

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

WRIT PETITION NO. 1672 OF 2022

Ashok Madhukar Nand
Age. 54 years, Occ. Senior Clerk,
SSC Board, Nashik,
R/o. Jaibhavani Nagar,
Survey No. 68, Aurangabad,
Taluka and District Aurangabad.

....Petitioner

Versus

1. The State of Maharashtra.
2. The Chairman,
Maharashtra State Secondary and
Higher Secondary Board,
Maharashtra State, Pune.
3. The Secretary,
Maharashtra State Secondary and
Higher Secondary Board,
Maharashtra State, Pune.

....Respondents

Advocate for Petitioner : Mr. Swapnil Joshi
and Mr. Sai Joshi i/b. J.P. Legal Associates
AGP for Respondent No. 1 : Mr. A.S. Shinde
Advocate for Respondent Nos. 2 & 3 : Mr. Yugant R. Marlapalle

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**CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.**

**Reserved on : 21 SEPTEMBER 2023
Pronounced on : 05 OCTOBER 2023**

JUDGMENT (PER : SHAILESH P. BRAHME, J) :

1. Rule. Rule is made returnable forthwith with the consent of the learned counsel of both the parties. With their consent the matter is heard finally at the admission stage.

2. The petitioner is seeking direction to consider him for the promotion to the post of 'supervisory clerk' with effect from 15.06.2021 as well as a direction to include his name in the seniority list.

3. Both the parties are ad idem on following facts :

- i. Petitioner is an employee of Maharashtra State Secondary and Higher Secondary Board (hereinafter referred to as 'Board') being appointed as 'Junior Clerk' on 24.06.1992.
- ii. Petitioner was promoted to the post of 'Senior Clerk' on 19.04.2014.
- iii. An offence bearing C.R. No. 116 of 2016 was registered with Taluka Police Station Jalna under provisions of Indian Penal Code, Maharashtra Prevention of Malpractices at University, Board and other Specified Examinations Act, 1982 and Prevention of Corruption Act, against 26 persons including the petitioner.
- iv. On 31.03.2016, the petitioner was suspended.
- v. He was reinstated on 01.06.2017.
- vi. Mr. D.R. Brahmapurkar and Mr. R.V. Gaikwad, were also involved in the above offence. They were also suspended and reinstated.

vii. On 15.06.2016, a charge sheet was filed before the Criminal Court in which the petitioner is accused no. 11, Mr. Brahmapurkar is accused no. 10 and Mr. Gaikwad is accused no.14. The Criminal case is sub judice.

viii. On 20.11.2017, charge sheet and statement of allegations were served upon the petitioner and above referred Officers also. The disciplinary action is underway and yet to be concluded.

ix. On 11.01.2021, seniority list of the Senior Clerk was published in which the petitioner is shown at serial no.34.

x. On 11.04.2018, Mr. Brahmapurkar and on 30.01.2019, Mr. Gaikwad were promoted to the post of Supervisory clerk temporarily.

xi. On 24.12.2021, the list of the promoted employees to the post of 'Supervisory Clerk' was published.

xii. The petitioner was shown not eligible for the promotional post of 'Supervisory Clerk' as the disciplinary action and criminal proceeding are pending.

4. The grievance of the petitioner is that he was eligible for the promotion to the post of Supervisory Clerk and his name was also included in the Seniority list. Despite that he was denied the promotion citing the reason that the disciplinary action and the criminal proceeding

pending against him. Whereas, similarly circumstanced employees Mr. Brahmapurkar and Mr. Gaikwad were given promotion which is discriminatory. The petitioner has placed reliance upon Government Resolutions dated 15.12.2017, 30.08.2018 and 01.08.2019 to make out a case that an employee against whom the disciplinary action or the criminal prosecution is pending is entitled to temporary promotion subject to the outcome of the actions. It is contended that on 16.09.2021 and thereafter, the petitioner made representation to the respondents requesting to promote him to the post in question. However, there was no response.

5. The learned counsel for the petitioner submits that the refusal to promote the petitioner is against the provisions of G.R. dated 15.12.2017 and 30.08.2018. The petitioner is discriminated because other two similarly situated employees were given temporary promotion. He would submit that there is no substantial progress in the disciplinary action as well as the prosecution. Without there being any fault on his part those proceedings could not be concluded. He would submit that the right to be considered is violated and the procedure contemplated by the government resolutions has not been followed by the respondent authorities.

