

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

LETTERS PATENT APPEAL NO. 29 OF 2011
IN
WRIT PETITION NO. 5138 OF 2007
WITH
CIVIL APPLICATION NO. 13007 OF 2015

Noor Mohamad Khan Gul Mohamad Khan,
Age 33 years, Occu. Service,
R/o. Jalna Road, Beed,
Tq. & Dist. Beed.

....Appellant.

Versus

1. The State of Maharashtra
Through the Dean,
Government Medical College and
Hospital, Latur, Tq. & Dist. Latur.
2. Girish Shankarrao Mamade,
Age 30 years, Occu. Service,
3. Suryakant Madhavrao Jamge,
Age 32 years, Occu. Service,
4. Vasant Madhavrao Jamge,
Age 29 years, Occu. Service,
5. Javjeet S. Jagtap,
Age 29 years, Occu. Service,
6. Kundlik Ramrao Chotmal,
Age 24 years, Occu. Service,
7. Ku. Sandhya Dagadu Patil,
Age 22 years, Occu. Service,
8. Sanjay Shivaji Ingale,
Age 32 years, Occu. Service,
9. Sanjay Saheb Kadam,
Age 32 years, Occu. Service,
10. S.S. Pingale,

- Age 30 years, Occu. Service,
11. Brijbhushan N. Gaikwad,
Age 24 years, Occu. Service,
 12. Shaikh M.M.,
Age 22 years, Occu. Service,
 13. Rajesh Sakharam Sawant,
Age 32 years, Occu. Service,
 14. Baburao Jakoji Tate,
Age 32 years, Occu. Service,
 15. Jayjeet Sahebrao Fawade,
Age 22 years, Occu. Service,
 16. Sayyad Ashfaq Shaukat,
Age 32 years, Occu. Service,
 17. Gangadhar Vaijnath Munde,
Age 30 years, Occu. Service,
 18. Manoj Narsing Bhisar,
Age 28 years, Occu. Service,
 19. Ku. Parveen Mohd. Sallauddin,
Age 22 years, Occu. Service,
 20. Sanjay Marotirao Shinde,
Age 30 years, Occu. Service,
 21. Samiullah Khan Pathan,
Age 26 years, Occu. Service,
 22. Santosh Kakasaheb Patil,
Age 26 years, Occu. Service,
 23. Amar Narsing More,
Age 21 years, Occu. Service,
 24. Santram Kishanrao Suryawanshi,
Age 24 years, Occu. Service,
 25. Ku. Jaywanti Nanasaheb Bhise,
Age 24 years, Occu. Service,

26. Sanjay Pandurang Togare,
Age 29 years, Occu. Service,
27. Sukhdeo Shahdeo Mane,
Age 32 years, Occu. Service,
28. Chottupasha Chandpasha Patel,
Age 30 years, Occu. Service,
29. Shaikh Abdul Rauf Abdul Sayyad,
Age 28 years, Occu. Service,
30. Abhay Shriniwasrao Raikar,
Age 27 years, Occu. Service,
31. Shivaji Ramhari Futane,
Age 27 years, Occu. Service,
32. Govind Devidasrao Kokate,
Age 27 years, Occu. Service,
33. Rajed Gorakh Ghule,
Age 30 years, Occu. Service,

All R/o. C/o. Government Medical
College and Hospital, Latur.

....Respondents.

Mr. A.S. Shelke, Advocate for petitioner.

Mr. S.P. Tiwari, AGP for respondent No. 1/State.

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.**
DATED : 06/03/2019

JUDGMENT :

1) The appeal is filed to challenge the decision of learned Single Judge in Writ Petition No. 5138/2007. The said writ petition was filed by the State Government to challenge the decision given

by the Member, Industrial Court, Latur in Complaint (ULP) No. 58/2005. The Industrial Court had given direction to the Government to pay salaries to the complainants of the said proceeding with effect from 4.1.2005 and direction was also given to provide work to those complainants of the posts on which they were working before the date of their termination. The learned Single Judge has set aside the decision of the Industrial Court by holding that the complainants were not appointed by following due procedure of recruitment. The learned Single Judge has held that appointment itself was void and so, there was no necessity to follow the procedure for removal of such persons. Such ground was argued before the learned Single Judge.

