

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12913 OF 2016

1. Yashwantrao Sadashiv Deshmukh,
Age 44 years, D-203, Chandganga
C.H.S. Ltd., Near Swami
Vivekanand School, Gorai-1,
Borivali (W), Mumbai-400 091.
2. Umesh Yuvraj Avchar,
Age 39 years,
R/at Omkar Complex, A-Wing-404,
Bldg. No.1, Shahad, Near R.O.B.,
Shahad (W).
3. Vikas Vishnu Parab,
Age 35 years,
R/at 1405, Sanghavi Exotica
C.H.S. Ltd., Maratha Colony Road,
Near Jame Theatre, S.V. Road,
Dahisar (E), Mumbai-400 068.
4. Shrikrishna Sadashiv Mohite,
Age 42 years, R/at B-1005,
Jangid Heights, Ghodbunder Road,
Kapurbawadi, Thane (W).
5. Deepak Vitthal Jadhav,
Age 39 years,
R/at B-501, Kailas Mansarovar,
Tembha Road, Bhayander (W),
Thane – 401 101.
6. Uttam Yashwant Randive,
Age 39 years,
R/at B-406, Sunrise Plaza,
Kasturi Garden, Bhayander (W),

Thane – 401 101.

7. Arvind H. Patil,
Age 42 years,
R/at 602, Prathamesh Orchid,
Tembha Road, Bhayander (W),
Thane – 401 101.

8. Prashant P. Jankar,
Age 33 years, R/at F-3,
Vinayak Thakkar Complex,
Opp: Vimal Dairy,
Navghar Phatak Road,
Bhayander (E).

9. Yatin V. Jadhav,
Age 34 years, R/at A/103,
Bhairav Sruthi, 150 Ft. Road,
Bhayander (W).

10. Sachin N. Patil,
Age 30 years, R/at Vakratund
Apartment, J.P. Thakur Marg,
Bhayander (W).

11. Sachin L. Pawar,
Age 38 years, R/at C-712,
Shri Salasar Radha Vallabh
C.H.S. Ltd., Near D' Marg,
150 Ft. Road, Bhayander (W),
Thane – 401 101.

12. Chetan B. Mhatre,
Age 39 years, R/at 303/3,
Sector No.3, Shanti Garden,
Opp: Surya Shopping Center,
Mira Road (E) -401 107.

13. Bhupesh D. Kakade,
Age 41 years, R/at B-103,

Raj Amrut, Vijay Home Complex,
Amrutwani Sastang Marg,
Bhayander (W).

.... Petitioners

- Versus -

1. Mira Bhayandar Municipal Corporation
Through the Commissioner,
Chhatrapati Shivaji Marg,
Bhayandar (W), Dist. Thane.

2. The State of Maharashtra
through Department of
Urban Development,
Mantralaya, Mumbai.

.... Respondents

Mr. R.S. Apte, Senior Counsel i/by Mr. Ashutosh
R. Gole for the Petitioners.

Mr. N.R. Bubna for Respondent No.1.
Ms Sushma Bhende, Asstt. Government Pleader,
for Respondent No.2.

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

DATE : MARCH 06, 2017

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. This writ petition was argued at great length on the last date and it was placed today for passing orders. Hence, **rule.** The respondents through their respective Advocates waive

service. By consent, rule is made returnable forthwith and the petition is taken up for final disposal.

2. By this writ petition under Article 226 of the Constitution of India, the petitioners, who are the employees of the Mira Bhayandar Municipal Corporation, have challenged the order, dated 23-6-2016, seeking to withdraw certain benefits accruing to them when in the service of this Corporation.

3. The facts lie in a very narrow compass. The petitioners are not disputing that they were appointed as Junior Engineers in the first respondent/Municipal Corporation. They were appointed by orders passed in the year 2004. One of the orders, copy of which is at page 15 of the paper-book, invites the attention of the petitioners to the conditions and which are enumerated therein.

4. The petitioners submit that in the year 2006 and particularly on 30-8-2006, the second respondent-State through its Urban Development Department issued a circular. That

circular, copy of which is at Annexure-B, requires the petitioners and others to clear an examination. The circular enumerates that the exam has to be cleared by such of those who are appointed as Junior Engineers. For future promotions, including the career advancement benefits the said examination would have to be cleared. The questions which have been raised and for the State's consideration is, whether any exemption can be granted from appearance in the said examination? and secondly, what would be the effect and impact on the future of such of the employees who do not clear this examination? Both have been answered by this circular dated 30-8-2006.