6. The respondent nos. 2 and 3 have filed affidavit-in-reply to oppose the claim of the petitioner. According to them, sealed cover procedure as contemplated by Government Resolution dated 15.12.2017

was followed by Divisional Promotion Committee (hereinafter referred to as Committee) in case of petitioner. In a meeting dated 24.12.2021, the entitlement of the petitioner to the promotional post was considered. Thereafter, the decision was revisited in a meeting dated 27.09.2022. It is emphatically made clear that the Committee applied necessary criteria contemplated by clause 9 of G.R. dated 15.12.2017 and found the petitioner ineligible for temporary promotion.

7. It is further clarified by the answering respondent that the decision of entitlement to the promotional post cannot be re-considered before lapse of two years from the date of first meeting. Therefore, the petitioner has to wait till any decision is taken in the meeting to be held in December 2023 or January 2024. It is denied that other two employees namely Mr. Brahmarkar and Mr. Gaikwad are similarly placed. They were given temporary promotion subject to the outcome of proceedings before the Supreme Court. It is further averred that Mr. Brahmarkar is also not given the next promotion to the post of Assistant Superintendent due to sealed cover procedure, to refute the allegation of discrimination. The respondents have prayed to dismiss the petition.

8. The learned counsel for the respondent nos. 2 and 3 submits that the petitioner does not have a right to the promotion but has a limited right to be considered for the promotion. He would submit that there are various factors to be considered by the Committee to decide the eligibility of an employee for the promotional post. He would submit

that the Committee has meticulously followed the sealed cover procedure as contemplated by Government Resolutions which are sought to be relied upon by the petitioner. The ground of parity which is pressed into service by the petitioner is strongly refuted by the learned counsel. He would submit that the petitioner's claim can be re-considered in a meeting which is to be held in December 2023 or January 2024 and presently the petitioner is not entitled to any relief. The learned counsel for the petitioner has placed reliance upon the judgment rendered by the Supreme Court in the matter of *Union of India Versus K.V. Jankiraman and others*, reported **(1991) 4 SCC 109**.

9. The petitioner has filed a re-joinder to the affidavit-in-reply of the respondents, reiterating his grounds of objections and the grievance stated in the memo of the petition. It is averred that the minutes of the meeting dated 27.09.2022 have not been produced on record. The respondents have deliberately and mala fide denied promotion to the petitioner. It is clarified that the other two employees were given promotion subject to the outcome of the result of the proceedings before Supreme Court. Those proceedings are in respect of the Krushna Value Development Corporation. The petitioner could have been promoted with a similar rider.

10. We have considered the rival submissions canvassed by the learned counsel for the respective parties. The learned counsel for the respondent has placed reliance upon judgment of the Supreme Court in

the matter of *Union of India Versus K.V. Jankiraman and others* (supra), especially on para no. 29, to buttress a submission that an employee does not have any right to promotion but has right to be considered for the promotion. The modality in case of an employee facing disciplinary or criminal action is prescribed in the judgment. The differential treatment and the parameters which are made applicable for the promotion of such an employee are laid down.

11. In view of the law laid down by Supreme Court, the government resolution dated 15.12.2017 was issued by the State Government. There is corrigendum to the marginal extent which is provided by Government Resolution dated 30.08.2018. The present matter is covered by the modality of sealed cover procedure laid down by G.R. dated 15.12.2017 is undisputed. The learned counsel for the respondents has rightly submitted that the petitioner does not have any right to the promotion in question but has only right to be considered for the promotional post.

