

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2144 OF 2018

The State of Maharashtra ...Petitioner.
Versus
Dr. Ratna w/o. Dinkar Raokhande ...Respondent.

Mr. O.M. Kulkarni, AAGP for the State-Petitioner.
Mr. Nitin P. Deshpande for the Respondent.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 5th MARCH 2018.

P.C.

1] Heard learned counsel for the parties.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the judgment and order dated 8th July 2016 made by the Maharashtra Administrative Tribunal, Mumbai (MAT) in Original Application No. 743 of 2014 instituted by the respondent.

By the impugned judgment and order, the MAT has directed that the respondent be placed above Dr.Sonawane in the seniority list of Civil Surgeon as well as the combined seniority list of Civil Surgeon, Dist. Health Officer and Specialists.

4] Mr. O.M. Kulkarni, learned AAGP for the State-petitioner, submits that the respondent failed to implead Dr. Sonawane, who has a necessary party in O.A.No. 743 of 2014. In the absence of impleadment of such necessary party, O.A.No.743 of 2014 ought to have been dismissed by the MAT.

5] Mr. Kulkarni, without prejudice to the aforesaid, submits that the respondent was initially selected and appointed as a Gynecologist (Specialist) on 9th January 1991. Thereafter, the respondent, applied for and was selected as a recruit through the MPSC to the post of Civil Surgeon only on 9th October 1996. Mr. Kulkarni, therefore, submits that the seniority of the respondent in the cadre of Civil Surgeon had to be determined on the basis of her fresh appointment as a Civil Surgeon on 9th October 1996

and not any prior date as held by the MAT in the impugned judgment and order. For this reason also Mr. Kulkarni submitted that the impugned judgment and order is liable to be set aside.

6] Mr. Nitin Deshpande, learned counsel for the respondent, submits that there is no dispute that there is a common cadre of the posts of Gynecologist (Specialist), District Health Officers and Civil Surgeon. He submits that the posts in such cadre are inter transferable. He submits that there is no dispute that the respondent was selected on 19th December 1990 and appointed on 9th January 1991 Gynecologist (Specialist) to such common cadre. He submits that in the present case, we are concerned with the common seniority list as between the three posts in the common cadre. Therefore, he submits that the MAT has quite correctly, determined the seniority of the respondent on the basis of her initial selection on 19th December 1990. He submits that since Dr. Bharati Sonawane was appointed as Gynecologist (Specialist) only on 1st January 1991, the MAT, has correctly directed that the respondent be placed above Dr.Sonawane in the seniority list of Civil Surgeon as

well as combined seniority list of Civil Surgeon, District Health Officer and Specialists. Mr. Deshpande relies upon Rule 4(2) (b) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 2002 (said Rules) in support of his contention.

7] Mr. Deshpande further submits that the petitioner-State has adopted an unequal yardstick as between the cases of the respondent and Dr. Bharati Sonawane was also appointed as a Specialist on 1st January 1991 and was thereafter on 20th November 2002 given posting in Civil Surgeon Cadre. The petitioner - State has, however, counted seniority of Dr. Sonawane on the basis that her entry in the cadre of Civil Surgeon was 1st January 1991 and not 20th November 2002. However, when it comes to the case of the respondent, the petitioner - State seeks to ignore the fact that even the respondent was selected and appointed as Specialist on 19th December 1990 and 9th January 1991 respectively. Mr. Deshpande submits that the MAT has only redressed the issue of discrimination practised by the petitioner - State and therefore, there is no case made out to interfere with the impugned judgement

and order made by the MAT.

8] Mr. Deshpande also submits that the issue of non-joinder of necessary party was never raised in the reply opposing the original application. Mr. Deshpande submits that the respondent was mainly aggrieved by the action of the petitioner – State in denying the respondent were rightful place in the seniority list. In such circumstances, there was no necessity for the respondent to implead any party other than the petitioner – State as a respondent to O.A.No. 743 of 2014. For all these reasons, Mr. Deshpande submits that the present petition may be dismissed.

9] The rival contentions now fall for our determination.

10] The respondent, in her O.A.No.743 of 2014, had applied for the following substantive reliefs:

“(a) This Hon'ble Tribunal may be pleased to call for record and proceeding pertain to the above said matter and thereby issued direction to the Respondent to place the applicant at a appropriate seniority and deem date may be accordingly granted from the date of appointment of Dr. Bharati Sonawane, i.e., from 05.12.1990, the date on which Jr. of the applicant i.e. Dr.Bharati Sonawane appointed to the post of Gynecologist Class – I.

