

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

79 WRIT PETITION NO.2679 OF 2023

THE STATE OF MAHARASHTRA,
THROUGH ITS SECRETARY AND OTHERS
VERSUS
RAOSAHEB SHRIPATI BANGAR

...
Advocate for Petitioner / State : Mr. S. G. Karlekar.
Advocate for Respondent : Mr. I. D. Maniyar.
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CORAM : **RAVINDRA V. GHUGE &
SANJAY A. DESHMUKH, JJ.**

DATE : 08th March, 2023.

Per Court:

1. The Petitioner is aggrieved by the judgment and order dated 10th August, 2022 delivered by the learned Maharashtra Administrative Tribunal in Original Application No.658 of 2018 vide which the Application has been allowed with the following directions:-

“ORDER

The Original Application No. 658 of 2018 is allowed in following terms:-

(A) Benefits of Assured Career Progression Scheme be granted to the Applicant w.e.f 31.08.2002, i.e. on completion of 12 years regular service as Civil Engineering Assistant, subject to the Applicant fulfilling all other eligibility criterion prescribed by the G.R. No. वेतन-११९९/प्र.क्र.२/९९ सेवा-३, dated

20.07.2001, ignoring the un-communicated adverse ACR entry for the year 2001-02.

- (B) As the benefits of scheme of ACPS are non-functional, all consequential benefits should also be granted including those relating to pensionary benefits. The exercise in this respect may be completed within a period of four months from receipt of this order by the Respondents, failing which penal interest on amount due but not paid @ 6% per annum shall be payable to the Applicant.
- (C) Respondent Nos. 1 to 3 may fix responsibility of concerned for not communicating adverse ACR entry to the Applicant and failing to exercise supervisory control in this respect, as per procedure prescribed and in force at the relevant time.
- (D) No orders as to costs.”

2. The issue raised by the Petitioner before the Tribunal is as regards the granting of the benefits of the first time bound promotion to the original Applicant. The department has granted such benefit with effect from 1st April, 2007 instead of 31st August, 2002, on the ground of adverse Annual Confidential Report (in short ACR) for the year 2001-2002. There is no dispute that the average of five years has to be taken into account while calculating the effect of the ACR.

3. We have considered the submissions of the learned AGP on behalf of the Petitioner and the learned Advocate on behalf of the original Applicant. With their assistance, we have perused the Petition paper book.

4. The original Applicant joined service with the Command Area Development Authority, Ahmednagar as a Technical Assistant on 22nd May, 1980. He was promoted to the post of Deputy Superintendent on 9th April, 1986. In view of the Government Resolution dated 31st January, 1989, he was absorbed as a Civil Engineering Assistant with effect from 30th September, 1989. He completed 12 years in regular service with the employer as on 30th September, 2001. Admittedly, he was not able to pass the professional examination until he completed 45 years of age on 31st May, 2002. It is conceded that even thereafter, the Applicant could not pass the professional examination, which was necessary until the age of 45 years for promotion to the next higher position, which was the post of Junior Engineer. Hence, he was not given the benefit of the Assured Career Progression Scheme (ACPS), which came into effect from 1st August, 2001. It is beyond debate that if a person does not pass the department exam and attains the age of 45 years, he is exempted from appearing for the exam thereafter, though the disadvantage for having

not appeared for the exam would always affect the career progress of the candidate.

5. The Petitioner approached the Tribunal in 2015 with Original Application No.395 of 2015 and by order dated 27th March, 2018, the Tribunal disposed off the Original Application while recording the exemption from appearing for the exams, after 45 years, in view of Rule 3(a) of the 1998 Recruitment Rules for Junior Engineers. Keeping this in view, the Tribunal granted relief to the original Applicant in terms of (ii) and (iii), which read as under:-

“(ii) The respondents are directed to consider all the applicants for grant of time bound promotion as well as assured career progression scheme by exempting them from passing of the professional examination as required under Rule 3 Sub Rule (a) of the 1998 Recruitment Rules for Junior Engineers on reaching 45 years’ age, provided that the applicants meet all other criteria as per schemes of time bound promotion.

