

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

LETTERS PATENT APPEAL NO.225/2013 IN WRIT PETITION NO.5828/2012 (D)

Vijay s/o Bhiwaji Bhagat,
aged about 47 years, Occ. Service,
R/o Seminary Hills, Manavsewa Nagar, Nagpur.

APPELLANT

-VERSUS-

Chief Executive Officer,
Zilla Parishad, Civil Lines, Nagpur.

RESPONDENT

Shri Nahush S. Khubalkar, counsel for the appellant.
Shri V.D. Raut, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND G.A. SANAP, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 22ND NOVEMBER, 2021.

DATE ON WHICH JUDGMENT IS PRONOUNCED : 23RD DECEMBER, 2021.

JUDGMENT (PER : A.S. CHANDURKAR, J.)

In this letters patent appeal filed under Clause 15 of the Letters Patent challenge has been raised to the judgment of the learned Single Judge dated 15.01.2013 in Writ Petition No.5828 of 2012. By the said judgment the learned Single Judge was pleased to uphold the order passed by the Industrial Court dated 13.08.2012 thereby dismissing the complaint filed by the appellant seeking the relief of promotion.

2. The facts in brief giving rise to the present proceedings are that the appellant claims to have passed the Diploma in Civil Engineering exam in the year 1985. In the year 1993, he was appointed as Assistant Junior Engineer. The appellant claims to belong to Scheduled Caste category. Further promotions were to be granted on the basis of seniority-cum-merit and the appellant claimed that he was the only eligible person entitled to be promoted from Scheduled Caste candidates but despite availability of such post he was not so promoted. On 07.10.2002

therefore the appellant filed complaint under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, 'the Act of 1971') seeking consideration of his case for promotion to the post of Junior Engineer from the date other similarly situated Assistant Junior Engineers were promoted. This relief was sought on the premise that by failing to consider the case of the appellant for promotion the respondent-Employer had committed unfair labour practice.

In the reply filed by the respondent all allegations as made were denied. It was further pleaded that the name of the appellant was placed in the provisional seniority list at Serial Number 7 while the candidate placed at Serial Number 1 was accordingly promoted. The appellant ultimately on 29.01.2004 came to be promoted as Junior Engineer from 02.01.2003.

3. The parties led evidence before the Industrial Court and by its judgment dated 30.09.2006 the learned Member of the Industrial Court dismissed the complaint holding that the appellant had failed to establish that the post of Junior Engineer for candidates from the Scheduled Caste category was lying vacant and that he was not considered for such promotion.

4. The appellant being aggrieved by the aforesaid judgment filed Writ Petition No.6205 of 2006. The learned Single Judge noted that the

appellant having been promoted to the post of Junior Engineer on 29.01.2004, the only aspect to be considered was his entitlement to promotion from the date his juniors were promoted. In view of the fact that certain additional material which was not available before the Industrial Court was placed on record in the writ petition, by judgment dated 07.09.2011 the learned Single Judge was pleased to set aside the judgment of the Industrial Court and remand the proceedings for a fresh decision.

5. Pursuant to the aforesaid order of remand the parties again led evidence by placing on record further documents. The Industrial Court reconsidered the complaint as filed and by its judgment dated 13.08.2012 held that the appellant did not hold the requisite qualification for being promoted to the post of Junior Engineer. On that premise the complaint came to be dismissed. Being aggrieved the appellant filed Writ Petition No.5828 of 2012. The learned Single Judge found that in absence of requisite qualification at the relevant time the appellant was rightly not promoted in the year 1999. Having acquired such qualification in December-1999 the appellant was rightly promoted on 29.01.2004. It was further found that no details of the persons who were junior to the appellant and who were promoted before him were placed on record. On that premise the writ petition was dismissed. Being aggrieved this letters patent appeal has been filed.

