

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2883 OF 2018

1. The State of Maharashtra
Through the Principal Secretary
Public Works Department,
Mantralaya, Mumbai – 400 032.
2. The Superintending Engineer,
Public Works Circle, Aurangabad. .. Petitioners

Versus

Subhash Gopinath Chavan,
Age : 59 Years, Occu. : Retired,
R/o 56, Alankar Housing Society,
(Near Essar Petrol Pump), Pundalik
Nagar Road, Garkheda Parisar,
Aurangabad. .. Respondent

Shri Vishwanath Talkute, Special Counsel i/by Shri S. M.
Ganachari, A.G.P. for Petitioners.
Shri Ajay S. Deshpande, Advocate for the Respondent/Sole.

**CORAM : S. V. GANGAPURWALA AND
A. M. DHAVALA, JJ.**

CLOSED FOR JUDGMENT ON : 20.02.2019

JUDGMENT PRONOUNCED ON : 03.05.2019

JUDGMENT (Per S. V. Gangapurwala, J) :-

. Rule. Rule made returnable forthwith. With the consent

of parties taken up for final hearing at the stage of admission.

2. The present respondent had filed Original Application No. 572/2015 to grant him assured career progress scheme benefit and deemed date of promotion as per the deemed date granted by the Superintending Engineer Aurangabad under order dated 25.08.2014. The Tribunal partly allowed the original application in terms of the deemed date. Aggrieved thereby the State has filed the present petition.

3. The learned advocate for the petitioner/State of Maharashtra submits that, the respondent/original applicant was appointed on work charged establishment as a junior engineer on 21.02.1983 for specific period and for specific work. The appointment was on purely temporary basis and respondent joined the E.G.S. work at Aurangabad. The services of the respondent were terminated on 30th June, 1987 as the E.G.S. work for which he was appointed was completed. The learned counsel states that, the Government took a policy decision under the Government Resolution dated 06.12.1989 to fill the vacant posts of temporary establishment from 136 junior engineers who had worked on work charged establishment and were terminated after the work was completed. It is clearly mentioned in the said Government Resolution that the appointments of these junior engineers would be on temporary establishment and would be

totally fresh new appointments and they would not get any benefit of previous service rendered on work charged establishment. The respondent joined on the regular temporary establishment on 29.12.1989. He was upgraded on the post of sectional engineer. According to the learned counsel, the respondent is seeking deemed date on the basis of one granted to Mr. A. D. Salve. Benefit granted to Mr. Salve has been withdrawn. The petitioner is seeking parity with Mr. Salve, who was given the deemed date of appointment as 26.02.1984 by the Superintending Engineer under order dated 25.08.2014. According to the learned counsel said benefit given to Mr. Salve has been withdrawn. The Tribunal has wrongly relied on Government Resolution dated 15.02.1997. The said Government resolution is not applicable to the respondent. It relates to only continuous work charged service. The conditions put forth in the order of appointment of the respondent are not binding upon the respondent. The appointment order itself says that the respondent would not be entitled for any benefit of previous service. Same was accepted by the respondent and now he cannot resile.

4. The learned counsel further submits that, Clause III of G. R. dated 15.02.1977 states that, only the continuous work charged service from the date the concerned junior engineer fully qualified for appointment to the post of junior engineer on the

basis of age and qualification should be taken into account for assignment of such deemed date. The respondent came to be newly appointed as a junior engineer on temporary establishment under G. R. dated 06.12.1989. There was gap of two years and five months between the period the respondent was terminated and was subsequently appointed. Moreover, the G. R. dated 15.02.1977 is for the deemed date of seniority of junior engineer who had continuously worked without break on work charged establishment. In the present case, the respondent was seeking deemed date of appointment to the post of junior engineer. Mr. Salve was wrongly granted deemed date of appointment and the same has been withdrawn by the Government.

