

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10151 OF 2022.

The Commissioner,
Kolhapur Municipal Corporation

.. Petitioner

vs.

Mahanagar Palika Karmachari Sangh & Anr.

.. Respondents

...

Mr. Sagar A. Mane, for the Petitioner.

Mr. M.S. Topkar, for the Respondents.

...

CORAM: SANDEEP V. MARNE, J.

DATE : 29 AUGUST 2023.

P. C.:

1. By this Petition, the Petitioner-Municipal Corporation challenges the judgment and order dated 18th November 2016 passed by the Industrial Court, Kolhapur allowing complaint of Respondents and directing the Municipal Corporation to promote Respondent No.2 to the post of Mukadam-cum-Clerk w.e.f. 9th September 2015 by granting him all benefits of wages, perks and seniority of that post from 9th September 2015.

2. Mr. Mane, learned counsel appearing for the Petitioner-Municipal Corporation would invite my attention to the

recruitment rule by which the post of Mukadam-cum-Clerk can be filled. He would submit that under the recruitment rules a Watchman is required to put in 10 years of service for becoming eligible for promotion to the post of Mukadam-cum-Clerk. He would submit that Petitioner was appointed on the post of Watchman on 12th September 2007 and had not completed requisite eligibility service of 10 years as on 9th September 2015. He would further submit that though there is a power under the Rules to relax the eligibility criteria in respect of candidate belonging to the reserved categories, it is a discretionary power and the Industrial Court could not have arrived at a conclusion that the Municipal Corporation has indulged in unfair labour practices only on account of non exercise of such discretionary power.

3. Mr. Topkar, on the other hand would oppose the Petition and support the order passed by the Industrial Court. He would raise a preliminary objection to the maintainability Petition on the ground that the Petition has been filed after long delay of five years. He would submit that the present Petition is filed only after Respondent No.2 filed proceedings for execution of the order. So far as the merits of the Petition are concerned, he would submit that the rules clearly provide for relaxation of eligibility service and that the view taken by the Industrial Court cannot be termed as perverse for exercising jurisdiction of this Court under Article 227

of the Constitution of India. He would further submit that Respondent No.2 is highly qualified and despite possessing qualifications of MA, MSW, LGSD and LGS Degrees, he is still working on the post of Watchman. That the Industrial Court has not committed any error in directing Petitioner-Municipal Corporation to promote him to the post of Mukadam-Cum-Clerk.

4. I have considered the submissions canvassed by the learned counsels for the parties. So far as the first objection of inordinate delay in filing the present Petition is concerned, it is seen that the impugned order has been passed by the Industrial Court on 18th November 2016 and the present Petition has been filed on 19th July 2022. Thus, there is a delay of more than six years in filing the present Petition. However, the Petitioner-Municipal Corporation has given following justification for late filing of the Petition in paragraph 12 of the Petition, which reads thus:

“12. The Petitioner states that the impugned order is passed on 18.11.2016. The Petitioner states that when the copy of the said Judgment and order was received to the Petitioner Corporation, the proposal / file was put up to challenge the said Judgment and order before this Hon'ble Court. However, in the meantime i.e. on 27.2.2017 the Respondent No. 2 was arrested by the A.C.B. Team. It was the case against the Respondent No. 2 that he had demanded an illegal amount of Rs.10,000/- from the other watchmen working in the Petitioner Corporation in order to give them the difference in salaries to which they were entitled for. In other words, the Respondent No. 2 had made an illegal demand from the other watchmen for the purpose of

payment of difference in salaries. The Petitioner states that after the said arrest, the Respondent No. 2 was suspended vide order dated 1.3.2017 and he was continued to be under suspension from the said date till 23.06.2019 and thereafter he was allowed to resume duties. The Petitioner states that the A.C.B. has filed the criminal complaint against the Respondent No. 2 before the Learned Additional Sessions Judge, at Kolhapur being Special Case No. 16 of 2017. The said case was decided on 21.1.2021 and the Learned Additional Sessions Judge, at Kolhapur had acquitted the Respondent No. 2. The Petitioner states that the Departmental Enquiry which is initiated against the Respondent No. 2 is still under progress. The Petitioner states that in the light of the fact that, immediately after the Judgment and order passed by the Learned Industrial Court, the Respondent No. 2 was booked under the offences punishable under the Prevention of Corruption Act, 1988 and he was suspended and the Departmental Enquiry was pending against him, the Petitioner Corporation had put on hold the proposal to challenge the order passed by the Learned Industrial Court. The Petitioner states that due to this event which occurred after passing of the impugned order, there is a delay in filing the present Writ Petition. The Petitioner states that as on today the Departmental Enquiry which is initiated against the Respondent No. 2 is completed and Enquiry Officer has submitted his report to Petitioner. However, the Respondent No. 2 has filed Criminal ULP before the Learned Labour Court bearing Criminal ULP No. 17 of 2021 against the Petitioner for not complying with the order passed by the Learned Industrial Court vide the Judgment and order dated 18.11.2016. . Hereto annexed and marked as EXHIBIT - D is the copy of Criminal ULP No. 17 of 2021. Hence in the light of the said fact, the decision was taken by the Petitioner Corporation to challenge the said order and hence the present Writ Petition is being filed. The Petitioner states that there is a delay in filing the present Writ Petition, but the same is not deliberate and intentional. The Petitioner states and submits that because of the subsequent developments after passing of the impugned order, the Petitioner Corporation did not challenge the impugned order immediately. The Petitioner