6. Shri Nahush Khubalkar, learned counsel for the appellant submitted that the only reason for the Court to hold that the appellant was not holding the requisite qualification would now not survive in view of the judgment of the Division Bench in *Abdul Saleem Siddiqui Abdul Rahim Versus State of Maharashtra & Others* [2004(3) ALL MR 487] wherein it was held that while seeking promotion to the post of Junior Engineer, an Assistant having a recognized degree or diploma was not required to pass the professional examination for overseers. Since the appellant had the requisite qualification in the form of a diploma in Civil Engineering, it was not necessary for him to pass the professional examination for being considered to be eligible for promotion. This judgment of the Division Bench was not cited before the learned Single Judge as a result the learned Single Judge did not have the benefit of the view taken therein. He further submitted that during pendency of the letters patent appeal this Court had called upon the respondent to place on record relevant material as regards the number of posts occupied by the persons belonging to the Scheduled Caste category in the cadre of Junior Engineer as well as the date on which one Shri Satpute was granted a deemed date of promotion. Inviting attention to the additional affidavit filed on behalf of the appellant it was submitted that the appellant was infact entitled to be promoted from December-1999 itself especially since the posts of Junior Engineer were to be filled in the ratio of 1:1 by promotion and nomination. It was thus submitted that in the light of this undisputed position the appellant was entitled to the relief

sought by him in the complaint. In support of his submissions, the learned counsel placed reliance on paragraph 10 of the judgment of the Division Bench in *Abdul Saleem Siddiqui* (supra). It was thus submitted that appropriate relief be granted to the appellant.

7. In reply Shri V.D. Raut, learned counsel for the respondent stated that despite remand of the proceedings the appellant did not care to amend the complaint and place on record relevant facts. There were no pleadings with regard to commission of unfair labour practice despite the appellant being promoted on 29.01.2004. He referred to the additional affidavit filed by the respondent to substantiate his contentions and supported the findings recorded by the Industrial Court as well as by the learned Single Judge. Since the appellant was considered for being promoted and his candidature was thereafter rejected as he was not found suitable, the appellant was not entitled to any relief whatsoever. In support of his contentions, the learned counsel relied upon the judgment in *Maharashtra Industrial Development Corporation & Others Versus Baban Nathaji Sarode & Another* [2003(1) Mh.L.J. 63]. He sought for the dismissal of the letters patent appeal.

8. With the assistance of the learned counsel for the parties we have gone through the documents placed on record and we have also given due consideration to their respective submissions. In the light of the admitted position that the appellant came to be promoted to the post of

Junior Engineer from 02.01.2003, as noted by the learned Single Judge in Writ Petition No.6205 of 2006 the only aspect to be considered is whether the appellant is entitled to grant of deemed date of promotion from December-1999. According to the respondent the case of the appellant was considered for promotion but on finding that he did not possess requisite qualification as prescribed by the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 (for short, 'the said Rules') the appellant was not promoted. This aspect regarding possession of requisite qualification as prescribed by Rule 4 of the said Rules need not detain us for the reason that this very Rule has been considered by the Division Bench in *Abdul Saleem Siddiqui* (Supra). In paragraph 10 it has been held as under:

"10. We are of the clear view that the provision contained in Clause (a) requires to be construed harmoniously in consonance with the intention of the rule makers which is explicit in the language used in Clause (b). Clause (a) reads thus:

'Appointment shall be made either -

(a) by promotion from amongst suitable Assistant to Junior Engineers and maistries Grade I who have passed the Professional Examination for Overseers prescribed by the State Government.

(b)'

It is obvious that the examination for overseers is an inferior qualification, as compared to possessing a recognised degree or diploma and a person possessing a degree or diploma could be presumed to possess the requisite knowledge which a candidate possesses by passing Professional Examination for

Overseers. In this view of the matter, with a view to harmoniously construe clauses (a) and (b), we propose to read in clause (a), the following words, so that clause (a) could be read down to include and encompass passing of the Professional Examination for overseers in regard to only such of the Assistant to Junior Engineers who have not passed the recognised degree or diploma (three years course) in Civil, Mechanical or Electrical Engineering, as the case may be. In our considered view, clause (a) needs to be read thus:

‘Appointment shall be made either by promotion from amongst suitable Assistant to Junior Engineers and maistries Grade-I who have passed the Professional Examination for Overseers prescribed by the State Government, or who possesses a recognised degree or Diploma (three years course) in Civil, Mechanical or Electrical Engineering, as the case may be, or an equivalent qualification.’
(Emphasis supplied)

We are reading the underlined portion in the rule.

If so read, the relevant rule would not result in absurdity and the legislative intent would be achieved.

If read in proper perspective, passing Professional Examination for overseers prescribed by the State Government, would be no doubt, necessary qualification only for those who do not possess a Degree or Diploma of three years. If so read, there would be no inconsistency and in this view of the matter, we conclude that the petitioners who possess recognised Diploma (three years course) in Civil Engineering and though they do not possess the Professional Examination for Overseers prescribed by the State Government, they are still eligible for being considered for appointment in the post of Junior Engineer by promotion.”