5. The petition proceeds on the footing that the respondent/Municipal Corporation has never adopted the Maharashtra Civil Service Rules. It is the internal Service Regulations of the first respondent/Corporation which is applicable to the services of the petitioners. The said circular was never approved and ratified by the General Body of the Municipal Corporation. The petitioners, in para 5 of the writ petition, state that this circular was never brought to the notice

of the petitioners by the Municipal Corporation. They were unaware of its existence. The petitioners then say that the Corporation's own Service Regulations, which were sanctioned in the year 2014, came into effect from the same year. The Service Regulations contained a provision similar to the circular about the requirement of passing of a technical examination. However, the Service Regulations specifically state that the Corporation must educate the affected employees by informing them about the curriculum and syllabus of the examination, conduct training courses and give them at least time of three terms to clear the examination. The Service Regulations exempt, those who have attained the age of 45 years, from appearance at the above examination.

6. Reliance is heavily placed upon the Service Regulations and duly approved and published in the Official Gazette in the year 2014. A copy of this is annexed at page 24 of the paper-book.

7. Then the petitioners accuse the Municipal

Corporation, the first respondent, of not informing the petitioners about any syllabus or training programme. The 40 hours of training has never been provided.

8. The petitioners were, therefore, surprised to receive a circular dated 30-10-2015 (Annexure-D) which mandates that parties like the petitioners should clear this examination, else they would not be considered for promotional benefits and similar other perquisites. Even their increments can be stopped. It is in these circumstances that the petitioners are informed that the examination which has been prescribed must be cleared within a period of four years and three attempts from the date of issuance of the circular.

9. The petitioners also state that a further communication to the Corporation dated 6-11-2015 (Annexure-E) is by one Junior Engineer and he brings to the Corporation's notice that in the appointment order there is no condition prescribed of clearing any examination. Secondly, the circular, dated 30-8-2006, has been issued prior to the appointment of

the petitioners. That is why the new condition would not apply to those who have been appointed prior to that date. Thirdly, the Municipal Corporation's Service Regulations which were approved by the General Body in the year 2008 have not prescribed any examination for the prior appointees, but states that the said requirement would come into force on the date the Regulations are published in the Official Gazette. Lastly, none of the arrangements and that are contemplated, namely, making known and much prior in point of time the curriculum and syllabus and holding of training sessions have been completed. It is in these circumstances and in the absence of any guidance that the said circular would not bind the petitioners.

10. It is pointed out that all but one petitioner were appointed prior to the issuance of the circular dated 30-8-2006.

11. In para 11 of the writ petition, it is contended that the General Body of the first respondent passed a Resolution bearing No.103 in a meeting held on 30-1-2016, amending the existing Regulations. Then, an exemption has been provided to

such employees appointed prior to 2005 from clearing the technical examination. The said amended Service Regulations were forwarded by the Municipal Corporation to the State for approval. The writ petition, therefore, proceeds on the footing that the petitioners *bona fide* believed that they are not required to appear and clear any examination, more so and in the light of the Municipal Corporation's subsequent acts.

12. That is how they would challenge the impugned order, copy of which is at page 44 of the paper-book, whereunder the Municipal Commissioner informs the petitioners that having failed to clear the prescribed examination they would have to be proceeded against. There is a serious irregularity and as noticed in the Audit Report for the year 2011-12 {para 9(d)} which states, in clearest terms, that such of those engineers who have not cleared this examination, the increments due and payable to them were still released. That is why they should not be allowed to retain the benefits. That is why from 1-7-2016 the increment which was erroneously granted would be recovered by making appropriate adjustments from the salaries payable to

such employees.

13. It is on this footing that the writ petition challenges the impugned order.

14. Mr. Apte, learned Senior Counsel appearing on behalf of the petitioners, would submit that the petitioners have averred in the writ petition that their appointments are prior to the issuance of the Circular dated 30-8-2006. Therefore, this circular is inapplicable to them. However, this is without prejudice to the contention that the Government has no power to issue a circular of this nature so as to bind the Municipal Corporation. The power of control and supervision vesting in the State Government would not enable it to issue such circulars and enforcing them. Once there is no power to issue the circular, then, the question of its applicability does not arise. Alternatively, it would not apply to the appointees prior to the issuance of the circular.

