

DDR

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6814 OF 2017

Jitendra Gotugir Bawa & 67 others ...Petitioners

vs.

The State of Maharashtra & 3 others ...Respondents

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Mr. Rajiv Chavan, Senior Advocate i/by Mr. Arun H. Palekar,
Advocate for the petitioners.

Mr. O.M. Kulkarni, AAGP for the State / Respondents.

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**CORAM : SMT. V.K. TAHILRAMANI ACTING C.J.
AND M.S.KARNIK, J.**

RESERVED ON : 20th DECEMBER, 2017.

PRONOUNCED ON : 10th JANUARY, 2018.

ORDER (PER : M.S. KARNIK, J.) :-

Rule. Rule made returnable forthwith by consent.

2. The challenge in this petition filed under Article 226 of the Constitution of India by 68 petitioners who are working as ward boys in the health services of the respondents is to an

order dated 28/9/2016 passed by the Maharashtra Administrative Tribunal (“the Tribunal” for short) in O.A.No. 913 of 2015 thereby dismissing O.A. filed by the petitioners. Before the Tribunal the petitioners had challenged the action on the part of the respondents in cancelling entire selection process in which the petitioners were appointed.

3. By an advertisement dated 4/5/2007 issued by the respondent No.1, 67 vacancies viz. 51 posts of ward boy, 4 posts of accident servant and 12 posts of office peon were advertised to be filled up on regular basis. Upon scrutiny 5047 applications were found to be eligible and the candidates were allowed to appear for written examination conducted on 15/9/2008. On 7/11/2008, call letters were issued to the candidates who were successful in the written test including the petitioners. Interviews were conducted on 20th and 21st November, 2008. The petitioners came to be appointed by various orders of appointment issued between 26/11/2008 to 26/12/2008. The petitioners started working on the said post.

4. A question came to be raised on the floor of the Assembly during the session held on 28/12/2008 bringing to light irregularity in the appointment process of the petitioners. The respondents appointed a three members committee to go into the question as to whether there is any irregularity in the appointment process. The report of the inquiry was submitted on 24/3/2009. Based on the said report the respondent No.3 appointed Joint Director (Financial & Administration) as a one member committee to hold a detailed inquiry by an order dated 22/4/2009. An inquiry came to be held on 19/5/2009 and report was submitted by Dr. Nitin Patil, Joint Director to the respondent No.3. Based on the said report, orders terminating the services of the petitioners were issued on 30/5/2009 and the petitioners came to be terminated on 2/6/2009 by issuing an order to that effect. The petitioners filed O.A.No.812/2009 before the Tribunal challenging the said orders. The Tribunal was pleased to quash and set aside the termination orders and directed reinstatement as the orders were passed in breach of the principles of natural justice. Liberty was granted to the

respondents by the Tribunal to issue appropriate order after following due process. This Court in Writ Petition No.5154/2011 by an order dated 8/7/2011 was pleased to dismiss the petition filed by the respondents.

5. The petitioners came to be reinstated and they were posted at different places. Even the challenge of the respondents before the Apex Court to the order dated 8th July, 2011 passed by this Court failed.

6. Learned Senior Counsel Shri Rajiv Chavan for the petitioners submitted that taking undue advantage of the directions issued by the Tribunal on 9/2/2011, after a span of almost three years from the date of issuance of earlier termination orders, the respondents issued fresh show cause notice dated 31/1/2012 to the petitioners on the same cause of action to show cause as to why the petitioners should not be terminated. Learned Senior Counsel invited out attention to the reply dated 6/2/2012 filed by the petitioners to the said show cause notice, requesting the respondents to supply the

documents so as to enable them to file a detailed and effective reply to the show cause notice. As there was no reply from the respondents, petitioners filed another reply on 14/2/2012.

7. Learned Senior Counsel submits that as there was no response to the said reply, the petitioners bonafide believed that the respondents were satisfied with the explanation offered by the petitioners to the show cause notice. In the submission of the learned Senior Counsel Shri Chavan, firstly, there was delay in issuing show cause notice and secondly, belated action on the reply filed by the petitioners vitiates the impugned order.

8. Learned Senior Counsel submits that the petitioners were constrained to file O.A.No.269/2015 before the Tribunal for appropriate directions to the respondents to treat the petitioners as regular/permanent employees of the Government with effect from 26/11/2008 with all consequential benefits. O.A.No.269/2015 came to be disposed of on the basis of the statement made by Dr. Patil, Civil Surgeon, Civil Hospital, Thane that all benefits including annual increments, arrears of pay, if

any, will be paid to the petitioners for the period actually worked by the petitioners. On the basis of the statement the O.A. was disposed of.

