

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO. 5402 OF 2018

1. Dr. Sanjay S/o Ramrao Kadam,
Age : 45 Years, Occ. Service as Taluka Health
Officer, Georai,
R/o 19, Navjeevan Shikshak Colony,
Beed, Tq. & Dist. Beed.
2. Dr. Vikas S/o Uttamrao Athawale,
Age : 43 Years, Occu. Service as
Taluka Health Officer, Kaij,
Tq. Kaij, Dist. Beed.
3. Dr. Dnyaneshwar Shesherao Nipte,
Age : 43 Years, Occ. Service as Medical
Officer, District T.B. Center,
Beed, Tq. & Dist. Beed.
4. Dr. Sanjeevani Chitambar Gavhane,
Age : 43 Years, Occ. Service as Medical
Officer, District Training Sangh,
Beed, Tq. & Dist. Beed.
5. Dr. Manisha Uttamrao Kale,
Age : 41 Years, Occ. Service as Medical
Officer, District T.B.Center Beed,
Tq. & Dist. Beed.
6. Dr. Satish Bapurao Shinde,
Age : 44 Years, Occ. Service as Medical
Officer, District T.B.Center Beed,
Tq. & Dist. Beed.
7. Dr. Mahadeo Vishwanath Chinchole,
Age : 53 Years, Occ. Service as
Medical Officer, District Hospital,
Beed, Tq. & Dist. Beed.

: PETITIONERS

...VERSUS...

1. The State of Maharashtra,
Through its Principal Secretary,
Public Health Department,
Government of Maharashtra,
Mantralaya, Mumbai – 32.
2. The State of Maharashtra,
through its Secretary,
Public Health Department,
10th Floor, G.T.Hospital Compound,
Mantralaya, Mumbai.
3. The Commissioner of Health &
Mission Director, National Health Mission,
Maharashtra State Arogya Bhawan,
St. George Hospital Compound,
Near C.S.T. Mumbai
4. The Director of Health Services,
Arogya Bhawan, St. George Hospital,
Compound, Near CST, Mumbai.
5. The Under Secretary Public Health
Department, 10th Floor, G.T. Hospital
Compound, Mantralaya, Mumbai : RESPONDENTS

Shri. Avinash S. Deshmukh, Advocate h/f Shri Sanjaykumar Bhosale, Advocate
for the petitioners.

Shri V.M.Kagne, A.G.P for the respondent nos. 1 to 5.

Shri A.R.Salve, intervenor in Civil Application No. 10287 of 2019.

**CORAM : S.V.GANGAPURWALA AND
ANIL S. KILOR, JJ.**

RESERVED ON : 16th OCTOBER, 2019

DATED : 20th MARCH, 2020.

JUDGMENT (Per Court : ANIL S. KILOR, J.)

Rule. Rule made returnable forthwith. Heard
finally by consent of learned counsel for the respective parties.

2. The State of Maharashtra issued Government Resolutions dated 30th May, 2015, 30th June, 2015 and 3rd September, 2015, increasing the age of superannuation of the District Health Officers, Civil Surgeons and Superior Officers working in the Public Health Department, from 58 years to 60 years on the ground of non availability of medical officers and senior officers at General Hospitals, Sub District Hospitals and Rural Hospitals.

3. Petitioners who are the Medical officers and superior officers in the Public Health Department, Government of Maharashtra, by way of present petition praying for directions to the Respondents, not to increase the age limit for superannuation of the District Health Officers, Civil Surgeons and superior officers working in the Public Health Department, for the reasons that it has blocked the legitimate right of promotion and future prospects of petitioners and others like petitioners.

4. Heard Shri Avinash Deshmukh, learned counsel for the petitioners, Shri V. M. Kagne learned Asst. Govt. Pleader for the respondent No. 1 to 5 and Shri A. R. Salve for intervenor.

5. Shri Deshmukh, learned counsel for petitioner has alleged that to give benefit to some of the officers who are nearer and dearer, Ministers and higher officers working in the Mantralaya, issued impugned Government Resolutions, increasing the age of superannuation.

6. Shri Deshmukh, learned counsel for the petitioners argues that from last many years no effective steps have been taken by the respondents to fill in the vacancies though petitioners and many like petitioners, are available for promotion and though candidates in large number are available for fresh recruitment.

