

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

WRIT PETITION NO. 2170 OF 2015

Vikas Dhanaji Sawant	...Petitioner
Versus	
The State of Maharashtra & Ors.	...Respondents

Ms Neeta Gaikwad for Petitioner.
Mr. N. C. Walimbe – AGP for State - Respondents.

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

DATE : 05 JUNE 2018

ORAL JUDGMENT :

- 1] Heard the learned counsel for the parties.

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

- 3] The challenge in this petition is to the judgment and order dated 17th April 2014 made by the Maharashtra Administrative Tribunal (MAT) dismissing the petitioner's Original Application No. 80 of 2013 seeking appointment to a class IV post in government service on account of

retirement of his father who was also a class IV employee.

4] The petitioner's father was holding a class IV post at the Government Central Press at Mumbai. Before his retirement w.e.f. 1st September 2002, the petitioner's father made an application dated 4th January 2002 requesting the respondent no. 3 (The Manager, Government Central Press, Mumbai) to appoint his son i.e. the present petitioner to a class IV post. For this purpose, the petitioner and his father relied upon GRs dated 14th April 1981 and 6th March 1990. The petitioner contends that in terms of these GRs, the wards of class IV employees are entitled to be directly recruited to class IV posts in government service subject no doubt to the fulfillment of the conditions prescribed in GR dated 14th April 1981.

5] Ms Gaikwad, the learned counsel for the petitioner submits that the petitioner fulfills all the conditions prescribed in the GR dated 14th April 1981 and therefore the respondents were not justified in denying direct recruitment to the petitioner. She submits that GRs dated 14th April 1981 and 6th March 1990 make it quite clear that

direct recruitment is to be offered to the wards of class IV employees in government service if they fulfill the eligibility conditions prescribed in the GR dated 14th April 1981. She submits that such direct employment has in fact been offered to at least six candidates at the Government Central Press itself and this information was supplied to the petitioner under the Right to Information Act by communication dated 5th October 2012 (Exhibit 'I' at page 37).

6] Ms Gaikwad submits that the petitioner is meritorious since he possesses the B.Com. Qualification. She submits that the petitioner belongs to the scheduled caste category and this is also relevant consideration which has unfortunately been ignored by the respondents. In particular, Ms Gaikwad stresses upon GRs dated 14th April 1981 and 6th March 1990 to submit that the petitioner, in terms of the said GRs is entitled to direct recruitment to a class IV post in government service and the denial by the respondents is *ex facie* illegal and arbitrary. Ms Gaikwad also submits that the petitioner has been discriminated against because similar benefits have been granted to

persons referred to in communication dated 5th October 2012, which persons, are in no different position than the petitioner. For all these reasons, Ms Gaikwad submits that the impugned judgment and order of the MAT warrants interference.

7] Mr. Walimbe, the learned AGP submits that the petitioner seeks to misconstrue the scope and import of GRs dated 14th April 1981 and 6th March 1990. He submits that the two GRs if read in conjunction with one another merely provide for relaxation in the matter of registration with the local employment exchange. He submits that the two GRs, unlike in the case of compassionate appointments do not provide for direct employment to wards of class IV government employees. He submits that the interpretation suggested by the petitioner might amount to some sort of reservation in favour of the wards of government employees and such reservation only on the grounds of descent will be impermissible under the constitutional scheme.

8] Mr. Walimbe submits that the cases of the persons

referred to in communication dated 5th October 2012 were considered on their own merits after such persons took part in the regular selection process. He submits that the only concession granted to the said six persons was in the matter of registration with the local employment exchange. For all these reasons, Mr. Walimbe submits that there is absolutely no error in the view taken by the MAT and therefore this petition may be dismissed with costs.

9] The rival contentions now fall for our determination.

10] The GR dated 14th April 1981 in fact acknowledges that there is a mandatory requirement regards registration with the employment exchange when it comes to appointments to class IV posts in government service. However, subject to the fulfillment of the prescribed conditions prescribed in the GR itself, the wards of class IV employees are exempted from compliance with such requirement. There is nothing in the GR dated 14th April 1981 which suggests that the wards of class IV government employees are entitled to the direct recruitment to class IV posts bypassing the normal selection procedures prescribed

in the recruitment rules or bypassing the constitutional requirements prescribed by Articles 14 and 16 of the Constitution of India. The only limited relaxation granted to wards of class IV employees is in the matter of registration with the local employment exchange, which condition, would otherwise be insisted upon in case of other applicants desirous of seeking employment to class IV posts in government service. The MAT, has quite correctly interpreted and construed the GR dated 14th April 1981 and there is really no jurisdictional error or perversity so as to warrant interference with the view taken by the MAT.

