

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Civil Application (CAW) No.2875 of 2017 (for Modification)
And
Civil Application (CAO) No.1062 of 2018 (for Condonation of delay)
In
Misc. Civil Application Stamp No.13067 of 2018 (for Review)
In
Writ Petition No.1657 of 1998 of 1998 (D)
[State of Maharashtra, through Secretary, Home Department (Transport & State Excise), Mantralaya, Mumbai v. Pratapsingh Damodar Golekar, Dy. Commissioner of State Excise, Mumbai and others]

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri V.P. Maldhure, Assistant Government Pleader for
Applicants/Original Respondent Nos.1 and 2.

Shri Rajiv Madkholkar with Shri D. Takwale, Advocates for
Original Petitioner.

Coram : R.K. Deshpande & Smt. Swapna Joshi, JJ.
Date : 20th July, 2018

1. Civil Application No.2875 of 2017 is for recall/modification of the direction No.(2) in the judgment and order dated 25-7-2017 passed in Writ Petition No.1657 of 1998, by which the selection and appointment of the respondent Nos.4 and 5 was quashed and set aside. Civil Application No.1062 of 2018 is for condonation of 300 days' delay caused in filing an

application for review. Misc. Civil Application Stamp No.13067 of 2018 is for review of the judgment and order dated 25-7-2017 passed in Writ Petition No.1657 of 1998.

2. Writ Petition No.1657 of 1998 was decided by this Court on 25-7-2017, setting aside the denial of promotion to the original petitioner on the post of Joint Commissioner and directing grant of deemed date of appointment of 1-2-1994 to the said post and to pay the difference in the arrears of salary along with all consequential benefits. This Court retained control over the matter and posted it after three months to see the compliance of the decision, as, according to this Court, the matter pertained to the denial of the promotion in the year 1991 and it remained pending in the Court till it was decided finally by us. We did not want to leave it to the respondents to take their own time to implement the judgment, as the petitioner had retired from service on 31-1-2007.

3. Initially, an application for modification of the order was listed before this Court on 15-6-2018, when we passed an order as under :

“1. In spite of expiry of period of three months, as granted by this Court in the judgment dated 25/7/2017 it has not been complied with. The petitioner has not been paid with his dues and this application is filed for recall/modification of direction no.2 in the judgment by which the appointments of the respondents-employees were quashed and set aside.

2. Shri Dhumale, the learned Assistant Government Pleader also submits that the respondent no.2 is proposing to prefer review petition before this Court. However, neither the review petition is filed till this date nor the order is complied with.

3. Place this matter on 06/07/2018.

4. The respondent nos.2 – Secretary, Home Department (Transport and State Excise) and the respondent no.4 – Commissioner of State Excise to remain personally present before this Court to explain as to why

the order has not been complied with. If by the next date the order is not complied with, the Court may think of issuing notice as to why action for contempt should not be initiated against them.

Steno copy of this order be supplied to the learned Assistant Government Pleader to act upon.”

4. On 29-6-2018, the civil application for condonation of delay along with the application for review came up for hearing, and we passed an order on it as under :

“ Civil Application (W) No.2875 of 2017 filed by the State is already posted for hearing on 06.07.2018.

In view of this, the present civil application can also be considered on that date. This Court wanted to see firstly the compliance of the order passed by this Court.

Put up on 06.07.2018 along with Civil Application No.2875 of 2017.”

5. Thereafter on 6-7-2018, the following order was passed on the application for condonation of delay :

“ The learned AGP has expressed certain difficulties of the Secretary, Home Department and the Commissioner State Excise, to personally remain present before this Court as per the order dated 15.06.2018.

We appreciate the difficulties and grant exemption from their personal appearance.

Put up this matter on 20.07.2018.

We expect the concerned persons to remain personally present before us. We further make it clear that if by the said time the order passed by this Court is complied with fully, their personal presence shall not be necessary.”

