

Meena

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

**WRIT PETITION NO.12961 OF 2017
WITH
CONTEMPT PETITION NO.191 OF 2018
IN
WRIT PETITION NO.12961 OF 2017
WITH
CIVIL APPLICATION NO.13592 OF 2017
IN
WRIT PETITION NO.12961 OF 2017
WITH
CIVIL APPLICATION NO.8125 OF 2019
IN
WRIT PETITION NO.12961 OF 2017
WRIT PETITION NO.12961 OF 2017**

Smt. Bharti D/o Shankarrao Sonawane
aged-57 years, Occu.-Govt. Service,
as Lady Medical Officer, Gynecology Dept,
Govt. Medical College, Ghati, Aurangabad
R/O Block No.5, Laxmi Colony, Opp. Milin
College, Aurangabad.

..Petitioner

Versus

- 1) The State of Maharashtra,
Medical Education and Drugs
Department,
Thru its Secretary, Mantralaya,
Mumbai.

- 2) The Director,
Medical Education and Research,
St. George Hospital Compound,
Dental College Building, Mumbai.

...Respondents

- 3) The Dean,
Govt. Medical College, Ghati,
Aurangabad

Mr. B. B. Lakhkar, Advocate for the petitioner.

Mrs. M.A. Deshpande, Additional Government Pleader for the respondents.

WITH
CONTEMPT PETITION NO.191 OF 2018

Smt. Bharti D/o Shankarrao Sonawane
aged-57 years, Occu.-Govt. Service
as Lady Medical Officer, Gynecology
Dept, Govt. Medical College, Ghati,
Aurangabad R/o Block No.5, Laxmi
Colony, Opp. Milind College,
Aurangabad.

..Petitioner

Versus

Smt. Kaanan Yelikar
The Dean, Govt. Medical College &
Hospital Ghati, Aurangabad

...Respondent

Mr. B. B. Lakhkar, Advocate for the petitioner.

Mrs. M.A. Deshpande, Additional Government Pleader for the respondents.

**CORAM: S. V. GANGAPURWALA &
R. N. LADDHA, JJ**

Reserved on: 13th October, 2021.

Pronounced on: 10th March, 2022

JUDGMENT: (Per R.N. Laddha, J)

This Writ Petition under Article 226 of the Constitution of India takes exception to the Judgment and Order of the Maharashtra Administrative Tribunal Bench at Aurangabad in Original Application No. 52 of 2017 dated 19th July 2017.

2. It is the case of the petitioner that she was appointed way back in the year 1990 as a “Medical Officer” in the Department of Obstetrics and Gynaecology of the Government Medical College, Aurangabad initially on temporary basis and since then has been in uninterrupted continuous service without any break. Further, it is the case of the petitioner that though her appointment order states that, the said appointment is temporary for a period of one year or till the post is filled in by the Maharashtra Public Service Commission “(MPSC”, for short), still the petitioner was continued for all these years. For last more than three decades the post was never advertised by the MPSC with the result the petitioner is continued in service all these years and

she has been getting all monetary benefits such as annual increments, admissible leaves, increase in the emoluments, subscribing to GPF, gratuity etc. as are being given to other regular employees.

3. Under these circumstances, all of a sudden and without any request from the petitioner so also in view of the Government Resolution dated 22nd October, 2016, after a period of more than 26 years of continuous service, the respondents regularised the services of the petitioner. The regularisation was, however, subject to depredatory and onerous conditions incorporated in the Schedule B of the aforesaid Government Resolution, which states that the employees whose services are regularised in October, 2016 shall have to accept the New Defined Contribution Pension Scheme, introduced in the year 2005 and applicable to the employees recruited in the year 2005 and onwards.

4. The petitioner raised a grievance that pursuant to the issuance of this Government Resolution, the third respondent forced the petitioner to sign a form showing that the petitioner has accepted the New Pension Scheme, however, the petitioner refused to do so, therefore, by way of coercive measure her salary for the month of November 2016 onwards was withheld. The petitioner further raised a grievance that despite of entitlement she has not been given benefits of the time

bound promotional higher pay scale after completion of 12 years and 24 years of service.

