

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

**WRIT PETITION NO. 5161 OF 2006
WITH
CIVIL APPLICATION NO. 1008 OF 2014**

Dr. Mohan S/o. Apparao Jadhav ...Petitioner
Versus

The State of Maharashtra
and ors. ...Respondents

**WITH
WRIT PETITION NO. 4968 OF 2006**

Dr. Sudhir s/o. Hanmantrao Deshmukh ...Petitioner
Versus

The State of Maharashtra
and ors. ...Respondents

Appearances in both petitions:

Ms Lata Patne a/w. Mr. Vinod Joshi for the Petitioners
Mr. O.M. Kulkarni, AAGP for Respondent Nos.1 and 3.
Mr. S.R. Atre for Respondent No.2-MPSC.
Mr. Ateet Shirodkar i/b Ms Simran Puri for Respondent No.4.
Mr. Rui Rodrigues for Respondent No.5.
Mr. A.M. Kulkarni a/w. Mr. S.S. Diwan for Respondent Nos.6
to 11, 13 and 15.

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

DATE OF RESERVING THE JUDGMENT : 19th APRIL 2018.
DATE OF PRONOUNCING THE JUDGMENT : 4th MAY 2018.

JUDGEMENT:

1] Heard learned counsel for the parties.

2] With the consent of and at the request of learned counsel for the parties, both these petitions are taken up for consideration together and disposed of by a common judgment and order. Even otherwise, the issues involved in both these petitions are interlinked and therefore, it is only appropriate that both these petitions are taken up and disposed of together by common judgment and order.

3] The challenge in both these petitions is to the common judgment and order dated 3rd April 2006 made by the Maharashtra Administrative Tribunal (MAT), Mumbai in O.A. Nos.1718 of 2004 and 1717 of 2004 instituted by the petitioners questioning the exclusion of the petitioners for consideration for appointment to the post of Dy. Director (Health) in pursuance to the advertisement dated 22nd October 2003.

4] Ms Lata Patne, learned counsel for the petitioners, submits that there is no dispute whatsoever that both the petitioners had met with the eligibility condition prescribed in the advertisement as also the recruitment rules for the post of Dy. Director (Health). She submits that the MPSC,

however, evolved an arbitrary shortlisting criteria mainly to favour the respondents - Dr. Satish Pawar and Dr.Smt.Archana Patil and invited only the candidates who possessed Ph.D qualification to attend the interview, thereby, excluding the petitioners from consideration for the post of Dy. Director (Health). Ms Patne submits that the petitioners are having degrees like D.C.H., M.D. and D.M., which are in fact higher than the degree of Ph.D. and therefore, even on basis of the arbitrary shortlisting criteria, the MPSC was not justified in excluding the petitioners from consideration. Ms Patne submits that such exclusion is *ex-facie* violative of Articles 14 and 16 of the Constitution of India.

5] Ms Patne submits that in any case, the respondents Dr. Satish Pawar and Dr. Smt. Archana Patil did not even meet with eligibility condition in terms of the shortlisting criteria. She submits that both the Medical Council of India as well as U.G.C. have clarified that Ph.D. Degree secured by Dr. Satish Pawar and Dr. Smt. Archana Patil are not recognized as any medical qualifications. Ms Patne submits that despite this being the position, the MPSC, has

considered the candidate of Dr. Satish Pawar and Dr. Smt. Archana Patil, but excluded the candidature of the petitioners. She submits that this is *ex-facie*, illegal, arbitrary and unconstitutional.

6] Ms Patne finally submits that Dr. Satish Pawar and Dr. Smt. Archana Patil do not even comply with the requirement of experience prescribed in the advertisement/recruitment rules. Despite this, MPSC, has selected them, but denied the petitioners even consideration for appointment to the post of Dy. Director. Ms Patne, has relied upon the communication dated 10th December 2004 issued by the MPSC itself, in which, it is clearly stated that experience cannot be counted from some deemed date, because the officer concerned, cannot be said to have actually worked on the post on the basis of deemed date.

7] For all the aforesaid reasons, Ms Patne submits that the impugned judgment and order made by the MAT be set aside and the reliefs prayed for by the petitioners in O.As. be granted. Ms Patne submits that on account of lapse of

time, it is only appropriate that the reliefs are moulded and the appointments of Dr. Satish Pawar and Dr. Smt. Archana Patil, which are *ex-facie* illegal, be set aside.

8] Mr. Atre, learned counsel for the MPSC, submits that there is nothing arbitrary or unconstitutional in the shortlisting criteria evolved by the MPSC. He submits that since in this case the post is to be filled-up was the post of Dy. Director (Health), there was no necessity of requiring the Ph.D. degree to be recognized by the Medical Council of India (MCI). He submits that the degrees of D.C.H., M.D., M.S., D.M. cannot be regarded as degrees higher than Ph.D or even equivalent. Applying the shortlisting criteria, which was legal and constitutional, the MPSC, shortlisted the candidates who possessed Ph.D. but excluded the petitioners because they did not possess Ph.D. Mr. Atre submits that the MAT has correctly appreciated this position and there is no warrant to interfere with the impugned judgment and order made by the MAT.