6. Today, pursis is filed before us by the applicants, stating therein as under :

“ The original Respondent No.2 most respectfully submits as under:-

In terms of the orders dated 25.07.2017 in Writ Petition No.1657/1998 and further orders dated 15.06.2018 and 05.07.2018 in CAW No.1062/2018 in Writ Petition No.1657/1998 passed by this Hon'ble Court, the Government of Maharashtra, Home Department has issued Government Resolution dated 19.07.2018 granting deemed date and other consequential benefits to the petitioner. The copy of the Government Resolution dated 19.07.2018 is enclosed herewith.

Hence this pursis.”

7. The learned AGP does not dispute before us that till this date the monetary benefits have not been released in favour of the petitioner. He invites our attention to the Government Resolution dated 19-7-2018 and submits that the implementation is to be made subject to the result of this review petition.

8. At the outset, we enquired as to whether the State wants to approach the Apex Court in the matter, as we thought of

waiting, but the response of the learned AGP was that the decision of the Government is otherwise and there is no advice to approach the Apex Court. We, therefore, gave an opportunity to the State to withdraw the Misc. Civil Application for review, but the response is that, with full understanding of the consequences of the decision of the review application, the decision under the Government Resolution is made subject to the result of the review application and hence the instructions to the learned AGP are to proceed to argue the matter on merits of the review application. Hence, we have heard the learned counsels appearing for the parties.

9. This Court had quashed and set aside the promotions granted to the respondent Nos.4 and 5 to the post of Joint Commissioner, State Excise, and has directed to grant deemed date of promotion to the petitioner with all consequential benefits. The application for modification seeks recall of this direction on the ground that the respondent No.4 retired on 30-6-1997 and the respondent No.5 retired on 30-6-2001, the

pension comes of both these employees was finalized and one of them had also expired. The direction given by this Court, according to the State, would have cascading effect on the entire list of officers/seniority list, whereby the persons, who had worked and retired after the petitioner, would also be affected.

10. The respondent Nos.4 and 5 were parties to the Original Application filed before the Maharashtra Administrative Tribunal and also before this Court. They were well aware of the pendency of the proceedings and the consequences likely to ensue if the petition is to be allowed. Certain allegations were also made against them, but in spite of an opportunity, they have neither chosen to file their reply or appear before the Tribunal so also before this Court. In Para 24 of the judgment, this Court has taken note of the conduct of the respondent Nos.4 and 5. When the petition was decided, no such pleas were raised by the State. We, therefore, feel that the application for modification of the order is nothing but a device adopted to kill the time and it is frivolous and vexatious, causing abuse of process of the Court.

The same is, therefore, dismissed.

11. So far as the application for condonation of delay is concerned, we do not find that any sufficient cause is made out for condonation of 300 days' delay in filing an application for review. If the Government was of the view that the decision of this Court need not be carried to the Apex Court and the review application was required to be preferred, the same could have been done immediately within a period of three months, which we had granted, to comply with the order passed by this Court. In our view, the attempt to seek condonation of delay is nothing but an abuse of process of the Court, intended only to kill the time.

12. We have gone through the application for review of the judgment, and the relevant portion in Para 4 of this application is reproduced below :

“4. ... After going through the record, it appeared that the Petitioner was never in the zone of consideration before

*2007 for promotions to the posts of Joint Commissioner. These documents reflect that the Petitioner was for the first time eligible for promotion in the year 2007 wherein he was considered and promoted to the post of Joint Commissioner. The Gradation-Sheet of the petitioner along with other candidates as per gradation list of 1990 in which the petitioner is placed at Sr. No.11. The said Gradation-Sheets are annexed herewith as **Annexure R-2-II** collectively. In view of the discovery of new material in the files of GAD which was not available with the Home Department, Respondents in the Writ Petition, demonstrating ineligibility of the Petitioner for promotions to Joint Commissioner Post again, opinion of Law and Judiciary Department was sought and as per the opinion it was decided to prefer a Review Application before this Hon'ble Court. Accordingly, present Review Application is being filed.”*

13. The discovery of the gradation list is shown to be the new material, which became available after the decision of this Court, to seek review of the judgment. According to the State, the petitioner was at Serial No.11 in the gradation list prepared in the year 1990, whereas the respondent Nos.4 and 5 were at

Serial Nos.1 and 2 respectively. The contention is, therefore, that the petitioner was not in the zone of consideration.