15. Further alternatively, Mr. Apte would submit that

before the impugned order was passed, the Municipal Corporation has given no opportunity to the petitioners. He would submit that the opportunity that is envisaged is to inform well in advance the parties like the petitioners that they would be required to clear the examination. They must be given reasonable time to prepare themselves. The time to prepare can be granted provided there is a defined curriculum or syllabus. The word “prescribed” employed in the Government circular would mean prescribed either by way of a prior rule or further communication in the nature thereof setting out the complete curriculum, programme or schedule of the examination, the training courses and other particulars are made available. The Municipal Corporation should make the training arrangements. When nothing of this kind has been done, then, the petitioners cannot be proceeded against. Now, a penalty is being imposed on them. If such is the nature of the action, then the principle of fairness, equity and justice requires that the impugned order be quashed and set aside.

16. Further alternatively, he would submit that the

Municipal Corporation has prescribed examination in its own Service Regulations and for the first time in the year 2014. The Service Regulations of the said Municipal Corporation were sought to be further amended or amplified and that is clear from the General Body Resolution No.103, dated 30-1-2016. That has also been sent for approval of the State Government. In the circumstances, the belief that the petitioners entertained was that, they are not required to clear any examination as of now or any examination provision would not apply to their appointments; that they are not required to abide by any circulars including that of the State Government. It is in these circumstances that Mr. Apte would submit that the petitioners be protected and the petition be allowed.

17. Mr. Bubna, appearing for the first respondent contesting party, would submit that the requirement of clearing the examination or a circular prescribing such examination for career advancement or promotional benefit is implicit in the power of the employer to appoint and to promote candidates. If for judging their relative merit, a process is carved out by which

exams are prescribed, the exams have to be cleared and on the marks obtained in such examinations, together with the performance in the oral interviews, promotional benefits or career advancement opportunities are provided, then, in tune with the mandate of Articles 14 and 16 of the Constitution of India, the action of the Municipal Corporation, in particular, a public body deserves to be upheld. It is a public body and which acts in the interest of public administration. It knows how best to arrange its affairs. Mr. Bubna would submit that in the entire petition though a faint attempt is made to challenge the power of the Government, there is no challenge to the circular. There is nothing by which a legal point is raised for the first time. There is no foundation in the pleadings for the same. How the State Government is not empowered to prescribe this examination by issuance of a circular is not amplified and clarified at all. Therefore, the circular is binding. Secondly, the Municipal Service Regulations, as proposed to be amended by the first respondent/Municipal Corporation by a General Body Resolution, are sent for approval but not approved by the State

Government. Therefore, the earlier circular would be binding. In such circumstances, Mr. Bubna would submit that there is no merit in the writ petition and it be dismissed.

18. We have perused the petition and all the annexures thereto with the assistance of Mr. Apte and Mr. Bubna. We have also perused the affidavit in reply.

19. We are in agreement with Mr. Bubna that in the entire petition though a faint attempt is made to question the power of the Government, there is nothing indicated therein as to which provision of the Maharashtra Municipal Corporations Act, 1949 (for short, "the said Act") disables the State Government from issuing such circulars. We have also not seen any serious attempt made to question the authority of the State Government for what we have on record are the elaborate provisions contained in the said Act. The petitioners cannot dispute that by Section 448 onwards, which are contained in Chapter XXVIII, titled as Control, varied powers are conferred in the State Government. The power of the State Government to

require performance of duties in default of any municipal authority are enumerated in Section 448. By Section 449, expenses of measures enforced under section 448 can be recovered by the State Government. By Section 450, the State Government has been conferred with the power to call for extract from proceedings, etc.. By Section 450A, the State Government has been conferred with the power to issue instructions or directions. This power is an over-riding one. It over-rides anything contained in the Act. The State Government has a discretion to issue to the Municipal Corporation general instructions as to matters of policy to be followed by the Corporation in respect of its duties and functions, and in particular it may issue directions in the larger public interest or for implementation of the policies of the Central Government or the State Government and the National or the State level programmes, projects and schemes. The issue of such instructions or directions and which would bind the Corporation and its duty to enforce or give effect to them, is doubted, then, the power is to be exercised as in the State Government itself.

Then, by Section 451, there is power of the State Government to suspend or rescind any Resolution or order of the Corporation or other authority in certain cases. Apart from larger power to dissolve Corporation and conferred by Section 452 and a further enabling power by Section 452A, what we have under Chapter XXIX, titled, Rules, Bye-laws, Regulations and Standing Orders is a power in the Municipal Corporation to alter or make additions to the rules prescribed in Schedule-D. Then, by Section 455, the Corporation has power to make rules subject to sanction of the State government. The power to make, add to, alter or rescind any rule under Section 454 shall be subject to the sanction of the State Government and to the condition of the rules being made after previous publication.

