

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8960 OF 2013

Shri Vijay Murlidhar Ubale ... Petitioner
Vs.
State of Maharashtra & Ors. ... Respondents

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Mr. S.C. Chandratre for the Petitioner.
Mrs. M.S. Bane, 'B' Panel Counsel for Respondent No.1.
Mr. S.P. Thorat for Respondent No.2.

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**CORAM : S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATE : MARCH 07, 2017.

P.C. :

1. This Writ Petition under Article 226 of the Constitution of India challenges the order of appointment dated 11th December, 2012 appointing the respondent no.3.

2. The petitioner is aggrieved and dissatisfied with the appointment of respondent no.3 as Health Worker (Male) from the Scheduled Caste category. The appointment is made by the Zilla Parishad. At that time, the Health Center, namely, Primary Health Centre in the Javar Taluka was part of District Thane. That Taluka itself was within the limits of Thane District. Now, and after creation of a distinct District called Palghar, the Javar Taluka is part of the Palghar District.

3. The argument is that the petitioner was also belonging to the same category, namely, Scheduled Caste. The respondent no.3, though a Scheduled Caste, was not qualified inasmuch as he did not fulfill the criteria of age. Even if the outer/upper age limit for the post could have been relaxed, it cannot be beyond 38 years. On the date of the appointment, and in fact, on the date of the application itself, the respondent no.3 had crossed 38 years of age. That is why the petitioner has challenged this appointment.

4. On this Writ Petition, an affidavit was called for and which came to be filed by the competent authority. An explanation was provided that the appointment was made of an over-aged candidate by virtue of the direction of this Court in a Writ Petition filed by the 3rd respondent, namely, Writ Petition No. 8456 of 2011. On the basis of an observation and finding therein, the Zilla Parishad allowed the respondent no.3 to apply and to appear at the interview for the post.

5. It is in such circumstances and on the specific averment in the Writ Petition that the candidate, namely, respondent no.3 had not fulfilled the criteria of upper or outer age which cannot be waived or condoned, that the original records were summoned by us.

6. With the assistance of the Advocate appearing for the petitioner and Mr. Thorat, learned counsel appearing for the Zilla Parishad, we perused the original record. Surprisingly, we found

from the record itself that there is no denial of the fact that respondent no.3 had crossed the upper age limit. The power to relax the upper age limit was available in case of such candidates who were sportsmen. Having come from a sports quota, there was a discretion in the superiors or the appointing authority to relax the requirement of age limit. Beyond that, there is no power. The record indicates in voluminous documents and files that possibly everybody was of the opinion that 3rd respondent should not be appointed. Yet he has been appointed.

7. After the lapse was brought to the notice of the Zilla Parishad concerned, Mr. Thorat sought time in the morning session to take instructions. The counsel has informed the Court that now, a separate Zilla Parishad is created for Palghar District and even a Chief Executive Officer has been appointed. We have found from the papers that the 3rd respondent, though duly served, has remained absent and continuously.

8. After noticing the rival contentions and in the light of the record, we find that this is a fit case where the matter should be sent back to the Chief Executive Officer of the Palghar Zilla Parishad. The Palghar Zilla Parishad, through its Chief Executive Officer, shall take a fresh decision as to whether to continue the appointment of respondent no.3 on the post of Male Health Worker. The Chief Executive Officer to take requisite decision after scrutiny of all records within a period of three months from today. He shall give opportunity to both sides, namely, the petitioner and

the 3rd respondent, to rely upon such materials as are permissible in law. He shall pass a speaking order. While passing a speaking order, he should bear in mind that the upper age bar can be relaxed provided there are definite Rules or such other instruments in force which apply even to the services of Zilla Parishad. The power to relax must be found specifically and in the Rules. The authority must bear in mind the judgment of the Hon'ble Supreme Court of India in the case of *Chairman, Public Service Commission, J.&K. and another vs. S. S. Jamwal and another* (AIR 1999 SC 840).

9. In the above case, the Hon'ble Supreme Court has held in specific terms that Section 21 of the General Clauses Act cannot apply to a situation where there is no order issued in exercise of power to make Rules. If the power is not exercised in the like manner and subject to the like sanction and conditions which operate for the making of Rules, then, reliance on Section 21 is entirely misplaced. No assistance can be taken from the authority derived from Section 21 to relax the upper age limit. There has to be a specific provision in the Rules empowering and guiding the carrying out of such act.

10. As a result of the above, we presently do not quash and set aside the order of appointment of respondent no.3, but remand the case back to the Chief Executive Officer of the Palghar Zilla Parishad, who shall take a decision as directed above, within a period of three months from the date of receipt of copy of this

order, and in the event, the decision and the conclusion reached is that the 3rd respondent should not have been appointed, then, that appointment must be brought to an end. What has to be done further and thereafter is entirely left to the Zilla Parishad, but it shall act only in accordance with law. The Writ Petition is disposed of accordingly. The original files be now returned to Mr. Thorat, learned counsel for respondent no.2.

(B. P. COLABAWALLA, J.)

(S. C. DHARMADHIKARI, J.)