

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

902 WRIT PETITION NO.11834 OF 2022
WITH CA/519/2023 IN WP/11834/2022

RAMKRUSHNA ZAWARU PATIL
VERSUS
THE STATE OF MAHARASHTRA THROUGH THE PRINCIPAL
SECRETARY AND OTHERS

.....

AND
WRIT PETITION NO. 117 OF 2023
WITH CIVIL APPLICATION NO. 835 OF 2023 IN WP NO. 117 OF
2023

SANJAY DHANRAJ MAHAJAN
VERSUS
THE STATE OF MAHARASHTRA THROUGH THE PRINCIPAL
SECRETARY AND OTHERS

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Advocate for Petitioner : Mr. Tope Sambhaji S.
AGP for Respondents-State authorities: Mr. S.G. Karlekar
Advocate for Respondents 2 and 5 : Mr. U.B. Bondar
Advocate for applicants in civil applications : Mr. S.S. Thombre

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**CORAM : RAVINDRA V. GHUGE AND
SANJAY A. DESHMUKH, JJ.
DATED : 7th FEBRUARY, 2023.**

PER COURT :-

1. Writ petition No. 117 of 2023 is not board. By consent, taken on board.
2. On 07.12.2022, we had passed the following order:-

“1. The petitioner has put forth prayer clauses B, C and D

as under :-

- "B) *By issuing writ of mandamus or any other writ in the like nature, this Hon'ble Court may kindly direct the Res. No.3 i.e. Commissioner of Education that, by considering the seniority of the petitioner, please to insert the name of the petitioner in the State Seniority List prepared by the Res. No.3, for the District Technical Service Group-C, Grade-2 (Education) and to accord the benefits to the petitioner as per the said seniority.*
- C) *By issuing writ of mandamus or any other writ in the like nature, this Hon'ble Court may kindly direct the Res. No.1, 3 and 4, to promote the petitioner in the cadre of Dy. Education Officer by considering the seniority of the petitioner in District Technical Service Group-C, Grade-2 (Education).*
- D) *By issuing writ of mandamus or any other writ in the like nature, this Hon'ble Court may kindly direct all the Respondents that, to sanction the pay-scale of the Dy. Education Officer to the Petitioner and for that purpose may kindly issue necessary directions/ orders."*

2. *It is stated that the petitioner is due to retire in March, 2023.*

3. *Issue notice to the respondents, returnable on 23.01.2023. The learned AGP waives service of notice on behalf of respondent Nos.1, 3 and 4. The parties to note that this matter is likely to be heard finally at an admission stage.*

4. *All office objections to be removed within five weeks.*

5. *The learned advocate for the petitioner submits that he is the senior-most teacher in the Department. His name for promotion for the first time in his entire career is recommended on 14.10.2022 to the Commissioner of Education and it is recommended that he should be included in the combined seniority list by virtue of which, he would be entitled for promotion. Yet, he is not being promoted and juniors are being considered for promotion.*

6. *It is further stated that his name is in the District Seniority List and not included in the State Seniority List. Promotion to the post of the Deputy Education Officer is only within the jurisdiction of the State authorities. He, therefore, desires that his name be included in the State Seniority List. To his misfortune, juniors to him find their names entered in the seniority list.*

7. *As such, such juniors to the petitioner, whose names have been entered in the seniority list of the State, shall not be issued with the orders of promotion until further orders in this petition.”*

3. On 27.01.2023, we had considered the civil applications filed by the interveners, alongwith the writ petitions and we had passed the following order:-

“1. We have briefly heard the learned advocates for the respective sides.

2. The original petitioners, who are seniors to the applicants in the Civil Application and on which count there is no dispute, have been recommended to be entered in the State Seniority List for promotion to 119 vacant posts of the Deputy Education Officer cadre.

3. The learned advocate for the applicants in the intervention applications submits that they have no doubts that these two petitioners are seniors to them. However, due to the litigation of the petitioners and interim order of this Court dated 06.01.2023, these applicants, with regard to whom there are no legal impediments, are unnecessarily prevented from being promoted. Hence, it is suggested that

these applicants be promoted as there is no legal impediment and above these applicants, two posts be kept vacant and as and when the petitioners are promoted, they would be seniors to these applicants and their deemed date of promotion can be the same date on which these applicants are promoted.

4. *We find that the submissions of the learned advocate for the applicants is well placed.*

5. *The learned advocate for the petitioners also does not have any objection.*

6. *However, we find that the proposal of the two petitioners is unnecessarily kept pending with respondent Nos.1 and 3 (the Principal Secretary, School Education and Sport Department, Mantralaya, Mumbai-32 and the Commissioner of Education, Pune), though their proposals are forwarded in 2013 and again in 2022. As such, respondent Nos.1 and 3 shall pass appropriate orders on the proposals of the petitioners for entering their names in the State Seniority List, on or before 03.02.2023.*

7. *List this matter on 07.02.2023 in the "passing orders" category."*

4. The petitioners have placed reliance upon a judgment delivered by the Hon'ble Supreme Court in **Bal Kishan Vs. Delhi Administration, 1990 AIR (SC) 100** and more specifically, paragraphs 9, 10 and 11, which read thus:-

"9. We have perused the lists and gave our anxious consideration to the question Urged. We fail to understand how the appellant could be ranked above his seniors and how

he could get flyover promotions in every cadre. The High Court while directing confirmation of the appellant with reference to a particular date did not say that he should be ranked above even to those who were appointed earlier to him. There was also no direction that he should be ranked above those who were liable to be confirmed before him. Indeed, it was not the intention of the High Court and it could not have been intended too, since his seniors were not parties to the writ petition. But the faulty implementation of the order of the High Court has resulted in that undesirable consequence. It has resulted in supersession of appellant's seniors. In fact, the appellant has overtaken 21 SIs who were senior to him. That was totally unjustified and arbitrary.

