

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

MISC. CIVIL APPLICATION NO. 3/2018

IN

WRIT PETITION NO.4103/2000 (D)

Smt. Farhad Bano Shah Mohammad Ibrahim Vs. State of Maharashtra and Ors.

.....
Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders

Court's or Judge's order

.....
Shri M. R. Joharapurkar, Advocate for the Applicant/Petitioner.
Ms N. P. Mehta, A.G.P for Non-applicant(s)/Respondent(s)/State.

**CORAM : A. S. CHANDURKAR &
AMIT BORKAR, JJ.**

DATED : 06th JUNE, 2022.

. By this application, the petitioner is seeking review of order dated 13.07.2017 in Writ Petition No.4103/2000.

2. The case of the petitioner in the present application in substance is to the effect that the order under review is challenged on the basis that there is no power to condone the delay. The petitioner in the petition has pointed out a specific provision in the form of Section 76(2) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. According to the petitioner, the order under review being in ignorance of the said provision as it falls within the purview of error on the face of record. Therefore, the judgment under review dated 13.07.2017 deserves to be recalled.

3. Ms. N. P. Mehta, learned A.G.P opposed the submission of the petitioner. She submitted that though on

the date of the appointment of petitioner, the right under Section 76(2) of the said Act was available with the petitioner, on the date of the filing of the application for condonation i.e. on 29.04.1995, the said right was not available with the petitioner.

4. We have carefully considered the order under review and the submissions made on behalf of the parties. We are satisfied that while deciding Writ Petition No.4103/2000, the Co-ordinate Bench of this Court has adjudicated upon the controversy involved in the petition without adjudicating as to whether Section 76(2) of the said Act is applicable or not. Without such adjudication and without recording finding, as to whether the benefits of Section 76(2) of the said Act was available to the petitioner, disposal of the petition would amount to “error apparent on the face of record”. We have also perused the order dated 17.01.2001 passed by the Director of Municipal Council Administration by which the Director had condoned maximum age of similarly situated teachers. It appears that said exercise of power was done on 17.01.2001.

5. Both the above material aspects have not been considered by the Co-ordinate Bench of this Court, therefore, in our view, the order dated 13.07.2017 needs to be recalled and the writ petition needs to be adjudicated on merits.

6. We therefore pass following order :

ORDER

- i] Misc. Civil Application No.3/2018 is allowed.
- ii] Writ Petition No.4103/2000 is restored on the file for adjudication on merits.
- iii] Misc. Civil Application No.3/2018 stands disposed of.

WRIT PETITION NO.4103/2000

. By this Writ Petition, the petitioner is challenging order dated 24.11.2000 passed by the respondent No.3, order dated 21.11.2000 passed by the respondent No.2 and also order dated 19.09.2000 passed by the respondent No.1 terminating the service of the petitioner on the ground that the petitioner was over aged on the date of the appointment.

2. The petitioner was appointed temporarily as Assistant Teacher by the respondent No.3 by order dated 30.12.1986 for a period of one year. Thereafter, the petitioner was further appointed from academic years 1987-88. The petitioner was also appointed as in charge Head Mistress on 24.08.1987 and was awarded pay scale of 600-30-750-40-950. The petitioner was promoted by an order under Schedule – B of Rule 9(5) on 07.06.1990. By order dated 21.12.1990 the Education Officer (Secondary), Zilla Parishad, Yavatmal granted approval for the appointment of the petitioner.

3. The petitioner was served with a show cause notice dated 31.10.1994 which was replied by the petitioner on 08.11.1994. Thereafter, again a show cause notice was issued to the petitioner by respondent No.3 on 19.05.2000, which was replied by the petitioner on 02.06.2000. On 24.11.2000, the petitioner was served with the order of termination on the ground that on the date of appointment, the petitioner was over aged. Director Administration of Municipal Council, Amravati Division has not granted sanction to the appointment of the petitioner. The petitioner has challenged the order of termination by way of present petition.

4. The respondents were served with the notice of this petition. The respondent No.3 has filed reply dated 15.01.2001 and additional reply dated 25.02.2002. The respondent No.3 has resisted the petition mainly on the ground that the petitioner was not eligible for being appointed on the post of Assistant Teacher as the petitioner was over aged on the date of the appointment. It is also stated that the said defect has not been condoned by the Director Municipal Council Administration, Amravati Division.

5. We have heard the learned Advocate for the petitioner and the learned A.G.P.

6. Mr. Joharapurkar, learned Advocate for the petitioner submitted that as a matter of fact, the respondent No.5 has

approved appointment of the petitioner. He submitted that during the relevant period, trained lady teachers were not available and the practice of condoning age was in force. He further submitted that in case of similarly situated teachers, the delay was condoned by the Director, Municipal Council Administration, Amravati Division. He invited the attention of this Court to the order passed by this Court in Writ Petition No.640/1997 to point out that respondent No.6 had condoned age of nine teachers in relation to Nagar Parishad, Daryapur by order dated 17.01.2001. He, therefore, submitted that the case of the petitioner deserves similar treatment as was done in respect of other similarly situated teachers.

7. Ms. Mehta, learned A.G.P. submitted that the question as to whether the provisions of Section 76(2) of the said Act would be applicable to the petitioner has not been considered by any of the Authorities. She, therefore, submitted that in absence of adjudication by the Subordinate Authorities, this Court may not for the first time adjudicate upon the said issue.

8. We have carefully considered the submissions made on behalf of the petitioner and the respondents. We are satisfied that in absence of adjudication on the applicability of Section 76(2) of the said Act and whether the case of the petitioner is similar to the other teachers in relation to which the Director, Municipal Council Administration, Amravati Division has granted relaxation of the defect of

over age needs to be adjudicated by the Competent Authority having power under the provisions of concerned statute. We find substance in the submission of the learned A.G.P that this Court for the first time may not adjudicate upon the applicability of Section 76(2) of the said Act to the petitioner and whether the case of the petitioner is similar to those in relation to which the respondent No.6 had condoned the defect of over age of the said teachers. We are therefore, of the opinion that it would be in the fitness of things that the parties are relegated to the Competent Authority i.e. respondent No.6 to adjudicate upon the issue of applicability of Section 76(2) of the said Act, and also issue as to whether the petitioner deserves similar treatment as has been done in relation to the teachers covered by the order dated 17.01.2001 and 24.07.2009. We, therefore, pass following order :

ORDER

i] The impugned order dated 24.11.2000 passed by the respondent No.3 and order dated 21.11.2000 passed by the respondent No.2 and also order dated 19.09.2000 passed by the respondent No.1 are quashed and set aside.

ii] The matter is relegated back to the respondent No.6 to decide the rights of the petitioner. Respondent No.6 shall decide whether the defect of over age of the petitioner on the date of appointment can be condoned in view of Section 76(2) of the said Act and also in view of the similar order passed earlier by the respondent No.6.

iii] The respondent No.3 shall send proposal of the petitioner to the respondent No.6 for condoning the defect of over age of the petitioner within a period of four weeks from the date of receipt of this Court.

iv] The respondent No.6 shall adjudicate upon the rights of the petitioner within a period of eight weeks from the receipt of the date of proposal from the respondent No.3.

9. It is made clear that this Court has not adjudicated upon the merits of the contentions raised by the parties and it is open for the respondent No.6 to adjudicate upon the rights of the petitioner without being influenced by any of the observations made by this Court in the present application.

10. Writ Petition is disposed of in the above terms.

JUDGE

JUDGE

RGurnule