5. As the petitioner was not being granted her rightful claims, she was constrained to approach to the Maharashtra Administrative Tribunal (MAT, for short) by filing Original Application No.52 of 2017 claiming various reliefs. The Tribunal reproduced the rival contentions of the parties and thereafter proceeded to ascribe reasons in paragraphs No. 21 and 22, which persuaded it to dismiss the Original Application. It may be apposite to reproduce the observations in paragraphs No.21 and 22, which contain the reasons. They read as under :

"21. Considering the above said discussion, the applicant's services is regularized w.e.f. 24.10.2016 by the Government Resolution dated 22.10.2016. Accordingly, the applicant joined on her new posting w.e.f. 24.10.2016. The Government Resolution provides that New Pension Scheme is applicable to the employees regularized under the said Government Resolution. Therefore, the applicant is not entitled to get the benefit of the Old Pension Scheme and the New Pension Scheme is applicable to her in view of the Government Resolution dated 22.10.2016. Her service has been regularized w.e.f. 24.10.2016. Therefore, she is not entitled to the benefit of time bound higher pay scale on completion of 12 years' and 24 years', as well as, the regular pension as per the Pension Rules. The applicant has not opened the account under New Pension Scheme, therefore, her salary is withheld.

22. The applicant has been regularized in service in view of the Government Resolution dated 22.10.2016, the applicant

has not challenged the legality of the said Government Resolution. Therefore, the clause 5 in Schedule 'B' of the Government Resolution 22.10.2016 is binding on the applicant. Therefore, the applicant is not entitled to claim relief as prayed for. There is no merit in the present Original Application. Consequently it deserves to be dismissed."

6. Aggrieved by and dissatisfied therewith, the present Writ Petition has been filed.

7. Mr. B.B. Lakhkar, learned Counsel for the petitioner urged with tenacity that the grounds on which the claim of the petitioner was negatived are legally unsustainable. His principal contentions were that the petitioner was appointed in the year 1990 by duly constituted Selection Committee and since then she has been in uninterrupted continuous service without break. Her continuous service of more than 30 years with all monetary benefits is required to be treated as regular service. It was never informed to the petitioner that her service is not regular. The Tribunal erroneously concluded that there is no pleadings and challenge to the Government Resolution dated 22nd October, 2016. The petitioner had never made a request for regularisation of her services. Though the petitioner's appointment has been temporary, the post held by the petitioner is permanent and is against the clear vacancy. For last more than 30 years the post was never advertised by MPSC with the result the petitioner is continued for all these years. As

the petitioner was recruited and appointed in the year 1990, the Old Pension Scheme of the year 1982 is applicable to her. Since the services of the petitioner have been regularised, she is entitled to get the benefit of time bound promotional higher pay scale. The petitioner is duly qualified for the said post and the said post was vacant. To bolster up the aforesaid submissions, the learned Counsel for the petitioner placed reliance upon the judgment of the Division Bench of this Court in the case of **Ms. Kunda w/o. Ramchandra Lakhkar v/s. State of Maharashtra and others**¹

8. The learned Additional Government Pleader for the respondents however, supporting the decision of the Tribunal in toto contends that the petitioner was appointed in the year 1990 as a Medical Officer purely on adhoc and temporary basis. The Government had taken a policy decision to regularise the temporary services of such employees and issued Government Resolution dated 22nd October, 2016 to that extent. As the services of the petitioner were regularised since 24th October, 2016 she is entitled for New National Contributory Pension Scheme and not the Old Pension Scheme. According to the learned Additional Government Pleader, the petitioner is not entitled to get time bound higher pay scale as her appointment was regularised w.e.f.