Perusal of the aforesaid indicates that Assistants possessing the recognized degree or diploma in the relevant field were found eligible for being considered for appointment to the post of Junior Engineer by promotion. Absence of professional examination qualification has been held not to be a bar for considering such candidates for promotion. In the present case it is clear from record that the appellant had obtained diploma in Civil Engineering in the year 1985 itself. This indicates that when the persons belonging to Scheduled Caste category were to be considered for promotion to the post of Junior Engineer in December-1999 the candidature of the appellant ought to have been considered in that regard. The appellant's candidature was not considered only for the reason that he had not passed the professional examination which qualification has been held to be not necessary for the candidates possessing recognized degree or diploma. In the light of aforesaid judgment of the Division Bench the basis for refusing promotion to the appellant does not now survive.

9. It may be noted that by an order dated 09.01.2014 passed in this letters patent appeal the respondent was directed to file an affidavit indicating the total strength in the cadre of Junior Engineers as on 01.01.2000 and the number of posts occupied by the candidates belonging to the Scheduled Caste category. Similarly, the date on which one Shri Satpute was granted deemed date of promotion was also required to be placed on record. Pursuant thereto an affidavit has been

placed on record dated 30.01.2014 in which it has been stated that at the relevant time there was no vacant post of Junior Engineer in the Scheduled Caste category. It is further stated that Shri Satpute retired as Assistant Engineer on 30.09.2003 and no deemed date of promotion was granted to him. The appellant has further filed an additional affidavit controverting the affidavit filed by the respondents. It was stated that the respondent ought to have followed the ratio of 1:1 in the matter of promoting Junior Engineers through nomination and promotion. According to the appellant one Shri K.P. Nikhare belonging to the Scheduled Tribes category who was junior to the appellant was promoted on 31.08.2001.

10. Once it is found that the appellant was eligible for being considered for promotion to the post of Junior Engineer as he was duly qualified in terms of the judgment of the Division Bench in *Abdul Saleem Siddiqui* (supra) it becomes clear that the appellant would be entitled for being granted deemed date of promotion by considering the date on which his immediate junior was promoted. As stated above Shri K.P. Nikhare being the immediate junior of the appellant was promoted on 31.08.2001 and hence the appellant would be entitled for grant of such deemed date of promotion. Since the judgment of the Division Bench in *Abdul Saleem Siddiqui* (supra) was not placed before the learned Single Judge the ratio therein could not be considered by the learned Single Judge. In the light of the ratio of the Division Bench in *Abdul Saleem*

Siddiqui (supra) the order passed by the Industrial Court dismissing the complaint as well as the judgment in Writ Petition No.5828 of 2012 therefore would have to be set aside. In these facts the decision relied upon by the learned counsel for the respondent cannot be made applicable to the facts of the present case.

As regards the contention that the appellant failed to amend the complaint after remand it is seen from the record that while remanding the proceedings the learned Single Judge in Writ Petition No.6205 of 2006 had clearly indicated that what was to be considered by the Industrial Court was the availability of the post of Junior Engineer in the Scheduled Caste category and entitlement of the appellant for promotion from 31.08.2001. The parties were therefore aware of the scope of remand and no prejudice whatsoever has been shown to have caused to the respondent in absence of the complaint being amended.

11. For aforesaid reasons, the following order is passed:

- (a) It is held that the appellant being duly qualified for being considered for promotion to the post of Junior Engineer, non-consideration of his candidature by the respondent at the time when the appellant's junior was promoted has resulted in commission of unfair labour practice by the respondent.
- (b) It is held that the appellant is entitled to a deemed date of promotion to the post of Junior Engineer from 31.08.2001. The appellant would be entitled to all consequential benefits flowing from this adjudication. The deemed date shall be taken into account for computing the seniority of the appellant and grant of

retiral benefits. However, the appellant would not be entitled for any difference in salary for the period from 31.08.2001 till 29.01.2004.

Correction is carried out as per Hon'ble Court's order dated 25.02.2022.

12. The letters patent appeal is thus allowed in aforesaid terms leaving the parties to bear their own costs.

(G.A. SANAP, J.)

(A.S. CHANDURKAR, J.)

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