9] Mr. Atre submits that the reliefs applied for by the petitioners in their O.As., have by now, become infructuous

since, by now, there is no question of considering the candidatures of the petitioners for appointment to the post of Dy. Director. Mr. Atre points out that with regard to subsequent vacancies, the petitioners did apply for consideration and they were considered, but rejected. Mr. Atre points out that Article 16 of the Constitution of India confers only a right to be considered for appointment and not a right for actual appointment. For all these reasons, Mr. Atre submits that both these petitions may be dismissed.

10] Mr. A.M. Kulkarni and Mr. S.S. Diwan, learned counsel for Dr. Satish Pawar and Dr. Smt. Archana Patil, submit that the petitioners through their learned counsel Ms Patne have sought to argue a case, which was never pleaded either before the MAT or in this court. They submit that from the pleadings before the MAT and this court, it is quite clear that the petitioners had never challenged the shortlisting criteria, but had merely urged that since they have degrees like M.D., M.S., D.M., D.C.H., such degrees should be considered as higher than Ph.D. qualification, if not equivalent. They submit that the MAT, on the basis of

cogent material before it, has held that such degrees cannot be held as higher or equivalent to Ph.D. On this basis, the MAT did not find any fault with the exclusion of the petitioners. They submit that, at this stage, the petitioners cannot be permitted to attack shortlisting criteria itself, which, in any case, is legal and valid.

11] Mr. A.M. Kulkarni submits that Dr. Satish Pawar and Dr. Smt. Archana Patil were not even impleaded as parties before the MAT and therefore, there is no question of entertaining any challenge to their appointments. Mr. A.M. Kulkarni submits that there is no question of entertaining any direct challenge to the appointments of Dr. Satish Pawar and Dr. Smt. Archana Patil on the alleged ground that they do not fulfill either shortlisting criteria or criteria prescribed in advertisement/recruitment rules for appointment to the post of Dy. Director (Health).

12] Mr. A.M. Kulkarni, without prejudice, submits that Dr. Satish Pawar and Dr. Smt. Archana Patil fulfill not only the shortlisting criteria, but also the criteria prescribed in the advertisement/recruitment rules and therefore, there is no

question of interfering with their appointments as Dy. Director. For all these reasons, Mr. A.M. Kulkarni submits that these petitions may be dismissed.

13] The rival contentions now fall for our determination.

14] In the O.As., from which, the impugned judgment and order arise, the petitioner Dr. Mohan Jadhav had prayed for the following substantive reliefs:

“9) RELIEF SOUGHT:

The Applicant therefore prays that:

(a) That this Original Application may kindly be allowed.

(b) That the impugned communication dated 11.11.2004 issued by the respondent no. 2 may kindly be quashed and set aside.

(c) That the action of the respondent no. 2 rejecting the candidature to the post of Dy. Director, Class I Grade “A” and not calling for interview may kindly be declared as illegal and arbitrary.

(d) Pending hearing and final disposal of this O.A. the respondent no. 2 may kindly be directed to allow the applicant to attend the interview conducted by the respondent no. 2 for the post of Deputy Director, Health Services, Class I, Grade “A”.

(e) That the respondent no.2 may kindly be directed to allow the applicant to attend the interview of the post of Dy. Director, Health Services, Class I, Grade “A”.

(f) That the Respondent no. 2 may kindly be directed that not to declare the results of interview till the pendency of O.A.

(g) Ad-interim in terms of prayer clause d, 3 & f may kindly be granted.

(h) Record and Proceedings may kindly be called for.

(i) Any other suitable relief in favour of the applicant may kindly be granted in the interest of justice."

15] The petitioner Dr. Sudhir Deshmukh had also prayed for substantively the same reliefs.

16] Besides, we have also perused the O.As. instituted by Dr. Mohan Jadhav and Dr. Sudhir Deshmukh before the MAT and we find that there was no serious challenge to the shortlisting criteria evolved by the MPSC, but rather, the contention of two petitioners was that since they possess the qualifications like M.D. M.S., D.C.H., D.M., even they must be regarded as fulfilling the shortlisting criteria and on this basis, even they ought to have been called to attend the interview for appointment to the post of Dy. Director. The issue, which they have raised in their O.As. was that the qualifications of D.C.H., M.D., M.S., D.M., must be regarded as better or at least equivalent to Ph.D. and

on this basis, their exclusion by the MPSC from the interviews for appointment to the post of Dy. Director (Health) was not legal and valid.