7. He submits that provisions of the Maharashtra Civil Services (Pension) Rules 1982 (herein after referred as 'Rules, 1982') prescribes the age of retirement but does not empower the State Government to increase the age limit of retirement of a Government Servant from 58 to 60 years by issuing Government Resolutions. Thus, it amounts to exercise of legislative power without authority.

8. He points out that no cogent and valid reasons are given in the Government Resolutions to increase the age of

superannuation, therefore the same is arbitrary, mala fide and not sustainable in the eyes of law.

9. Per contra the learned Asst. Government Pleader submits that due to shortage of Medical Officers and Higher Officers, Government is facing difficulties in providing Health Services to the needy people, therefore, the age of superannuation has been increased in exercise of power under Rule 12 of Rules, 1982.

10. He points out that in the 'Civil Surgeon' Cadre, sanctioned posts are 643 out of which 377 posts are vacant. In the 'District Health Officers' Cadre sanctioned posts are 281 out of which 141 posts are vacant. In the 'Specialty cadre' sanctioned posts are 627 out of which 466 posts are vacant.

11. He draws attention of this Court to the fact that four Specialty Doctors have been appointed on recommendation of Maharashtra Public Service Commission, vide order dated 7th March, 2018. Promotion to 58 Medical officers in Civil Surgeon cadre has been granted vide order dated 9th May, 2018.

12. According to him the Government is making all efforts to

fill up the vacant post and for speedy recruitment of Medical Officers (Group A), a Committee under the Collector of each District has been formed as per the Government Resolution dated 26th October, 2016, and vacant posts to some extent have filled in.

13. He lastly opposes the petitioner on the ground that the petitioners are Government employees and they can raise their grievance before the Administrative Tribunal.

14. To consider the rival contentions, we have gone through the record and relevant provisions of law.

15. To consider the contentions of learned counsel for the respective parties, it is necessary to refer to Rule 10(I) and Rule 12 of the Maharashtra Civil Services (Pension) Rules, 1982. It reads thus:-

“10. Age of retirement (I) Except as provided in this rule, every Government servant, other than a Class IV servant, shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years.

12. Extension in service beyond the age of compulsory retirement – Notwithstanding anything contained in sub-rule (3) of Rule 10 Government may grant an extension of service to any Government servant beyond the age of retirement, on public grounds, which must be recorded in writing.

Note.- Normally except in very exceptional circumstances, extension should not be granted beyond the age of 60 years.”

16. From Rule 10(1) of Rules, 1982, it is clear that age of retirement of a Government Servant is 58 years and under Rule 12, the Government may grant an extension of service to any Government servant beyond the age of retirement, on public grounds, which must be recorded in writing.

17. There is no doubt that maintenance and improvement of public health is of paramount importance as it relates to the right to life of every person. The services of Medical Officers, Civil Surgeons, Superior Officer and other Officers in the Public Health Department are directly connected with the issue of maintenance and improvement of public health.

18. In the case of *Association of Medical Superspeciality Aspirants and Residents and others Vrs. Union of India and others* reported in *(2019) 8 Supreme Court Cases 607*. The paragraphs 22 to 26 read thus:

“22. Article 21 of the Constitution of India imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by

the State and the Medical Officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right guaranteed Under Article 21 of the Constitution. 2 Therefore, in a welfare State it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.

23. Article 47 of the Constitution reiterates the constitutional obligation imposed on the State to improve public health. The Directive Principle provides as follows:

“47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”

24 . In Akhil Bharatiya Soshit Karamchari Sangh v. Union of India MANU/SC/0058/1980 : (1981) 1 SCC 246 it was held that maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. It was further observed in the above judgment that attending to public health, therefore, is of high priority-perhaps the one at the top.

25. It is for the State to secure health to its citizens as its primary duty. No doubt the Government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities to employ best of talents and tone up its administration to give effective contribution, which is also the duty of the Government.

26. Right to health is integral to the right to life. Government has a constitutional obligation to provide

health facilities 5 . The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter, and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and the restriction would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.”

19. Hence, it is clear that Article 21 of the Constitution of India imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance and therefore maintenance and improvement of public health has to rank high, so these are indispensable to the very physical existence of the community and on the betterment of these, depends the building of the society of which the constitution makers envisaged.