9. At this juncture it would be material to mention that in the order dated 21/10/2015 passed by the Tribunal, it was reflected that the Presenting Officer placed on record a bunch of orders dated 12/10/2015 terminating the services of the petitioners.

10. Learned Senior Counsel Shri Chavan submits that as a counter-blast to the filing of O.A. No.269 of 2015, the respondent No.1 issued a show cause notice dated 12/8/2015 almost on the same materials stated in earlier show cause notice which was found to be illegal by the Tribunal in the earlier round of litigation. It is submitted that along with show cause notice dated 12/8/2015, the report of Dr. Patil dated 19/5/2009 was annexed. Though the issuance of show cause notice itself was illegal nevertheless the petitioners filed their reply to the

said show cause notice. By an order dated 12/10/2015 the respondents terminated the services of the petitioners.

11. The petitioners thereupon filed O.A.No.913 of 2015 before the Tribunal for setting aside the order terminating the services of the petitioners. The Tribunal was pleased to dismiss the O.A.

12. Learned Senior Counsel Shri Chavan contended that the respondents were not justified in issuing show cause notice on 31/1/2012 on the same materials which was the basis of the order of termination dated 2/6/2009 set aside by the Tribunal. Learned Senior Counsel Shri Chavan would submit that in any case there is a gross and unexplained delay of three years in issuing the show cause notice which would vitiate the termination orders. Learned Senior Counsel would contend that though Dr. Patil's report of the year 2009 was very much available when the show cause notice was issued in 2012, supplying the same to the petitioners along with another show

cause notice dated 12/8/2015 is obviously a counter-blast to O.A.No.269 of 2015 which was filed by the petitioners before the Tribunal. Learned Senior Counsel submits that though repeated requests made by the petitioners to furnish them the materials which formed the basis of the issuance of show cause notice, the report was given to the petitioners only on 12/8/2015. Learned Senior Counsel objects to the said report of Dr. Patil and submits that the report of Dr. Patil cannot be relied upon as the same is unsigned. Learned Senior Counsel vehemently contends that the respondents ought to have examined the alleged irregularities in each case and analyzed the extent of the same before causing termination of each petitioner. In his submission, no hearing was given to the petitioners before terminating their services. Learned Senior Counsel submits that there is no finding recorded that it is the petitioners who have played mischief or are guilty of suppression of material of facts so as to render their appointments illegal. In the submission of the learned Senior Counsel, the Tribunal has held that the appointments of the

petitioners suffer from irregularities and not from illegality, therefore, the order is harsh. Learned Senior Counsel would submit that only because the questions were raised on the floor of the Assembly on 27th and 28th December, 2008 that the respondents were swayed by the alleged irregularities. Learned Senior Counsel Shri Chavan pointed out that after regular selection process the petitioners were selected and therefore, the Tribunal committed an error in observing that the petitioners were not appointed on substantive basis but only on Ad-hoc basis. In the submission of learned Senior Counsel, reading of the report itself would go to show that the petitioners are not responsible for any lapse and on the contrary delay occasioned in taking action in this regard renders the termination orders illegal. Learned Senior Counsel submitted that the reports of the Minutes of Meeting dated 19/9/2015 which is observed in the termination order has not been supplied to the petitioners and therefore, also the impugned action is unsustainable. Learned Senior Counsel relied upon the judgment of the Apex Court in the case of **Shri B.D. Gupta Vs. State of Haryana (1973) 3 SCC**

149, to contend that it is essential for a show cause notice to indicate the precise scope of the notice and also to indicate the points on which the officer concerned is expected to give a reply. Learned Senior Counsel relying on the said decision would contend that the show cause notice issued to the petitioners is vague. The order of termination is passed without giving any opportunity to the petitioners to make out their case as admittedly no hearing was given to the petitioners.

13. Learned Senior Counsel Shri Chavan also relied upon the decision of the Apex Court in the case of **Girjesh Shrivastava and others Vs. State of Madhya Pradesh and others (2010) 10 SCC 707**, in support of his submission that setting aside the entire selection on the ground that there has been grave irregularity in the selection process is rather sweeping one and even if there were some illegal beneficiaries from the selection process, they should have been weeded out instead of striking down the entire selection process.

14. Learned Senior Counsel Shri Chavan also relied upon the decision of the Apex Court in the case of **Prem Singh and others Vs. Haryana State Electricity Board and others (1996) 4 SCC 319**, to support his contention that even with respect to the appointments made against vacancies which arose because of deaths etc., a lenient view can be taken and on consideration of expediency and equity they need not be quashed.

15. Learned AGP on the other hand supported the order passed by the Tribunal. He submits that by an order dated 9/2/2011, the Tribunal had set aside the termination only on the ground that no show cause notice was given to the petitioners. The Tribunal nevertheless granted the liberty to follow the due procedure in the event the respondents desire to terminate the services of the petitioners. In his submission, show cause notice was accordingly issued in the year 2012. He further submits that in compliance with the principles of natural justice, the report dated 19/5/2009 of Dr. Patil was made available to the petitioners under the show cause notice dated 28/8/2015.

