

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

WRIT PETITION NO. 7364 OF 2016

Madan Bansidharrao Tonge .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

WITH

WRIT PETITION NO. 7365 OF 2016

Kiran Ramakant Pabitwar .. Petitioner

Versus

The State of Maharashtra and another .. Respondents

WITH

WRIT PETITION NO. 8223 OF 2016

Tarannum Nisar Khan .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

WITH

WRIT PETITION NO. 9698 OF 2016

Shrikant Bhanudas Tambe .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

Shri Upendra B. Bilolikar, Advocate for the Petitioner in all matters.

Shri S. B. Talekar, Special Counsel for Respondent Nos. 1 to 3 in all matters.

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

Closed for order on : 08.02.2019

Order pronounced on : 15.02.2019

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

. All these petitions are based on common set of facts and involve similar issues, as such are decided together.

02. Mr. Bilolikar, the learned advocate for petitioners submits that, the petitioners were appointed as Professor/Associate Professors pursuant to an advertisement and undergoing selection process. The petitioners were interviewed by duly constituted selection committee. The respondents have not conducted selection process through the Maharashtra Public Service Commission (for short "M.P.S.C.") before the petitioners had joined or even thereafter. According to the learned counsel, petitioners hold required qualification for the post of associate professor/professor. The rules for the selection were prescribed and they were followed.

03. The learned counsel further submits that, petitioners herein seek directions against the respondents to regularize/absorb the petitioners. The petitioner in Writ Petition No. 7364 of 2016 namely Mr. Madan Bansidharrao Tonge is appointed as a professor in a stream of Dravyaguna with Government Ayurvedic College, Nanded on 28.08.2013. The

petitioner in Writ Petition No. 7365 of 2016 is appointed as a Associate Professor on 27.01.2012 in the stream of Sharirkriya with Government Ayurvedic College, Nanded. The petitioner in Writ Petition No. 8223 of 2016 is appointed as a Associate Professor in the stream of Strirog and Prasuti Tantra with Government Ayurvedic College, Nanded on 27.01.2012. The petitioner in Writ Petition No. 9698 of 2016 is appointed as a associate professor on 02.05.2013 in the stream of Rognidan.

04. The learned counsel further submits that, the petitioners are continuously working for more than six years on their respective posts. The respondents are not considering request of petitioners to regularize them. The posts are duly sanctioned posts. According to the learned counsel, the entry of petitioners is not a back door entry, but they are selected and appointed after following due selection process viz issuance of advertisement and interview through duly constituted selection committee. Though the petitioners are appointed on consolidated salary, their appointments cannot be said to be illegal. The petitioners though are appointed on consolidated salary and on temporary basis, they have been continued for almost six years and only by giving technical breaks. The respondents cannot continue to keep the petitioners on temporary basis for such a long period.

05. The learned counsel further submits that, the respondents

under notification dated 02nd February, 2009 have taken a decision to regularize service of temporary Medical Officers under the Health Department, having completed three years as on 31st December, 2007. The petitioners have put in more than six years of service. They are required to be given same treatment. The Government Resolution was also issued on 22nd January, 2009 to regularize the temporary employees in the Government Medical and Dental College. The learned counsel submits that, this Court in a case of **Sachin Ambadas Dawale and others Vs. The State of Maharashtra and another** reported in **2014(2) Mh. L. J. 36** had directed regularization of lecturers in Government Polytechnic Colleges in the State of Maharashtra who had put in service of three to ten years and the said judgment has been confirmed by the Apex Court in **Special Leave to Appeal No. 3904 of 2013** under order dated 06.01.2015. The learned counsel submits that, based on said judgment this Court in number of writ petitions have regularized services of the persons who were working on contractual basis in Polytechnic Colleges for more than three years.

06. The learned counsel further submits that, pursuance to aforesaid orders of this Court, the Government under G. R. dated 14.01.2015 regularized 62 contractual lecturers. The learned counsel relying on the judgment of the Division Bench of this Court in Writ Petition No. 8118 of 2015 dated 25.02.2016 submits that, under the said judgment this Court directed

regularization of the petitioner therein working in Government Ayurvedic College, Osmanabad as an Assistant Professor. The petitioners are similarly situated and the same view be taken in present cases also. The petitioners are appointed by duly constituted selection committee. No procedure for selection through M.P.S.C. was conducted. The learned counsel further relies on the Government Resolution dated 22nd October, 2016 and contends that the respondents have regularized 159 Assistant Professors in Government Medical College and Hospital, 24 Assistant Professors in Ayurvedic Colleges and Hospitals, 04 Junior Assistant Professors in Blood Bank Department and 05 Ladies Medical Officers. The petitioners are serving as associate professors/professor in the Government Ayurvedic College, Nanded. Differential treatment is accorded to petitioners by respondents. The petitioners also ought to have been given benefit of regularization in service.

