

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.288 OF 2012

Shri Conceicao D'Costa
son of Diogo D'costa,
age – 60 years,
Occupation – Retired,
House No.442, Bandol,
Curtorim, Goa-403 709

.... Petitioner

Versus

The Board of Trustees for the
Mormugao Port, a body
incorporated under the
Major Port Trusts Act, 1963,
with its office at Headland
Sada, Mormugao Taluka, Goa.

.... Respondent

Mr. Sudesh Usgaonkar along with Ms. R. Pereira, Advocates for the
Petitioner.

Mr. Y. Nadkarni along with Mr. Sanket Kamat, Advocates for the
Respondent.

Coram:- M.S. SONAK &
SMT. M. S. JAWALKAR, JJ.

Date:- 11th March, 2020

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

Heard Mr. Sudesh Usgaonkar along with Ms. R. Pereira for the

Petitioner and Mr. Y. Nadkarni along with Mr. Sanket Kamat for the Respondent.

2. The petitioner seeks appropriate writ, order or direction requiring the respondents to consider the case of the petitioner for promotions to the post of Senior Assistant Secretary on regular basis from 01.06.2010 and for grant of consequential pay fixation and other monetary benefits including pension payable on the basis of regular promotion to the post of Senior Assistant Secretary.

3. The petitioner was initially appointed as a Clerk with the respondents with effect from 31.08.1974. He was then promoted to the post of Senior Clerk somewhere in the year 1988 and in the year 2001 he was elevated to the Selection Grade Clerk. In the year 2003 the petitioner was promoted to the post of Head Clerk and in the year 2006 he was promoted to the post of Accounts Superintendent. Thereafter, the petitioner was even promoted to the post of Establishment Officer with effect from 01.03.2007.

4. There is no dispute and the records indicate that the post of Senior Assistant Secretary fell vacant on 01.06.2010. It is the case of the petitioner that the candidature of the petitioner was required to be considered for promotion to this post of Senior Assistant Secretary on the basis of M.P.T.E. (Recruitment, Seniority and Promotion)

(Amendment) Regulations, 2004, which entered into force on 04.03.2004. In terms of these 2004 Regulations, there was no requirement that the prospective promotee is a graduate. This is because the qualifications prescribed for direct recruitments were held as inapplicable to promotees. The petitioner, was however not promoted on regular basis to the post of Senior Assistant Secretary but was promoted as Senior Assistant Secretary vide order dated 30.06.2010 only on ad hoc basis. The petitioner's representation was rejected vide Official Memorandum dated 06.05.2011, by which, the petitioner was informed that the Recruitment Rules of 2010 have entered into force sometime in August, 2010 i.e. with effect from 23.08.2010, and in terms thereof, graduation was an essential qualification even in respect of promotees. Since the petitioner, did not possess qualification of graduation, he could not be promoted on regular basis to the post of Senior Assistant Secretary.

5. The Petitioner contends that since, the vacancy to the post of Senior Assistant Secretary had arisen on 01.06.2010, his candidature was required to be considered on the basis of the Recruitment Rules as obtained on the date of the vacancy. He contends that as on the date of the vacancy, it is the Regulations of 2004 which were in force, in terms of which the petitioner was fully qualified to be considered for promotion. The petitioner contends that the respondents have clearly erred in taking cognizance of the 2010 Rules, in order to declare the

petitioner as ineligible to even being considered to be promoted to the post of Senior Assistant Secretary.

6. Mr. Usgaonkar has pointed out that the 2004 Regulations contemplate the preparation of select list each year not only in respect of the vacancies which have already arisen but also in respect of the anticipated vacancies. He therefore submits that the respondents were duty bound to take into consideration the Regulations in force on the date of the vacancy and petitioner's candidature could not have been rejected relying on 2010 Regulations which admittedly entered into force only sometime in August, 2010.

7. Mr. Nadkarni, learned counsel for the respondents, at the outset, has relied upon the decision of the Hon'ble Supreme Court in the case of *Deepak Agarwal & Anr. v/s. State of U.P. & Ors. - 2011 AIR SCW 2138* to submit that there is no universal rule that promotions have to be made on the basis of the rules in existence on the date when the vacancy arises.