20. But in order to make it meaningful it has to be within

the reach of its people, as far as possible, to reduce the queue of waiting lists and it has to provide all facilities to employ best of talents and tone up its administration to give effective contribution, which is also the duty of the Government.

21. Failure on the part of Government hospitals to provide timely medical treatment to a person in need of treatment resulting violation of his right guaranteed under Article 21 of the Constitution of India. Therefore, in a welfare State it is the obligation on the State to ensure the creation and the sustaining of conditions congenial to good health.

22. Thus, it is obligatory on the part of the State Government not only to open Government hospitals and health centers but also to provide all facilities to employ best of talents and tone up its administration to take timely steps in the matter of filling vacancies in the Government Medical hospitals and health centers, so as to provide timely medical treatment to a person in need of treatment.

23. Public interest requires and demands, that as and when vacancies arise, candidates duly selected in accordance with law

should be available to occupy them in order to avoid the mischief of posts remaining vacant for long period merely because of the complex and long process of selection. Public interest requires that there need not be any gap between the occurrences of a vacancy and the appointment. The government must be both, responsible to and responsive to the community. All public institutes including Public Health Department are expected to carry out their role and responsibilities with integrity and efficiency for the service of the public.

24. The Government possesses sufficient data in respect of vacancies to be occurred in future and thus the Government is expected, in the matter of filling of vacancies in Public Health Sector, to take timely steps to fill in the vacancies, so as to effectively discharge its solemn duty towards its citizens.

25. Failure to perform its obligation to provide health services by filling vacancies of the medical officers, superior officers and specialty in the public health department, amounts to not providing timely medical treatment to a person in need of such treatment.

26. In the present matter, it is the case of the respondents that due to shortage of Medical Officers and Higher Officer, the Government is facing difficulty in providing health services to the needy people, however, the details about the steps taken by the Government in last seven to eight years to fill in the vacancies, have not been brought on record.

27. It appears from the record that except the statement by the respondents that Government is taking steps to fill up the vacancies, nothing has been brought on record to show that the respondents are serious in filling up the vacancies.

28. Even from the reply of the respondents, it can be seen that 377 posts of 'Civil Surgeons' are vacant, 141 posts of 'District Health Officers' cadre are vacant and in the Specialty 466 posts are vacant.

29. Whereas four appointments in Specialty Cadre were made vide order dated 7th March, 2018 and vide order dated 9th May, 2018, 58 'Medical Officers' have been promoted in 'Civil Surgeon' cadre.

30. Except these figures of promotion of 58 Medical Officers and appointment of Specialty Doctors, there is no statement made in the affidavit by the respondents about what steps have been taken to make promotions and appointments after 2015, that is after the issuance of impugned Government Resolutions.

31. There is no statement in the affidavit of the respondents that no candidates are available for promotion or for direct recruitment.

32. In absence of these details and data available on record, merely saying that due to shortage of Medical Officers and Higher Officers, the Government is facing difficulty in providing health services to the needy people is not sufficient and it appears to be an eye wash to create a public ground for grant of extension beyond age of superannuation.

33. In the said backdrop, if we consider the provisions of Rule 12, it is clear that the said provision is meant for a public servant whose retention after the period of retirement is depended upon exigencies / public grounds, that is only in special circumstances.

34. The said Rules permit the Government to continue a Government servant beyond the age of retirement on public grounds. The public ground which is shown in the present matter is shortage of Medical Officers and Higher Officers. Admittedly the said situation has been created because of non filling of vacancies for years together by the Government. The said situation cannot be therefore termed as an 'exigency' or an 'unforeseen situation'. There are vacancies in large numbers, continuously from prior to 2015 which is evident from impugned Government Resolutions.

35. Therefore, we are of the considered view that the public ground which has been shown in the present matter is a created one, because of the failure on the part of the Government to perform its obligatory duty to promptly fill in the vacancies by taking necessary steps in that regard.

36. In this matter, it is apparent from the record that for years together the Government has not taken necessary and sufficient steps to fill in the vacancies by granting promotion or by making fresh recruitment.