14. The aforesaid contention was specifically raised before the Maharashtra Administrative Tribunal and also before this Court rather, if permitted to say so, this was only the stand which required adjudication on merits by the Tribunal as well as this Court. The Tribunal resolved the issue in favour of the State, holding that the petitioner was not in the zone of consideration, whereas this Court has reversed it and a categorical finding is recorded that for the purposes of zone of consideration, a select list was required to be prepared and operated to judge the comparative assessment of the merits of the candidate in the zone of consideration and the name of the petitioner was required to be included in the zone of consideration. Paras 19 and 20 of the judgment of this Court being relevant, are reproduced below :

“19. In our view, there was a complete deviation of the principles of selection on the basis of merits to a Super

Class-I post in question. In fact, the zone of consideration prepared was the placement in the seniority list of Class-I officers in the post of Superintendent, which was contrary to the aforesaid Government Resolution and norms. As per the guidelines laid down in consultation with the Maharashtra Public Service Commission, a select list of the candidates working in Class-I post of Superintendent, State Excise, fit for promotion on the basis of their confidential reports was required to be prepared. For the purposes of the zone of consideration, such a select list was required to be operated, and on the basis of comparative assessment of merits of the candidates in the zone of consideration, the selection and appointments were required to be made.”

“20. *There was a total failure on the part of the respondent Nos.1 and 2 to - (i) prepare a select list as contemplated by the guidelines at Serial Nos.1, 2 and 3 of the Government Resolution dated 11-9-1975, 18-5-1983 and 18-10-1988, which are reproduced above, and (ii) make comparative assessment of merits as per the norms prescribed in the Government Resolution dated 28-1-1975, 1-4-1976 and 19-9-1977. If the petitioner had been given the benefit of these Government Resolutions on the basis of “Outstanding A+” grade for five years preceding the date of consideration, he would have definitely come in the zone of*

consideration, and on comparative assessment on merits, according to us, doubtlessly, the petitioner could have been selected for appointment by way of promotion to the post in question on 1-2-1991.”

15. In view of above, we find that the contention raised in the application for review was totally frivolous and intended to kill the time specified to implement the decision of this Court. The contention is not at all based upon discovery of new and important material having bearing on the controversy involved or decided by this Court. It was an undisputed position before this Court that in the seniority list, the respondent Nos.4 and 5 were at Serial Nos.1 and 2, whereas the petitioner was at Serial No.11. If the State was of the view that the decision of this Court is wrong, the only remedy was to challenge it before the Apex Court and not to file an application for review.

16. The next ground in the review application is that on 20-1-1998, the petitioner was considered for promotion to the post of Joint Commissioner and DPC had considered the annual

confidential reports of the petitioner for the period from 1992-93 to 1996-97, and the average remark was 'A'. The relevant portion of Para 6 of the review application, reproducing the gradation of the petitioner, is as under :

“6. ... In the Writ Petition direction was given to the State to file Annual Confidential Report of the Petitioner alongwith those of Respondent No.4 & 5. In the Writ Petition an Affidavit came to be filed that the said record is not available with the Home Department as it was burnt in the fire in the Mantralaya. The Hon'ble Court thereafter proceeded to decide the petition and allowed the petition. During the processing of the file of the petition for implementing the judgment, as per the seniority list dated 13-2-1990 for the post of Superintendent Prohibition and State Excise, it is observed that Shri Sawant and Shri Malakapatte are as Sr.No.1 & 2 respectively and the Petitioner Shri Golekar is at Sr.No.11. The papers for the promotions to the post of Commissioner State Excise were put up before the Departmental Promotion Committee in the year 1997. The perusal of the record revealed that only one post was available for promotion. As per the Govt. Resolution six Officers would come in the zone of consideration for this one post. In the year 1997, as per the