After considering the representation, the respondents have terminated the services of the petitioners. In the submission of the learned AGP, the appointment letters of the petitioners clearly mentioned that the said appointments were 'Ad-hoc' and can be brought to an end without any notice. In his submission, pursuant to a detailed inquiry it is concluded that there were some irregularities in the entire selection process and therefore the decision was taken to scrap the entire selection process. Learned AGP further relied upon the Government Resolution dated 12/10/1993 which provides that if an employee is appointed in violation of various provisions, his services can be terminated. Learned AGP invited our attention to the report submitted by Shri Nitin Patil in the year 2009 and pointed out the various irregularities noticed in the selection process. In his submission, as there were numerous irregularities in the selection process it was not possible for the respondents to come to a definite conclusion that the petitioners' selection process was fair. In the submission of the learned AGP, there was no alternative for the respondents but to scrap the entire selection

process because it was not possible to ascertain whether the petitioners were selected in a fair and transparent selection process. Learned AGP relied upon the following decisions of the Apex Court in support of his submissions :-

- (i) **Ashwani Kumar & ors. Vs. State of Bihar & ors., (1997) 2 SCC 1 ;**
- (ii) **Indian Council of Agricultural Research & anr. Vs. T.K.Suryanarayan & ors., AIR 1997 SC 3108 ;**
- (iii) **Jitendra Kumar & ors. Vs. State of Haryana & anr., (2008) 2 SCC 161 ;**
- (iv) **Lila Dhar Vs. State of Rajasthan & ors., (1981) 4 SCC 159 ;**
- (v) **Inderpreet Singh Kahlon & ors. Vs. State of Punjab & ors. (2006) 11 SCC 356.**

16. We have considered the submissions of the learned Counsel. The advertisement was issued on 19/4/2007 to fill up a total 67 Class IV posts and not 77 posts. The appointment letters were issued on 26/11/2008 in which it was clearly mentioned that the said appointments were on 'Ad-hoc' basis and can be brought to an end without any notice. Pursuant to inquiry conducted into the selection process the petitioners were

terminated by an order dated 22/11/2009. The Tribunal was pleased to set aside the termination orders on the ground that the petitioners were terminated without following due process of law. Liberty was granted to the respondents to adopt due procedure if they desired to terminate the services of the petitioners. A show cause notice came to be issued in 2012. Though immediate action was not taken on the show cause notice, a fresh show cause notice dated 12/8/2015 was issued along with the copy of the report dated 19/5/2009 of the Joint Director of Health Services Shri Nitin Patil. Some of the irregularities noticed by the Tribunal in the selection process as indicated by the report of Shri Patil are thus :-

“(1) The vacant posts were not calculated correctly. Some hospitals in the District were not started, but the posts in those Hospitals were filled. A lot of surplus staff from other hospitals was available, but the vacant posts were filled by the aforesaid recruitment.

(2) The advertisement dated 19.4.2007 did not mention any horizontal reservation, including that for women. This was in violation of various G.Rs regarding reservation for women, Sports persons etc. This was mentioned in the earlier report dated 25.3.2009 submitted by the Respondent no.1 to the Respondent no.3.

(3) Many persons who had crossed the age limit on the date of advertisement were selected, which show that there was no proper scrutiny of the applications received during the selection process.

(4) Separate roster registers for Ward Boys/Casualty Attendants on one hand and Peons on the other hand were kept. The posts were required to be worked out category wise, i.e. for vertical and horizontal reservation for these two cadres. However, the same roster for Ward Boys and Peons was used. After the written examination was held on 12.10.2008 and oral interviews were held on 20/21.11.2008, the reservation for various posts was changed on 25.11.2008. After the selection process was completed, reservation was changed. Such a mistake cannot be rectified later.

(5) Candidates belonging to backward classes, were appointed without asking for Caste Validity Certificates.

(6) In the advertisement dated 19.4.2007, only 1 post of Casualty Attendant was reserved for S.C. However 4 S.C. Candidates were selected for the post of Ward Boys, though there was no reservation for S.C candidates for the post of Ward Boys.

(7) There were large scale irregularities in conducting the written examination. It was found that it could not be ascertained as to whether all the candidates, who had applied, were informed about the date of the written examination. There was no record of the number of question papers, viz. how many were printed, how many were used and how may remain unused. It was not clear as to who had examined the answer books.”