07. The learned counsel in alternate submits that, the petitioners are even ready to work on the post of Assistant Professors. The respondents be directed to appoint them as assistant professors. The learned counsel further submits that, the petitioners have also filed civil applications praying for the pay scale on the basis of the principle of equal pay for equal work. The petitioners are paid honorarium. They are entitled for regular pay scale. To buttress his submissions, the learned counsel relies on the judgment of the Apex Court in a case of

State of Punjab and others Vs. Jagjitsing and others
reported in (2017) 01 SCC 148.

08. Mr. Talekar, the learned Special Counsel for respondents/State submits that, the posts on which petitioners are appointed, are required to be filled in by promotion. The Departmental Promotion Committee is to be constituted by the M.P.S.C. Two candidates are already recommended for the post of Associate Professors by the M.P.S.C. to be filled in by promotion, but, because of interim orders, said posts cannot be filled in. The learned counsel further submits that, the petitioners are appointed on consolidated salary for contractual period. It is only purely temporary arrangement. The petitioners are given honorarium as per Government Resolution dated 07.09.2011 and not the regular pay scale. The Government Resolution relied by the petitioners granting regularization was by way of one time measure. Moreover, the Government Resolution dated 30th August, 2008 is for assistant professor, an entry level post. The petitioners are on higher posts. The petitioners cannot get any right on the permanent post. The posts are to be filled in through M.P.S.C. only. The petitioners are selected by a committee appointed by Dean at the Dean's level only. No state level merit list was published. The advertisement pursuant to which the petitioners are appointed specifically mentions that, the posts are temporary and on contract basis. The appointment order is issued by the Dean of

the Government Ayurvedic College on contractual basis and on honorarium. Since June 2016 the petitioners are working pursuant to interim orders of the Court. The regularization of the services of Assistant Professors under G. R. dated 22.01.2009 in Medical and Dental Colleges was on altogether different footing. There was shortage of lecturers in Government Medical and Dental Colleges at that time and, therefore, Government has taken policy decision to recognize the temporary services of lecturers in Government Medical and Dental Colleges in 2009. Same was a one time measure. The Government Resolution dated 02.02.2009 is regarding Medical Officers of Public Health Department, which is a different department under which the petitioners were appointed temporarily. The posts of professor and associate professor are to be filled either by direct recruitment or by promotion in the ratio of 50 : 50. The posts on which the petitioners are appointed are required to be filled in by promotion. For the post of professor already qualified persons are recommended by the Departmental Promotion Committee, but those are not appointed because of interim orders of this Court. According to the learned counsel, reliance in the judgment dated 25.02.2016 in Writ Petition No. 8118 of 2015 by petitioners is misplaced. The petitioner therein was assistant professor in Government Ayurvedic College. In the said writ petition the petitioner was appointed in a proper pay scale of Rs. 8000 – 275 – 13500, whereas in these cases, the petitioners are appointed on payment of consolidated salary. In Writ Petition

No. 8118 of 2015, the petitioner was appointed by regular selection committee, whereas in present cases, petitioners are appointed by local selection committee. In Writ Petition No. 8118 of 2015, the petitioner therein was appointed after interview of short listed candidates, whereas in present cases it was only a walk-in interview. The learned counsel further submits that, the petitioners had given an undertaking. The petitioners are appointed as per G. R. dated 07.09.2011 on contractual basis. It does not provide for selection through duly constituted selection committee, nor it provides for absorption on category wise roster before making appointments.

09. The learned counsel submits that, the learned Judge that had delivered judgment in a case of **Sachin Ambadas Dawale and others Vs. The State of Maharashtra and another** (supra) has explained the facts in which the judgment was given while delivering judgment in Writ Petition No. 14065 of 2016 dated 15th June, 2017. It was clarified that in the case of **Sachin Ambadas Dawale and others Vs. The State of Maharashtra and another** (supra), the lecturers in different faculties in the Government Polytechnics of the Government of Maharashtra were not available on account of the selection not conducted by the MPSC. The petitioners in case of **Sachin Ambadas Dawale and others Vs. The State of Maharashtra and another** (supra) were selected pursuant to an advertisement and after that undergoing a due selection process by a selection committee

duly constituted under the said Government Resolution, which consisted of various experts.