2) The learned counsel for appellant placed reliance on Government Resolution (G.R.) dated 13.9.2000 of the State Government, General Administration Department. In this G.R., the Government had given direction to District Collector to prepare the wait list of Project Affected Persons on the basis of date of their application and to maintain register of such persons. Further direction was given that the appointing authority was not to make appointment of Project Affected Persons only on the basis of applications given by such persons and when some posts were available the appointing authority was expected to write to District

Collector and District Collector was to supply the candidates from wait list as per the requirement of the posts. The District Collector was to see that the names of only seniormost persons were sent and reservation policy was followed. This G.R. is of no help to the appellant as it is not the case of appellant that such procedure was followed by the appointing authority.

3) It appears that Government Medical College, Latur wanted to fill some posts including the posts of Lab Attendants and advertisement was also published of that post and other posts. Many applications were received. The posts were to be filled on contract basis and for that, Scrutiny Committee was constituted. The Scrutiny Committee did not act swiftly and the College wanted to complete the process before the end of March 2004. Even up to June 2004 no progress was made by the Scrutiny Committee. Then all of a sudden, to many candidates except respondent Nos. 25 to 29 of the writ petition regular posts were given. No due selection process was followed and the posts were advertised for appointment on contract basis. To the present appellant also appointment as against permanent post was given. When subsequent Dean came, he realised this irregularity and he removed these persons from service. Though it is contended by the complainants before Industrial Court that there was no termination and only work was not given to them,

the circumstances were sufficient to infer that they were terminated. Due to all these circumstances, the learned Single Judge has set aside the decision of the Industrial Court.

4) As per the procedure, the Dean had no power to make appointment for the period extending 120 days and that too could have been done on contract basis. Thus, the appointing authority had no power and this circumstance was also there.

5) The learned counsel for appellant submitted that even if there is irregularity in the appointments, the procedure needs to be followed like issuing show cause notice, holding enquiry before issuing order of termination. He placed reliance on the case of Apex Court reported as **LEX (SC) 2018 11 73 [The State of Bihar Vs. Kirti Narayan Prasad]**. The facts of this reported case were totally different. There was no dispute about the power of Civil Surgeon (Dean) to make such appointment. Most of the appointments were cancelled as appointments themselves were illegal. Prior to filing of the proceeding in Supreme Court some directions were given to see that proper procedure was followed and after following the proper procedure, the orders were issued in those cases where the appointments themselves were illegal. In the present matter also, the appointments were illegal. In the case cited supra, the

Apex Court has referred the case reported as **(2011) 3 SCC 436 [State of Orissa and Anr. Vs. Mamata Mohanty]** and the relevant observations are as under :-

“68(i) The procedure prescribed under the 1974 Rules has not been followed in all the cases while making the appointment of the respondents/teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the notice board of the College. Some of these teachers did not face the interview test before the Selection Board. Once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage.”

In the present matter, those observations can be used. It is nothing, but back door entry and further the appointment itself was void as the Dean of the College had no power to make such appointment. Thus, on merits also, there is no case to the petitioner.