37. Thus, it appears to us that Government is not serious in

removing the vacancies by filling the same through the candidates like the petitioners who are available for promotion or through fresh candidates who are coming out of the Medical Colleges every year in large numbers by completing their medical training and course.

38. Moreover, according to us, the general application of Rule 12 of the Rules, 1982 is not permissible, whereas only in special circumstances which have arisen out of some unavoidable exigency. *Albeit* applying the Rule 12 of the Rules, 1982 in general manner and not to individual case, as in the present case, the whole idea of fixing the age of retirement and granting extension to Government Servant only in the case of public grounds beyond the age of retirement becomes meaningless.

39. Under Rule 12 of the Rules, 1982, a Government Servant can be retained beyond the age of superannuation when the Government in exigencies of public service or on public grounds exercise its discretion to retain a Government Servant in service after the age of superannuation.

40. The scope for exercise of this discretion is limited to an

individual Public Servant and not in general, unrestricted and uncontrolled manner.

41. In the present matter the Government instead of filling the vacancies, has adopted a course of increasing the age of superannuation from 58 years to 60 years by illegally exercising discretion under Rule 12 of the Rules, 1982, which is not permissible in law.

42. At this stage, it is also necessary to examine the powers of the State Government to issue any such Government Resolutions / executive instructions which is admittedly not in conformity with the provisions of the Rules, 1982.

43. Article 162 of Constitution of India lays down the extent of the executive powers of the State in following terms.

162. Extent of executive power of State.-

Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof.

44. In the case of *G.J. Fernandez Vr. The State of Mysore and others* reported in *AIR 1967 Supreme Court 1753*, Hon'ble the Supreme Court of India has observed thus:

“Learned counsel for the appellant is unable to point out any statute under which these instructions in the code were framed. He also admits that they are administrative instructions by government to its servants relating to the public works department. But this contention is that they are rules issued under Article 162 of the Constitution. Now Article 162 provides that "executive power of a state shall extend to the matters with respect to which the legislature of the State has power to make laws". This Article in our opinion merely indicates the scope of the executive power of the State, it does not confer any power on the State Government to issue rules there under. As a matter of fact wherever the Constitution envisages issue of rules it has so provided in specific terms. We may for example refer to Art, 309 the proviso to which lays down in specific terms that the President or the Governor of a State may make rules regulating the recruitment and the conditions of service of persons appointed to services and posts under the Union or the State. We are therefore of opinion that Art. 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of Course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are justifiable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution

providing therefore.”

45. In the case of *J and K. Public Service Commission etc. Vrs. Dr. Narinder Mohan and others etc.* reported in *AIR 1994 Supreme Court 1808*, the Hon'ble the Supreme Court of India observed thus:

“7. Existence of statutory Rules in not a conditions precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil posts fill them up according to executive instructions consistent with Articles 14 and 16 of the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law. The Governor exercising the power under proviso to Section 125 (Article 309 of the Constitution of India) made the rules which do not expressly give the power to the State Government to make ad hoc appointments. No such rule has been brought to our notice._No express power was conferred and in fact cannot be conferred to relax the rules of recruitment. Having made the Rules the executive cannot fall back upon its general power under Article 162 to regularise the ad hoc appointments under the Rules. Rule 9(3) empowers only to relax the qualification of age in particular exigencies which cannot be called in aid to relax the rules of recruitment. To tide over unforeseen exigencies, power to make ad hoc appointments, may be visualised as envisaged by Explanation-b to Rule 4 but it expressly states that by virtue of such appointment, the ad hoc appointee does not become member of the service. The rules prescribes direct recruitment/promotion by

selection as the mode of recruitment which would be done only by PSC or promotion committee duly constituted and by no other body. Therefore, ad hoc employee should be replaced as expeditiously as possible by direct recruits. A little leeway to make ad hoc appointment due to emergent exigencies, does not clothe the executive government with power to relax the recruitment or to regularise such appointment nor to claim such appointments to be regular on in accordance with rules. Back door ad hoc appointments at behest of power source or otherwise and recruitment according to rules are mutually ant agnostic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The later are the product of order and regularity. Every eligible person not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitment for appointment assures fairness in selection and inhibits arbitrariness in appointments. In view of the Explanation-b to Rule 4 the ad hoc appointments to any post in any of the three wings of the services under the rules are therefore de horse the rules. Appointments of the respondents 1 to 6 cannot be held to be in accordance with the Rules.”

