

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 867 OF 2009**

Mrs. Madhuri V. Naik,
alias Madhuri P. Desai,
45 years of age, married,
Resident of H.No.114/1,
Canacona Goa.

... Petitioner

Versus

1. The State of Goa,
Through its Chief Secretary,
having office at Secretariat,
Porvorim Goa.

2. The Public Works Department,
Through its Chief Engineer,
having office at Altinho,
Panaji Goa.

... Respondents

Mr. A. D. Bhobe and Ms. K. Govekar, Advocates for the Petitioner.

Mr. D. Pangam, Advocate General with Ms. Neha Umesh Kholkar,
Addl. Government Advocate for Respondents.

**Coram:- M. S. SONAK &
NUTAN D. SARDESSAI, JJ.**

Date:- 23rd August, 2019

ORAL JUDGMENT (Per M. S. Sonak,J)

Heard Mr. A. D. Bhobe, learned counsel for the Petitioner
and Mr. D. Pangam, learned Advocate General alongwith Ms. N.
Kholkar, learned Addl. Government Advocate for the Respondents.

2. By this petition, under Article 226 of the Constitution of India, the Petitioner seeks a writ of mandamus to regularise her to the post of Works Assistant with effect from 7th July, 2000, on which date, she was in fact regularised in the post of Supervisor in the Public Works Department. It is the case of the Petitioner that she ought to have been regularised in the post of Works Assistant, which is the post she was holding since the year 1996.

3. The Petitioner was appointed as a Supervisor in the Public Works Department on 01.05.1990 on Nominal Muster Roll (NMR) basis. It is the case of the Petitioner that she was promoted to the post of Works Assistant in the year 1996. The learned Advocate General submits that the NMR employees are not promoted and therefore, the appointment of the Petitioner as Works Assistant in the year 1996 cannot be treated as some promotion. However, the fact remains that the Petitioner was initially appointed as Supervisor on 01.05.1990 and thereafter appointed as Works Assistant in the year 1996, again, on NMR basis without any interruption or break. In fact, it is the case of the Petitioner that by order dated 21.06.1996, the Executive Engineer redesignated the persons who were qualified the Supervisors on NMR as Works Assistants with effect from 01.06.1996. The name of the Petitioner finds place at serial No.3 of the said order.

4. On 19th November, 1997, the Petitioner was granted a temporary status effective from 14.05.1997. Again in this order also, the

Petitioner was designated as Works Assistant. By further order dated 07.07.2000, the services of the Petitioner were regularised. However, in this order dated 07.07.2000, the Petitioner was indicated as regularised against the post of Supervisor and not on the post of Works Assistant. There is no dispute that the Works Assistant and Supervisor are two different and distinct posts. The pay scale of Works Assistant at the relevant time was 3050-4590 and that of Supervisor was Rs.2650-4000. It is the case of the Petitioner that since on 19.11.1997 she was already working as Works Assistant, her regularisation ought to have been to the post of Works Assistant and not merely Supervisor. In any case, the Petitioner submits that pay protection should have been granted.

5. Mr. Bhobe, learned counsel for the Petitioner submits that the Respondents were not justified in regularising the Petitioner only against the post of Supervisor but should have regularised the Petitioner against the post of Works Assistant. Mr. Bhobe has relied upon the decision of this Court in the case of *Pradeep Sahakari Vs State of Goa*,¹ as well as the order dated 23.06.2003 passed in Review Petition against the said decision. He submits that principle accepted in this decision is that the regularisation can always be granted as and when the employee complete five years in employment and it is not as if the regularisation is to be granted only to the employee who may have completed five years as on the date of Notification permitting the regularisation. Mr. Bhobe submits that the Petitioner was in

¹ WP No.263 of 2000 dt. 20.09.2000

employment though on NMR basis since the year 1990. This means that the Petitioner had completed five years as an employee on NMR basis. On this basis, the Petitioner was required to be regularised against the post which she was actually holding on the date of regularisation order. He submits that in lieu of regularisation, the Petitioner should not have forced to accept the employment against the post of Supervisor, which admittedly carries a lesser pay scale. Mr. Bhobe, therefore submits that reliefs as prayed for by the Petitioner may be granted.