20. From Section 456 it is evident that the State Government may at any time require the Corporation to make rules under Section 454 in respect of any purpose or matter specified in Section 457 and if the Corporation fails to comply with such requisition within such reasonable time as may be fixed by the State Government, the State Government may, after

previous publication, make such rules and the rules so made shall, on their final publication in the Official Gazette, have the effect as if enacted in the said Act. There is a special power conferred in the State Government to make rules. The argument is that the circular in the present case is not in tune with this legal mandate. In that regard, a careful perusal of the circular would indicate that the Municipal Corporation has appointed the petitioners as Junior Engineers by various orders. The petitioners after being appointed were not informed, according to them, about this circular of 30-8-2006.

21. We do not see how the State Government can be said to be denuded the power of the circular merely because the Corporation fails to reveal the contents of this circular to the employees like the petitioners. We are not considering the power of the State Government. That issue can be considered provided any issue is raised in that regard by the Municipal Corporation. The Municipal Corporation feels that the circular of the State Government dated 30-8-2006 does bind it. In fact, if this circular is perused, it is merely clarificatory in nature. It

proceeds to answer certain queries of certain Municipal Councils and Municipal Corporations. These Municipal Councils and Municipal Corporations were of the clear opinion that the decisions of the State Government and the directions issued by it are binding on them. They only sought certain clarifications. Firstly, they sought a clarification as to prescription of age-limit or whether the Corporation is obliged to hold an examination for such of the candidates who have completed a specified age of their life. In answering that the Municipal Corporation's request to pin down the requirement to 40 years has not been accepted. The circular of the State Government says that those of the employees who have attained 45 years or have completed 45 years of their life, they can, at best, be exempted from the requirement. On the second question as to whether the Corporation would have to act and recover the benefits already accrued or granted to such of the candidates who failed to clear the examination, it is once again reiterated in the circular that the Corporation must stop their increments and should not grant them any available benefits on par with the other employees if

the appointees fail to clear the examination.

22. Then, there is a clear stipulation in this circular that such of these employees who have not cleared the examination, irrespective of their appointments which may be prior to the issuance of this circular or otherwise, they must clear the prescribed examination within a period of four years with three chances from the date of issuance of the circular.

23. We have no doubt in our mind that this circular alone cannot be questioned. This circular only clarifies the doubts expressed by some Municipal Corporations and Municipal Councils in the State. Each of such Councils and Corporations proceed on the footing that there are enough powers in the State Government to issue the circular and to enforce it. Each of these Councils and Corporations in the State proceed on the footing that the circular and equally the clarifications bind them. We do not see how the employees can then raise any grievance. It is inconceivable that the petitioners who have been appointed in the year 2004 are not aware of the

contents of the circular or the issuance thereof. They must have noticed on several occasions candidates like them appearing for the examination and clearing it. They relied upon the Corporation's alleged attempts to assist them. There is nothing on record which would indicate that the State Government lacks the power or that the Municipal Corporation has ever questioned the authority of the State to issue the circular and to prescribe an examination for the candidates like the petitioners. The petitioners then rely upon the Municipal Corporation's Examination Rules and Regulations which have been published in the Official Gazette (Page 24). Upon a perusal of these Regulations, it is evident that these Regulations come into play after the circular of the State Government. Till then the circular of the State Government was on record. The requirement of passing a technical examination and stipulated in the Service Regulations of the Municipal Corporation may have been issued in the year 2014, but merely because such an act was performed by the Municipal Corporation in the year 2014, it does not mean that the circular of the State Government ceases to have any

effect. In fact in the Audit carried out in the year 2011-12, the State Government noticed that despite its binding effect, several Municipal Corporations and Municipal Councils in the State have not abided by the same and conducted or held an examination, or though such examinations have been held from time to time, it has retained such of the employees in promotional posts or continued their benefits, though they failed to clear this examination. We do not see how reliance upon the Municipal Service Regulations and Gazette Notification would mean that the earlier stipulation and contained in the circular was never binding on the petitioners.

