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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 3491 OF 2022

Anilkumar S/o Rupchand Ukey .. Petitioner

Vs.

Maharashtra Electricity Regulatory
Commissioner & Ors. .. Respondents

Dr. Abhinav Chandrachud a/w Mr. Pramod G. Kathane for
petitioner.

Mr. Vishwajit Sawant, Senior Advocate a/w Mr. Nitin Dhumal
for respondent nos.1 and 2.

Mr. Himanshu Takke, AGP for respondent no.3/State.

**CORAM: DIPANKAR DATTA, CJ. &
MADHAV J. JAMDAR, J.**

DATE: OCTOBER 11, 2022

ORAL JUDGMENT (Per CHIEF JUSTICE):

1. The petitioner is the Deputy Director (Legal) of the Maharashtra Electricity Regulatory Commission, Mumbai (hereafter "the Commission", for short). He has been holding such post since 2nd July, 2012. He has also been holding additional charge of the post of Director (Legal) of the Commission from 18th April, 2019. In view of his educational and other attainments, coupled with the fact that he has been working on the post of Director (Legal) for almost three years, the petitioner claims that he is the only eligible and entitled candidate for promotional appointment on the post of Director (Legal) of the Commission.

2. By presenting this writ petition dated 28th March, 2022, the petitioner seeks the following relief: -

- (a) direction upon the respondents to produce entire papers and proceedings including all office notes for grant of promotion to the officers and staff working on the establishment of the Commission from 2017 till date.
- (b) direction upon the Commission as well as the Chairman of the Commission "to hold the Petitioner entitled for promotion to the post of Director (Legal), Maharashtra Electricity Regulatory Commission as per the Regulations, 2007, and Amended Regulations, 2011 r/w office order dated 9th December, 2011 and already passed the Department Examination".
- (c) direction upon the Commission and its Chairman to issue "an order of promotion in the name of the Petitioner on the post of Director (Legal), Maharashtra Electricity Regulatory Commission as per the Regulations, 2007, and Amended Regulations, 2011 from 2nd July, 2017".
- (d) direction upon the respondents "to maintain status quo with regard to the post of Director (Legal) Maharashtra Electricity Regulatory Commission during the pendency of present writ petition".

3. It is not in dispute that the post of Director (Legal) of the Commission has been lying vacant for nearly a decade.

It is also not in dispute that previous attempts to fill up the post have proved abortive. Having continued to be in additional charge of the post of the Director (Legal) of the Commission for over three years, it is not unusual for the petitioner to claim that he be considered for promotion on such post; however, we find it somewhat unusual for the petitioner, who is trained in law, to seek relief on terms as noted above. Law is well settled that no Court in exercise of power under Article 226 of the Constitution ought to make a mandatory order directing that a petitioner before it should be promoted to a higher post unless, of course, a very exceptional case is made out for grant of such a relief. This case, for reasons to follow, does not appear to be such an exception where a mandatory order for promotion should be issued.

4. The Commission has framed the Maharashtra Electricity Regulatory Commission (Recruitment of Conditions of Service of Employees) Regulations, 2007 (hereafter "the 2007 Recruitment Regulations", for short). Such regulations contain provisions for appointment on the post of Director (Legal). We consider it appropriate to reproduce below the relevant provisions: -

"1. Director (Legal)

Recruitment to the post of Director (Legal) shall be either: -

- (i) By nomination on regular basis,
- Or*
- (ii) By appointment on promotion
- Or*
- (iii) By appointment on deputation

(i) By nomination on regular basis

Educational Qualification: -

Post Graduate Degree in Law from a Recognized University/Law school

Experience: -

(a) Minimum 10 years post qualification experience in appearing in various Courts, representing cases before Judicial/Quasi-Judicial bodies, handling the legal affairs of any Public/private sector organization or Public Authority. The candidate should have atleast 4 years experience in appearing in courts/tribunals/ Forums etc., as an advocate, as defined under the Advocates Act, 1961

(b) Written and verbal communication skills in Marathi and English;

(c) Computer literacy is compulsory;

(d) Candidates having at least 3 years experience in Power Sector/Regulator Commission would be an added advantage.

Age Limit: -

Maximum age limit of the candidates should not be more than 45 years.