6. On the aspect of delay and laches, Mr. Bhobe submits that the Petitioner, as it has been appointed against the post which does not carry substantial pay. He submits that the Petitioner has been representing and though her initial representation was rejected in the year 2003, further representations were made by the Petitioner and finally rejection came about only vide Memorandum dated 07.03.2008. He submits that this petition was instituted on 10.09.2009. He submits that this is not the case where any parallel right have accrued in favour of the State. For all these reasons, he submits that there is no delay or laches involved and in any case there is sufficient explanation furnished by the Petitioner.

7. Mr. D.Pangam, learned Advocate General points out that the Petitioner, has completed six years in the post of Supervisor on NMR basis having worked in the said position from 1990 to 1996.

However, in the post of Works Assistant the Petitioner has worked for only four years, one month and six days. Accordingly, when the regularisation order dated 07.07.2000 was made naturally, the Petitioner was regularised against the post of Supervisor, she having not even completed the minimum required service of five years in the post of Works Assistant. He submits that thus construed there is no infirmity whatsoever in the order dated 07.07.2000 and on merit the Petitioner is not entitled for any relief.

8. The learned Advocate General submits that mere filing of repeated representations is no answer to explain the delay and laches which are writ large in the facts and circumstances of the present case. He therefore, submits that this is not the case where the Petitioner should be granted any relief in the matter.

9. We have considered the rival contentions and perused the material on record.

10. The facts have already been adverted to above and there is no serious dispute regard the primary fact though there may be dispute with regard to interpretation which arise therefrom. Therefore, the rival contentions will have to be evaluated in the context of aforesaid primary facts, about which at least, there is no serious dispute between the parties.

11. The regularisation effected vide order dated 07.07.2000 relates to Office Memorandum dated 29.10.1990. This Office Memorandum specifically deals with issue of regularisation of NMRs/Daily wagers and workcharged staff deployed in different departments of the Government.

12. The Office Memorandum states that after careful examination, the Government has decided upon the following course of action :-

“3. In regard to NMRs/Daily Wagers, Government has decided to consider regularisation of employees who have completed more than 5 years of continuous service subject to the following conditions:

- (i) That work should be available on continuous basis.*
- (ii) That in case any recruitment has taken place after 12th May, 1985, the candidate should have been sponsored by the Employment Exchange. This condition is imposed because the Central Government has already exempted appointment to Group 'D' posts from the purview of Employment Exchange where such appointments have taken place prior to 12th May, 1985.*
- (iii) That the persons concerned should qualify for the post as per the recruitment rules applicable for departmental candidates. Here, age limit prescribed in the Recruitment Rules shall not be made applicable to such cases.*
- (iv) That the resultant vacancy should not be filled up under any circumstances.*
- (v) That on retirement of the incumbent, review may be carried out by the Department concerned whether the post is required or not any further.*

Once the employees completes 5 years of

continuous service as NMRs/Daily Wagers, he would automatically qualify for being considered for regularisation subject to the conditions stated above.

However, under no circumstances, should there be any further recruitment of NMRs/Daily wagers in any Department.

4. In respect of workcharged employees (whether permanent or temporary) Government has decided to give benefit of regular pay scales and other benefits to all the workcharged staff subject to the conditions already stated in para 3 above.”

(Emphasis supplied)

13. From the aforesaid, it is apparent that the Government has decided to consider the regularisation of the employees who have completed "*more than five years of continuous service*" subject to conditions set out in clause (i) to (v) of clause 3 of the said Office Memorandum.

14. The only reason now set out in the affidavit on behalf of the Respondent is that the Petitioner had completed six years of continuous service on NMR basis as Supervisor whereas the Petitioner had completed only four years, one month and six days of service on NMR basis as Works Assistant and therefore, the Petitioner, was regularised in the post of Supervisor and not in the post of Works Assistant.

15. According to us, the Office Memorandum dated 29.10.1990 speaks only of completion of more than five years of continuous service on NMR basis. The Office Memorandum, at least

specifically, does not make reference to service in a particular post or in a particular position. Besides, in the peculiar facts and circumstances of the case, it is necessary to note that the Respondents themselves had appointed the Petitioner as a Works Assistant from the year 1996. Further, there is order dated 21.06.1996 issued by the Executive Engineer which styled qualified Supervisor on NMR basis as Works Assistant with effect from 01.06.1996. The name of the Petitioner finds place at serial no.3 of the said order. By order dated 19.11.1997, the Petitioner was granted temporary status with effect from 14.05.1997, again, in the post of Works Assistant and not Supervisor. Therefore, these peculiar facts and circumstances were required to be taken into consideration by the Respondents at the time of issuance of regularisation order.