(iii) The respondents are directed to consider the cases of the present applicants as directed above within a period of 4 months’ from the date of this order and the necessary orders shall be issued by them and the said orders shall be communicated to each of the applicants by Registered Post Acknowledgement Due, thereafter.”

6. It is in deference to the above order of the Tribunal, that Respondent No.2 issued an order on 14th September, 2017, granting the benefit of ACPS to the original Applicant with effect from 1st April, 2007, on the ground that the ACR of the original Applicant was not satisfactory and average of the 5 years led to his dis-entitlement. By Original Application No.658 of 2018, the original Applicant approached the Tribunal with the plea that the adverse remarks were never conveyed to him and considering the Government Resolution issued by the GAD dated 1st November, 2011, adverse remarks not conveyed, are to be ignored.

7. The only issue that was taken up before the Tribunal was as to whether the adverse remarks were conveyed and as to what would be the effect, if it is established that the said remarks were not conveyed to him. Clauses 39 and 40 of the guidelines set out in the Government Resolution dated 1st February, 1996, indicate the adverse remarks being conveyed to a candidate. Such remarks should be conveyed/communicated either by hand delivery and an acknowledgment to be obtained thereof, or by Registered Post with Acknowledgment Due. The learned AGP submits that even by ordinary post, the remarks can be conveyed.

8. The only issue that is germane is as to whether such remarks were communicated to the Petitioner even by ordinary post. The learned AGP relies upon the communication dated 7th May, 2002, which is a letter titled as "Confidential" with an outward number 2/220/02 by which the Petitioner is conveyed of the annual remarks for the year 2001-2002. Since an acknowledgment receipt was not taken from the original Applicant, the Executive Engineer directed the Sub-Divisional Engineer vide communication dated 5th October, 2002, which also has an outward number, to get the acknowledgment from the original Applicant. In view of this communication, the Sub-Divisional Engineer addressed a letter dated 16th October, 2002 by way of a service report, indicating that the original Applicant was served with adverse remarks.

9. The handicap faced by the department in this case is that there is no acknowledgment signature acquired from the original Applicant of having received the adverse remarks. Though there is an outward number, now outward register is not available. Though it is contended that the remarks were forwarded through ordinary post, no record of dispatching such letter is found in any outward register. In short, there is no evidence of communicating the adverse remarks for the year 2001-2002, to the original Applicant.

10. Insofar as the issue of delay is concerned, the original Applicant approached the Tribunal immediately upon being conveyed on 14th September, 2017, that he would not be entitled for the benefit of the ACPS from 2002 and instead, the same would be extended to him from 2007. This conclusion was drawn on the basis of the ACRs available. However, as the original Applicant has raised the plea from the very first instance that he was not communicated the adverse remarks, the Petitioner herein had to establish this fact before the Tribunal since the decision to deprive him of the ACPS benefit until 2007, was on the basis of the record available. We are informed that the issue of preservation of records was also considered by the learned Tribunal. Records pertaining to a candidate have to be preserved for a period of at least 5 years from the date of the retirement of the candidate. The original Applicant has retired on 31st May, 2015.

11. Though it appears a bit weird that the communication to the original Applicant has an outward number and it is only because the establishment cannot prove that the adverse remarks were communicated to the original Applicant, that the Tribunal has concluded that the defence taken by the original Applicant of non-communication of the ACR, is sustainable. In the absence of any record, we as well, have no option, but to conclude that though the

communication letters are available and the report of the Sub-Divisional Engineer also indicates service, absence of documentary evidence to prove service, will have to be construed as a factor in favour of the Petitioner.

12. In view of the peculiar facts recorded as above, we do not find that the impugned judgment and order of the learned Tribunal could be termed as being perverse or erroneous. This Petition is, therefore, devoid of merits, stands dismissed.

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[SANJAY A. DESHMUKH, J.]

[RAVINDRA V. GHUGE, J.]