

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 9935 of 2015

- | | | | |
|----|---|---|--|
| 1) | The State of Maharashtra |] | |
| | Through the Secretary, |] | |
| | Medical Education & Drugs Dept., |] | |
| | Mantralaya, Mumbai-400 032. |] | |
| | |] | |
| 2) | The Directorate of Medical |] | |
| | Education & Research, Govt. Dental |] | |
| | College & Hospital Building, St. |] | |
| | George's Hospital Compound, Mumbai. |] | |
| | |] | |
| 3) | The Dean, |] | |
| | Grant Medical College, Mumbai-400 008.] | | |
| | | | |
| 4) | The Principal Secretary, |] | |
| | General Administration Department, |] | |
| | Mantralaya, Mumbai 400 032. |] | PETITIONERS. |
| | | | (Original Respondent No. 1 to 3 and 6) |

VERSUS.

- | | | | |
|----|--|---|---------------------|
| 1) | Shri Ramesh Menghraj Sundarani, |] | |
| | Residing at B-1404, Willow Tiwn Tower, |] | |
| | Swapna Nagar, Mulund (West), |] | |
| | Mumbai - 400 080. |] | |
| | (Original Applicant) | | |
| | |] | |
| 2) | Dr. Sanjay N. Gaikwad, |] | |
| | Professor in T.B. And Chest, |] | |
| | Dr. Bhausahab Hire Govt. |] | |
| | Medical College, Dhule. |] | |
| | |] | |
| 3) | Dr. Abdul M. Shaikh, |] | |
| | Professor in T.B. and Chest, |] | |
| | Govt. Medical College, |] | |
| | Miraj, District Sangli. |] | RESPONDENTS. |

Mr. M.H.I. Patel with Mr. C.P. Yadav, A.G.P. for the State.
Mr. Nusrat Shah a/with Mr. E. Almeda, Mr. Kevin Gala,
i/by Naazish Murad Shah for the Respondents.

CORAM : R.M. BORDE &
A.S.GADKARI, JJ.

RESERVED ON: 10th FEBRUARY, 2017.
PRONOUNCED ON : 22nd FEBRUARY, 2017.

JUDGMENT (PER : R.M. BORDE,J)

1) The State of Maharashtra, Director of Medical Education and Research (for short, “DMER”), the Dean, Grant Medical College, Mumbai and the Principal Secretary, General Administration Department have presented the instant petition objecting the order passed by the Administrative Tribunal in Original Application No. 680 of 2012 decided on 2nd July, 2015. The Maharashtra Administrative Tribunal, Mumbai Bench, Mumbai (hereinafter referred to as “the Tribunal”) by allowing Original Application presented by Respondent No.1 herein, has quashed and set aside the proceedings of Establishment Board dated 1st March, 2012 qua the Respondent No.1-original applicant and it is directed to the State to convene a review of D.P.C. to consider the original applicant for promotion to the post of

Professor effective from the date his juniors were promoted in the year 2004. The petitioners herein are directed to take decision in the matter within a period of three months from the date of the order.

2) Respondent No.1-original applicant is at present working as an Associate Professor in T.B. and Chest Department, Grant Medical College, Mumbai. The original applicant approached the Maharashtra Administrative Tribunal by presenting original application claiming the following reliefs:-

(a) This Original Application may kindly be allowed;

(b) That the impugned promotion order dated 8/5/2012 issued by the Respondent no.1 may kindly be quashed and set aside;

(c) Pending hearing and final disposal of this Original Application, Respondent No.1 may kindly be directed that to consider and grant the promotion to the applicant to the post of Professor in Tuberculosis by granting the benefits of deemed date of promotion to the post of Professor in T.B. from the date on which juniors have been promoted i.e. July, 2004;

(d) That the action of the Respondent No.1 for not granting promotion to the applicant to the post of Professor, T.B. may kindly be declared as illegal, arbitrary and unjust;

(e) That the respondent No.1 may kindly be directed to consider the representations made by

the applicant in regard to getting the promotion to the post of professor in T.B. at Mumbai as the applicant is going to retire within a period of 2½ years;

(f) Records and proceedings be called for;

(g) pass such other and further order as this Hon'ble Tribunal may deemed fit and proper in favour of the applicant in the interest of justice.

—

3) According to the original applicant, he was appointed as Lecturer in Medicine (Tuberculosis) by an order dated 10th April, 1980. He was promoted to the post of Reader by an order dated 28th May, 1984. He was thereafter promoted as a Professor (Tuberculosis) by an order dated 5th May, 1998 and posted at Government Medical College, Aurangabad. According to the applicant, he represented to petitioner-respondent No.1 expressing his inability to join the Government Medical College, Aurangabad due to family difficulties and on consideration of representation tendered by him the order of promotion was cancelled and he was allowed to continue to work as Associate Professor at Grant Medical College, Mumbai. It is further contended by the original applicant that by an order dated 22nd June, 2001 he was promoted as Professor on *ad hoc* basis for 360 days. He was transferred to Government Medical College, Aurangabad by an order dated 15th July, 2002. The transfer order came to be cancelled by an order dated 3rd December,