seniority list, Shri Sashital was the senior most officer available, however, he was under suspension and was not considered for promotion. Thereafter Shri Kohak next in line was also not considered as he was under suspension and his annual confidential report was also not available and accordingly he was not considered for promotion. The third officer Shri S.A. Patil completed all the criteria for promotion and was recommended for promotion on 20-1-1998. At that time Shri Golekar the present Petitioner was within the zone of consideration, however, the DPC had considered annual confidential report for the period 1992-93 to 1996-97, during which period the average of the Petitioner was "A". The gradation of Petitioner for relevant period is as below :-

<i>Year</i>	<i>Year</i>	<i>Year</i>	<i>Year</i>	<i>Year</i>	<i>Year</i>
<i>1992-93 A</i>	<i>1993-94 B+</i>	<i>1994-95 A</i>	<i>1995-96 A+</i>	<i>1996-97 A+</i>	<i>A</i>

Thereafter in the year 2001 proposal for preparation of selection list for one post was submitted by Home Department to the Establishment. The said proposal was considered by the Committee in its meeting on 4-5-2002 and Shri P.B. Mishra's name was recommended for promotion as he was eligible for promotion. ..."

17. We fail to understand the aforesaid contention raised in the application and we find it as totally false, frivolous and vexatious and an afterthought. It was the specific case of the petitioner before the Tribunal that while he was working as Deputy Commissioner on 1-2-1991, he was possessing the grading of 'Outstanding A+' in the confidential reports pertaining to the period of five years preceding the date of consideration on 1-2-1991, whereas the respondent Nos.4 and 5 were less meritorious. It was the specific case that the adverse report awarded to the respondent No.5 was expunged, without even his representation, whereas the respondent No.4 was short in height, contrary to the statutory requirement of Clause (2) of the Rules of Physical Fitness, framed under Article 309 of the Constitution of India. The Tribunal records the finding that the confidential reports of the petitioner for five years preceding the appointment of the respondent Nos.4 and 5 were outstanding and the State failed to produce all the confidential reports and the Minutes of Meeting before the Tribunal.

18. On 6-6-2017, when we heard the matter, an order was passed, expressing that the service record pertaining to the period of five years prior to 1-2-1991 would be relevant and the time was granted to the State. Thereafter on 15-6-2017, we specifically directed the applicants to produce only the annual confidential reports of the petitioner as well as the respondent Nos.4 to 8 for the period from 1-1-1985 to 31-12-1990, which were considered before passing the order of promotion of the respondent Nos.4 and 5. We also directed affidavit of the responsible officer to be filed.

19. The Joint Secretary of the Home Department filed her own affidavit stating that on 21-6-2012, the Mantralaya building was hit by major fire, as a result many records and proceedings, documents and other important stored information of the Home Department came to be burnt down to ashes. It was also the stand taken in the affidavit that the annual confidential reports of the petitioner had been gutted in the untoward fire incident

and the record is not traceable anywhere.

20. We have dealt with the aspect of confidential records in Para 18 of the judgment, which is reproduced below :

“18. It is a fact that neither the confidential records of the petitioner and the respondent Nos.4 and 5 nor the minutes of meeting dated 1-2-1991 in which the consideration took place, were either produced before the Maharashtra Administrative Tribunal or before this Court in spite of specific orders. The Tribunal records a specific finding after taking into consideration the averments made in the Original Application and the return filed by the respondent Nos.1 and 2 that the petitioner was graded as “Outstanding A+” during the period of five years preceding the date of consideration, i.e. 1-2-1991. The Tribunal also records a specific finding that the respondent Nos.4 and 5, viz. P.B. Sawant and V.V. Malkalpatte respectively, were given promotion in spite of their comparatively less meritorious C.Rs. than the petitioner, that too without following the criteria for promotion by strict selection on merits. These findings are not challenged by any of the respondents either by filing return before this Court by way of separate petition. We, therefore, concur with such

findings recorded by the Tribunal and hold by drawing an adverse inference that the petitioner was more meritorious than the respondent Nos.4 and 5 on the basis of the confidential reports.”

