.2017**

P.C. :-

1. The petitioner had filed original application before the Maharashtra Administrative Tribunal with a grievance that he is not promoted as Associate Professor. During the pendency of the original application, the petitioner was promoted as Associate Professor w.e.f. 21.08.2013. The petitioner claimed that the petitioner was the only candidate to be considered for promotion from Scheduled Castes category. On or about 15.07.2011, two candidates from the open category were promoted as

Associate Professor. The petitioner claimed the said date of deemed promotion. The Tribunal negatived the contention of the petitioner. Aggrieved thereby the present petition.

2. Mr. Deshmukh, learned advocate for the petitioner submits that in the year 2007, the proposal was sent for consideration of the candidates for filling in the promotional post of Associate Professor. From the Scheduled Castes category, name of Mr.M.N. Pawar and the petitioner was sent for consideration. There was one vacancy meant for Scheduled Castes category. Said proposal was pending in 2008. Two posts for open category were also available to be filled in by promotion to the post of Associate Professor and in 2008 the proposal to fill in two open category posts of Associate Professor was also sent. The proposal of scheduled castes category candidate was already pending. Said proposal was not considered and in the meantime Mr.M.N. Pawar from Scheduled Castes category through MPSC was appointed as

Professor in the year 2010. As such, he was out of contention for the promotion of the Associate Professor post in the year 2010. However, the respondent employer did not intimate this fact to the Establishment Board/Committee. Because of non-communication to the Establishment Board/Committee by the respondent, name of the petitioner for promotion from Scheduled Castes category was not considered and two posts for open category candidate were filled in by promotion on 15.07.2011. The Establishment Board communicated to the respondents that when Mr.Pawar is already appointed as Professor, why his name is still being sent. It is, thereafter, on 10.10.2011, proposal of the petitioner was sent for being considered for promotion of Associate Professor and the petitioner was promoted as Associate Professor on 21.08.2013.

. Mr.Deshmukh, learned advocate further submits that because of fault of the respondent, the petitioner was not considered. The petitioner's name was not sent,

although in the proposal of 2007, petitioner's name appears next to Mr. Pawar from Scheduled Castes category. In the year 2010 as Mr. Pawar was appointed as Professor through MPSC, name of the petitioner ought to have been replaced for the name of Mr. Pawar and the petitioner could also have been considered for promotion w.e.f. 15.07.2011. Learned advocate submits that it is constitutional duty of the respondents to fill in the reserved posts. The same not being adhered to, tantamounts to violation of Article 15 and 16 of the Constitution. To buttress his submission, learned advocate relies on judgment of the Apex Court in the case of Superintending Engineer, Public Health, U.T. Chandigarh Vs. Kuldeep Singh reported in 1997(9)SCC 199.

According to learned Counsel, maintenance of roster and adherence to it is charge and trust put on public servants. The discrimination has been created in promotion of candidates from open category and the reserved category. Learned advocate submits that the petitioner was eligible and in the zone of consideration

since the year 2007 and in 2010 a person senior to the petitioner was already appointed as Professor and out of contention for the post of Associate Professor, it is the petitioner who alone was the candidate to be appointed as Associate Professor by promotion from Scheduled Castes category. As such the petitioner is entitled to be deemed to be promoted when other two candidates from the open category were promoted viz. 15.07.2011.

3. Learned AGP strenuously contends that promotion takes effect from the date of promotion being granted and not from the date of occurrence of vacancy or creation of post. Learned AGP submits that the promotion to the post can be granted only after Establishment Board has made its recommendation for promotion being granted. Even before the Establishment Board considers the competency of the petitioner to be promoted, the petitioner can never be promoted. It is not a case that any senior to the petitioner was ever promoted, so as to give effect of deemed date. The Tribunal has rightly considered the

said aspect. The learned AGP relies on the judgment of Apex Court in the case of Nirmal Chandra Sinha Vs. Union of India & Ors., 2008 (14) SCC 29 and in the case of Baij Nath Sharma Vs. Rajasthan High Court at Jodhpur reported in 1998 DGLS SC 875 and also in the case of Sunaina Sharma & Ors. Vs. State of Jammu and Kashmir & Ors., 2017 DGLS (SC) 1058.

4. We have considered the submissions advanced by the learned Counsel for the respective parties and have also gone through the judgment of the Tribunal.

