

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.5435 OF 2014

Bebi Eknath Bichkule,
Age-54 years, Occu:Service,
R/o-Pirachi Pimpalwadi,
Tq-Paithan, Dist-Aurangabad.

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through its Secretary,
Health Department,
Mantralaya, Mumbai-400032,
- 2) The District Health Officer,
Aurangabad,
- 3) The Chief Executive Officer,
Zilla Parishad, Aurangabad.

...RESPONDENTS

...

Mr.Ajay Shinde Advocate for Petitioner.
Mr.S.B. Yawalkar, Additional Government
Pleader for Respondent No. 1.
Mr.M.C. Swami Advocate for Respondent
Nos.2 and 3.

...

**CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.**

DATE OF RESERVING JUDGMENT : 17TH JANUARY, 2018

DATE OF PRONOUNCING JUDGMENT: 25TH JANUARY, 2018

JUDGMENT [PER S.S. SHINDE, J.] :

1. Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. This Petition is filed with following substantive prayer:

"B) By issuing writ of certiorari or any other writ, order or directions in the like nature, the impugned order dated 9.05.2014 issued by the respondent No.3 may kindly be quashed and set aside thereby directing the respondents to grant promotion to the petitioner on the post of Sweeper/Peon in Class 4 and for that purpose issue necessary orders."

3. It is the case of the Petitioner that on 9th June, 1986, she came to be appointed as Temporary Sister with the Primary Health Centre, Dhakephal and her name stood at Sr. No.3 in the chart of appointments and since her appointment from 1986 till today the Petitioner is working as a Temporary Sister at Primary Health Centre, Pimpalwadi, Tq-Paithan, Dist-Aurangabad. It is the case of the Petitioner that Respondent No.2 - District Health Officer, Zilla Parishad, Aurangabad has prepared the seniority list on 22nd April, 1987 which shows that the name of the Petitioner is at Sr. No.69. The Petitioner has passed 4th class examination in the year 1989, which is the eligibility for the promotion as a Sweeper. Though another employee namely, Smt. Malanbai Ghodke is far junior to the Petitioner, instead of the Petitioner said Malabai Ghodke is promoted on the permanent post of Sweeper.

4. It is the case of the Petitioner that the

medical officer has issued various certificates which shows that the Petitioner is working well and there is no any complaint against the Petitioner in respect of her work. It is submitted that the Petitioner was not having any knowledge about the seniority list and promotions. After getting the knowledge of the promotions, the Petitioner filed the representation dated 9th December, 2013 stating that she is qualified and having requisite qualification for permanency, therefore she may be promoted as a peon. It is submitted that as sought by Respondent Zilla Parishad, legal opinion is submitted by their panel Advocate on 28th February, 2014, which is in favour of the Petitioner.

5. It is further the case of the Petitioner that The Divisional Commissioner, Aurangabad vide its letter dated 16th April, 2014 directed Respondent No.3 Chief Executive Officer, Zilla Parishad, Aurangabad to decide the

representation/claim of the Petitioner at his level, in view of the Government policy and the relevant provisions of law. In pursuance of the said letter, Respondent No.2 has called the record of the Petitioner. Respondent No.3 - Chief Executive Officer, Zilla Parishad, Aurangabad vide its order dated 9th May, 2014 rejected the claim of the Petitioner thereby stating that in view of the Government Resolutions dated 25th August, 2005 and 9th August, 2011 the Petitioner is not entitled for permanency. Hence this Petition.

6. Learned counsel appearing for the Petitioner submits that the Petitioner came to be appointed with the Respondents way back in the year 1986 and therefore the Government Resolutions dated 25th August, 2005 and 9th August, 2011 cannot be made applicable retrospectively. He submits that the Petitioner has passed 4th standard examination in April, 1989 and therefore the Petitioner is entitled to be promoted as

Sweeper/peon. He further submits that by ignoring the claim of the Petitioner, the employee who is far junior to the Petitioner has been promoted by the Respondents. He therefore submits that the Petition deserves to be allowed.

7. Learned Additional Government Pleader submits that the Respondents have rightly rejected the claim of the Petitioner as no posts of permanent peon/sweeper are available with the Zilla Parishad, Aurangabad.

8. Learned counsel appearing for Respondent Nos.2 and 3, relying upon the affidavit in reply filed by Pundlik s/o Anandrao Athavale, Statistic Officer, Zilla Parishad, Aurangabad submits that as per office order dated 31st March, 1989, twenty temporary peon were promoted to the post of permanent peon. Passing of 4th Standard is essential qualification for the post of permanent post. When the said promotions were given on 31st

March, 1989 at that time the Petitioner was not possessing requisite qualification of passing of 4th standard examination. The Petitioner acquired the said qualification in April, 1989 when the promotion orders were already issued. At the relevant time of issuing promotion orders, said Malanbai Ghodke was possessing the requisite qualification of passing of 4th standard examination and therefore though she was junior than the Petitioner, she was promoted on the post of permanent post.