(ii) By appointment on promotion from Deputy Director (Legal), MERC cadre

5. It has been brought to our notice that the unamended terms of regulation 9 of the 2007 Recruitment Regulations ordained that the employees shall be appointed by the Commission either (i) on a regular basis; or (ii) on deputation or (iii) on a contract basis. However, regulation 9 was amended by the Maharashtra Electricity Regulatory Commission (Recruitment and Conditions of Service of

Employees) (Amendment) Regulations, 2011, whereafter regulation 9 stands substituted in the following manner: -

“The employees shall be appointed by the Commission either: -

By Nomination on regular basis

Or

By Promotion

Or

By Deputation”

6. It is also relevant to note that regulation 10 of the 2007 Recruitment Regulations provide that the Commission “shall have the power to determine the mode of recruitment/appointment to a particular vacancy or a group of vacancies or all vacancies”.

7. While provisions for appointment on the post of Director (Legal) of the Commission stood thus, this writ petition was instituted by the petitioner alleging that the respondents which also include, *inter alia*, the State of Maharashtra, have abused their powers, acted in colourable exercise of power and in a biased manner by denying promotion to the petitioner who happens to be the only eligible and entitled candidate as per the 2007 Recruitment Regulations, since amended, for appointment on the post of Director (Legal), by violating the rule of law, principles of equity and natural justice as enumerated in Articles 14, 16 and 21 of the Constitution of India.

8. Appearing on behalf of the petitioner, Dr. Chandrachud learned counsel has raised the following contentions: -

- (a) There is no blackmark against the petitioner. Having rendered blemish less service on the post of Deputy Director (Legal) for almost a decade and also having efficiently discharged the duties and functions on the post of Director (Legal), for over three years while holding additional charge, there could hardly be any reason for the Commission not to consider the petitioner for promotional appointment on the post of Director (Legal).
- (b) There have been several attempts by the Commission to make appointment on the post of Director (Legal) earlier, all of which have proved abortive. Notwithstanding such undisputed factual position, the attempt of the Commission to fill up the post of Director (Legal) by nomination smacks of *mala fide*.
- (c) There has been colourable exercise of power in not attempting to fill up the post of Director (Legal) through promotion. Nothing is placed by the Commission on record to indicate why despite there being an eligible candidate like the petitioner, and who is fit in all respects for promotional appointment on the post of Director (Legal), they have proceeded to issue a fresh advertisement dated 8th June, 2022 inviting applications from candidates interested to participate in the process of selection.

- (d) Although it is entirely the preserve of the executive as to which mode of recruitment would be followed, every such administrative decision must be backed by reasons which have not been placed on record.

And

- (e) Although the petitioner does not have a fundamental right to be promoted, Article 16 of the Constitution does guarantee to him the fundamental right to be considered for promotion and the activities of the Commission over the period of years since the petitioner acquired eligibility for promotion to the post of Director (Legal) would clearly demonstrate that there has been no effective and meaningful consideration of the petitioner's candidature for promotion to the post of Director (Legal) which is in clear violation of the petitioner's fundamental right protected by Article 16 of the Constitution.

9. Resting on the aforesaid contentions, Dr. Chandrachud contends that the petitioner ought to be considered for promotion notwithstanding the fact that an exercise has been undertaken by the Commission to fill up the post of Director (Legal) by nomination.

10. We record Dr. Chandrachud having fairly placed before us, in course of his submissions, decisions of the Supreme Court in **Nilangshu Bhusan Basu vs. Deb K. Sinha &**

Ors.¹, Union of India vs. Pushpa Rani & Ors.², Major General H.M. Singh, VSM vs. Union of India & Anr.³, S.B. Bhattacharjee vs. S. D. Majumdar & Ors.⁴ and Manoj Manu & Anr. vs. Union of India & Ors.⁵. Some of these decisions, we hasten to observe, do not assist the petitioner but would guide us to arrive at an appropriate decision.

11. The Commission and its Chairman, respondents 1 and 2, are represented by Mr. Sawant, learned senior counsel. According to him, no case for interference has been set up by the petitioner. He has tendered certain documents to which we propose to advert a little later. It is his contention that neither has the petitioner challenged the 2007 Recruitment Regulations, since amended, laying down the procedure for appointment on the post of Director (Legal) nor has he been able to demonstrate, with reference to any authority, that the Commission instead of making an attempt to fill up the post of Director (Legal) by way of nomination is duty bound to first explore whether any candidate in the feeder post is eligible to be considered for promotional appointment. In view of the discretion that the Commission enjoys to elect the source of appointment and since it has not been shown that the discretion in this behalf has been erroneously exercised, coupled with the fact that the process for appointment on the post of Director (Legal) by way of nomination is underway, Mr. Sawant submits that

¹ (2001) 8 SCC 119

² (2008) 9 SCC 242

³ (2014) 3 SCC 670

⁴ (2007) 10 SCC 513

⁵ (2013) 12 SCC 171

the writ petition ought not to be entertained.