8. Mr. Nadkarni without prejudice, further submits that in the present case one post of Senior Assistant Secretary had fallen vacant on 01.03.2010 and Mr. Sebastiao Diniz, who was admittedly senior to the petitioner, was considered and recommended for promotion on ad hoc basis against the said vacancy. This is because Mr. Dinkar Korgaonkar

and Mr. Dhanraj Parate, who also fell within the zone of consideration could not be considered on account of penalty/clearance from the vigilance angle. Mr. Nadkarni pointed out that consequent upon retirement of Mr. K. M. Burde with effect from 01.06.2010, Mr. Sebastiao Diniz was promoted on regular basis. In the DPC which was held on 17.06.2010 to consider promotions to the vacancy which had arisen on 01.06.2010, the case of Mr. Dhanraj Parate was considered but kept in sealed cover. Consequently, the petitioner was promoted to the post of Senior Assistant Secretary only on ad hoc basis with effect from 30.06.2010.

9. Mr. Nadkarni points out that the petitioner retired from service on 31.05.2011 i.e. even before completing one full year service on ad hoc basis as Senior Assistant Secretary. He submits that there was nothing wrong in the respondents taking into consideration the 2010 Regulations which had admittedly entered into force in the meanwhile and rejecting the petitioner's representation vide Official Memorandum dated 06.05.2011. For all these reasons Mr. Nadkarni submits that this petition is required to be dismissed.

10. The rival contentions now fall for our determination.

11. In this case, we are basically concerned with the vacancy to the post of Senior Assistant Secretary which arose on 01.06.2010 consequent upon retirement of Mr. K. M. Burde. As on the date of

this vacancy, admittedly, the 2004 Regulations were very clear, inasmuch as the qualifications prescribed for direct recruitments, were held as inapplicable to promotees. Accordingly, there is no dispute whatsoever, that if the 2004 Regulations were to apply, the petitioner, was very much eligible to be considered for promotion.

12. The post of Senior Assistant Secretary had fallen vacant on 01.06.2010. The 2010 Regulations, according to the affidavit filed on behalf of the respondents, entered into force on 23.08.2010. In terms of the 2010 Regulations however, graduation is an essential qualification, even for promotees.

13. Mr. Nadkarni, relying upon *Deepak Agarwal (supra)* contends that the respondents were justified in applying the 2010 Regulations which entered into force on 23.08.2010 in respect of vacancy which had arisen on 01.06.2010.

14. *Deepak Agarwal (supra)* has basically distinguished the rulings in *Y. V. Rangaiah & Ors. v. J. Sreenivasa Rao & Ors. - (1983) 3 scc 284*, in which, it was held that a candidate has a right to be considered for promotion in accordance with the rules in force on the date when the vacancy arose. The Apex Court has held that the observations *Y. V. Rangaiah (supra)* were in the context of rules casting a duty to prepare yearwise panel of eligible candidates.

15. In the present case, both the 2004 as well as 2010 Regulations cast a duty upon the respondents to prepare yearwise panel of eligible candidates. In fact, the relevant Regulations in the present case would be the 2004 Regulations which clearly provide that the departmental promotion committees shall meet as may be necessary and prepare a “*Select List*” of all employees fit for appointment against the promotion quota of vacancies in the various grades or posts. Where promotion is made on the basis of merit, employees shall be arranged according to the order or merit adjudged by the committee and the select list so prepared shall be utilized for filling up vacancies likely to arise during the course of the year. While adjudging merit of an employee, the due regard shall be given to his seniority also.

16. The 2004 Regulations further provide that the DPC shall, for the purpose of determining number of employees who shall be considered from out of those eligible employees for the feeder grade (s) restrict the field of choice as indicated, with reference to the number of clear regular vacancies proposed to be filled in the year. This is the concept of a restrictive zone for consideration, which is again specified in the 2004 Regulations.

17. Since, the 2004 Regulations had specifically cast a duty upon the respondents to prepare yearwise panel of eligible candidates, the principles laid down in *Y. V. Rangaiah (supra)* would squarely apply in

this matter. Based upon *Deepak Agarwal (supra)* therefore, the respondents were not at all justified in rejecting the petitioner's representation vide Official Memorandum dated 06.05.2011 on the alleged ground that the petitioner was not possessing the required qualification as per “*the Recruitment Rules invoked and there is no provision in the rules to regularize his ad hoc promotion*”.