9. In support of his submissions, learned counsel appearing for Respondent Nos.2 and 3 relied upon the ratio laid down by the Supreme Court in the case of A. Umarani vs. Registrar, Co-operative Societies and others¹, submits that it is a settled proposition that the appointment made in violation of the mandatory provision of the statute and in particular ignoring the minimum

¹ A.I.R. 2004 S.C. 4504(1)

educational qualification and other qualifications would be wholly illegal and such illegality cannot be cured by taking recourse of regularization. Regularization cannot be given to the employees whose services are ad-hoc in nature. In support of his submissions, learned counsel also relied upon the ratio laid down by the Supreme Court in the Case of Dr. (Mrs.) Chanchal Goyal vs. State of Rajasthan².

10. Referring to another affidavit in reply filed by District Health Officer, Zilla Parishad, Aurangabad, learned counsel appearing for Respondent Nos.2 and 3 submits that, as on today 166 employees are working on temporary basis in Health Department. If the Petitioner is absorbed on permanent post, then remaining 165 employees also required to be regularized on permanent posts which is against the circular passed by the Government and against the ratio laid down by the

² A.I.R. 2003 S.C. 1713(1)

Supreme Court. Therefore, he submits that the Writ Petition may be rejected.

11. The Petitioner has also filed rejoinder affidavit and denied the averments made by the Respondents in its affidavit in reply.

12. We have carefully considered the submissions of the learned counsel appearing for the Petitioner, learned Additional Government Pleader appearing for the State and learned counsel appearing for Respondent Nos.2 and 3. With their able assistance, we have perused the grounds taken in the Petition, annexures thereto, affidavit in reply filed by the Respondents and rejoinder filed by the Petitioner.

13. It is clear from the perusal of the documents placed on record that at the relevant time when the promotions were given to the employees, the Petitioner was not possessing the

requisite qualification of passing of 4th standard examination. One Malanbai Ghodke, though junior to the Petitioner, as she was possessing the requisite qualification at the relevant time, she was promoted on the post of peon. Therefore the grievance raised by the Petitioner in this respect is without any substance and the same cannot be entertained.

14. During the pendency of this Petition, by order dated 9th January, 2018 this Court directed the Respondent Nos.2 and 3 to file short affidavit stating therein the position of vacancies of the post of peon. In response to the said directions, Respondent Nos.2 and 3 filed additional affidavit and submitted that, the office record shows that as per the roster balance there is no vacancy available for the post of peon. It is further stated that as per the roster balance, 7 posts are already in excess category. Thus, it is clear that not a single post of

permanent peon is available in the establishment of Respondent Nos.2 and 3. In such situation, when the post of peon is not available, the prayer of the Petitioner to direct Respondent Nos.2 and 3 to promote her on the permanent post of peon, cannot be entertained.

15. The Supreme Court in the case of Secretary, State of Karnataka and others vs. Umadevi (3) and others³, while considering the issue of absorption, regularization or permanent continuance of temporary, contractual, casual, daily-wage or adhoc employees appointed/recruited and continued for long in public employment dehors the constitutional scheme of public employment, in Para 53 of the Judgment dated 10th April, 2006, held as under:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as

³ (2006)4 S.C.C. 1

explained in S.V. Narayanappa⁴, R.N. Nanjundappa⁵ and B.N. Nagarajan⁶ and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten year or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date.

4 A.I.R. 1967 S.C. 1071

5 (1972) 1 S.C.C. 409

6 (1979) 4 S.C.C. 507

We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

16. Keeping in view these observations of the Supreme Court, Respondent No.2 - the District Health Officer, Aurangabad and Respondent No.3 - the Chief Executive Officer, Zilla Parishad, Aurangabad are directed to prepare the proposal of the employees similarly situated like the Petitioner and who have served for more than ten years before the pronouncement of the Judgment in the case of Secretary, State of Karnataka and others vs. Umadevi (3) and others, cited supra, and who are not made permanent, within the period of ten weeks from today mentioning therein the necessary details of their dates of joining, nature of duties performed by them and the salary

being paid to them. Such proposal shall be forwarded to the Health Department of the Government of Maharashtra.

17. On receipt of such proposal, the concerned Department shall consider the cases of the Petitioner as well as the similarly situated employees serving on the establishment of Zilla Parishad, Aurangabad, and take a policy decision, whether the posts can be created with Aurangabad Zilla Parishad and whether such employees could be accommodated on such posts and whether their services could be regularized.

18. The Health Department, Government of Maharashtra shall take such decision within the period of SIX MONTHS from the date of receipt of the proposal. The decision so taken shall be communicated to the Zilla Parishad, and the Zilla Parishad shall convey the said decision to the Petitioner and similarly situated employees.

19. In case any adverse decision is taken, the Petitioner will be at liberty to avail of an appropriate remedy as available in law to seek redressal of her grievances.

20. In the mean time, Respondent Nos.2 and 3 shall continue the Petitioner in employment on the same terms and conditions subject to revision in the amount of salary and shall not terminate her services only on the ground that she is a Temporary Sister. Respondent Nos.2 and 3 shall continue to pay the Petitioner the salary on monthly basis. Such continuance in employment will be as per the scheme applicable.

21. Rule is made partly absolute in the above terms.

[S.M. GAVHANE, J.]

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[S.S. SHINDE, J.]