12. We have heard the parties and perused the documents annexed to the writ petition as well as those tendered by Mr. Sawant.

13. The writ petition has been listed today for admission. In course of arguments, the first document tendered by Mr. Sawant reveals that on 8th June, 2022, the Commission published Advertisement No.10/2022 reading as follows: -

"The Maharashtra Electricity Regulatory Commission (MERC) invites Online Applications for the Post of **Director** (Legal) (1 Post – Unreserved) and **Computer System Administrator** (1 Post – Unreserved) by nomination on regular basis.

For eligibility criteria and other details please visit MERC website www.merc.gov.in

The Online Application should be submitted on or before **28/6/2022 till 5.30 p.m.**

Date: 08/06/2022

Place: Mumbai

Secretary, MERC"

The online link which an interested candidate could access would reveal that the process was subject to final outcome of this writ petition.

Insofar as age limit for the post of Director (Legal) is concerned, it was stipulated as follows: -

"Age Limit (as on 01.06.2022): -

Maximum age limit of the candidate should not be more than 45 years.

(5 years age relaxation over and above the prescribed age limit shall be applicable to the applicant belonging to Scheduled Caste,

Scheduled Tribes, Vimukta Jatis (A), Nomadic Tribes (B), Special Backward Classes, Nomadic Tribes (C), Nomadic Tribes (D) and other Backward Classes (Non Creamy Layer).

This (5 years) age relaxation over and above the prescribed age limit will also be available for employees working in the Electricity Regulatory Commission."

14. The second document that Mr. Sawant has placed before us is the letter dated 14th June, 2022 addressed to the petitioner by the Deputy Director (A&F) of the Commission. Referring to two applications made by the petitioner, it was conveyed to him that since the advertisement dated 8th June, 2022 had been published, he was at liberty to apply for the post of Director (Legal) through online mode.

15. It is not in dispute that the petitioner received the said letter dated 14th June, 2022. The endorsement made by him in his own handwriting reads as follows: -

"Received letter dt. 14.06.2022 at 11.6 am
Under protest and incomplete
communication on my representations
made from time to time and
particular my application dated 18.10.22.
CC. The Letter is received during
the pendency of Writ Petition No. 10031/22
before the Hon'ble High Court & after publication of
Advt.

sd/-."

16. Since the Commission had exercised the option to fill up the post of Director (Legal) by nomination and not by promotion, two options were open to the petitioner. The first was to apply online after seeking the Court's leave, without prejudice to his rights and contentions in this writ petition.

Even if he were not nominated, participation in the process with the Court's leave and without prejudice would have preserved the contention raised in this writ petition, i.e., the Commission wrongfully denied him promotion and proceeded for appointment on the post of Director (Legal) by nomination, for being raised later. The other option open to the petitioner was to challenge the advertisement itself and seek stay of its operation by way of amendment of the writ petition. He opted for neither of the two. The submission of Dr. Chandrachud that the advertisement itself mentioned that the process would be subject to the result of this writ petition and for such reason no application was made does not advance the cause of the petitioner any further. Once the process has commenced for filling up of the post of Director (Legal) by nomination and the petitioner, despite being eligible to apply had not so applied, we do not consider such conduct of the petitioner to be rational enough to even examine the point raised by Dr. Chandrachud that the Commission must first satisfy the Court why it elected to fill up the post of Director (Legal) by nomination and not by promotion. The 2007 Recruitment Regulations, as amended, do confer discretion on the Commission to decide its course of action and that being the preserve of the executive, the writ court would not ordinarily interfere and substitute its decision for that taken by the Commission.

