

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

WRIT PETITION NO. 699 OF 2016

Vijaysing s/o Dayasing Chouhan ...Petitioner

Versus

State of Maharashtra and Ors. ...Respondents

Mr. G.L. Deshpande, Advocate for Petitioner
Mrs. P.V. Diggikar, Assistant Government Pleader for
Respondent No. 1
Mr. C.K. Shinde, Advocate for Respondent Nos. 2 to 4

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

DATE: 7th JANUARY, 2019

PER COURT

1. The time bound promotional benefit granted to the petitioner has been withdrawn.

2. Mr. Deshpande, the learned Counsel for the petitioner strenuously contends that the petitioner was given the first time bound promotional benefit on 2nd October, 1997. The petitioner was working as a Jr. Clerk and was given the pay scale of a Sr. Clerk. The petitioner was appointed as a Jr. Clerk in the year 1979. Though the petitioner would be eligible for getting the pay scale of a Sr. Clerk in the year 1994 as per the Government

Resolution dated 18th April, 1995, the said benefit was given to the petitioner since October, 1997. The learned Counsel submits that the said benefit given to the petitioner in the year 1997 has been unilaterally withdrawn by the respondents under order dated 1st August, 2008. The learned Counsel submits that reason given for withdrawal of the benefit given to the petitioner is per se erroneous. The Government Resolution dated 20th July, 2001 and the subsequent Government Resolutions would not apply to the petitioner as the benefit was already given to the petitioner. The learned Counsel submits that only because the petitioner is not promoted, that would not make the petitioner ineligible for the promotion inter alia the time bound promotional benefits given could not have been withdrawn. The learned Counsel relies on the Judgment of the Division Bench of this Court in the case of *Shrirang S/o Atmaram Nikam Vs. District and Sessions Judge, Thane and Ors.* reported in 2005 (3) ALL MR 573.

3. Mr. Shinde, the learned Counsel for the respondent submits that under the Scheme of time bound benefit as detailed in Government Resolution dated 18th April, 1995 more particularly, clause (Y), if the petitioner is found ineligible, the benefits could be taken away, but the recovery could not be made. As per subsequent Government Resolutions, the respondents have

rightly acted. The petitioner was called for the interview of the post of Sr. Clerk in the year 2008. However, the petitioner was held ineligible on account of the punishment imposed upon the petitioner in the departmental inquiry. Even on merits, the bench mark for promotion was 50 marks, the petitioner secured only 15 marks.

4. It is undisputed that the petitioner was given time bound promotional benefits as per the Government Resolution dated 18th April, 1995 in October, 1997. The said benefit was actually given to the petitioner. The petitioner was called for the interview of the post of Sr. Clerk (the benefit of which the petitioner was given in the year 1997). The petitioner was found ineligible. Departmental inquiry was initiated against the petitioner. The punishment was imposed upon the petitioner. The service record of the petitioner as such was tainted. Moreover, it is also averred by the respondent that the petitioner could not secure the bench mark of 50 marks, he could secure only 15 marks. Afterwards, the petitioner was held ineligible for promotion. The Judgment of the Division Bench of this Court in the case of *Shrirang Nikam* referred to supra and relied by the learned Counsel for the petitioner would not help to the petitioner. The Division Bench of this Court observed thus -

A reading of these paragraphs, therefore, would make it clear that it is only those employees who are held not eligible for regular promotion who will not get the benefit. In other words an employee either on account of not possessing the qualifications, experience or having a bad service record namely adverse entries would not be eligible to get the benefits of the scheme. In the case of promotion whether by selection or based on seniority-cum-fitness what is always considered is the number of posts and the zone of consideration. As an illustration if there be one post, depending upon the G.R. 3 persons may be considered. All the 3 employees may be having good record, but still as the vacancy is only one, the candidate in the case of selection post, having the best record would be selected. It does not mean that the other candidates are not fit for promotion. The test, therefore, is not whether a candidate would be promoted. The test is whether a candidate is eligible.

5. The Court observed that an employee either on account of not possessing the qualification, experience or having bad service record namely, adverse entries would not be eligible to get the benefit of the Scheme. The Judgment would squarely apply in the facts of the present case and the petitioner would be ineligible to get the benefit of such scheme. The petitioner is subsequently promoted in the year 2012.

6. It is submitted by the respondent that the recovery is not made. According to the petitioner, the recovery was made.

7. The pay fixation of the petitioner made in the year 1997, certainly would not be valid and the same pay fixation since the year 1997 would be cancelled. However, the actual recovery cannot be made as per the relevant Government Resolutions relied upon by the learned Counsel for the respondent, such as Government Resolution dated 18th April, 1995, 20th July, 2001. In case, if any recovery is made from the petitioner, the same would be refunded to the petitioner. However, the pay fixation which was done in the year 1997 of Sr. Clerk, certainly has to be cancelled.

8. The Writ Petition is accordingly disposed of. No costs.

(A.M. DHAVAL, J.) (S.V. GANGAPURWALA, J.)

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