6) There is also the point of tenability of L.P.A. The learned counsel for appellant submitted that the aforesaid points were not considered by Industrial Court and as they are considered first by the learned Single Judge, the L.P.A. is tenable. This submission is not at all acceptable. As initial appointment itself was void, there

was no relationship of employer and employee and due to that there was no jurisdiction to Industrial Court to entertain the complaint. Thus, the point of jurisdiction itself is involved and that point is considered by the learned Single Judge. The proceeding could have been decided by the learned Single Judge only on that point also. The aforesaid points were additional points against the appellant and they are rightly considered by the learned Single Judge. This power can be exercised by the learned Single Judge under section 227 of the Constitution of India as Industrial Court is subordinate to this Court. For that the provisions of Rule 18 of Chapter 17 of the Appellate Side Rules of this Court can be seen. Reference can be made to the two cases of Apex Court reported as **(2015) 5 SCC 423 [Radhey Shyam and Anr. Vs. Chhabi Nath and Ors.]**, AIR 2015 (SC) 3623 **[Sh.Jogendrasinhji Vijaysinghji Vs. State of Gujrat]** and the decision of this Court in **L.P.A. No. 108/2012 [Yuvraj s/o. Suka Mahajan and Anr. Vs. Bajirao s/o. Martand Mali and Anr.] decided on 6.2.2019**. In the recently decided case, this Court had an occasion to consider both the cases of **Radhey Shyam and Sh. Jogendrasinhji** cited *supra* and relevant observations are at para Nos. 13 and 14 :-

“13 The decision of the Apex Court in the case of *Jogendrasinhji Vijaysinhji Vs. State of Gujarat and others* (*supra*) shows

that all the cases, which were decided in the past by the Apex Court on tenability of letters patent appeal under Clause 15 of Letters Patent are considered. The Apex Court has made it clear that when the matter comes from Civil Court to High Court, it can be only under Article 227 of the Constitution of India and that observation is in paragraph 18, which is as under:

“18. The aforesaid authoritative pronouncement makes it clear as day that an order passed by a civil court can only be assailed under Article 227 of the Constitution of India and the parameters of challenge have been clearly laid down by this Court in series of decisions which have been referred to by a three-Judge Bench in *Radhey Shyam*, which is a binding precedent. Needless to emphasise that once it is exclusively assailable under Article 227 of the Constitution of India, no intra-court appeal is maintainable.”

The observations made in paragraph 30 are as under:

“30. From the aforesaid pronouncements, it is graphically clear that maintainability of a letters patent

appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, the type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. Barring the civil court, from which order as held by the three-Judge Bench in *Radhey Shyam* that a writ petition can lie only under Article 227 of the Constitution, orders from tribunals cannot always be regarded for all purposes to be under Article 227 of the Constitution. Whether the learned single Judge has exercised the jurisdiction under Article 226 or under Article 227 or both, needless to emphasise, would depend upon various aspects that have been emphasised in the aforestated authorities of this Court. There can be orders passed by the learned Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. We reiterate it would depend upon the nature, contour and character of the order and it will be the obligation of the Division Bench

hearing the letters patent appeal to discern and decide whether the order has been passed by the learned Single Judge in exercise of jurisdiction under Article 226 or 227 of the Constitution or both. The Division Bench would also be required to scrutinise whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. Be it stated, one of the conclusions recorded by the High Court in the impugned judgment pertains to demand and payment of court fees. We do not intend to comment on the same as that would depend upon the rules framed by the High Court.”

14. In view of the aforesaid observations of the Apex Court and the facts of the present matter, this Court has no hesitation to hold that there is nothing in the decision of the learned Single Judge to show that original jurisdiction, jurisdiction under Article 226 of the Constitution of India was required to be used by the learned Single Judge. Even if it is presumed that the petition was filed under Articles 226 and 227 of the Constitution of India, due to nature of

relief claimed and decision given by the learned Single Judge, it needs to be presumed that the supervisory jurisdiction available under Article 227 of the Constitution of India is used by the learned Single Judge. For these reasons, this Court holds that on merits and also on tenability, the Appellants have no case. In the result, the letters patent appeal stands dismissed. Pending civil application also stands disposed of."

7) In view of the aforesaid observations regarding tenability of the L.P.A., this Court holds that L.P.A. itself is not tenable. Thus, no relief can be granted in this L.P.A. In the result, the L.P.A. stands dismissed. Civil Application is disposed of.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

ssc/