5. The learned advocate further submits that, the present original application was also barred by principles of *res-judicate*. The respondent had earlier filed Original Application No. 18/2012 requesting to grant him deemed date as granted to Mr. Salve. Said original application was dismissed and disposed of by the Maharashtra Administrative Tribunal Aurangabad on 09.01.2012 holding that the present respondent was given fresh appointment in the year 1989 and he was aware that his service rendered between 21.03.1983 to 31.07.1987 was totally ignored. The Tribunal also held that the original application is barred by limitation. The present respondent challenged said order before

the High Court by filing Writ Petition No. 6913/2012. In the High Court the counsel for the present respondent made a statement that he will once again approach the respondent therein. The Court upon statement of the learned counsel for the respondent directed that the representation shall be decided after hearing the petitioner within eight weeks. Now for the same relief another original application would not be tenable. Moreover the respondent ought to have made representation to the Government in Public Works Department. It was not within the powers of Superintending Engineer, P. W. D. to take decision. The appointing authority is the Government. As per General Administrative Department G. R. dated 21.06.1982 and GAD G. R. dated 06.06.2002, the Superintending Engineer could not have granted deemed date of appointment to the respondent under order dated 25.08.2014. As the same was wrongly granted by the Superintending Engineer, the Government under letter dated 20.10.2016 has rightly cancelled the same. The judgment of the Tribunal be set aside.

6. Mr. Deshpande, the learned advocate for the respondent submits that, though the appointment of the petitioner on work charged establishment made on 21.03.1983 came to an end on 31.07.1987. He was reemployed in service under policy decision dated 06.12.1989. Although it has been stated in the said G. R. that new appointments would be altogether new and the benefit

of service rendered on work charged establishment would not be available, it is equally true that the said G. R. mandated to join within 15 days from the date of appointment order and those who join within 15 days their interse seniority would be maintained. The name of the respondent appears at Sr. No. 16 in the list of junior engineers working on work charged establishment and his date of appointment is 21.03.1983. As against this one Mr. A. D. Salve was appointed on 18.04.1983 and he was junior to the respondent. Said Mr. Salve was assigned deemed date of appointment as a junior engineer as 18.04.1983. As interse seniority was to be maintained, the respondent was senior to Mr. Salve and Salve was assigned deemed date of appointment as junior engineer. The respondent could not have been given the date of appointment as 06.12.1989. His deemed date of appointment ought to be 21.03.1983. The learned advocate further submits that, as per the directions of this Court in Writ Petition No. 6913/2012, the representation was decided and the respondent was granted the deemed date of appointment as 21.03.1983, but the consequential orders and financial benefits were not granted. As such the respondent filed Original Application No. 572/2015. The petitioners filed an affidavit testifying that the issue raised by the respondent is under process and after it is decided the benefits would be extended. In fact, there is no order passed by the petitioner cancelling order dated 25.08.2014 giving deemed date of

appointment to the respondent. Only a communication dated 20th October, 2016 is placed on record, which cannot be said to be an order. The learned advocate submits that, the powers to grant deemed date of appointment vest with the petitioner No. 2. The petitioner No. 2 under communication dated 17.08.2004 made a reference to petitioner No. 1 for grant of a deemed date to Shri A. D. Salve. The petitioner No. 1 directed the petitioner No. 2 to take appropriate decision. As such the petitioner No. 2 granted deemed date to Shri A. D. Salve. One Mr. Deelip Bhambre has also been bestowed with deemed date reckoning his service from day one of his appointment on work charged establishment. According to the learned counsel the question of *res-judicata* does not arise. Once the High Court directed to decide the representation after hearing the respondent, it was within the powers of the petitioner No. 2 to pass the orders. The petitioner No. 1 was a party to the Writ Petition No. 6913 of 2012. If the petitioner No. 2 did not possess the powers to decide the representation of the respondent, then the petitioner No. 1 should have pointed out said fact. After three years the petitioner No. 1 cannot be permitted to state that the petitioner No. 2 is not competent to address the grievance of the respondent.

7. The learned counsel submits that, in view of specific covenant in the G. R. dated 06.12.1989 that those who join

within fifteen days their interse seniority should be maintained. The respondent has preferential claim in seniority to that of Mr. Salve. The respondent has rendered in all 31 years of service from the initial date of joining. The respondent is eligible and entitled for his first elevation as sectional engineer upon rendering five years service as Junior Engineer. Thereafter becomes eligible for the benefit of time scale promotion scheme upon rendering 12 years of service as sectional engineer that is with effect from 01.04.2001, the respondent thereupon become eligible for further benefit under time scale promotional scheme of pay scale of Executive Engineer upon rendering 12 years of service in the promotional scale of Sub Divisional officer with effect from 01.04.2013 and the respondent retired on 30.04.2014. He would be eligible for drawing the pay scale of Executive Engineer. The respondent is made to retire while drawing salary of sectional engineer only thereby depriving him benefit of time scale scheme.