(b) This Hon'ble Court further may be pealed to direct the Respondent to calculate the seniority of the applicant after the assignment of deem dated i.e. 05.12.1990 and all consequential service benefits like increments, pay and promotion (if any) to the next promotional cadre according to the seniority of the applicant."

11] If the averments in the O.A. are perused, then, in several paragraphs, the respondent has made reference to Dr.Bharati Sonawane, who, according to the respondent, is liable to be declared as junior to the respondent. Ultimately, even the relief granted by the MAT by the impugned judgment and order directs that the respondent be placed above Dr. Sonawane in the seniority list of Civil Surgeon as well as combined seniority list of Civil Surgeon, District Health Officer and Specialists. Admittedly, Dr.Sonawane was never impleaded as a respondent in the O.A., even though, as a result of the impugned judgment and order, it is the respondent, who is directed to be placed at a position senior to Dr. Bharati Sonawane.

12] In ***Suresh vs. Yeotmal Dist. Central Co-op. Bank Ltd. and anr. - AIR 2008 SC 2432***, the Hon'ble Supreme Court has held that a petition challenging promotions cannot be adjudicated unless candidates higher-up in

seniority are impleaded as parties.

13] In ***Rashmi Mishra vs. M.P. Public Service Commission and ors. - (2006) 12 Scc 724*** and ***Prabodh Verma and ors vs. State of Uttar Pradesh and ors. - (1984) 4 SCC 251***, the Hon'ble Supreme Court has held that a High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of the being before it as respondents in a representative capacity if their number is too large, and, therefore, Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity.

14] Applying the aforesaid principles to the facts of the present case, we are satisfied that the MAT, should not have made the impugned judgment and order without insisting upon the impleadment of Dr. Sonawane to O.A.

No. 743 of 2014. The ultimate relief granted by the MAT in the impugned judgment and order places the respondent above Dr. Sonawane, which means that the seniority position of Dr. Sonawane has been disturbed, without she being a party to the O.A. No.743 of 2014. In such circumstances, we will have to uphold the contention of Mr.Kulkarni that O.A. No.743 of 2014 was required to be dismissed for non-joinder of necessary party.

15] Even otherwise, we find that the MAT, was not justified in treating the cases of the respondent and Dr.Sonawane upon a common yardstick. There was an essential distinction between the two cases, which, the MAT, has failed to appreciate. The respondent, was no doubt selected and appointed as a Specialist on 19th December 1990 and 9th January 1991. If therefore, she had continued in the same position when the common seniority list in the cadre of Civil Surgeon, District Health Officer and Specialists was drawn out, then, perhaps, in terms of Rule 4(2)(b) of the said Rules, she could have claimed seniority over Dr. Sonawane. However, there is no dispute that the respondent applied for fresh recruitment through the MPSC

to the post of Civil Surgeon and was selected and appointed to the said post on 9th October 1996. Since, this was an entirely fresh and direct recruitment, it is obvious that her entry in the cadre of Civil Surgeons had to be taken as 9th October 1996 and there was no question of the respondent claiming benefit of her past service from 1991 for purposes of seniority.

16] In contrast, Dr. Sonawane, who was appointed as Specialist on 1st January 1991 continued in the same position until 20th November 2002 until by order dated 20th November 2002, the petitioner – State, closed down the PPC programme to which Dr. Sonawane had been appointed. As a consequence, Dr. Sonawane was given posting as a Civil Surgeon. Unlike in the case of the respondent, the posting secured by Dr. Sonawane as Civil Surgeon was not voluntary or of her own accord. This is the reason why a service of Dr. Sonawane from 1st January 1991 was taken into consideration for the purposes of determination of seniority. The MAT, by failing to notice this distinction has sought to treat unequals as equals.

17] The fortuitous circumstance that inter cadre transfers may be permissible is not a ground to hold that the service of the respondent prior to her fresh and direct recruitment in the cadre of Civil Surgeon, as a Specialist, is to be counted. The respondent, obviously, gained certain benefits by securing direct recruitments to the post of Civil Surgeon at this belated stage that too, without impleading necessary party, the respondent, cannot seek to disturb the seniority position already determined by the petitioner – State.

18] For the aforesaid reasons the impugned judgment and order dated 8th July 2016 made by the MAT is hereby set aside. Rule is made absolute in terms of prayer clause (a). There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)