46. From the judgments referred above, it is clear that Article 162 of the Constitution of India does not confer any power on the State Government to frame rules and it only indicates the scope of the executive powers of the State. Under such executive powers, the State can give administrative instructions to its servants, as how to act in certain circumstances; but that will not make such instructions statutory rules which are justifiable in certain circumstances.

47. It is now well settled law that the executive orders cannot be made for giving effect in violation of what is mandatory by the rules. The Hon'ble the Supreme Court of India in the case of **Punjab and National Bank by Chairman and another Vrs. Astamija Dash** reported in **2008(14) SCC 370**, has observed thus :-

“In Vasu Dev Singh V. Union of India wherein the validity of Section 3 of the East Punjab Urban Rent Restriction Act, 1949 was challenged, this Court after referring to a large number of decisions on subordinate legislation, held: (SCC p.796, para 118)

“118. A statute can be amended, partially repealed or wholly repealed by the legislative only. The philosophy underlying a statute or the legislative policy, with the passage of time, may be altered but therefor only the legislature has the requisite power and not the executive. The delegated legislation must be exercised, it is trite, within the parameters of essential legislative policy. The question must be considered from another angle. Delegation of essential legislative function is impermissible. It is essential for the legislature to declare its legislative policy which can be gathered from the express words used in the statute or by necessary implication, having regard to the attending circumstances. It is impermissible for the legislature to abdicate its essential legislative functions. The legislature cannot delegate its power to repeal the law or modify its essential features”

48. In the case of **Sant Ram Sharma Vr. State of Rajasthan and others** reported in **AIR 1967 Supreme Court 1910**, the Hon'ble the Supreme Court of India observed thus:

“
It is true that there is no specific provision in the Rules, laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that

does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed”

49. The judgments referred above further make it clear that once statutory rules have been made, the executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law.

50. To tide over unforeseen exigencies, the grant of extension or to increase the age of superannuation of some employee may be permissible but, by way of executive instructions increasing the age of superannuation of all District Health Officers, Civil Surgeons and Superior Officers working in the Public Health Department from 58 years to 60 years, is not permissible without express authority and power under the Rules.

51. It is well settled law that what cannot be done directly cannot be done indirectly. When any alteration is to be brought

about by legislation, the same purpose cannot be achieved by taking recourse to Government Resolutions or Executive instructions which do not have the force of law.

52. In the present matter, the Government is not able to point out any provision under any statute, under which the State Government can issue such executive instructions by the way of Government Resolutions, increasing the age of superannuation from 58 years to 60 years, except Rule 12 of the Rules, 1982 which we have already discussed herein above and held that its application is limited to an individual Public Servant and not in an unrestricted and general manner.

53. In view of the above discussions, we have no hesitation to hold that the impugned Government Resolutions dated 30th May, 2015, 30th June, 2015 and 3rd September, 2015 are illegal and issued without any express authority or power under the statute. Thus, the said Government Resolutions are arbitrary in nature and are liable to be set aside.

54. Since, we have already held that the impugned Government Resolutions, increasing the age of superannuation, are

illegal and the same have been issued without authority or power, we reject the plea of alternate remedy raised by the respondents. More over there is no complete bar to exercise writ jurisdiction. Looking to the illegality involved in the present matter we are of the opinion that the said objection is liable to be rejected.

55. Accordingly, we declare that the impugned Government Resolutions dated 30th May, 2015, 30th June, 2015 and 3rd September, 2015 are illegal and are hereby set aside. However, we are not inclined to unsettle the Medical Officers, Civil Surgeons and Superior Officers in Public Health Department who are benefited by the said Government Resolutions, in view of the fact that they are not party before us and in view of present situation which has arisen because of COVID-19. However, we make it clear that the State Government shall not grant further extension by way of executive instruction without the authority and power under the statute.

56. Considering large vacancies in health department, it is expected that the State Government should take necessary steps to fill in the vacancies expeditiously, in the interest of public at large.

57. Accordingly, the Writ Petition is allowed in above terms.

(ANIL S. KILOR, J.)

(S.V.GANGAPURWALA, J.)

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