8. Mr. Deshpande, the learned advocate further submits that, contention of petitioner that assignment of a deemed date is within the powers of petitioner No. 1 alone atleast from the year 2002, is a fallacy. As a matter of fact, the petitioner No. 2 had forwarded a proposal to the petitioner No. 1 for granting deemed date to said Shri A. D. Salve under communication dated 17.08.2004, which has been returned by petitioner No. 1 to the

petitioner No. 2 under communication dated 30.08.2004 interalia stating that, power to assign a deemed date to the Junior Engineers is in G. R. dated 15.02.1977 and the said powers have been conferred upon the concerned Superintending Engineer in the capacity as appointing authority, and therefore, it was instructed by the petitioner No. 1 to petitioner No. 2 that, by taking necessary steps a compliance report be submitted to the Government in that behalf. It falsifies the claim of the respondents that, as per G. R. dated 06.06.2000, powers to grant deemed date to Group A and Group B officers is with the Government.

9. The learned counsel further submits that, it is established principle of service jurisprudence that in normal course a junior should not get more salary than his senior. Mr. Salve was junior to the respondent for all legal and practical purposes and he has been drawing more pay than the respondent and said anomaly has been rightly removed by the petitioner No. 2 within his powers.

10. The petitioner No. 2 being a competent authority to assign a deemed date to the respondent as a junior engineer, the petitioner No. 1 was not supposed to sit in appeal. The petitioner No. 2 was competent to assign deemed date. The learned counsel relies on the G. R. dated 15.02.1977 and submits that, it is

abundantly clear that powers to assign deemed date is with the petitioner No. 2.

11. The learned counsel submits that, the order cancelling deemed date of appointment granted to Salve on 21.04.2018 is a paper order. He stood retired on 30.06.2018 and such an exercise after his retirement would be exercise in futility. Mr. Salve was promoted as Sub Divisional officer long back and he enjoyed position of Sub Divisional officer and also received salary of promotional post. The learned counsel submits that, one Mr. A. G. Gaikwad is also identically placed as that of Mr. Salve but said information is declined. Mr. Gaikwad is working as Sub Divisional Officer from 2015. The other persons are also granted deemed date, such as Mr. D. R. Bhamre, Mr. A. G. Patil, Mr. Kiran K. Patil. The learned counsel refers to the litigation taken up by Mr. Bhamre bearing Original Application No. 1038 of 2013 at the Principal seat at Mumbai of Maharashtra Administrative Tribunal. It is said that Original Application was allowed on 15.09.2014 and the said order is confirmed by the High Court in Writ Petition.

12. The undisputed factual matrix can be culled out as under :

Present respondent was appointed on work charged establishment for E.G.S. work as a Junior Engineer on 21.02.1983 and that he joined the E.G.S. work on 21.03.1983.

The services of the respondent were terminated on 31.07.1987. The Government took a policy decision under G. R. dated 06.12.1989 to fill the vacant posts on temporary establishment from those junior engineers who had worked on work charged establishment. The present respondent pursuant thereto has joined as junior engineer. The respondent had filed Original Application No. 18 of 2012 requesting to grant him deemed date as granted to one Mr. Salve. The original application was dismissed. The respondent filed writ petition bearing Writ Petition No. 6913 of 2012. In the said writ petition the counsel for the present respondent made a submission that the respondent will once again submit representation and make himself available for personal hearing. In the light of the said statement the Court disposed of the writ petition directing the respondent No. 4 therein to decide the representation within eight weeks from the date of filing of fresh representation and after hearing the present respondent. Thereafter the present respondent filed a representation. The present petitioner No. 2 under order dated 25.08.2014 granted deemed date of appointment as Junior Engineer to the respondent as 26.02.1984. However, as some consequential benefits were not given to the respondent filed Original Application before the Maharashtra Administrative Tribunal and during pendency of said original application, the letter is issued on 20th October, 2016 cancelling deemed date granted to the respondent. The respondent

amended the original application and challenged the letter dated 20.10.2016. The original application is allowed. It also appears that, the case of the petitioners was based on the deemed date granted to one Mr. A. D. Salve, however, during the course of hearing of the present writ petition, the petitioners submitted that, under order dated 21st April, 2018, deemed date and benefit granted to Mr. Salve is withdrawn. Same is under Government Resolution dated 21st April, 2018.