16. The regularisation in the post of Works Assistant could not have been denied on the basis that the Petitioner had completed only four years, one month and six days of service as Works Assistant though there is no dispute that without any interregnum or break the Petitioner for six years prior to such service also completed the service as Supervisor on NMR basis. The Office Memorandum which uses the expression "*who have completed more than five years of continuous service*" can always be construed, in the peculiar facts and circumstances of the present case, to hold that the Petitioner, had completed more than five years of continuous service by combining her service as Supervisor and Works Assistant. This was clearly a case where such a construction

was warranted, since for purpose of regularization, the Respondents have themselves confirmed the services in posts of Supervisor and Works Assistant.

17. In the decision in the case of ***Pradeep Sahakari*** (supra) the first issue related to construction of Notification for award of temporary status. The Division Bench of this Court held that it was not necessary to strictly construe the Notification so as to restrict its benefits only to those employees who had completed five years on the date of Notification. The Division Bench held that as and when the employees complete five years, the benefits of regularisation can be extended to them. Admittedly, in another 10 months or so from the date of regularisation, the Petitioner would have completed five years service in Works Assistant.

18. There was yet another contention raised in the said case in the context of reduction of remuneration of the Petitioner consequent upon the regularisation. In this context, the Division Bench at paragraph 8 made the following observations.

“8. Another contention raised in the petition is that after the said Notification, the Petitioner's service was regularized by the Government of Goa. In that process, his remuneration that he was receiving before the date of regularization was reduced. This can never happen in service jurisprudence. The present remuneration of an employee cannot be reduced without any valid

reason nor with any notice to the employee. Therefore, if the Petitioners contention is correct that his remuneration has been reduced, the Government is directed to rectify that error and protect his remuneration that he was drawing on the previous day of his regularization.”

(Emphasis supplied)

19. The review petition was taken up by the State to question the judgment and order dated 20.09.2000 in the case of **Pradeep Sahakari** (supra). This review petition was disposed of by order dated 23.06.2003. The Division Bench of this Court held that the pay protection extends not only to original pay but also to the annual increments.

20. From the aforesaid orders, it is clear that this Court did not approve the action of the Respondent in reducing pay of the employees post regularisation. In the present case as well, the Petitioner, on the date of regularisation was drawing pay in the higher scale of Works Assistant which post she was holding since the year 1996. Post regularisation however, the Petitioner was made to draw lower pay scale as Supervisor. Such a course of action was not approved in the case of **Pradeep Sahakari** (supra).

21. In the facts and circumstances of the present case, we are satisfied that the Petitioner is entitled to the relief of regularisation in the post of Works Assistant and not merely Supervisor as has been done

in the order dated 07.07.2000.

22. There is issue of delay and laches raised in this petition. The record indicates that the Petitioner did make representations within reasonable period from implementation of order dated 07.07.2000. Once such representations were rejected in 2003, the Petitioner, made further representations by pointing out that her claim for regularisation as Works Assistant be considered at least from the date she completed five years as Works Assistant, which was hardly 10 to 11 months after the issuance of order dated 07.07.2000. This representation was finally rejected by the Office Memorandum dated 07.03.2008. This petition has been instituted in the year 2009. Thus, construed, this is not a fit case to non suit the Petitioner on the ground of delay and laches. At the highest this case calls for moulding of some relief in relation to monetary benefits payable to the Petitioner.

23. Accordingly, we allow this petition and we direct the appropriate modification in the order dated 07.07.2000 so as to indicate regularisation of the Petitioner in the post of Works Assistant with effect from 07.07.2000 in substitution of her regularisation in the post of Supervisor from the same date. Necessary orders to this effect shall be issued by the Respondents within four weeks from today.

24. The Petitioner should be paid consequential benefits in monetary terms, effective from 10.09.2006 and not any earlier date.

This is because the present petition was instituted on 10.09.2009 and arrears of three years is what, we feel can be legitimately awarded to the Petitioner in the facts and circumstances of the present case. This means that the Petitioner should stand regularised in the post of Works Assistant effective from 07.07.2000 but she will be entitled to monetary benefits i.e. difference in the pay scale only from 10.09.2006 and not earlier. The Respondents to work out the arrears payable in terms of this order and to pay the same to the Petitioner within three months from today.

25. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

NUTAN D. SARDESSAI, J.

M. S. SONAK, J.

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