10. The learned counsel relies on the judgment of the Apex Court in a case of Mohd. Asif and others Vs. State of Bihar and others reported in (2010) 5 SCC 475 and submits that, the length of service is not relevant for considering regularization, if, they are appointed on purely contractual basis. The learned counsel also relies on the judgment of the Apex Court in a case of Secretary, State of Karnataka and others Vs. Umadevi (3) and others reported in (2006) 4 SCC 01. The learned counsel also relies on the judgment of the Apex Court in a case of State of Maharashtra and others Vs. Anita and another reported in (2016) 8 SCC 293 and submits that, if the petitioners have accepted contractual appointments, they are estopped from challenging the terms of appointment. There are already persons recommended for appointment on the post of petitioners and candidates are available for filling in the said posts.

11. We have considered the submissions canvassed by the learned counsel for respective parties.

12. The appointments to the post of associate professor and professor in the Government Ayurvedic Colleges are governed by, “Rules regulating the recruitments to posts of the Professors and

Associate Professors in Maharashtra Ayurvedic Service Group – A and Assistant Professors in Maharashtra Ayurvedic Service Group - B”, in the Government Ayurvedic Colleges under the Directorate of Ayurved (Recruitment) Rules, 2013 (for the sake of brevity hereinafter referred as to the “Rules of 2013”). As per Rule 3, the post of professor in Maharashtra Ayurvedic Service can be filled in by promotion of a suitable person on the basis of strict selection with due regards to seniority from amongst the person holding the post of Associate Professor or by nomination. The appointment to the post of associate professor is governed by Rule 4 of the Rules of 2013. The said post can be filled in by promotion of a suitable person on the basis of strict selection with due regards to the seniority from amongst the person holding the post of Assistant Professor having not less than five years regular service in that post or by nomination. Rule 7 of the Rules of 2013 further prescribes that appointment to the posts mentioned in rule 3 and 4 by promotion and nomination shall be made in the ratio of 50 : 50. Under rule 13, if in the opinion of the Government the exigencies of services so require, the Government may for reasons to be recorded in writing and after ascertaining that no qualified person is available for being appointed by promotion wherever necessary, make appointment to the posts by nomination in relaxation of the ratio prescribed in rule 7 in consultation with the M.P.S.C.

13. The petitioners and respondents are at consensus that the

posts on which the petitioners are appointed are required to be filled in through M.P.S.C. and the posts on which petitioners are appointed are required to be filled in by promotion and not by nomination. The petitioners at present are working on the posts earmarked to be filled in by promotion of candidates selected by departmental promotion committee through M.P.S.C.

14. The petitioners prior to filing of writ petitions have worked for almost three years on the respective posts on temporary basis for a contractual period on consolidated salary. The advertisement pursuant to which the petitioners are appointed specifically mentions that the advertisement is issued for filling in the post on temporary, contractual basis and on a fixed honorarium. The petitioners at the time of applying for the post were aware that they would be appointed for temporary period on contractual basis, so also on fixed honorarium. They participated in the walk-in interview. The appointment orders issued to them also specifically mentions that the petitioners are appointed for a contractual period and on a fixed honorarium. The petitioners, it appears are appointed by the selection committee constituted of the Dean at the local level. The selection committee consisted of Dean of the Medical College, two professors and associate professors and the interviews were held in the chamber of the Dean, Government Ayurvedic College, Nanded. Whereas for a proper selection through M.P.S.C. it should be by regularly constituted selection committee.

15. The Apex Court in a case of Secretary, State of Karnataka and others Vs. Umadevi (3) and others (supra) has observed and held that the entire process of recruitment for service is controlled by detailed procedure. If the rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with Rules. The State is meant to be a model employer. The only fair means to adopt is to make appointments based on the rules so framed.

16. The appointments to the posts of professor and associate professor in Government Ayurvedic College have to be made in consonance with Rules of 2013. Rules 3 and 4 of Rules of 2013 provide the procedure of filling in the posts of professor and associate professors. Rule 7 of the Rules of 2013 provide for appointment of professor and associate professor by nomination and promotion in the ratio of 50 : 50. The petitioners are selected through local selection committee and have been appointed by nomination de hors through M.P.S.C. The petitioners are occupying posts earmarked to be filled in by promotion of assistant professor to the post of associate professor and associate professor to the post of professor. It is because of interim orders passed by this Court, the petitioners are continued since June 2016. M.P.S.C. has already selected the candidates to be promoted on the posts which are now occupied

by petitioners. Their appointments are by nomination. The chart giving details of persons who are already earmarked to be promoted on the post of petitioners and appointment through M.P.S.C. is detailed below.