13. The ground raised by the petitioners of *res-judicata* is not at wholly irrelevant. The respondent had approached the competent forum viz the Maharashtra Administrative Tribunal at Aurangabad by filing Original Application No. 18 of 2012 requesting to grant him deemed date as granted to Mr. Salve. Said original application was dismissed. The respondent approached this Court by filing Writ Petition No. 6913 of 2012. In the said writ petition the judgment of the Tribunal dismissing the original application was not set aside. The learned counsel for the respondent made a statement that the respondent would once again approach the present petitioners and will submit representation and make himself available for personal hearing. In the light of that statement, this Court directed the authorities to consider the fresh representation that would be filed by the present respondent and decide it after hearing the respondent within eight weeks. The order of Tribunal dismissing the

original application for the relief to grant deemed date as granted to Mr. Salve was never set aside. The petitioner No. 2 may not have any jurisdiction to circumvent the judicial order of the Tribunal, however, as per the orders in the writ petition, the petitioner No. 2 had decided the said representation.

14. As the Tribunal has considered the case on merits, we have considered the case of the parties on merits, though according to us principle of *res-judicata* is not totally irrelevant.

15. The prayers made in Original Application No. 18 of 2012 are as under :

"B. By issuing appropriate directions and order to the respondent to give deem date to the petitioner serving from 21.03.1983 and the name of the petitioner be listed in the seniority list, by giving all the monetary benefits, like increments and arrears.

C. By allowing this application the respondent be directed to pay the salary from 31.07.1987 to 28.12.1989 along with increments and monetary benefits.

D. By allowing this application the respondents be directed to decide the representation submitted by the applicant on 29.11.2011 within 3 months or as this Hon'ble Tribunal deem fits."

16. As narrated above, the respondent was appointed on work charged establishment on or about 21.03.1983 and he rendered service on work charged establishment as a junior engineer upto

21.07.1987. On the said date he was terminated from service. The Government took a policy decision under Government Resolution dated 06th December, 1989 thereby taking a decision that, those 136 junior engineers who are terminated should be appointed on regular temporary establishment. The appointment of these junior engineers would be fresh appointments and they would not be entitled for any benefit of the services rendered on work charged establishment. It was further clarified in Clause 8 that while making appointment, the condition in Clause Nos. 3 and 6 should be stipulated.

17. Relevant clauses of the Government Resolution in regional language are reproduced as under :

२. उर्वरित १३६ रिक्त पदावर राहिलेल्या सेवा मुक्त कनिष्ठ अभियांत्यांना त्यांच्या कार्यव्यापी अस्थापनेवरील सेवा कालाधारीत जेष्ठतेनुसार नेमणुका देण्यात याव्यात.

३ सदर कनिष्ठ अभियांत्यांच्या अस्थाई अस्थापनेवरील नेमणुका पुर्णपणे नवीन नेमणुका राहतील. व त्यांना कार्यव्यापी अस्थापनेवर पुर्वी केलेल्या सेवेचा कोणताही लाभ मिळणार नाही

६. यापैकी पदविधर अभियांत्यांच्या नेमणुका सहायक अभियांता श्रेणी - २ (कनिष्ठ स्तर) म्हणुन करण्यात याव्यात. अशांच्या नेमणुका महाराष्ट्र लोकसेवा आयोगाच्या मान्यतेने अधिन राहतील.

८. संबंधीत अभियांत्यांच्या नेमणुका करताना वर. कं ३ व ६ येथे नमुद केलेल्या अटींचा उल्लेख त्यांच्या नेमणुकिच्या आदेशात स्पष्ट करावा.

१०. १५ दिवसाच्या विहित मुदतीत हजर होणारंची आपआपसातील जेष्ठता कायम राहील.

18. In the original Application No. 572 of 2016 the respondent has claimed following reliefs.

(B) The respondents may kindly be directed to elevate the applicant to the post of Sectional Engineer on 01.04.1989, with further extension of first benefit under Time Scale Promotion Scheme on 1.4.2001 as Sub-Divisional Officer and thereafter to extend second benefit under Time Scale Promotion Scheme on 1.4.2013 in the cadre of Executive Engineer, with all consequential financial benefits flowing therefrom.