11] The GR dated 6th March 1990 has to be construed in conjunction with the GR dated 14th April 1981. The said GR at the highest suggests that the candidatures of the wards of class IV employees may be considered for appointment if they fulfill the conditions set out in the GR dated 14th April 1981. However, there is nothing in GR dated 6th March 1990 to suggest that there is any right vested in the wards of class IV employees to secure direct recruitment to class IV posts in government service bypassing the normal selection procedures or the normal selection channels.

12] Even if we are to assume that there is some ambiguity in the two GRs, the ambiguity, if any, has to be necessarily resolved by interpreting the two GRs consistent with the scheme enshrined in Articles 14 and 16 of the Constitution of India. Any interpretation which might render the two GRs *ultra vires* or unconstitutional is required to be avoided. The interpretation suggested by Ms Gaikwad, the learned counsel for the petitioner will possibly, render the two GRs *ultra vires* or unconstitutional. This is because the interpretation as suggested by her, will promote discrimination only on the grounds of descent, which is specifically prohibited under Article 16 (2) of the Constitution of India.

13] Article 16 of the Constitution of India provides for equality of opportunity in matters of public employment. It lays down there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(2) specifically provides that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of

them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Therefore, a claim to employment in government service bypassing the regular selection channels or selection procedures only on the ground that the applicant is a ward of a class IV employee will virtually amount to discrimination against other applicants who may not be wards of government employees, in the matter of employment or appointment in government service. The interpretation as suggested by the petitioner, if accepted, will fall foul of the constitutional mandate in Article 16(2). Such an interpretation has therefore, rightly not been accepted by the MAT.

14] In ***Secretary, State of Karnataka & Ors. vs. Umadevi (3) & Ors. [(2006) 4 SCC 1]***, the Hon'ble Supreme Court has held that the power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (see *Basu's Shorter Constitution of India*). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of

persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognised that no government order, notification or

circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

15] In *Umadevi* (supra), the Hon'ble Supreme Court has emphasised that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a

proper competition among qualified persons, the same would not confer any right on the appointee. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

16] In ***Gazula Dasaratha Rama Rao vs. State of Andhra Pradesh & Ors. [(AIR 1961) SC 564 (V 48 C 82)]***, the Hon'ble Supreme Court has held that Section 6(1) of the Madras Hereditary Village Offices Act, in so far as it makes discrimination on the ground of descent only, is violative of the fundamental right under Article 16(2) of the Constitution and is void. It says that in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified *from among the families of the last holders of the offices which have been abolished*. This is discrimination on the ground of descent only and is in contravention of Article 16(2) of the Constitution.

17] In ***Yogender Pal Singh & Ors. vs. Union of India***

& Ors. [(1987) 1 SCC 631], the Hon'ble Supreme Court has held that any preference shown in the matter of public employment on the grounds of descent only has to be declared as unconstitutional. While it may be permissible to appoint a person who is the son of a police officer who dies in service or who is incapacitated while rendering service in the Police Department, a provision which confers a preferential right to appointment in a department on the descendants or other relatives of persons either in service or retired from service in that department merely because they happen to be the children or wards or other relatives of such persons would be contrary to Article 16 of the Constitution because that will result in discrimination to others as they do not happen to be sons of such persons. Opportunity to get into public service should be extended to all the citizens equally. Therefore, Rule 12.14(3) of the Punjab Police Rules, 1934 which authorised the granting of preference in favour of sons and near relatives of persons serving in the police service became unconstitutional on the coming into force of the Constitution.

18] In **I. G. (Karmik) & Ors. vs. Prahalad Mani**

Tripathi [(2007) 6 SCC 162], the Hon'ble Supreme Court has held that an employee of a State enjoys a status. Recruitment of employees of the State is governed by the rules framed under a statute or the proviso appended to Article 309 of the Constitution of India. In the matter of appointment, the State is obligated to give effect to the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India. All appointments, therefore, must conform to the said constitutional scheme. Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by the Supreme Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion.

19] In ***V. Sivamurthy vs. State of Andhra Pradesh &***

Ors. [(2008) 13 SCC 730], the Hon'ble Supreme Court has held that Article 16 of the Constitution bars discrimination in employment on the ground only of descent. *If the service rules or any scheme of the Government provides that whenever a government servant retires from service, one of his dependants should be given employment in his place, or provides that children of government servants will have preference in employment, that would squarely fly in the face of prohibition on the ground of descent. Employment should not be hereditary or by succession.*

20] Applying the principles laid down in the aforesaid decisions, we are unable to accept the petitioner's contention that the two GRs confer any right upon the petitioner to insist upon direct employment to class IV post in government service bypassing the recruitment rules or the normal selection procedures only on the ground that the petitioner is a ward of a retired class IV employee. Such a contention, if accepted, will fly in the face of the prohibition in Article 16(2) of the Constitution as held by the Hon'ble Supreme Court in the case of *V. Sivamurthy*

(supra).