17. Insofar as the contention of the learned Senior Counsel that the petitioners are no way concerned with these irregularities, no doubt, the Apex Court has held that the efforts should be made out to segregate the beneficiaries of one or other irregularities, if any, from others. The Tribunal while dealing with this aspect in para 9 has observed thus :-

“Hon'ble Supreme Court has emphasized that as far as possible, efforts should be made to segregate tainted candidates from the non-tainted candidates and the whole selection process should not generally be quashed. In the present case, even the Respondents are not claiming that the Applicants are 'tainted'. However, the selection process was held in violation of legal and Constitutional provisions. Ignoring the issue of number of vacancies and the fact that surplus candidates were available and it was probably not necessary to hold the selection process itself, let us examine the other irregularities in the selection process. The advertisement dated 19.4.2007 is at Exh.'B' (page 198 of the Paper Book in O.A.913/2015). It is clear that the total number of vacancies was 67, but a total of 77 candidates were selected. There was no horizontal reservation for including women in the advertisement, though the State Government has provided for 30% compartmentalized reservation for women in Group 'D' (and other categories also) posts. On that basis out of 34 (32 Ward boys + 2 Casualty Attendants) posts, 10 posts from open category should have been reserved for

women from open category. Similarly, 2 posts (2.4 rounded off to 2) of Peon should have been reserved for open-women candidates. However, as no provision was made for such reservations in the advertisement, it is not possible to rectify this mistake at a later date. The minimum qualification for these posts was 4th class pass and it is inconceivable that sufficient number of candidates were not available from women category. The above calculations are from open-women category only. There should have been reservation from S.T, (NT(C) and SBC categories also for women. The fact that a few women candidates were selected does not mitigate the seriousness of this mistake, which is impossible to rectify. To give another illustration, it is mentioned that in the report dated 19.5.2009, that the record did not disclose that all candidates who had applied, were informed about the written examination. A moment's reflection will make it clear that this is also an irregularity, which cannot be rectified. It is not known, how many candidates were not informed about the date of written examination. The fact that this issue of irregularities in selection process was discussed in the Legislative Assembly on 27th & 28th December, 2008, goes to support that there were large scale dissatisfaction with the whole selection process. It is reported (in the report dated 19.5.2009) that the 'Selection List' was not published. There was no information about how the question paper was selected (out of 3 sets printed), how many question papers were printed, how many used and how many remained unused. Even the examiners who examined the Answer Book were not known. These irregularities are of such a nature,

that it is just not possible to segregate tainted candidates from the untainted candidates and it is the case of 'exception' in which entire selection process has to be cancelled.”

In our opinion, the view taken by the Tribunal in the facts of the present case cannot be said to be unsustainable.

18. Insofar as the contention of learned Senior Counsel Shri Chavan that it is unfair to terminate the petitioners in 2015 almost after 7 years from the date of their appointment in 2008, we find that the said submission can only be stated to be rejected. Once we record the conclusion that the entire selection process is vitiated it is not possible for us to grant any relief to the petitioners merely because they have worked on the said posts for 7 years. The order of termination issued in the year 2009 was set aside by the Tribunal in the year 2011 on the ground of non compliance of principles of natural justice. The respondents issued a show cause notice in the year 2012 to which the petitioners filed a reply. By a fresh show cause notice issued in the year 2015 a copy of the report of Dr. Patil was enclosed. The petitioners have submitted replies to the show

cause notice of 2015. Thereafter, the order of termination came to be issued. It is not the case of the respondents that the petitioners are 'tainted'. However, as observed by the Tribunal the selection process was held in violation of legal and Constitutional provisions, ignoring the issue of number of vacancies etc. In the light of the fact that surplus candidates were available, it was probably not necessary to hold the selection process itself as the surplus candidates were required to be accommodated first. There were other irregularities in the selection process viz. that the total number of vacancies were 67, but a total of 77 candidates were selected. It was also found that the selection process was contrary to the reservation policy along with other irregularities noticed.

19. It is in this light of the matter, we are of the opinion that as regards the procedure adopted by the respondents in issuing a show cause notice along with the copy of the inquiry report of Dr. Patil into the alleged irregularities and if after giving an opportunity to the petitioners to reply to the show

cause notice, the respondents have terminated the services of the petitioners, we do not find any illegality in the procedure so adopted so as to warrant any interference in the exercise of writ jurisdiction under Article 226 of the Constitution of India. The Tribunal had, in the year 2011, set aside the order of termination thereby granting liberty to the respondents to follow due procedure in the event they desire to terminate the services of the petitioners. In our opinion, having regard to the nature of irregularities in the selection process as indicated above, the procedure adopted by the respondents in terminating the services of the petitioners cannot be said to be contrary to the principles of natural justice or contrary to the provisions of law.

20. We see no reason to interfere with the order passed by the Tribunal. The petition is accordingly dismissed with no order as to costs.

21. Rule stands discharged.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)