12. The right of the petitioner to be considered for the promotion is regulated by G.R. dated 15.12.2017. An employee who is facing a disciplinary action or prosecution is subjected to the procedure contemplated by the Government Resolution. Clause 6 contemplates reconsideration by the Committee if the performance of an employee is enclosed in the sealed envelope. If such an employee who is reinstated and against whom the disciplinary action has not begun then he can be

held to be eligible for the promotion subject to the parameters. If the disciplinary action culminates into penalty then his claim can be deferred to the next meeting without opening the sealed envelope. Following is the text of clause 6 :

“६) विभागीय पदोन्नती समितीच्या बैठकीच्या दिनांकाच्या ६ महिन्यांनंतर मोहोरबंद पाकीटात ठेवलेले प्रकरण नियुक्ती प्राधिकारी यांनी पुनर्विलोकित करावे. पुनर्विलोकनाच्यावेळी निलंबित अधिकाऱ्यास पुनःस्थापीत केले असल्याचे व त्यांचेविरुद्ध कोणतीही शिस्तभंगविषयक कार्यवाही सुरु झालेली नसल्याचे आढळून आल्यास, मोहोरबंद लिफाफा उघडून त्यातील निष्कर्षानुसार तो पदोन्नतीस पात्र असल्यास त्यास पदोन्नती देण्यात यावी. तसेच ज्या अधिकारी / कर्मचाऱ्याविरुद्धची शिस्तभंगविषयक कार्यवाही संपुष्टात येवून शिक्षा दिली असल्यास, अशा अधिकारी / कर्मचाऱ्यांचे सीलबंद लिफाफे न उघडता त्यांची पदोन्नतीसाठीची पात्रता पुढील नियमित विभागीय पदोन्नती समितीच्या बैठकीमध्ये तपासण्यात यावी.”

13. It is relevant to notice clause 9 which is as follows :

“९) विभागीय पदोन्नती समितीच्या मूळ बैठकीच्या दिनांकापासून दोन वर्षे झाल्यानंतरही मोहोरबंद पाकीटात निष्कर्ष ठेवलेल्या अधिकारी / कर्मचाऱ्यांच्या, शिस्तभंगविषयक / न्यायालयीन कार्यवाही प्रकरणी अंतिम निर्णय झालेला नसल्यास, अशा प्रकरणी नियुक्ती प्राधिकारी स्वविवेकानुसार संबंधीत अधिकारी/कर्मचाऱ्याला तदर्थ पदोन्नती देण्याबाबत जाणीवपूर्वक निर्णय घेईल. असा निर्णय घेताना नियुक्ती प्राधिकारी, खालील मुद्दे विचारात घेईल.

- अ) संबंधितांविरुद्धची शिस्तभंगविषयक / न्यायालयीन कार्यवाही बराच काळ प्रलंबित राहण्याची शक्यता,
- ब) दोषारोपांचे गांभीर्य,
- क) द्यावयाची पदोन्नती जनहिताच्या विरुद्ध जाईल का,
- ड) शिस्तभंगविषयक / न्यायालयीन कार्यवाही लांबण्यास संबंधित अधिकारी/कर्मचारी जबाबदार आहे का?
- इ) संबंधित अधिकारी/कर्मचार्यास तदर्थ पदोन्नती दिल्यानंतर , पदोन्नतीच्या पदावर काम केल्यामुळे, संबंधित अधिकारी/कर्मचार्याच्या शिस्तभंगविषयक/न्यायालयीन कार्यवाहीच्या प्रकरणावर परिणाम होण्याची शक्यता आहे का? किंवा संबंधित अधिकारी /कर्मचारी पदोन्नतीच्या पदाचा त्यासाठी दुरुपयोग करण्याची शक्यता आहे का?
- फ) न्यायालयीन कार्यवाही बाबतची सद्यस्थिती/अभियोगाबाबतचे किती टप्पे पार पडले याबाबतची माहिती करून घ्यावी.
- ग) सेवानिवृत्तीस १ वर्ष शिल्लक असेल तर पदोन्नती न देण्याच्या अनुषंगाने सेवानिवृत्तीचा कालावधी विचारात घेणे (तदर्थ पदोन्नती दिल्यास वरीष्ठ वेतनश्रेणी प्राप्त झाल्यामुळे सेवानिवृत्तीनंतर मिळणारे सेवानिवृत्ती वेतनाचा ज्यादा लाभ प्राप्त होणार असल्यामुळे सेवानिवृत्तीस एक वर्ष शिल्लक असलेल्यांना तदर्थ पदोन्नती देण्यात येऊ नये याकरीता ही बाब तपासणे आवश्यक आहे).