24. In fact what the Municipal Service Regulations provide is that from the date of its issuance the candidates falling within the purview of the same should clear the examination. The circular, at page 28, therefore enumerates that requirement. It is in relation to that, that the petitioners forwarded certain representation and we have enumerated the contents thereof in the foregoing paragraphs. The other representation and copy of which is at page 30 of the paper-

book would indicate that the petitioners were aware that there was circular of the State Government dated 30-8-2006. They were further aware that the Municipal Service Regulations and approved in the year 2008 have been forwarded to the State Government and the Gazette Notification would apply. This would make them applicable from the date of their publication in the Official Gazette. It is a general complaint made by them, without any particulars, about not providing the details of the syllabus or the training session. They do not know the nature of the examinations or the place where they are going to be conducted, is just an excuse. The inevitable was known to them. That is why we do not see any reason for the impugned order to be struck down. We have seen that the impact of non-clearance of the examination by employees like the petitioners was made known to the Municipal Corporation. It still continued to accommodate the parties like the petitioners. It did not insist on their clearance of the examination even when it revised its Regulations. It was clear that the audit objections were staring at the Municipal Corporation. The audit objections were indeed

serious. The monetary benefits continued to be extended to such of the employees, but it did not abide by the Government circular dated 30-8-2006 and the prior one issued in that regard. It is, therefore, apparent that some day or the other consequences had to fall and they indeed have now fallen, though belatedly.

25. In the affidavit in reply the Corporation has clarified that the circular, dated 30-8-2006, has been issued by the Urban Development Department for clarifying the doubt expressed by various Corporations regarding professional examination. The circular makes it compulsory for concerned engineering employees to clear professional examination within stipulated time. The circular further states that increment of concerned employees who fail to clear the examination within the stipulated time therefor will have to be stopped. The further circular, dated 9-11-2009, of the State Government clarified that increment of employees who fail to clear the examination in four years/three attempts from the date of the said circular would have to be stopped. Thus, there is a further circular and issued

following the earlier circular dated 30-8-2006. The further circular is dated 9-11-2009. The State was thus very considerate and continued to accommodate the employees like the petitioners. The petitioners appear to be taking undue advantage of the same. The Model Draft Recruitment Rules framed by the State Government though were adopted by the Corporation in the year 2008, it had to further modify them after considering the suggestions and objections received. These suggestions and objections were invited by a newspaper notice of 4-7-2009. Thereafter, the Final Draft Recruitment Rules of the Corporation were forwarded to the State Government. They were approved in the month of March, 2014. These Rules also make it compulsory for the professional examination to be cleared. That is how on 30-10-2015 the concerned engineering employees were called upon to clear this examination.

26. The Municipal Corporation's General Body, without any approval of the Municipal Administration, passed a Resolution to amend the Recruitment Rules. The Corporation's General Body sought to exempt the employees appointed prior

to 2005 from the requirement of clearing the professional examination. This General Body Resolution has been forwarded to the State Government and it is yet to sanction it.

27. It is in these circumstances that we are of the clear opinion that there is no merit in the writ petition. Firstly, the Municipal Corporation is right in its objection that there is no challenge to the circular. Secondly and correctly the Municipal Corporation does not question the power of the State Government to either issue a circular or to clarify the doubts expressed by the Municipal Corporations in the State by issuance of another circular. Thirdly, the Municipal Corporation feels that even the earlier circular and the clarification are binding on it. Fourthly, it must implement this circular, particularly in the light of the serious audit objections raised regarding its functioning and working. Lastly, it understands that in the event it continues to accommodate the employees, it would suffer adverse consequences and equally the employees. Any attempt of the General Body, therefore, to amend the existing Regulations of the Municipal Corporation which, in any event, prescribe an

examination from the year 2014, which also has not been taken by the petitioners, then, it must visit the petitioners with the consequences of not clearing the examination by depriving them of their increments.

28. In such circumstances, ordinarily we would have thought that the petitioners seek a final opportunity to clear the examination and in the event that is not cleared by them, they would be ready to face the consequences. Instead, they decided to go ahead with their challenge, as raised in the writ petition.

29. In the circumstances aforementioned and for the reasons set out above, we find no merit in the writ petition. It is dismissed. Rule is discharged. There will be no order as to costs.

30. Despite our above conclusion, purely in the facts and circumstances of the present case and peculiar to it, we direct that in the event the professional examinations are not held as yet, but are likely to be held in the near future, then, the petitioners be allowed one chance to appear for the same and in

the event the petitioners are successful, none of the consequences as flowing from the circulars referred to above shall be visited on them. In the event they fail to clear the examination despite attempting or do not take the examination at all, though permitted by us as a special case, then, all consequences shall follow and the petitioners would be visited with withdrawal of the benefits and already earned in the form of increments, etc.. In such an eventuality, the Municipal Corporation's powers under the circulars, Rules and Regulations are duly reserved and for being exercised against the petitioners.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)