

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2767 OF 2018**

Mahesh V. Pawar	...Petitioner
Versus	
The Addl. Chief Secretary Finance Deptt. and ors.	...Respondents

**WITH
WRIT PETITION NO. 2274 OF 2018**

The Additional Chief Secretary Finance Department and anr.	...Petitioners
Versus	
Mrs. Vidya N. Pondkule and anr	...Respondents

Mr. B.R. Patil i/b Mr. Ashish Gaikwad a/w. Ms Bhavana Khichi and Mr. Abhisehk Mishra for the Petitioner in WP 2767 of 2018 and for Respondent No.2 in WP 2274/2018.

Mr. O.M. Kulkarni, AAGP for Respondent Nos.1 and 2/State in W.P. 2767/2018 and for the Petitioners in W.P. 2274 of 2018.

Mr. N.V. Bandiwadekar a/w. U.B. Nighot i/b Mr. Vinayak R. Kumbhar, for Respondent No.3 in WP No. 2767/2018 and for Respondent No.1 in WP 2274/2018.

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

DATE : 15th MARCH 2018.

ORAL JUDGEMNT:

1] Heard learned counsel for the parties.

2] Rule in both the petitions. With the consent of and at the request of learned counsel for the parties, Rule is made

returnable forthwith in both the petitions.

3] Learned counsel for the parties agree that both these petitions can be disposed of by common judgment and order since, both the petitions challenge the judgment and order dated 3rd January 2018 made by the Maharashtra Administrative Tribunal (MAT) in O.A. No. 977 of 2017 instituted by Mrs. Vidya N. Pondkule, who is impleaded as respondent No.1 in Writ Petition No. 2274 of 2018 instituted by the State Government and as respondent No.3 in Writ Petition No.2767 of 2018 instituted by Mahesh Pawar, who in turn, had been impleaded as respondent No.3 in O.A.No.977 of 2017 instituted by Mrs. Vidya Pondkule.

4] Mr. Kulkarni, learned AAGP for the petitioners in Writ Petition No. 2274 of 2018 and Mr. B.R. Patil, learned counsel for the petitioner in Writ Petition No. 2767 of 2018, submit that the MAT has ignored or in any case misconstrued the Circular/G.R. dated 2nd April 1976 issued by the State Government in the matter of procedure to be followed for promotion of persons whose conduct is under

investigation or against whom departmental inquiries are pending. They submit that in the present case, Mahesh Pawar, was held as ineligible for promotion to the post of Accounts Officer, Class-I only on the ground of pendency of criminal prosecution against him. They submit that admittedly, Mahesh Pawar has been acquitted by the competent court and therefore, the State Government was entitled to order promotion of Mahesh Pawar without necessity of once again referring his case to the Departmental Promotion Committee. Learned counsel for the petitioner submits that this is quite clear from the reading of Circular dated 2nd April 1976 and inasmuch as the MAT has misread or misconstrued such circular, the impugned judgment and order dated 3rd January 2018 made by the MAT warrants interference.

5] Mr. Bandiwadekar, learned counsel for Mrs. Vidya Pondkule, submits that the DPC, upon consideration of the case of Mahesh Pawar, has recorded in the minutes that he was ineligible to be considered for promotion. He submits that post acquittal of Mr. Mahesh Pawar, even in terms of the Circular dated 2nd April 1976, the Government, was

duty bound to place his case before the DPC and there was no question of directly promoting Mahesh Pawar to the post of Accounts Officer. Such a promotion is contrary to both law as well as equity and therefore, the same was rightly interfered with by the MAT.

6] Mr. Bandiwadekar points out that the State Government, is taking undue interest to favour Mr. Mahesh Pawar when Mr. Mahesh Pawar had not even bothered to appear before the MAT to defend his promotion which was *ex-facie* illegal and unconstitutional. For all these reasons, Mr. Bandiwadekar submits that these petitions may be dismissed with costs.

