

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

WRIT PETITION NO.678 OF 2017

Santosh Narayan Deshmukh,
Age-40 years, Occu-Service,
R/o. At Post-Jamkhed, Taluka-Jamkhed,
Dist. Ahmednagar

...PETITIONER

VERSUS

1. The State of Maharashtra
Through Secretary,
Department of Education
Mantralaya, Mumbai-32

...RESPONDENTS

2. The Education Officer (Secondary),
Zilla Parishad, Ahmednagar,
Dist. Ahmednagar

3. The Peoples Education Society,
Jamkhed, Taluka-Jamkhed,
Dist. Ahmednagar

Mr. Pushkar S. Shendurnikar, Advocate for the petitioner
Mr. A.V. Deshmukh, AGP for the respondent/State

**CORAM : SUNIL P. DESHMUKH
& S.M.GAVHANE, JJ.**

DATED : 12-06-2019

ORAL JUDGMENT: [SUNIL P. DESHMUKH, J.]

. Rule. Rule made returnable forthwith and heard
learned counsel for the parties finally by consent.

2. By this petition under article 226 of the Constitution of India the petitioner seeks writ of certiorari or a writ of similar nature, to quash and set aside impugned communication/order dated 11-03-2015 issued by respondent No.2-the Education Officer (Secondary), Zilla Parishad, Ahmednagar and writ of mandamus or a direction of similar nature to grant approval to appointment of present petitioner on the post of Laboratory Assistant.

3. Succinctly stated, petitioner had been appointed in the year 1998 as a peon in L.N.Hoshing Vidyalaya, Jamkhed run by respondent No.3 society. The petitioner while been appointed had been possessing HSC certificate. Later, he improved his educational qualification acquiring bachelor's degree in Arts in the year 2004.

4. One Shri.J.D.Misal working on the post of Laboratory Assistant in aforesaid L.N. Hoshing Vidyalaya, retired on 31-05-2009 on superannuation and clear vacancy occurred in said post. Though the petitioner possessed requisite minimum rather higher qualification than required for said post, the post had remained vacant for a long time.

5. On 01-12-2014 having regard to that petitioner

possessed qualification making him eligible for appointment in said vacant post, he had been promoted to the post of Laboratory Assistant by Management. A proposal accordingly had been submitted for approval to said appointment on promotion.

6. Under impugned communication dated 11-03-2015 respondent No.2 purported to express inability to accept the request having regard to Government Resolution dated 28-10-2004 and thus, the petitioner is before the court under present writ petition.

7. In his response to the writ petition, respondent No.2 states that proposal for approval has been rejected mainly for the reason that there being no provision for promotion to the post of Laboratory Assistant. Having regard to Schedule-F, the post of Laboratory Assistant would not be available for being filled in by promotion.

8. Mr. Shendurnikar, learned counsel submits that impugned communication has been issued without objective appreciation of relevant legal provisions and facts and circumstances. He submits that Schedule-F gives guidelines for fixation of seniority and clause-3 thereof is about non-teaching staff which refers to that preference be given while

making appointment of Laboratory Assistant from the Lower Grade staff. In the face of such provision purported reason that post of Laboratory Assistant is not to be filled in by way of promotion and due process for recruitment will have to be followed is absolutely untenable.

9. He submits that Under the guidelines a Librarian is not eligible for promotion to any other post. So is the case of Laboratory Assistant. These two posts do not qualify and make eligible a Librarian or Laboratory Assistant to any other promotion. He contends there is no such prohibitory stipulation as is referred to in the cases of Laboratory Assistant and Librarian, so far as promotion from Lower Grade Staff to the post of Laboratory Assistant and / or Clerk

10. On the other hand learned AGP submits that post of laboratory assistant is not a promotional post and has to be regularly filled in. He submits that proper reading of guidelines in respect of lower grade staff under Clause-3 of Schedule-F shows that the person in list is to be given preference who has improved educational qualification for the post of Laboratory Assistant is a reflection of that while filling in said post, due procedure for recruitment will have to be followed as preference would come into play in case of equality of candidates. He further contends that the negation of the claim

for approval to the appointment of the petitioner to the post has been with reference to Government Resolution dated 28-10-2004. A copy of Government Resolution dated 28-10-2004 is tendered across and the same shows that it is for the purpose of having reservation for the posts of non-teaching staff. He therefore submits that, this being the situation, it would not be said that impugned order passed in any way is inappropriate or is bad.

11. Having heard submissions on behalf of the parties, it would be pertinent to refer to the relevant provisions under Schedule-F, clause-3 which read as under:

SCHEDULE-F

3. Guidelines for fixation of seniority of non-teaching staff:

Clerks: *The clerical and supervisory posts in the channel of promotion comprise Junior Clerk, Senior Clerk, Head Clerk and Superintendent, Seniority of Junior Clerks in a School or Schools shall be determined on the basis of the date of appointment of the persons concerned. The post of Senior Clerk shall be filled in by promotion of seniormost Junior Clerk. The posts of Head Clerk and Superintendent shall be filled in respectively by promotion of senior most Senior Clerk and seniormost Head Clerk, respectively.*

Librarian: *In the case where the Management runs only one school*

a seniority list of Librarian need not be maintained as the post is an isolated one. In case where the Management runs more than one School a seniority list of Librarians shall be maintained on the basis of the date of appointment. The Librarian shall not be held eligible for promotion to any other post.