17] Since, such were the pleadings in the O.As., we are not inclined, at this stage, to entertain any challenge to shortlisting criteria evolved by the MPSC. At the same time, we may not be taken as having approved such shortlisting criteria. Rather, we feel that it will be appropriate if the issue as regards the validity of such shortlisting criteria is kept open to be decided in an appropriate case, if and when, any occasion for the same, arises. We say this because, the post under consideration is that of a Dy. Director in health services. In terms of the advertisement, the essential qualifications prescribed were M.B.B.S. Degree of a statutory university or any other qualification specified in the first or second schedule to the Indian Medical Council Act, 1956 and a post-graduate degree or a post-graduate diploma specified in the first or second schedule to the Indian Medical Council Act, 1956 or any other qualification recognized as equivalent thereto by the Medical Council of India. There was no reference to an

Ph.D. qualification. By way of a shortlisting criteria, though, it is open to the MPSC to prescribe some higher qualification, taking into consideration the nature of the post, a serious question does arise as to whether candidates possessing a Ph.D., which is admittedly, not any qualification recognized by the Medical Council of India, could have been made as the basis for shortlisting and on such basis, the candidates who possess medical qualifications like M.D., M.S., D.C.H., D.M., could have been excluded from consideration. The only reason we are not going into this issue in these petitions is because the petitioners, in their O.As., had not really challenged the shortlisting criteria, but had contended that even they fulfill the shortlisting criteria. However, we leave this issue expressly open to be decided in an appropriate case, if and when, occasion therefor arises.

18] Ms Patne has then contended that since the Ph.D., qualification possess by Dr. Satish Pawar and Dr. Smt. Archana Patil was never recognized by the Medical Council of India, the same, could not have been made the basis for shortlisting. Again, this is nothing but an indirect challenge

to the shortlisting criteria. As observed earlier, from the pleadings in the O.As., there was no challenge to the shortlisting criteria. Therefore, as observed earlier, we do not propose to entertain a challenge to the shortlisting criteria, at this stage.

19] In terms of advertisement for appointment to the post of Dy. Director (Health), apart from, the educational qualifications of M.B.B.S. and post-graduate degree, the candidate to be considered as qualified, must have the following experience:

“(3) Experience of health administration, medical relief or family welfare under government of Maharashtra, Zilla Parishad or Local body for not less than 5 years in the case of those holding post-graduate degree & for not less than 7 years in the case of those holding post-graduate diploma, gained after acquiring the post-graduate degree or post-graduate diploma as the case may be and out of which experience for 4 years shall be in a Class - I post or in a post equivalent thereto.”

20] The requirement of educational qualification as well as experience had to be fulfilled on 12th November 2003, which was stated as the last date for receipt of applications in pursuance of the advertisement.

21] Ms Patne has contended that Dr. Satish Pawar was promoted temporarily on a Class I post of District Health Officer on 7th October 1996. He was regularized on 31st December 1998. From this, Ms Patne contends that Dr. Satish Pawar had experience of only 4 years and 3 months in a Class-I post. On this ground, Ms Patne submits that Dr. Satish Pawar was not even eligible to be appointed as Dy Director and therefore, this court should at least mould the relief and set aside the appointment of Dr. Satish Patil as Dy. Director.

22] Ms Patne also submits that Dr. Archana Patil was temporarily promoted on 31st July 2002 in the District Health Officer cadre, which is a Class-I post. She submits that this means that Dr. Archana Patil had experience of hardly 1 year in a Class - I post as against the requirement of experience of 5 years.

23] Ms Patne submits that the respondents have been trying to justify the otherwise unjustifiable appointment of Dr. Archana Patil by contending that though Dr. Archana Patil was promoted Class -I post only on 31st July 2002,

such promotion was with effect from 1st December 2003. She submits that the MPSC, by clarification dated 10th December 2004 has itself stated that experience cannot be computed on basis of such deemed date of promotion. For this reason, Ms Patne submits that the appointment of Dr. Archana Patil as Dy. Director is *ex-facie* illegal and this court ought to mould the relief and set aside such appointment.

24] Mr. A.M. Kulkarni, learned counsel for Dr. Satish Pawar and Dr. Smt. Archana Patil , at the outset had submitted that it is not open for the petitioners to question the appointments of Dr. Satish Pawar and Dr. Smt. Archana Patil in the present petitions, which arise out of challenge to the order made by the MAT. He points out that before the MAT, there was no challenge to the appointments of Dr. Satish Pawar and Dr. Smt. Archana Patil, who had in fact, not been impleaded as parties before the MAT. He therefore, submits that no direct petitions to question the appointments of Dr. Satish Pawar and Dr. Smt. Archana Patil would lie or in any case, could be entertained.