17. The other contention of Dr. Chandrachud that the petitioner was age-barred and, therefore, could not have applied pursuant to the advertisement dated 8th June 2022

is now taken up for consideration. We heard Dr. Chandrachud, at one stage, allege that the respondents have acted *mala fide*. Neither has he nor have we been able to trace any such allegation in the petition memo. On the contrary, what we find is that the Commission, acting *bona fide*, even went to the extent of publishing the said advertisement inviting applications for appointment on the post of Director (Legal) by nomination upon insertion of a clause relating to relaxation of age limit for departmental candidates. Since as per the petitioner's own claim he is the sole eligible departmental candidate, it can readily be inferred that such relaxation was granted keeping in mind that though the petitioner was otherwise eligible he may not be entitled to enter the zone of consideration because of the age bar; therefore, it was decided to give him the opportunity to compete with others which could not have otherwise fructified but for relaxation of the age limit. Not only that, the petitioner was also intimated by the Deputy Director (A&F) of the Commission that he was entitled to apply for the post. Ordinarily, no such intimation is given. The submission of Dr. Chandrachud that because of the petitioner's age he could not apply is wholly without any substance and, therefore, stands overruled.

18. Let us now consider the decisions cited by Dr. Chandrachud.

19. Paragraphs 6 and 7 of the decision in **Nilangshu Bhusan Basu** (supra), as we have noted above, instead of assisting the petitioner validates the action of the Commission in embarking upon an exercise to fill up the

post of Director (Legal) by nomination. Paragraphs 6 and 7 (to the extent relevant) read as follows: -

"6. We feel that once the Rules permit recruitment to a post either by direct recruitment or by promotion, leaving the decision to the appropriate authority, it will be difficult to say or lay down that process of recruitment by promotion must necessarily be adopted first. As a matter of fact, it would amount to legislating a provision in the statute.

7. In the absence of any rule to that effect, it would be an administrative function of the appointing/appropriate authority to take a decision as to which method should be adopted for recruitment on any particular post. It may depend on various factors relevant for the purpose e.g. status of the post, its responsibilities and job requirement, the suitable qualifications as well as the age as may be desirable may also be taken into consideration while making such administrative decision. *****"

20. Paragraph 37 of the decision in **Pushpa Rani** (supra) sounds caution in the following words: -

"37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The court has no role in determining the methodology of

recruitment or laying down the criteria of selection. It is also not open to the court to make comparative evaluation of the merit of the candidates. The court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration.

21. We regret to record that the petitioner has not been able to demonstrate violation of any constitutional or statutory provisions or patent arbitrariness or *mala fides* vitiating the process that has since been adopted by the Commission. We, therefore, see no reason to interfere with the process that has followed pursuant to the advertisement dated 8th June, 2022. Since the petitioner did not apply despite being eligible therefor, he has only himself to blame.

22. The decision in **Manoj Manu** (supra) reiterates that a public employer cannot arbitrarily decide not to fill up all the advertised vacancies after making appointment on some of them. The ratio of such decision has no application on facts and in the circumstances of the present case where a single post is sought to be filled up within the contours of the relevant recruitment regulations.

23. However, a parting observation is necessary in view of the decisions of the Supreme Court in **S.B. Bhattacharjee** (supra) and **Major General H.M. Singh** (supra). The petitioner definitely had a right to be considered for promotion to the post of Director (Legal). He was not so considered but additional charge of the post was given to him as far back as in 2018. Why the petitioner did not approach the Court seeking a direction on the Commission to consider him for promotion when he acquired the

eligibility therefor has not been explained. Also, there being no challenge to the advertisement dated 8th June 2022, as noted above, the process cannot be stalled on this writ petition. However, such an omission on the petitioner's part to explain should not be decisive so as to seal his fate forever. We are informed that pursuant to the advertisement dated 8th June, 2022, the Commission has received applications for the post of Director (Legal) from three aspirants. It would obviously be open to the Commission to take the process for filling up of the post of Director (Legal) by nomination to its logical conclusion in accordance with law. However, should the Commission find none of the said three aspirants suitable for the post of Director (Legal) and bearing in mind the undisputed fact that previous attempts to fill up the post by nomination proved abortive, the Commission may and ought to explore the desirability of considering the petitioner for promotional appointment on the post of Director (Legal) in accordance with law without initiating a further round of process to fill up such post by nomination. In our considered opinion, this much the petitioner is entitled to in equity.

24. With the aforesaid observations, this writ petition stands disposed of.

25. Parties shall bear their own costs.

(MADHAV J. JAMDAR, J.)

(CHIEF JUSTICE)