states that there will not be any prejudice or inconvenience caused to the Respondents if the petition is heard on merits. That on the contrary Petitioner will suffer great loss if the Writ Petition is not heard on merits. The Petitioner states that he has very good case on merits. The Petitioner crave leave of this Hon'ble Court to refer and rely on the record and proceedings of Criminal Complaint filed against Respondent No. 2 and also the Enquiry Proceedings initiated against Respondent No. 2 if called upon by this Hon'ble Court or as and when necessary.”

5. Mere involvement of Respondent No.2 in a criminal case and his suspension could not ordinarily have been a ground to ignore delay in filing the present Petition. However, in the present case, continuance of Respondent No.2 in service was at stake on account of his involvement in serious offence of demand and acceptance of illegal gratification. Also on account of his suspension and involvement in criminal prosecution and departmental enquiry, whether he could be promoted or not was also questionable. It is in that view of the matter, I proceed to consider the Petition on merits by ignoring the delay caused in filing the same.

6. There is no dispute to the position that Petitioner has been appointed on the post of Watchman on 12th September 2007. Under the Recruitment Rules the post of Mukadam-cum-Clerk can be filled in as follows:

- “a] nomination from the amongst the candidates who,
- 1] unless already in service of the Corporation are not more than 25 years of age.
 - 2] having passed S.S.C. Examination and preference will be given to those who have passed L.S.G.D. Examination.

Or

- b] promotion from amongst the candidates who,
- 1] have passed S.S.C. examination and,
 - 2] are working in the Corporation as Mukadam for a continuous period of not less than 5 years or as Peon, Watchman, etc. for a continuous period of not less than 10 years.”

7. Thus, a Mukadam working in Municipal Corporation for 5 years or Peon or Watchman working for a period of 10 years can be considered eligible for promotion to the post of Mukadam-cum-Clerk.

8. The State Government sanctioned amendment to the Recruitment Rules on 21st March 1977 and Rule 4 came to be added in the Recruitment Rules which reads thus:

“Rule 4:- Notwithstanding anything contained in Rule 3 above the qualifications regarding experience/higher basic academic qualification is relaxable at the discretion of the Appoint Authority in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes, vimukta Jattis and Nomadic Tribes, if at any stage of selection, the Appointing Authority is of the opinion that a sufficient number of candidates from these communities possessing the requisite experience/higher basic academic qualification are not likely to be available to fill up vacancies reserved.”

9. Undoubtedly, Rule 4 confers power on the appointing authority to relax experience or academic qualifications in respect of candidate belonging to reserved category. However, firstly the power is discretionary in nature. Secondly, the power can be exercised only in the event of the appointing authority forming an opinion about unavailability of sufficient number of candidates from reserved categories possessing requisite experience. In the present case, Respondent No.2 did not make out any case that sufficient number of eligible candidates from NT category, to which he belongs were not available for being promoted to the post of Mukadam-cum-Clerk. Furthermore, since the power of relaxation being discretionary, it was not open for the Industrial Court to issue a direction to the appointing authority to exercise discretion in favour of Respondent No.2. The order of the Industrial Court is thus not sustainable.

10. I, therefore proceed to pass the following order:

- a] The judgment and order dated 18th November 2016 passed by the Industrial Court, Kolhapur, is set aside;

- b] Respondent No.2 shall however be at liberty to make a representation to the appointing authority to exercise powers under Rule 4 of the recruitment rules for relaxing the conditions of eligibility for consideration of his case for promotion to the post of Mukadam-cum-Clerk w.e.f. 9th September 2015. If such an application is made within a period of four weeks from today, the same shall be decided by the appointing authority within a period of eight weeks from the date of receipt of such representation, strictly on merits considering the pension of Recruitment Rules.
- b] In the event representation of Respondent No.2 for relaxation of eligibility criteria is rejected, his case be considered for promotion after acquiring the prescribed eligibility criteria, subject of course to the pending disciplinary proceedings.

11. With the above observations, the Writ Petition is accordingly allowed

SANDEEP V. MARNE, J.