

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVIEW APPLICATION NO.2 OF 2019

Shri Sudhir Kerkar,
Major in age, working as Dy.
Commissioner of Corporation
of City of Panaji,
Municipal Council Building, Panaji,
Goa presently posted as Deputy
Director of Panchayat (North),
Panaji-Goa.

... Applicant

V e r s u s

1. Maya M. Pednekar,
Major in age, r/o. H.No.157,
Forgottem, Goa Velha, Goa
through her duly constituted
Power of Attorney Mrs. Varsha
Mandrekar, r/o. Mini Satelite
Township, Colvale,
Bardez-Goa.
(Original Petitioner no.1.)
2. Varsha Mandrekar,
Major in age, R/o. Mini
Satelite Township, Colvale,
Bardez-Goa.
(Respondent no.2)
3. Gaurish S. Kurtikar,
Major in age, Working as
Asst. Commissioner,
O/o Department of Commercial
Taxes, Panaji, Goa.
(Respondent no.3)
4. Neetal P. Amonkar,
major in age, working as
Under Secretary (Home-II),
Secretariat, Porvorim, Goa.
(Original Petitioner no.4.)
5. Shri Gaurish Shankwalkar,

Major in age, working as
Dy. Collector and SDO
Tiswadi, C/o. Collectorate
Panaji.
(Original Petitioner no.5)

6. Shri Mahadev J. Araundekar,
Major in age, Working as
Dy. Collector and SDO Bicholim
Taluka, Bicholim, Goa.
(Original Petitioner no.6)
7. State of Goa,
through the Chief
Secretary, having office at
Secretariat, Porvorim, Goa.
(Original Petitioner no.7)
8. Goa Public Service Commission
through its Member Secretary,
having its Office at EDC House,
Panaji, Goa.
(Original Respondent no.2)
9. Shri Parsh Faldessai,
major in age,
Asst. Commissioner of Commercial
Tax, Department of Commercial Taxes,
Osia Complex, SDPDA Market,
Margao, Goa.
(Original Respondent no.3) ... Respondents

Mr. V. A. Lawande with Ms. Ankita Kamat, Advocate for the Applicants.

Mr. Nitin Sardessai, Senior Advocate with Ms. Suzette Pereira and Ms. Gautami Kamat, Advocates for the Respondent no.1.

Mr. Amir Jamadar, Additional Government Advocate for the Respondent nos.7 and 8.

Mr. Balkrishna Sardessai, Advocate for the Respondent no.9.

**Coram :- C. V. BHADANG &
NUTAN D. SARDESSAI, JJ.**

Reserved for Order on : 22nd February 2019
Order pronounced on : 26th February 2019

ORDER (*Per C. V. Bhadang, J.*)

1. By this application, the applicant (the original respondent no.4) is seeking review of the judgment and order dated 02.02.2017 passed by this Court (F.M.Reis & Nutan D. Sardesai, J.J.,) in Writ Petition No.847/2015.

2. The respondent nos.1 to 6, (being the original petitioners), filed the aforesaid Writ Petition challenging the report dated 16.02.2015 prepared by the learned Ombudsman and the impugned order dated 09.09.2015 passed by the Government redetermining the *inter se* seniority of the petitioner nos.1 to 6, the applicant and the respondent no.9 herein. The respondent nos.1 to 6 also sought restoration of the final seniority list dated 16.07.2008.

3. This Court by the judgment under review while allowing the petition has set aside the impugned report dated 16.02.2015 prepared by the learned Ombudsman and the impugned order dated 09.09.2015. As a result thereof, the final seniority list dated 16.07.2008 stands restored.

4. We have heard Mr. Lawande, the learned Counsel for the applicant and Mr. Nitin Sardessai, the learned Senior Counsel for the contesting respondent nos.1 to 6. We have also heard Mr. Jamadar, the learned Additional Government Advocate for the respondent nos.7 and 8 and Mr. Balkrishna Sardessai, the learned Counsel for the respondent no.9. Perused record.

5. The only contention raised on behalf of the applicant is that this Court while deciding Writ Petition No.847/2015 has not considered the decision of the Supreme Court in the case of **Bimlesh Tanwar vs. State of Haryana & Ors. (2003) 5 Supreme Court Cases 604** although the same was cited and reliance was placed on it. It is submitted that the Supreme Court in the case of **Bimlesh Tanwar** (supra) has held that the *inter se* seniority of the candidates who are appointed on the same day, has to be determined as per the rules governing the same. It is submitted that as per Rule 5 of the Goa Government (Seniority) Rules, 1967 (Rules of 1967, for short), the relative seniority of all direct recruits has to be determined by the order of merit in which they are selected for such appointment on the recommendation of the Public Service Commission or any other selection authority. It is submitted that the applicant and the respondent no.9 were admittedly above the respondent nos.1 to 6 (original petitioners) in the

select list drawn by the selection authority and thus merely on account of the fact that because of the roster points, the respondent nos.1 to 6 were appointed prior to the applicant and the respondent no.9 they cannot lose their seniority in the cadre. The learned Counsel submitted that the principle on which Rule 5 of the Rules of 1967 is based on the *inter se* merit of the selectees. The learned Counsel submitted that an incumbent would be borne in the cadre on his selection and therefore this Court was in error in holding that the seniority has to be reckoned from the date of appointment and that the right to seniority can accrue only from the actual appointment.