Sr. No.	W. No.	P. No.	Name	Post	Subject	Whether promotion or nomination	Whether recommendation is available
1.	8223	of 2016	Taranum Khan	Associate Professor	Prasuti tantra	By way of promotion from general category	DPC recommended the name of Dr. Chaya Kulkarni
2	7362	of 2016	Madan Tonge	Professor	Dravya guna	By way of promotion from SC category	DPC. Recommended the name of Ashalata Pawar
3	7365	of 2016	Kiran Pabitwar	Associate Professor	Sharir Kriya	By way of promotion from general category	Requisition submitted to MPSC
4	9698	of 2016	Shrikant Tambe	Associate Professor	Rognidan	By way of promotion from SC category	Dr. J. V. Meghdambar and Dr. M. R. Kamble are under consideration for promotion.

17. Thus, it would be seen that prior to filing of writ petitions, the petitioners had completed about three years in service for contractual period on honorarium and that too appointed by local selection committee through walk in interviews, as against the post meant to be filled in by promotion of the candidates selected

by the departmental promotion committee through M.P.S.C. The distinguishing factors in the case of **Sachin Ambadas Dawale and others Vs. The State of Maharashtra and another** (supra) decided by this Court and the case of petitioners can be culled out as under :

Present cases	Writ Petition No. 8118 of 2015	Point of distinction
Consolidates salary Advertisement Appointment Orders	8000-275-13500 Advertisement Appointment order	Pay scale Vs. Consolidated salary
Local Committee constituted vide communication dated 26.08.2013 by Dean, Government Ayurvedic College under his own Chairmanship	G. R. dated 30.08.2008 constituting regular selection committee under the Chairmanship of Director, Ayurveda Directorate	Regular Selection Committee Vs. Local Selection Committee
The interviews were walk-in in nature in order to fill in the post at emergent situations.	The Committee would be constituted in order to interview shortlisted candidates holding the eligibility for the post as per recruitment rules.	Interview of shortlisted candidates Vs. walk-in interview
The post on which regularization is claimed are the senior most posts in the college of Professor and Associate Professor, for which most experienced persons are appointed so as to benefit the growth of the	The post on which regularization was claimed was the entry level post for which no prior experience is required	First level post of Assistant Professor Vs. Senior most posts of Professor and Associate Professor

institution		
Three years 2013-2016	Seven years 2009-2015	Years in service

18. Thus, it would be seen that, petitioners cannot be treated at par with the petitioner in the case of **Sachin Ambadas Dawale and others Vs. The State of Maharashtra and another** (supra) and Writ Petition No. 8118 of 2015.

19. The petitioners cannot claim parity in view of the aforesaid distinguishing factors. The High Court in view thereof in exercise of powers under Article 226 of the Constitution of India would not issue directions for absorption or regularization. The appointments of petitioners are not made as per the recruitment rules. The petitioners also had worked for only about three years prior to filing of writ petitions and from June 2016, the petitioners are under the cover of an order passed by this Court. The petitioners would not be entitled for any right of absorption or regularization in service. The regular recruitment is the rule. Issuing directions in the present matters to regularize the petitioners would be flouting the rules and those who are waiting to be appointed on the said post would be deprived of their legitimate right. The petitioners cannot claim to have been conferred with right as the same is not in consonance with the rules for appointment and as such it will not be possible for this Court to direct their absorption or regularization in service.

20. In the light of the above, we can not accede to the relief claimed by petitioners.

21. By now some of petitioners are age barred and have crossed the maximum age of recruitment. If the selection is made through M.P.S.C., respondents shall give benefit of age relaxation to the petitioners, considering the fact that since the date of their appointments no selection process for appointment by nomination through M.P.S.C. has been made, nor M.P.S.C. has issued any advertisement.

22. In the light of the above, writ petitions stand disposed of. No costs.

[A. M. DHAVAL, J.]

[S. V. GANGAPURWALA, J.]

23. At this stage, Mr. Bilolikar, the learned counsel for petitioners submits that, there was protection to these petitioners. Said protection be continued for further period of eight (08) weeks.

24. We have observed that, there are already persons, who are selected for the posts held by petitioners to be promoted. In view of that, request made by the learned counsel for petitioners cannot be accepted.

[A. M. DHAVAL, J.]

[S. V. GANGAPURWALA, J.]

bsb/Feb. 19