14. In the present matter both the parties are relying upon clause nos. 6 and 9 of the Government Resolution dated 15.12.2017. The petitioner's contention is that he was eligible for the promotion along with the similarly situated employees on temporary basis. Whereas, the submission of the respondent is that the petitioner was not found to be

eligible in the meeting dated 24.12.2021 and thereafter, in the meeting dated 27.09.2022. Additionally, clause 11 is pressed into service for deferring the decision for two years from the first meeting.

15. The learned counsel for the petitioner is harping upon the ground of parity. It can be seen from the charge sheet which is placed on record by the petitioner that the names of the petitioner as well as Mr. Gaikwad and Mr. Brahmapurkar are figuring as accused nos. 11, 10 and 14, respectively. The charge sheet was filed on 15.06.2016 and the prosecution is sub-judice. The petitioner as well as other two employees were suspended and thereafter reinstated. All these persons are facing disciplinary action. The petitioner has placed on record the statement of allegations and charge sheet dated 20.11.2017. An enquiry Officer is appointed and disciplinary enquiry is underway.

16. The learned counsel for the petitioner has placed on record a seniority list at exhibit 'I'. The petitioner's name is at serial no. 34 (page no. 87). On 13.04.2018, Mr. Brahmapurkar and on 31.01.2019, Mr. Gaikwad were promoted temporarily to the post of Supervisory Clerk. Considering the position of the petitioner, Mr. Brahmapurkar and Mr. Gaikwad, their involvement in the criminal case and disciplinary action initiated against them, we are of the considered view, that they are similarly circumstanced.

17. The learned counsel for the respondents has not placed on record any material to indicate that the petitioner played more incriminating role than other persons. Similarly, there is nothing on record to show that the charges in disciplinary enquiry against the petitioner are more grievous than the charges against other persons. It appears from the record that the respondents have applied sealed cover procedure in case of petitioner as well as other persons.

18. The minutes of the meeting dated 24.12.2021 are placed on record at page no. 147. It refers to the petitioner at page no. 153 at serial no. 13 indicating that the petitioner was not eligible. Learned counsel for the respondents pointed out that there was a benchmark of average four marks for confidential report to qualify for promotion. A reference is made to G.R. dated 01.08.2019. As the petitioner was not satisfying the benchmark and a disciplinary action was underway he was held to be not eligible. Learned counsel also contended that on 27.09.2022 the case of the petitioner was reconsidered but deferred.

19. The minutes of the meeting of 27.09.2021 have not been placed on record by the respondents. The minutes of the meeting dated 24.12.2021, holding the petitioner ineligible for the promotion do not show the objective analysis of the petitioner's case. The Committee is expected to record the decision by applying parameters laid down in clause no. 9. The objective satisfaction of the committee has not been brought on record to support the decision of denial of temporary

promotion to the petitioner. When a query is made to disclose the reasoning or the satisfaction of the committee in that regard, it is replied that he would produce the same on record.

20. Its a matter of record that Mr. Brahmarkar was given adhoc promotion on 11.04.2018, and Mr. Gaikwad was given adhoc promotion on 30.01.2019. The respondents have applied the parameters of Government Resolution dated 15.12.2017. The petitioner was similarly situated. The respondents might have applied sealed cover procedure as laid down by Government Resolution dated 15.12.2017, to the petitioner. They might have assessed the overall performance and eligibility of the petitioner as to deny him an adhoc promotion. They should have produced the record of the petitioner. The affidavit-in-reply and submissions of the respondents do not refer to the assessment of the petitioner done at the relevant time.

21. In the absence of relevant material to indicate that the petitioner was not eligible even for the temporary promotion like that of Mr. Brahmapurkar and Mr. Gaikwad we find that the petitioner has made out the case of parity and discrimination. The affidavit-in-reply and submissions of the learned counsel for the respondents fall short to demonstrate that parameters of clause 9 were made applicable and the decision of eligibility of petitioner for promotion was deferred till next date. The respondents are under obligation to show that the other persons were better placed and therefore, they were considered and given

temporary promotions. We do not accept the submissions of the learned counsel for the respondents that there was no discrimination.