¹ Writ Petition No. 8327 of 2013 decided on 10/02/2015

24th October, 2016. The petitioner is insisting upon benefits to which she is not entitled. It was canvassed that in all these years, large number of advertisements were published by the MPSC for the post of Medical Officer but the petitioner never applied for the same. It was strenuously contended that since the initial appointment of the petitioner was on temporary basis, she is not entitled to any relief as claimed by her in this Writ Petition and that therefore, the Writ Petition deserves to be dismissed.

9. The rival contentions now fall for our determination.

10. It may be apposite to enumerate the uncontroverted facts, before advertizing to deal with the contentious issues. It is incontrovertible that by an order dated 2nd January, 1990, the petitioner was appointed as “Assistant Professor cum Medical Officer” in the Department of Obstetrics and Gynaecology of the Government Medical College, Aurangabad w.e.f. 1st March, 1990 for one year or until a candidate duly selected by MPSC was made available. Further, it is not in dispute that the petitioner was appointed by following due selection process by the duly constituted Advisory Selection Board and that her appointment was on clear, vacant and sanctioned post. The fact that the petitioner has been getting all the monetary benefits such as annual increments, admissible leave of all kinds, increase in the emoluments, was

subscribing to GPF and was given all the increases owing to the revisions of all allowances as were being given to the regular employees is indisputable.

11. It is almost after three decades from the date of appointment of the petitioner that the respondents are now saying that the petitioner's appointment is not regular and in the year 2016 only sought to regularise the services of the petitioner without giving any past benefits of service. It would be contextually relevant to note that though the condition No.3 of the appointment order dated 2nd January,1990 lays down that the petitioner has to apply to MPSC in response to the advertisement for the post of substantive appointment but during the intervening period no advertisement for the said post was published by the MPSC. In this respect nothing is on record to show that the MPSC had ever published the advertisement for the said post. The appointment letter issued by the Government in January,1990 itself says that the petitioner's appointment would continue till a candidate was nominated by the MPSC.

12. The impugned order of the Tribunal was rested on the premise that the petitioner has not challenged the Government Resolution dated 22nd October,2016 and therefore, Clause 5 in the Schedule B of the said Government Resolution is binding on the petitioner. At this

juncture it would be contextually relevant to note that the petitioner got the knowledge of the said Government Resolution only after filing of affidavit-in-reply by the Government in the Tribunal. It is the claim of the petitioner that immediate thereafter the validity of the said Government Resolution was challenged. This claim of the petitioner finds support in the affidavit of rejoinder filed by the petitioner in the Tribunal. Thus, the basic premise of the learned Tribunal that the petitioner has not challenged the validity on the aforesaid Government Resolution and therefore, not entitled to claim relief seems to be incorrect. There is not much controversy over the fact that the petitioner was ever given to understand that she was not in permanent and regular employment. On the contrary, all monetary benefits as are given to the employees appointed on permanent basis are also given to the petitioner. For more than three decades of service, it would be too late in the day for the respondents to contend that the petitioner would stand regularised from the year 2016 and the petitioner would not be entitled for any benefits of her past service. The petitioner was selected by duly constituted Selection Board and was issued appointment order in the year 1990. In such circumstances, the appointment of the petitioner cannot be termed as back door entry. Moreover, the qualifications of the petitioner to hold the post were never questioned.

The respondents could not appoint a candidate for all these years, who was selected by the MPSC for the said post. In view of the above, the act of the respondents in treating the petitioner as a regular appointee since 2016 only, is illegal.

13. For the foregoing reasons, the impugned order of Tribunal is set aside. Consequently, the Government Resolution dated 22nd October, 2016 shall be held not binding on the petitioner and the petitioner shall be treated as regular employee as was treated earlier and shall be entitled to all the benefits of her service as that of a regular employee since the date of her initial appointment.

14. Rule is made absolute in the above terms.

15. Contempt Petition together with all pending applications shall stand disposed of.

R. N. LADDHA, J

MEENA
VISHAL
BHOIR

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by MEENA
VISHAL BHOIR
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S. V. GANGAPURWALA, J