6. Shri Sardessai, learned Senior Counsel for the respondent nos.1 to 6 has submitted that there is no error apparent on the face of record in the judgment under review. It is submitted that a person can be said to be borne in the cadre only from the date on which he assumes charge of the post on his appointment and not otherwise. It is submitted that the entire case of the applicant and for the matter of that the respondent no.9 is based on Rule 5 of the Rules of 1967 and the effect thereof has already been considered by this Court. It is submitted that Rule 5 would apply only where the persons who are issued appointment orders simultaneously join the service not strictly in accordance with the gradation in

the selection list. In other words, it is submitted that even if a candidate who ranks lower in the select list joins the service prior to the candidate who is shown higher up, would by itself not disturb the seniority as in the select list. It is submitted that Rule 5 of the Rules of 1967 has no application where the appointment letters are issued depending upon the availability of the vacancies. It is submitted that the decision in the case of **Bimlesh Tanwar** (supra) is distinguishable on facts.

7. We have considered the circumstances and the submissions made. It is true that there is no reference to the decision of the Supreme Court in the case of **Bimlesh Tanwar** (supra) in the Judgment under review. However, that alone in our considered view is not sufficient to review the judgment. This is for the reason that the effect of Rule 5 of the Rules of 1967 which is in consonance with the principle as laid down in the case of **Bimlesh Tanwar** (supra) has been considered by this Court at length while deciding Writ Petition No. 847/2015.

8. In our view, the case of **Bimlesh Tanwar** (supra) turned on its own facts. In that case the appellant who was belonging to a scheduled caste had sought seniority over the respondent nos.8 to 11 who ranked above the appellant in the

merit list (the select list). The respondent nos.8 to 11 were also appointed prior to the appellant. The High Court dismissed the petition filed by the appellant seeking seniority over respondent nos.8 to 11 which was confirmed by the Supreme Court. In that case, on facts it was found that the respondent nos.8 to 11 were unjustly deprived of their seniority for no fault of theirs.

9. The facts obtaining in the present case, are entirely different. In the present case, initially in the year 2001, an advertisement was issued inviting applications for 11 posts and 11 vacancies which were likely to occur in future. Subsequently, in November 2001, the respondent no.1 wrote to the respondent no.2 to make a wait list of 19 candidates and thus the total vacancies notified were 30 out of which 11 were existing and the remaining 19 candidates were put on wait list. The second respondent made recommendations in 5 batches depending upon the availability of vacancies. The first of such recommendation was made on 21.12.2011 recommending 11 candidates to the existing 11 posts out of which 7 posts were of general category, 3 were reserved for OBC and one for CFF candidate. The original Petitioner no.1 was appointed in pursuance of the said recommendation on 15.02.2002. The second recommendation was made on

26.02.2002 for 8 candidates out of which 5 were for general category and 3 for OBC. The third recommendation was on 24.05.2002 whereby two candidates were recommended one each belonging to the general category and for OBC. The original petitioner no.4 came to be recommended in this batch. Thereafter, a recommendation was made on 27.11.2002 for two more candidates one each belonging to the general category and one to the OBC. The original petitioner nos.5 and 6 were recommended and appointed in pursuance of the said recommendation on 14.01.2003. The final recommendation was made on 03.06.2003 consisting of 7 candidates out of which six were of general category and one for OBC. Indisputably, the applicant and the respondent no.9 were recommended in this batch.

10. The respondent nos.1 to 6 (original petitioners) have been promoted to hold Junior Scale posts in the Goa Civil Service Rules on regular basis in November 2014.

11. This Court in para 16 onwards has considered Rule 5 of the 1967 Rules and has held that although the seniority will be governed by merit in which the candidates are selected, it is found that there were no vacant posts after the initial 11 appointments were made and other 19 candidates (which includes the applicant

and the respondent no.9) were asked to be placed in the wait list. This Court has found that insofar as the remaining 19 candidates are concerned, there were no vacant posts against which appointments could be made when the original 11 posts were filled up. This Court after considering the decision of the Supreme Court in the case of ***State of Uttar Pradesh & Ors. vs. Ashok Kumar Srivastava & anr. [(2014) 14 SCC 720]***, has found that in the present case there was no dispute that when the respondent nos.1 to 6 were appointed, there were no substantive posts available to appoint the applicant and the respondent no.9 and, as such, without being borne in the cadre (as there were no substantive posts available at the relevant time), it would be grossly unjust to accept that the persons who are already in service would be deprived of their seniority on the basis of the subsequent appointment, which would have an effect of a retrospective date of availability of the substantive posts.

12. Thus, in our considered view, this Court while deciding Writ Petition no.847/2015 has already considered Rule 5 of the Rules of 1967 in the context of the factual situation obtaining in this case and therefore we do not find that there is any error apparent on the face of the record.

13. The application is without any merit and it is accordingly dismissed with no order as to costs.

NUTAN D. SARDESSAI, J.

C. V. BHADANG, J.

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