Laboratory Assistants: *A seniority list of Laboratory Assistants shall be maintained on the basis of the date of appointment. The incumbents of the posts shall not be held eligible for promotion to any other post.*

Lower Grade Staff: *A common seniority list of Laboratory Attendant, Naik, Oilman, Machine Attendant, Peon, Watchman, Chowkidar, Sweeper, call-woman, Kamathi, Attendant, Laboratory Hamal, Liftmen and such other lower grade staff, if any, shall be maintained on the basis of the dates of their appointment. If any of the lower grade staff improves his qualifications as prescribed either for the post of Laboratory Assistant or Clerk, such employee should be given preference while filling in the said post according to his place in seniority.*

12. Perusal of aforesaid guidelines would reveal that seniority list of non-teaching staff has to be prepared, *inter-alia*, for the posts to be filled in of Laboratory Assistant and Clerk. Said posts are indeed promotional posts for Lower Grade Staff.

13. Clause 3 under Schedule "F" giving guidelines for

fixation of seniority of non teaching staff creates an access of promotion for a lower grade staff employee upon improving qualifications to the posts of Laboratory Assistant / Clerk. It is an avenue available to a senior lower grade qualified staff giving preference while filling in posts of Laboratory Assistant / Clerks.

14. Aforesaid guidelines would show that it requires common seniority list to be maintained of various posts like Laboratory Attendant, Oilman, Machine Attendant, Peon etc in accordance with the dates of appointments and in case a person from said posts improves qualification as prescribed for the post of Laboratory Assistant/Clerk, such an employee is to be given preference in accordance with seniority in appointment of Laboratory Assistant/Clerk. It is a clear depiction of that Laboratory Assistant's post can be filled in by way of promotion.

15. Preference has been given under the guidelines to eligible and qualified person who had been already in employment in the establishment. Focus on the words 'giving preference' while filling in post of Laboratory Assistant or Clerk from lower grade staff would evince that such an employee should be given precedence. It necessarily implies that while the posts of Laboratory Assistant or Clerk are to be filled in,

candidates from other sources would have to give way to lower grade staff employee who is eligible and qualified.

16. It would not be said that in case of vacant posts of Laboratory Assistant / Clerk recruitment process as pleaded on behalf of respondents has to be followed while qualified employee from lower grade staff is available. If, that would have been the situation, from among lower grade staff direct promotion on the post of Laboratory Assistant / Clerk would never be considered.

17. Provisions do not at all preclude promotion from lower grade staff to a Assistant/ Clerk. Access giving preference to lower grade staff while filling in post of Laboratory Assistant/ Clerk gets subsumed into a right to be considered for promotion subject to criteria referred to. A qualified lower grade staff employee can stake claim to promotion as Laboratory Assistant/ Clerk subject to prescribed criteria.

19. Section 5 of the MEPS Act under proviso regulates and controls making of appointments, in the absence of promotional avenue being available. Proviso to Section 5 speaks of procedure to be followed in filling up a vacant post by appointment of a person duly qualified, unless, vacancy is

to be filled in by promotion.

19. When an eligible and qualified lower grade staff would be available to fill in promotional post of Laboratory Assistant / Clerk, preference is to be given to such employee and avenue other than promotion would be precluded, would not be resorted to. As such other source of filling up posts would be relegated as an option in case appointment on promotional avenue is not possible or does not work.

20. This appears to be emerging position from conjoint consideration of provisions of the MEPS Act, Section 5 and Clause 3 of Schedule "F" to the MEPS Rules. Impugned communication in the process turns out to be deflected from the intention and purpose under lying provisions of the MEPS Act and Rules.

21. For one other reason, the impugned communication is unjustified, while it refers to government resolution dated 28th October, 2004. The resolution speaks of reservations in lower grade staff posts and the reason given in the communication and the resolution do not have any compatibility. It had never been case of the respondent that the post of Laboratory Assistant had been reserved for any particular category. Even otherwise in the present matter it is

not the case of respondents that any surplus employee had been available for appointment to the post of Laboratory Assistant. The resolution and the reasons have no mutual relevance in present case. Thus, it appears to be a clear case of non application of mind to the proposal submitted for approval for petitioner.

22. Reasons as such given under the impugned communication and the reasons for which proposal has been rejected as referred to in the affidavit in reply do not appear to be sustainable in facts, circumstances and in law. Thus, impugned order is rendered untenable and impugned order is liable to be set aside.

23. In the light of above, we deem it appropriate to allow the writ petition. Writ petition is allowed in terms of prayer clause-A. Impugned communication dated 11-03-2015 is quashed and set aside. The Education Officer (Secondary), Zilla Parishad, Ahmednagar to issue appropriate orders with regard to proposal for approval of petitioner. Rule made absolute accordingly. No costs. Accordingly, the petition is disposed of.

[S.M.GAVHANE, J.]

[SUNIL P. DESHMUKH, J.]