7] There is no serious dispute insofar as facts are concerned. The cases of both Mr. Mahesh Pawar as well as Mrs. Vidya Pondkule were referred to DPC for promotion to the post of Accounts Officer. Insofar as Mr. Mahesh Pawar is concerned, the DPC has recorded a clear finding that since criminal prosecution in relation to bribery (corruption) is pending against Mr. Mahesh Pawar, he is ineligible for promotion. This is evident from the minutes of DPC, the

extract of which is annexed at page 44 in the Writ Petition No. 2274 of 2018 instituted by the State Government. Since, this was a truncated extract we called upon and were furnished with the minutes of DPC which also record that Mahesh Pawar was considered to be ineligible for promotion on the ground that a criminal prosecution was pending against him for his involvement in bribery (corruption).

8] It is neither the case of the State Government nor of Mahesh Pawar that the DPC, had in fact recommended Mahesh Pawar for promotion but had kept recommendation in a sealed cover on account of pendency of criminal prosecution against him. The State Government and Mahesh Pawar concede that DPC, had in fact, declared Mahesh Pawar as ineligible for promotion, when his case was referred for promotion to such DPC.

9] Later on, Mahesh Pawar has been acquitted in the criminal proceedings. Instead of once again referring the case of Mahesh Pawar for promotion to the DPC, the State Government, on basis of some advice from the General

Administration Department has chosen to straightaway promote Mahesh Pawar. This is sought to be justified on the basis of Circular dated 2nd April 1976, including, clauses 3 and 4 thereof. The MAT, in the impugned order has not accepted the contention on behalf of the State Government.

10] In order to appreciate the rival contentions, it will be appropriate to quote the Circular dated 2nd April 1976 in its entirety :

"Promotion

Procedure to be followed in The cases of persons whose conduct is under investigation or against whom departmental enquiries are pending:-

GOVERNMENT OF MAHARASHTRA
GENERAL ADMINISTRATION DEPARTMENT,
Circular No. SRV-1075/X,
Sachivalaya, Bombay 400 032
Dated the 2nd April 1976.

CIRCULAR OF GOVERNMENT

According to the existing practice, Government servants whose conduct is under investigation or against whom a departmental enquiry is pending, are ordinarily not considered for promotion. This practice is however, likely to cause hardship in the case of Government servants who are otherwise fit for promotion and the charges against whom may not be so serious as to disqualify them for provisional promotion during the pendency of the investigation or

enquiry. The question has been examined. There are three stages at which action will have to be taken viz.

1. The stage of preparing the select list.
2. Interim promotion during the pendency of the proceedings, and
3. The final action to be taken after the conclusion of the investigations and the departmental enquiry if any.

Action as below should be taken in respect of these three stages.

2. The Stage of preparation of select list:

(a) At the time of drawing up of the select list, the case of a person facing an investigation or departmental enquiry should be considered in the same manner in which the cases of other person are considered i.e. On the basis of his previous record of service. If on the basis of his record, he is found fit for promotion, his name should be included in the select list at the appropriate place; but this inclusion should be considered to be purely provisional to be reviewed after the conclusion of the departmental enquiry or investigation if on conclusion of the investigation it is decided that a departmental enquiry is not necessary. This position will apply to all persons irrespective of whether they are under suspension or not.

(b) If the state of his record is such that because of his suspension, his record for the past 2/3 years is not available and so no decision either way can be taken then the Selection Committee should keep his case 'open' i.e. to be considered at the later date without prejudice to him because of the delay.

(c) If, on the basis of his record, he is not found fit for promotion, no further question arises.

3. Interim promotion during the pendency of the proceedings

If the person is found fit and his name is provisionally included in the select list:

- (a) During the pendency of the proceedings,

the question of promoting a person under suspension does not arise such a person shall not be promoted.

(b) In respect of a person who is not under suspension, the competent authority should take a conscious decision, after taking into consideration the nature of the charges levelled whether the person should be promoted without waiting for the conclusion of the enquiry. If it is decided that he should be so promoted such promotion will be provisional and will be reviewed on the conclusion of the investigation or enquiry.

4. On conclusion of the investigations and/or departmental enquiry:

(a) If a person is completely exonerated the following consequences should follow:

(i) If he was provisionally promoted, his provisional promotion should be treated as regular.

(ii) If such a person had become due for promotion but was not promoted, he should be promoted at the first opportunity. He should retain the seniority of his position in the select list. His pay should also be fixed at a stage which he would have reached had he been actually promoted according to his rank in the select list, but he should not be entitled to any arrears of pay on this account.