In para 24, we observed as under :

“24. ... The respondent Nos.4 and 5 neither did oppose the claim of the petitioner, nor did defend their appointment to the post in question – either before the Tribunal or before this Court. All the confidential reports of the petitioner and the respondent Nos.4 and 5 have been destroyed along with the minutes of meeting dated 1-2-1991, in which the respondent Nos.4 and 5 were selected for the post in question. In such situation, we have to consider as to what relief the petitioner can be granted in the present petition, after a period of about 26 years.”

Then in Para 25, we have held as under :

“25. Normally in such cases, after setting aside appointments by promotion on the basis of selection on merits, the matter should go back to the respondent Nos.1 and 2 for reconsideration as on 1-2-1991 and there cannot be an order directing appointment of the petitioner to such

posts. However, keeping in view of the findings of the Tribunal, which we have confirmed, and the fact that all the records are destroyed, it is not possible to send the matter back for reconsideration. But the matter cannot be left out by saying that our hands are tied or that this is an incident of service or life or that there is delay. It is always said that the justice delayed is justice denied, but the delay cannot defeat justice. We must see that the justice is not only done, but it must appear to have been done. The petitioner who has struggled for maintaining his grading as “Outstanding A+” with a legitimate expectation of attaining the highest position in service cannot be left with frustration by saying that there is no solution. The High Court cannot be a stamper of the illegal appointments and permit the respondent Nos.4 and 5 to enjoy it in Super Class-I post because the matter is pending since last 26 years. In such cases, if the reliefs are not granted to the litigants, the faith in the judicial institution shall be eroded. We have, therefore, to allow this petition and grant the appropriate reliefs to the petitioner.”

21. In view of above, we find that the application for review is nothing but an abuse of process of the Court. If the confidential reports of the petitioner and the respondent Nos.4

and 5 were available, a false affidavit was filed before this Court stating that the record was destroyed and burnt. We are surprised to note as to how suddenly such records become available. As usual, the study of the matter starts after the decision is rendered by the Court and under the garb of seeking review, re-hearing of the matter is sought. We must, therefore, deprecate this practice and impose heavy costs of Rs.50,000/- upon the applicants, to be paid to the original petitioner within a period of two weeks from today.

22. At this stage, the learned AGP submits that at least two months' time is required to disburse the amount to the petitioner in compliance with the order passed by this Court, as the files are required to be moved from one table to another in the department and from one department to other department. We have an experience that if the officers of the Government intend to do certain things, they get it done within 24 hours. Where there is a will, there is a way. We do not expect the Secretary to go from table to table and department to department carrying

files with her personally and it is for her to decide how to comply with the order. We are concerned with the factum of compliance within stipulated period. We would have shown generosity in granting time to approach the Apex Court. But this is not the reason for non-compliance of the judgment. We cannot, therefore, accept the request for extension of time to comply with the decision of this Court and make the payment and all consequential benefits to the petitioner.

23. We, therefore, direct the applicants to release all the benefits to the petitioner within a period of two weeks from 25-7-2018. We could have said it from today, but we ignore the margin of communicating this order to the respondents. The Secretary, Home Department (Transport and State Excise), Mantralaya, Mumbai, to personally remain present before us on 10-8-2018, file an affidavit of compliance, and show cause as to why action - (i) for willful disobedience and breach of the judgment and order dated 25-7-2017 delivered by this Court in Writ Petition No.1657 of 1998, which amounts to committing a

civil contempt, and (ii) for abuse of the process of Court by filing frivolous and vexatious applications and making false statements on oath, constituting criminal contempt, should not be initiated against her.

24. The matter be placed for hearing in the court-room at 2.30 p.m. on 10-8-2018.

(Smt. Swapna Joshi, J.)

(R.K. Deshpande, J.)

LANJEWAR, PS

Prashant
Dewaji
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by Prashant
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Date: 2018.07.23
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