

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7918 OF 2022

The State of Maharashtra and others .. Petitioners

Versus

Asha Sandesh Gaikwad .. Respondent

Shri S. B. Yawalkar, Addl.G.P. for the Petitioners.

**CORAM : MANGESH S. PATIL AND
SANDEEP V. MARNE, JJ.**

DATE : 10.08.2022.

FINAL ORDER (*Per Sandeep V. Marne, J.*) :-

. By the present petition, the petitioners challenge judgment and order dated 27.11.2021 passed by the Maharashtra Administrative Tribunal, Mumbai, Bench at Aurangabad (for short 'Tribunal') in Original Application No. 44 of 2020. The original application was instituted by the respondent herein seeking appointment on compassionate ground on the post of clerk. By the impugned judgment and order, the Tribunal allowed the original application and set aside communication dated 20.05.2020 and directed consideration of the claim of the respondent for appointment on compassionate ground on the vacant post or by even creating supernumerary post by taking into consideration the seniority of the respondent in the waiting list.

2. Mr. Siddhartha Yawalkar, learned Additional Government Pleader appearing for the petitioners has raised three principal objections to the impugned judgment and order of the Tribunal. Firstly, he contends that the respondent had crossed age of 45 years on passing of order dated 20.05.2020 rejecting the case for compassionate appointment. He relies upon the provisions of the Government Resolution dated 06.10.2010 and submits that, the Tribunal ought not to have directed consideration of the case of the respondent after crossing age of 45 years more particularly when the said Government Resolution dated 06.10.2010 was not under challenge before the Tribunal. Secondly, Mr. Yawalkar takes exception to the order passed by the Tribunal on the ground that despite non existence of vacancy within 10% or 20% quota meant for compassionate appointment, the Tribunal ought not to have directed consideration of case of the respondent. Thirdly, Mr. Yawalkar, has a serious objection about the direction issued by the Tribunal for creation of supernumerary post for the purpose of accommodating the respondent. He seeks to distinguish the judgment of the Apex Court in the case of **Sushma Gosain and others Vs. Union of India and others** reported in **AIR 1989 SC 1976**.

3. In the light of the order that we propose to pass, we did not deem it necessary to issue notice to or to hear the respondent.

4. The first objection raised by Mr. Yawalkar is that the respondent had crossed age of 45 years on 20.05.2020 when her case was rejected. The Tribunal has taken into consideration circumstance of Covid-19 pandemic for the purpose of taking out the respondent from the clutches of bar of attaining age of 45 years. The respondent attended the age of 45 years on 10.05.2020. She had filed application for compassionate appointment on 25/26.08.2010, which remained pending with the petitioners for 10 long years. The rejection was done only after nation wide lock down was imposed on account of Covid – 19 pandemic. We do not find that there is any jurisdictional error committed by the Tribunal in extending the benefit of non applicability of the age bar imposed by the G. R. dated 06.10.2010. There is another aspect which is linked to the second ground of challenge of non availability of posts, which has connection to the first ground of challenge of crossing age of 45 years. While we propose to deal with second objection separately, suffice it to state that as per G. R. dated 11.09.2019 the petitioners ought to have arrived at a conclusion that there was one post for compassionate appointment and ought to have considered the case of the respondent immediately after issuance of G. R. dated 11.09.2019. Therefore, even on this count the rejection of the case of the respondent on the ground of she crossing age of 45 years appears to be clearly erroneous.

5. Now coming to the second ground of challenge of non availability of posts raised by Mr. Yawalkar. We find that the

Tribunal has conducted the exercise of calling for information with regard to the vacancy position for various years. The Tribunal has arrived at a finding that applying the quota of 10% or 20% as contemplated in G. R. dated 02.05.2014 and 11.09.2019 respectively, atleast one post was available for compassionate appointment applying decimal factor of 0.2, 0.4, 0.6 or 0.8 for various years. We do not find that any error is committed by the Tribunal while arriving at a conclusion that one post was available for consideration of the case of the respondent for grant of compassionate appointment.

6. Also Mr Yawalkar, in usual fairness, has invited our attention to a provision in the G R. dated 11.09.2019, which does not seem to have been taken into consideration by the Tribunal. By the said Government Resolution, while prescribing a quota of 20% for determining the posts for compassionate appointment, the State Government has directed that if the decimal factor is less than 0.5% atleast one post should be allotted for compassionate appointment. This leaves no matter of doubt that on the basis of decimal factors determined by the Tribunal, one post was most certainly available for consideration of the case of the respondent for compassionate appointment.

7. However, the third ground of challenge raised by Mr. Yawalkar with regard to direction of the Tribunal for creation of supernumerary post, in our opinion deserves to be

upheld. For issuing said direction the Tribunal has relied upon the judgment of the Apex Court in the case of **Sushma Gosain and others** (*supra*). The direction to create supernumerary post has been issued by the Apex Court in the case of **Sushma Gosain and others** (*supra*) on account of peculiar circumstances when a ban on appointment of ladies was imposed in the year 1985, whereas application for appointment on compassionate ground was made by the appellant therein in November 1982. The appellant therein had already passed the trade test and interview, but her case was kept waiting till 1985 after which ban came to be imposed on appointment of ladies. We, therefore, are in agreement with the contention of Mr. Yawalkar that the judgment in the case of **Sushma Gosain and others** (*supra*) could not have been relied upon by the Tribunal for issuance of direction for creation of supernumerary post for accommodation of the respondent.

8. However, since we have arrived at a conclusion that atleast one post was available for consideration of case of the respondent, the issue of correctness of direction of the Tribunal for creation of supernumerary post has, in that sense, become academic.

9. In the result, we do not find any infirmity in the order passed by the Tribunal, except to the extent indicated hereinabove. We, therefore, propose to pass the following order.

ORDER

- A. The judgment and order dated 27.11.2021 passed by the Maharashtra Administrative Tribunal, Mumbai, Bench at Aurangabad in Original Application No. 44 of 2020 is upheld. The same is however modified to a limited extent that there is no need to create a supernumerary post and the case of the respondent be considered against the available vacant post. The same cannot be rejected on the ground of non availability of vacant post.
- B. The petitioners are directed to consider the case of the respondent for compassionate appointment within a period of two (02) months from today.
- C. The writ petition is accordingly disposed of without any order as to costs.

[SANDEEP V. MARNE, J.]**[MANGESH S. PATIL, J.]***bsb/Aug. 22*