21] The second contention based upon alleged discrimination *qua* the persons referred to in communication dated 5th October 2012 also does not deserve acceptance. From the perusal of the communication dated 5th October 2012 it is not quite clear as to whether the six persons referred to therein were offered appointment at the Government Central Press without being required to go through the prescribed selection procedures. Mr. Walimbe, the learned AGP contends that the said six persons were not only qualified in terms of the recruitment rules prescribed but further, the said six persons went through the prescribed selection procedures and were only thereafter appointed. He submits that by way of communication dated 5th October 2012, the petitioner was only informed that these six persons were the beneficiaries of the GRs which exempted the wards of class IV employees from obtaining registration with the local employment exchange.

22] In any case, now that we have held that there is nothing in the two GRs which vests or creates any right in

the wards of class IV employees to secure direct appointment to government service, we are unable to uphold Ms Gaikwad's contention based upon any alleged discrimination. It is settled principle that equality is a positive concept and there could be no equality of illegalities. Therefore, even if we were to assume that these persons referred in communication dated 5th October 2012 came to be appointed to government service only on the ground that they were the wards of class IV employees, that by itself, will not entitle the petitioner, to plead discrimination or breach of Article 14 of the Constitution of India.

23] The object of Article 14 of the Constitution is not to perpetuate illegality and the said Article does not envisage negative equalities. Even if the appointments have been made by mistake or wrongly, that by itself, does not confer any right upon another person who insist upon perpetuation of such illegality (See: *Kulwinder Pal Singh & Anr. vs. State of Punjab & Ors.* [(2016) 6 SCC 532] and *State of U.P & Ors. vs. Rajkumar Sharma & Ors.* (2006) 3 SCC 330).

24] In ***Secretary, Jaipur Development Authority, Jaipur vs. Daulat Mal Jain & Ors. [(1997) 1 SCC 35]***, the Hon'ble Supreme Court has held that Article 14 has no application or justification to legitimise an illegal and illegitimate action. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to deny the same benefit. The rational relationship and legal back-up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derive benefit by illegality and had escaped from the clutches of law, similar persons cannot plead, nor the court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or *ultra vires* acts.

25] In ***Coromandel Fertilizers Ltd. v. Union of India [1984 Supp SCC 457]*** the Hon'ble Supreme Court in paragraph 13 has held that wrong decision in favour of any party does not entitle any other party to claim the benefit

on the basis of the wrong decision. In that case, one of the items was excluded from the schedule, by wrong decision, from its purview. It was contended that authorities could not deny benefit to the appellant, since he stood on the same footing with the excluded company. Article 14, therefore, was pressed into service. The Hon'ble Supreme Court had held that even if the grievance of the appellant was well founded, it did not entitle the appellant to claim the benefit of the notification. A wrong decision in favour of any particular party does not entitle another party to claim the benefit on the basis of a wrong decision. Therefore, the claim for exemption on the anvil of Article 14 was rejected.

26] In ***Chandigarh Admn. v. Jagjit Singh [(1995) 1 SCC 745]***, the Hon'ble Supreme Court has held that the mere fact that the respondent-Authority had passed a particular order in the case of another person similarly situated, can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner.

If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order could not be made the basis of issuing a writ compelling the respondent-Authority to repeat the illegality to cause another unwarranted order. The extraordinary and discretionary power of the High Court under Article 226 cannot be exercised for such a purpose.

27] In ***State of Bihar vs. Upendra Narayan Singh & Ors. [(2009) 5 SCC 65***, the Hon'ble Supreme Court has held that by now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or illegality has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order.

28] A host of other decisions in that context have laid the

same principle. It is not necessary to burden the judgment any further. Suffice it to hold that the illegal allotment founded upon *ultra vires* and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. For all the aforesaid reasons, we see no merit in the petitioner's contention based upon discrimination or violation of Article 14 of the Constitution of India.

29] Upon cumulative consideration of all facts, circumstances and the constitutional scheme, we see no good ground to interfere with the impugned judgment and order. This petition is liable to be dismissed and is hereby dismissed. Rule is discharged. The interim order, if any, stands vacated. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

CHANDKA