22. We have noticed that the charge-sheet is filed in the criminal court on 15.06.2016. The charge-sheet with the statement of allegations in the disciplinary action is served upon petitioner on 20.11.2017. The first meeting of the Committee is stated to have been conducted on 24.11.2021. It is not clear from the record any meeting was convened prior to 24.12.2021 and the claims of the petitioner and others were considered for the promotion. As per the submissions of respondents after six months from 24.12.2021, a meeting was conducted on 27.09.2022 to reconsider the claim of the petitioner. For want of record and material particulars we have our reservations to accept the submissions of learned counsel for the respondents that due procedure as contemplated by G.R. dated 15.12.2017 was ever followed.

23. The promotional orders of Mr. Brahmapurkar and Mr. Gaikwad are placed on record which are at exhibit 'Q'. It is stated in clause no. 1 that the promotions are temporary and subject to the decision of the Supreme Court in Special Leave Petition No. 28306 of 2017. In the rejoinder, the petitioner has contended that the Special Leave Petition pertained to the employees of Krishna Valley Development Corporation. It does not have any nexus with the issue of promotion of the employees of the board. The particulars of Special Leave Petition have not been placed on record to show the exact nature

of litigation, pleadings and the relief. It is incomprehensible why the condition which is incorporated in the promotional orders of Mr. Brahmapurkar and Mr. Gaikwad could not have been made applicable to the petitioner. We find that this is another instance to show pick and choose method adopted by the respondent.

24. Learned counsel for the respondent has invited our attention to the prohibition of two years in considering the claim of any employee like petitioner whose eligibility is closed in the sealed cover. The procedure as contemplated by clause 9 of G.R. dated 15.12.2017 is pressed into service. It is informed that in a next meeting which is to be convened in December 2023 or January 2024, the claim of the petitioner would be reconsidered. The respondents have not placed on record the objective satisfaction for holding the petitioner ineligible. We find that the petitioner is illegally deprived of the promotion. Therefore, the respondents cannot keep the petitioner waiting for two years. The submission of learned counsel relying upon clause 9 cannot be approved.

25. Its a matter of record that the disciplinary action and the prosecution have not been progressed substantially. The respondents/ authorities have not adhered to the procedure contemplated by Government Resolution dated 15.12.2017. The petitioner is entitled to be considered for promotion along with similarly placed employees. The petitioner has only right to be considered for the promotion and in a strict sense the direction to promote him cannot be issued. Having made out a

case of discrimination and illegal deprivation to the promotional post we are of the considered view that there is no point in relegating the petitioner to the Committee to reconsider his claim for promotion. The bar of two years engrafted in clause 9 is a legal impediment to such a type of direction.

26. Under these special features of the matter, we deem it appropriate to direct the respondents to grant temporary promotion to the petitioner though under normal circumstances we would not have granted such a relief to an employee. We are fortified in issuing such a direction by the fact that from the minutes of the meeting dated 24.12.2021, two promotional posts of Supervisory Clerk appear to be vacant. It is possible to accommodate the petitioner against one of those posts. However, he is not entitled to any other consequential benefits except an adhoc promotion, notionally.

27. We have already recorded the finding of discrimination and illegal deprivation of promotion in favour of the petitioner. Simultaneously we find that it is a dereliction of the duties of the respondent nos. 2 and 3. They failed to adhere to the procedure contemplated by G.R. dated 15.12.2017 and 01.08.2019. The learned counsel for the respondents has faintly mentioned that the decision or the reasons recorded to deprive the petitioner of temporary promotion has been arrived at and record to that effect is maintained by Committee which is not before Court.

28. We are not prepared to accept the justification. The Committee is part and parcel of the respondent no. 2. The plea of non-joinder of necessary party has not been taken by the respondents. Therefore, the respondent nos. 2 and 3 cannot disown the action/omission of the Committee. They are liable to respond to the Court in that regard. We find that the petition succeeds and the following order is passed :

ORDER

- i. The respondent nos. 2 and 3 shall issue an order of temporary promotion to the petitioner to the post of Supervisory Clerk with effect from 15.06.2021 within a period of two weeks from the date of this order. However, the petitioner shall not be entitled to claim any arrears.
- ii. The respondents shall accordingly, modify the seniority list by incorporating the name of the petitioner in it.
- iii. Rule is made absolute in the above terms.

[SHAILESH P. BRAHME, J.]

[MANGESH S. PATIL, J.]