18. Thus, we are satisfied, that there was an obligation on the part of the respondents to consider the candidature of the petitioner for regular promotion as against the regular vacancy of Senior Assistant Secretary, which had arisen on 01.06.2010. Such consideration was required to be on the basis of the 2004 Regulations and not the 2010 Regulations which entered into force only on 23.08.2010.

19. The next question which arises is whether only the candidature of the petitioner is required to be considered for promotion to the post of Senior Assistant Secretary which fell vacant on 01.06.2010 or whether, the DPC, is required to consider the candidatures of all the candidates who fell within the zone of consideration on the said date. Here again, we are satisfied that the DPC is required to consider the candidatures of all the candidates who fell within the zone of consideration as on the said date and not just the candidature of the petitioner because only the petitioner has instituted the present petition.

20. The record indicates that the case of Mr. Dhanraj Parate was in fact considered by the DPC. However, the recommendation of the DPC was kept in the sealed cover because there was no verification in respect of the caste certificate produced on record by the said Mr. Parate. Mr. Nadkarni, on instructions submitted that Mr. Parate's caste certificate was verified and found to be in order sometime in the year 2016. He however submits that by that point of time no regular promotion was granted to Mr. Parate, because, a view was taken that the 2010 Regulations would apply, in terms of which, even Mr. Parate did not fulfill the necessary qualification. Besides, there was some issue of adverse confidential remarks, insofar as Mr. Parate is concerned. Mr. Nadkarni pointed out that Mr. Parate retired in the year 2018, without raising any grievance about the non-consideration of his candidature.

21. Since, we are inclined to allow this petition on the basis of the principle that the recruitment rules in force on the date of the vacancy are the recruitment rules which must govern, the issue of promotions, particularly, where there was an obligation on the respondents to prepare yearwise panel of eligible candidates, it will not be appropriate to direct consideration, only of the case of the petitioner. According to us, the principle which we are upholding in the facts of the present case, will have to apply not only to the petitioner but also to all other candidates who fall within the zone of consideration which will

obviously include Mr. Parate as well. The position which prevailed as on 01.06.2010 is what will have to be taken into consideration by the DPC when it comes to filling in the post of Senior Assistant Secretary which fell vacant on 01.06.2010.

22. However, we agree with Mr. Nadkarni that should the DPC recommend Mr. Parate or any candidate other than the petitioner for the promotion, then, such candidates cannot be granted the actual pay in the promotional post since they will have never worked in the promotional post. Such candidates would however be eligible to receive their pension or retiral benefits on the notional basis that they were promoted with effect from 01.06.2010. The differential retiral benefits will therefore have to be paid in such an eventuality.

23. Accordingly, we dispose of this petition by making the following Order:

- a) The impugned Office Memorandum dated 06.05.2011 is quashed and set aside;
- b) Respondent is directed to constitute a DPC, which will have to consider the candidatures of the petitioner as also all the other employees which fall within the zone of consideration including Mr. Dhanraj Parate for promotion to the post of Senior Assistant Secretary on regular basis in respect of the vacancy which arose on 01.06.2010;

c) The DPC so constituted will have to consider the candidatures of the petitioner and all other employees who come within the zone of consideration, including Mr. Dhanraj Parate, on the basis of the 2004 Regulations as well as the position of the Confidential Reports, etc. as on the date of the vacancy i.e. 01.06.2010;

d) Depending upon the recommendations of the DPC as aforesaid, the respondents will have to make regular promotion to the post of Senior Assistant Secretary in respect of the vacancy which arose on 01.06.2010 and grant appropriate differential retiral benefits. This means that depending upon the recommendations of the DPC, promotion on regular basis will have to be granted with effect from 01.06.2010 but in respect of the candidates who have not actually worked on the promotional posts, there will be no obligation to pay the salary applicable to the promotional post. Their notional service however will have to be taken into consideration for determining the retiral benefits;

e) The respondents to complete the aforesaid exercise as expeditiously as possible and in any case within a period of three months from today.

24. The Rule in this petition is made absolute in the aforesaid terms.
25. In the facts of the present case, there shall be no order as to costs.
26. All concerned to act on the basis of an authenticated copy of this Order.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.