2002. But the said order was stayed by the State Government on 6th December, 2002. According to the applicant, he received communication dated 4th August, 2004 informing that his promotion as Professor has been cancelled since he failed to join at Government Medical College, Aurangabad. It is the contention of the original applicant that he did not receive the order of promotion dated 23rd February, 2004. However, after receipt of the cancellation order, he tried to join at Government Medical College, Aurangabad but was not allowed to join. He was thereafter posted at Government Medical College, Nanded by an order dated 23rd February, 2004. He made a representation to the State Government on 23rd February, 2005 to the effect that he is senior most teacher in Maharashtra and his juniors are being promoted. However, he has not been considered and is posted to work as Associate Professor. According to the original applicant, his representation was not considered. The original applicant contends that he is entitled to be promoted to the post of Professor. In the year 2012, Respondent Nos. 4 and 5 in the original application were promoted as Professor ignoring seniority claim of the original applicant. The original applicant as such prays for issuance of directions to the respondents to promote him and further grant him a deemed date of promotion of the year 2004, the date on which his juniors have been

promoted.

4) The original application tendered by the applicant has been opposed by the State Government by filing affidavit-in-reply. Certain facts disclosed by the State Government need to be considered. The original applicant was promoted as a Professor by an order dated 5th May, 1998 and was transferred to Government Medical College at Aurangabad. However, he declined to join the promotional post of Professor at Aurangabad. He presented Original Application bearing No. 193 of 1988 to the Tribunal, Mumbai objecting to the order of transfer and promotion.

5) The Original Application tendered by the applicant came to be rejected by an order dated 29th September, 1998. The original applicant extended a request to the DMER to cancel the order of promotion awarded to him as well as to recall his order of transfer to Aurangabad. Original applicant also expressed his willingness to continue to serve as an Associate Professor at Mumbai. On consideration of request made by the original applicant the order of promotion awarded to him on 5th May, 1998 came to be recalled on 20th November, 1998. Respondent no.1-State also issued him a warning for refusing to accept the

order of promotion. On second occasion there was an opportunity available to the original applicant to accept the promotional post. On 7th May, 1999 the Director of Medical Education and Research, Mumbai (DMER) called for willingness of the Associate Professors in respect of acceptance of the promotional post of professor at Aurangabad. The applicant was also asked to submit his willingness. However, the original applicant issued communication in writing to Dean, Grant Medical College on 11th May, 1999 expressing his unwillingness to accept the promotional post of Professor.

By an order dated 15th July, 2002, the original applicant was transferred to Government Medical College, Aurangabad. However, he did not join the transferred post. An order of promotion on ad hoc basis as a Professor for a period of 360 days was issued on 5th August, 2002. The name of the original applicant also finds place in the order issued by the State Government and he was directed to report at Government Medical College at Nanded. The original applicant failed to join the transferred post. As such, the order of promotion as Professor issued in favour of the original applicant was recalled by an order dated 21st October, 2002 by the Director of Medical Education and Research. It is also further pointed out that by an

order dated 3rd December, 2002, initially an order directing transfer of original applicant to Mumbai and offering him post of Professor at Grant Medical College was issued by the State Government. However, after noticing an error the said order came to be recalled by an order dated 6th December, 2002. Since the applicant did not join at Aurangabad in pursuance to the order dated 15th July,2002 and also did not accept posting at transferred place at Aurangabad during the period 7th December,2002 to 3rd September,2004 a departmental enquiry came to be initiated against the applicant and at the conclusion of the departmental enquiry, penalty withholding of one increment with cumulative effect for three years came to be issued by an order 20th January, 2012.

By an order dated 23rd February, 2004 the applicant was offered a promotion as a Professor and was posted at Government Medical College, Nanded. Since the applicant did not join the promotional post, the said order of promotion of the applicant came to be cancelled by subsequent order dated 16th July,2004. Though the original applicant contends that he did not receive the order of promotion dated 23rd February, 2004 he has admitted the receipt of the order of cancellation of the promotion issued on 16th July,2004. It is quite surprising to note that even after receipt of the order of cancellation of the

promotion, in July,2004 the applicant did not approach the Tribunal until the year 2012 i.e. for a period of about eight years. The applicant made a grievance in respect of the orders of promotion issued in favour of his juniors in the year 2012 belatedly after lapse of eight years. The claim of the applicant for award of promotion was considered in the year 2012. However, he was found unsuitable on consideration of his confidential record and also in view of the fact that he was penalized for remaining absent for almost two years unauthorizedly. It is pointed out on behalf of the State that in the year 2009 the claim of the applicant was considered for award of promotion to the post of Professor. However, he was found ineligible on consideration of his confidential record. It must be noted that the applicant was offered promotion for the first time on 5th May,1998 then thereafter in the year 1999, in the year 2002 as well as in the year 2004. However, the applicant has not accepted the offers of promotion and was adamant for his retention at Mumbai. Even in the representation dated 24th April, 2012 made to the State Government requesting to consider his claim for promotion to the post of Professor, original applicant insisted for his posting at Mumbai on the promotional post. It is more than clear that the applicant did not want to move outside Mumbai and on several occasions refused the offer

of promotion since he was required to move out of Mumbai, in the event of acceptance of offer of promotion. Original applicant, who, time and again refused the offer of promotion, cannot make any grievance in respect of non-consideration of his claim at a subsequent stage and more particularly when he finds suitable to raise such claim.