(C) The respondents may kindly be directed to revise pension and pensionary benefits payable to the applicant, by working out his pensionable pay on the basis of his elevation as Sectional Engineer w.e.f. 1.4.1989, as Sub Divisional Officer on 1.4.2001 and as Executive Engineer on 1.4.2013, under Time Scale Promotion Scheme and to make payment of the difference between due and 'paid' pensionary benefits payable to him, on account of extension of benefit of Time Scale Promotion Scheme on first and second occasion.

(B-1) The communication of respondent No. 1 dated 20.10.2016 addressed to respondent No. 2 age pages 53-55, thereby claiming to have cancelled the deemed date assigned to the applicant vide Annexure A-1 dated 25.08.2014 may kindly be quashed and set aside by directing the respondents to extend all consequential benefits flowing therefrom, including difference of pay and the benefits under the Time Scale Promotion Scheme, with resultant upward revision of pension and pensionary benefits."

19. In the original application filed by the present respondent,

the petitioner No. 2, in fact, had admitted the claim of the present respondent. Thereafter, the prayer was made to withdraw the said affidavit and file fresh affidavit. The said prayer was granted. The genesis of the respondent's case is based on the deemed date granted to Mr. Salve. The benefit granted to Mr. Salve is withdrawn. Moreover the respondent cannot claim parity, if some illegal order has been passed. The terms of the appointment order under G. R. dated 06.12.1989 are clear. The appointment made on regular temporary establishment in the year 1989 was fresh appointment, meaning thereby no benefit would be given of the appointment made on work charged establishment. There cannot be any dispute that in the appointments made on work charged establishment of the junior engineers in the year 1983, Mr. Salve was appointed on 18.04.1983 and the petitioner on 21.03.1983 and he would be senior to Mr. Salve. However, the respondent cannot go beyond the terms of his appointment under G. R. dated 06.12.1989. The State, it appears that, has realized its mistake and withdrew the deemed date granted to Mr. Salve. A wrong committed in one case cannot be a ground to seek parity. The respondent has also relied on the proceedings of one Mr. Bhamre. Mr. Bhamre, in fact, was appointed as a Assistant Engineer on work charged establishment on 17.01.1986. He was terminated on 31.07.1987 and the Government took policy decision by G. R. dated 30th November, 1993 to re-induct such persons by relaxing the

condition of selection through Maharashtra Public Service Commission.

20. As per the order of the Tribunal, the G. R. dated 30th November, 1993 provides that if the person re-joins within 15 days, he would maintain original seniority of work charged establishment. The G. R. dated 30th November, 1993 is not placed on record. It does not appear that, whether a clause similar to clause No. 3 appearing in G. R. dated 06.12.1989 was a condition. Moreover the post on which Mr. Bhamre was appointed is different. The G. R. appointing him was different. In view thereby, we cannot rely on the order passed by the Tribunal in the case of Mr. Bhamre and confirmed by the High Court.

21. In view of the above, it cannot be said that the respondent is entitled for the deemed date. The order passed by the petitioner No. 1 cancelling order of the petitioner No. 2 does not appear to be erroneous. The Resolution dated 15.02.1977 relied by the respondent may not be of any avail to the respondent. Under the said resolution it was decided by the Government that as far as respective persons on work charged establishment should be taken on regular temporary establishment in order of seniority and deemed date was directed to be assigned to them as was communicated therein and one of the clause was that only

continuous work charged service from the date the concerned junior engineer fully qualified for appointment to the post of junior engineer on the basis of age and qualification should be taken into account for assigning such deemed date and the powers should be given to the Superintending Engineer and other appointing authorities to assign deemed date and intimate the Government and the Government will fix the seniority on the basis of such deemed date. The said resolution was never meant to consider cases of persons who had initially worked on work charged establishment and their services were terminated and thereafter given fresh appointments. It is also not a case that the break in service has been condoned by the petitioners.

22. In the light of the above, we hold that the respondent is not entitled for the deemed date of 21.03.1983. The judgment of the Maharashtra Administrative Tribunal is set aside.

Rule accordingly is made absolute in above terms. No costs.

Sd/-
[A. M. DHAVAL, J.]

Sd/-
[S. V. GANGAPURWALA, J.]

bsb/May 19