5. The moot issue in the matter on hand is - "Whether the petitioner can be given deemed date of promotion prior to the consideration of the case by the Establishment Board and/or Departmental Promotion Committee (DPC)"

6. The petitioner was appointed as a Demonstrator in the year 1988 by the respondent. He was working as a

Lecturer/Assistant Professor. In the year 2007, three posts of Associate Professor were vacant and were to be filled in by promotions. From the three posts, two posts were meant for open category and one for Scheduled Caste category.

7. It appears that the proposal was submitted in the year 2007 and 2008 for filling in the posts by promotion. Six names were in the zone of consideration for the promotional post of Associate Professor. From the Scheduled Caste category, one Mr.M.N.Pawar and the petitioner were in the zone of consideration. Mr.Pawar was senior to the petitioner. During the interregnum in the year 2010 Mr.M.N.Pawar, who was from Scheduled Caste category was selected and appointed as Professor. In the year 2011, two posts of Associates Professor from open category candidates were filled in. The post for Scheduled Caste candidate was not filled in, as in the proposal that was submitted, the name of Mr.M.N.Pawar was recommended for promotion but he had already joined

higher post of Professor in the year 2010. Query was made to the department. The department, thereafter, sent the proposal of the petitioner for consideration in the year 2011 and the petitioner was eventually promoted as Associate Professor in the year 2013.

8. It appears that initially in the proposal, name of Mr.M.N.Pawar who was senior to the petitioner was recommended for promotion and his name continued in the proposal, though he was appointed as Professor in the year 2010. It is, thereafter, the proposal of the petitioner was submitted for consideration in the year 2011. By the time Establishment Board/DPC could consider the proposal of the petitioner, two posts of Associate Professor from open category were filled in. For the post of Associate Professor of Scheduled Caste category, no candidate was appointed by promotion.

9. Promotion is not a fundamental right. The petitioner can only be promoted only after DPC considers

the case of the petitioner. After the case of the petitioner was considered, by DPC he was promoted.

10. The petitioner has relied upon judgment of the Apex Court in the case of Superintending Engineer (Supra). Said judgment may not be of much assistance to the petitioner. In the said case before the Apex Court, the post was meant for Scheduled Tribe candidate. The Scheduled Tribe candidate was not available and after three years had expired, the general category candidate was considered in preference to the eligible Scheduled Caste candidate. The Apex Court held that when as per roster, Scheduled Tribe candidate was not available to fill up the post, the candidate belonging to Scheduled Caste category is required to be considered according to the rules and given promotion on seniority-cum-fitness basis. The Apex Court further held that the duty to implement the rules of reservation is constitutional duty to be performed honestly, sincerely and in a true content and spirit.

11. In the present case, the post belonging to Scheduled Caste candidate is not filled in from general category candidate. But, it is only because of the reason that Mr.Pawar, who was senior to the petitioner and who also belonged to Scheduled Caste category, was being considered for promotion as Associate Professor and in the year 2010 through MPSC he was selected for the post of Professor, the petitioner could get chance to be considered for promotion. The proposal was sent in October, 2011 to the DPC/Establishment Board. The Establishment Board considered the case of the petitioner and eventually promoted him in the year 2013.

12. In the case of Baij Nath Sharma (Supra) and in the case of Nirmal Chandra Sinha (Supra), the Apex Court has categorically held that after post falls vacant for any reason whatsoever, promotion to that post should be from the date, the promotion is granted and not from the date on which such post falls vacant. The promotions to

the post can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. The date of occurrence of vacancy is not relevant.

13. The Apex Court in the case of Sunaina Sharma (Supra) has observed that normal rule is that a person is entitled to seniority only from the date when said person actually joins the post. There are exceptions and sometimes "in-service" candidates can be granted promotion from the date anterior to their being regularly promoted/appointed. However, this can be done only if the rules enable retrospective appointment and on fulfilling other requirement and rules.

14. In the present matter, no candidate from Scheduled Caste category has been promoted prior to the petitioner to the post of Associate Professor. The promotion cannot be directed to become effective even before DPC has met and assessed suitability of the

petitioner for promotion. Of course, the respondents could have been more vigilant in sending name of the petitioner earlier immediately after Mr. Pawar was selected and appointed as a Professor. However, the delay on the part of the department itself in the facts and circumstances of the present case not be a ground to grant the petitioner deemed date of promotion even prior to the case of the petitioner being considered by the DPC.

15. In the result, the impugned judgment of the tribunal deserves to be upheld. The writ petition is dismissed. No costs.

[S.M.GAVHANE, J.]

[S.V.GANGAPURWALA, J.]