6) The original applicant claims that he has been superseded and his juniors are considered for promotional post of Professor in the year 2004 and as such he shall be granted deemed date of promotion of the year 2004. It must be noted that on 23rd February, 2004 an order of promotion was, in fact, issued promoting the applicant to the post of Professor and he was posted at Nanded. The applicant was absent from 7th December, 2002 to 3rd September, 2004 and did not report to duties anywhere. It appears that the applicant protested against the order of transfer to Aurangabad and since he did not want to join at Aurangabad, he remained absent and did not join duties for almost two years. Though the applicant makes a grievance that he did not receive the order of promotion dated 23rd February, 2004, this defence appears to be shaky for the reason that the applicant admits to have received the order of cancellation of promotion issued on 16th July, 2004. The order of cancellation of

promotion presupposes issuance of order of promotion. The applicant however did not make any grievance in respect of receipt of the order of cancellation of promotion dated 16th July, 2004 and did not approach the Tribunal almost for eight years and for the first time he made grievance in Original Application in the year 2012. The applicant claims that he made representation protesting the order of cancellation of promotion. However, he was, all the while, insisting for his posting at Mumbai and was unwilling to accept the posting outside Mumbai. An employee cannot insist the employer that he should be posted at a particular place. The applicant, who, time and again, refused to accept the offer of promotion, does not have any entitlement to claim promotion at a later point of time when it is suitable for him.

7) The Maharashtra Administrative Tribunal has considered the issue of un-communicated Annual Confidential Reports (ACRs) and has recorded the finding that the applicant needs to be extended an opportunity to represent against the un-communicated ACRs and that itself cannot be a ground for denying his claim. In the instant matter, since the applicant has willingly declined the offer of promotion on several occasions, he is not entitled to stake his claim at the later point of time. The

Maharashtra Administrative Tribunal has not considered the aspect of delay on the part of the applicant in approaching it. Although the original applicant claims a deemed date of promotion of July, 2004 and contends that the cause of action accrued to him in July, 2004, it is evident that the original applicant approached the Tribunal belatedly in the year 2012. There is no convincing explanation for the delayed approach to the Tribunal. In this respect, the Tribunal ought to have considered the judgment of the Hon'ble Supreme Court in the matter of **State of Uttaranchal and Anr v. Shiv Charan Singh Bhandari & Ors** reported in **2013 AIR SCW 6627**. The Hon'ble Supreme Court in paragraph 22 has observed thus :

“.....Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the Tribunal and accepted by the High Court. True it is, notional promotional benefits have been granted but the same is likely to affect the State exchequer regard being had to the fixation of pay and the pension. These aspects have not been taken into consideration. What is urged before us by the learned counsel for the respondents is that they should have been equally treated with Madhav Singh Tadagi. But equality has to be claimed at the right juncture and not after expiry of two decades. Not for nothing, it has been said that everything may stop but not the

time, for all are in a way slaves of time. There may not be any provision providing for limitation but a grievance relating to promotion cannot be given a new lease of life at any point of time”.

8) The applicant has not explained the delay and laches in approaching the Tribunal. The stale claim of the applicant of grant of promotion ought not to have been entertained. In the circumstances, specially when the applicant himself is irresponsible for the state of affairs since he willingly gave up his claim for the promotional opportunities, almost on four occasions. It must be noted that the State Government having noticed that there are no Professors, willing to teach in the Medical Colleges situated in rest of Maharashtra, except Bombay, adopted a policy of transferring the Senior Professors. The applicant and such other doctors preferred to give up the opportunities of promotion with a view to continue in the Metropolitan Areas like Mumbai and Pune thereby jeopardizing the larger interest of the student community in the colleges situate outside Mumbai and Pune. The Senior Academicians in the Medical field like the original applicant and others are responsible for defeating the objective of the State Government to extend the facility of medical education to the students studying in other

parts of the State except the Metropolitan area like Mumbai and Pune. The refusal on the part of the senior members of the academic field to make available their service to the students in the other part of the State, except Mumbai and Pune, in fact, affects the larger interest of the students community and thereby defeats the objective of the State Government. The adamant approach of the Senior Members in the academic field like the original applicant is required to be dealt with appropriately and in the instant matter, according to us, the State Government was justified in recalling the orders of promotions issued to the applicant, on more than two occasions.

9) For the reasons recorded above, in our considered view, the order passed by the Maharashtra Administrative Tribunal, Mumbai deserves to be quashed and set aside and same is accordingly quashed and set aside.

10) Rule is made absolute to the extent as specified above. Interim order, if any, stands vacated. There shall be no order as to costs.

(A.S. GADKARI, J.)

(R.M. BORDE, J.)