25] Without prejudice, Mr. A.M. Kulkarni submits that if proper opportunity is granted to Dr. Satish Pawar and Dr. Smt. Archana Patil, they will be in a position to satisfy that they fulfill the requirements as regards the experience prescribed in the advertisement.

26] Mr. A.M. Kulkarni submits that from the service book of Dr. Satish Pawar, it is clear that Dr. Pawar was appointed to a Class - I post on 8th October 1996 and therefore, on the cut off date 12th November 2003, Dr. Pawar had more than 5 years experience in the Class - I post. Mr. A.M. Kulkarni submits that though Dr. Archana Patil promoted to a Class-I post on 31st July 2002, such promotion was made effective from 1st December 2003. He relies upon the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982, which, according to him, provides that where a deemed date of appointment is assigned then, the length of his service in the said post shall be computed as commencing from that date.

27] Insofar as the experience of Dr. Archana Patil is concerned, at least *prima facie*, it is difficult to accept the

contention of Mr. A.M. Kulkarni that the requirement of experience is to be computed on the basis of some deemed date. The recruitment rules and the advertisement speak of 5 years experience in a Class-I post and this, at least, *prima facie*, means actual working experience in a Class-I post and not so called non-working experience on the basis of deemed date.

28] At least, *prima facie*, Rule 5 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 will not apply in the matter of determination of actual experience. The 1982 Rules deal with the aspect of regulation of seniority. Rule 5 deals with assignment of deemed dates of appointments. In the context of determination of seniority, Rule states that the length of service should be computed as commencing from the deemed date which may have been assigned. At least, *prima facie*, this fiction cannot be stretched to the extent of computing experience, even though, an officer may not have even worked on the Class – I post.

29] In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It also cannot be extended by importing another fiction. These principles are well settled. **(See: State of West Bengal vs. Sadam K. Bormal - (2004) 6 SCC 59).**

30] Besides, we find that at least *prima facie*, even the MPSC had expressed the opinion that experience cannot be computed on the basis of any deemed date.

31] We do not propose to go much deeper into the issue as to whether Dr. Satish Pawar and Dr. Smt. Archana Patil , did fulfill the requirements as to experience as prescribed in the advertisement/recruitment rules as on the cut off date of 12th November 2003, because, as pointed out by Mr. A.M. Kulkarni, such an issue ought not to be permitted

to be raised for the first time in these petitions, without exhaustion of the remedy available before the MAT.

32] Mr. A.M. Kulkarni has also submitted that in case opportunity is granted to Dr. Satish Pawar and Dr. Smt. Archana Patil , they will place material on record with regard to their experience as on the cut off date.

33] Therefore, we dispose of these petitions by granting liberty to the petitioners, if they so desire, to institute O.As., before the MAT to question the appointments of Dr. Satish Pawar and Dr. Smt. Archana Patil to the post of Dy. Director (Health), on the ground that they did not possess the prescribed experience as on the cut off date and therefore, were not even eligible to be selected /appointed to the post of Dy. Director.

34] If such, O.As., are instituted within three months from the today, then, we request the MAT to dispose of them on merits without going into the question of limitation. This is because the petitioners have been *bonafide* pursuing the issue of their non-consideration for appointment to the

post of Dy. Director and consequently questioning the appointment of Dr. Satish Pawar and Dr. Smt. Archana Patil as Dy. Directors in pursuance of advertisement dated 22nd October 2003.

35] In a sense, therefore, liberty which have now granted is in the nature of remand to the MAT, with liberty to the original applicants to amend their O.As., to implead Dr. Satish Pawar and Dr. Smt. Archana Patil and to challenge their appointments on the ground that they lacked the requisite experience on the cut off date. This is why, we request the MAT to decide O.As. on merits, if instituted by the petitioners within three months from today.

36] We also clarify that our observations on the aspect of experience of Dr. Satish Pawar and Dr. Smt. Archana Patil are only *prima facie* and the MAT to dispose of the O.As., if instituted within three months, uninfluenced, by any such observations.

37] These petitions are therefore, disposed of with the following order:

(a) The impugned common judgment and order dated 3rd April 2006 made by the MAT is not interfered with;

(b) The petitioners, if they so chose, are granted liberty to institute original applications within three months from today before the MAT to question the appointments of Dr. Satish Pawar and Dr. Smt. Archana Patil to the post of Dy. Director (Health) in pursuance of advertisement dated 22nd October 2003 and seek consequential reliefs therein.

(c) If such original applications are indeed instituted within three months from today, the MAT, is requested to consider the same on merits and dispose of them as expeditiously as possible, without being influenced by the *prima facie* observations made in this judgment and order;

(d) Rule, in each petition, is disposed of in the aforesaid terms. There shall, however, be no order as to costs.

38] In view of disposal of main petitions, the pending civil application (s), if any, do not survive and the same are also disposed of.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)