10. In service, there could be only one norm for confirmation or promotion of persons belonging to the same cadre. No junior shall be confirmed or promoted without considering the case of his senior. Any deviation from this principle will have demoralising effect in service apart from being contrary to Article 16(1) of the Constitution.

11. It is not shown that the seniors were not eligible for confirmation when the appellant was confirmed. Nor it is shown that the seniors were not suitable for promotion when the appellant was promoted. The appellant therefore could not complain against the corrective action taken by the respondents.”

5. Further, a reliance is placed by the petitioners on the judgment delivered by the Hon'ble Supreme Court in **Tek Chand and others Vs. Bhakra Beas Management Board and others, 2021 (7) JT 151** wherein the Hon'ble Supreme Court has observed in paragraph Nos. 14, 15 and 16, as under:-

“14.

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“11. *In State of Kerala v. N.M. Thomas [(1976) 2 SCC 310]* A.N. Ray, C.J. has thus explained the criterion of “seniority cum merit”: (SCC p. 335, para 38)

“With regard to promotion the normal principles are either merit cum seniority or seniority cum merit. Seniority cum merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority.”

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18. *We thus arrive at the conclusion that the criterion of “seniority cum merit” in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority cum - merit.”*

15. *We are unable to sustain the view taken by the High Court that it was only if a candidate possessed an appreciable*

initiative and also obtained good reports, then only he was eligible to be considered for promotion. The use of the word 'and', to our understanding does not make it compulsory for the candidate to possess both because in that event the question of selection from amongst the eligible post on the seniority cum merit principle would not apply stricto sensu.

16. *Respondent no.3 had not sought any relief for setting aside the promotion of the appellants. The High Court travelled beyond the pleadings in annulling the promotion of the appellants. The High Court even while holding that promotion was not a matter of right, nonetheless instead of directing consideration of the claim of respondent no.3 for promotion, exceeded its jurisdiction by issuing a mandamus for promotion. The High Court completely lost sight of the objection of the management that there were many others senior to respondent no.3 in the category of Fireman. A writ petition by respondent no.3 could not become a springboard for out of turn promotion superseding his seniors, taking them by surprise without an opportunity to contest even. The impugned order directing promotion of respondent no.3, causes discrimination by a judicial order leaving the aggrieved remediless as observed in Bharat Petroleum Corporation Ex-employees Association v. Bharat Petroleum Corporation Ltd. (1995) 2 SCC 15. Appropriately the High Court ought to have directed consideration of respondent no.3 for promotion in accordance with law. However, in the facts of the case we are not inclined to interfere with the promotion of respondent no.3."*

6. The learned A.G.P. submits that the School Education and Sports Department, has issued a notification dated 28.12.2022, vide which the 'Deputy Education Officer Group-B (Gazetted) in the

Maharashtra Education Service, (Administrative Branch) (Recruitment), Rules, 2022' have been introduced. By these Rules, the feeder cadres are modified and, therefore, the "District Technical Service (Class III) (Educational) Grade II", would become applicable to the case of the petitioners.

7. The learned advocate representing the interveners, vehemently submits that the interveners are not in conflict with the petitioners. They have no grievance if the petitioners are found to be seniors to them on the basis of the record and depending upon the seniority, the placements may be granted. Considering the vacancy available and the recommendations of these applicants for being considered for the posts of Deputy Education Officer, the interest of the petitioners are not in conflict with the interest of the applicants. He further submits on instructions that the promotions may be effected and if the petitioners are found to be seniors to the applicants, two posts may be earmarked for them which would be higher to the applicants.

8. Having considered the controversy before us, we are of the view that the Rules of 2022, introduced by the Notification dated 28.12.2022, would be applicable, prospectively. If the promotions at issue were due for a long time, prior to the introduction of the 2022 Rules, the cases of these petitioners and the applicants and all similarly situated employees, will have to be considered on the date of such recommendations, in the light of Law as it stood then. If the

petitioners find that their claims are impinged only on account of any lapse on the part of the authorities and if the juniors to the petitioners are being considered for promotion, as per the conditions in the existing Rules, all of them will be considered together, since a lapse on the part of the department causing prejudice to the petitioners, cannot be perpetuated only on the ground that the 2022 Rules have now been introduced. It cannot be said that these petitioners have missed the bus.

9. In view of the above, these two petitions are disposed off with a direction to the Principal Secretary, School Education and Sports Department, and the Commissioner of Education, Pune, shall consider the proposal of these petitioners, which were earlier forwarded in 2013 and again in 2022, much prior to the introduction of the 2022 Rules, in accordance with the earlier Rules applicable. Needless to state, the cases of the applicants will also have to be considered simultaneously, as their recommendations have also been effected prior to the introduction of the 2022 Rules. Let the decision be taken by respondent Nos. 1 and 3, on or before 21.02.2023.

10. We are issuing the timeline as above, since our earlier order dated 27.1.2023, directing that an appropriate order should be passed on or before 03.02.2023, has been apparently disobeyed by the Principal Secretary, School Education and Sports Department

and Commissioner of Education, Pune which could have been a ground for initiation of suo motu contempt proceedings. However, we are putting this issue to rest, in view of the above.

11. Pending civil applications are also disposed off.

(SANJAY A. DESHMUKH, J.)

(RAVINDRA V. GHUGE , J.)

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