(b) If he is not completely exonerated, then his case should be reexamined and a fresh decision should be taken as to whether, in view of the result of the investigations or enquiry, he is fit to be promoted.

(i) If he is not found fit in such a reexamination and if he was provisionally promoted earlier the provisional promotion should come to an end. If he was not so promoted, no further question arises.

(ii) If he is found fit, the competent authority should indicate his revised place in the Select List. This revised place is expected to be lower than original provisional place in most cases because of the interresulting from the proceeding. If such a person was already provisionally promoted earlier, he should be deemed to be promoted accordingly to his revised position in the select list and the period his earlier promotion should be treated as fortuitous. If such a person was not already promoted, he should be promoted according to his revised position in the select list and the same consequence as in clause (a) (ii) above should follow.

(c) Cases which are kept Open should be decided expeditiously.

By order and in the name of the Governor of Maharashtra,

sd/-

(K.P. Nadkarni)

Joint Secretary to Government"

11] Mr. Kulkarni and Mr. Patil placed particular emphasis on clause 4(a)(ii) of the aforesaid Circular dated 2nd April 1976 and on such basis submit that there is no requirement for once again referring the case of Mahesh Pawar to the DPC. They submit that the only reason why Mahesh Pawar was not promoted on the earlier occasion is because of pendency of criminal prosecution. Consequent upon his acquittal, the State Government has every right to order promotion of Mahesh Pawar.

12] According to us, the Circular dated 2nd April 1976 has to be read and construed in its entirety. At least, clauses 3 and 4 of the Circular have to be construed in tandem. Clause 3, which is entitled "*interim promotion during pendency of the proceedings*" provides that if a person is found fit and his name is provisionally included in the select list, then, in respect of such person who is not under suspension, the competent authority should take a conscious decision, after taking into consideration the nature of the charges levelled, whether the person should be promoted without waiting for the conclusion of the enquiry. If it is decided that he should be so promoted, such promotion should be provisional and should be reviewed on the conclusion of the investigation or enquiry. What is important insofar as this clause is concerned is that the person concerned should be found fit and his name should have been provisionally included in the select list. As noted earlier, in the present case, Mahesh Pawar was neither found fit by the DPC nor did the Government include his name in the select list. In fact, the Government, could never have included his name in the select list since the DPC did not find him fit for promotion,

when his case was referred to the DPC.

13] Clause (4) of the DPC, applies on conclusion of investigation and/or departmental enquiry. Therein, it is provided that if a person is completely exonerated the following consequences should follow:

- (i) If such person was provisionally promoted, relying upon Clause (3) of the Circular dated 2nd April 1976, then, such provisional promotion should be treated as regular ;
- (ii) If such a person had become due for promotion but was not promoted, he should be promoted at the first opportunity. He should retain the seniority of his position in the select list. His pay should also be fixed at a stage which he would have reached had he been actually promoted according to his rank in the select list, but he should not be entitled to any arrears of pay on this account.

14] The aforesaid contemplates the the person concerned during pendency of the enquiry/investigation had been found fit by the DPC and in pursuance thereof, his name had been provisionally included in the select list by the

Government. In the present case, admittedly, Mahesh Pawar, was neither found fit by the DPC nor was his name included provisionally in the select list when his case was referred to the DPC at the stage when the criminal prosecution was pending against him. In such circumstances, there is no question of Government, straightaway seeking to promote Mahesh Pawar to the post of Accounts Officer without reference of his case to the DPC.

15] In this case, we are unable to accept the contention of the petitioner that the MAT has either ignored or misread or misconstrued the Circular dated 2nd April 1976. In fact, the impugned judgment and order is quite consistent with what is set out in the Circular dated 2nd April 1976. It is perhaps, the Government which is bent upon misconstruing the Circular dated 2nd April 1976. We make no comments on the submission of Mr. Bandiwadekar that efforts are being made to confer undue favour upon Mr. Mahesh Pawar at the cost of other deserving candidates in the zone of consideration. These are all matters for the DPC to consider.

16] Accordingly, we find no good reason to interfere with the impugned judgment and order made by the MAT. Both the petitions are therefore, dismissed. Rule in both the petitions is discharged. There shall however, be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)