

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

WRIT PETITION NO. 4707 OF 2018

Vaquar Ahmad S/o Sheikh Mukhtar,
Aged about 29 years, Occu. Student,
R/o Tipu Sultan Square, Telgu Nagar,
Buldhana, Dist. Buldhana.

.....**Petitioner**

...Versus...

(1) The State of Maharashtra,
Law & Judiciary Department, through
It's Secretary Mantralaya,
Mumbai-400032.

(2) The Principal District & Sessions Judge,
Buldhana, At. Post. Tal. Buldhana,
Dist. Buldhana.

(3) The Registrar, District & Sessions Court,
Buldhana, Dist. Buldhana.

(4) The Superintendent, District &
Sessions Court, Buldhana,
Dist. Buldhana.

.....**Respondents**

Mr. P. P. Deshmukh, Advocate for the petitioner
Mrs. K. R. Deshpande, A.G.P. for respondent 1
Mr. Abhay Sambre, Advocate for respondents 2 to 4

CORAM : ROHIT B. DEO AND M. W. CHANDWANI, JJ.

DATE : 21-06-2023

ORAL JUDGMENT : (PER ROHIT B. DEO, J.)

Rule. Rule made returnable forthwith. With consent,
heard finally.

2. The petitioner is the son of Mr. Sheikh Mukhtar Sheikh Gafur, who was working on the establishment of District and Sessions Court, Buldhana as Book Binder, which is Class IV post.

3. Mr. Sheikh Mukhtar Sheikh Gafur unfortunately expired on 24-11-2014.

4. It would be necessary to broadly note the backdrop of the petition.

5. Mr. Sheikh Mukhtar Sheikh Gafur was served with charge-sheet alleging that he altered the disability certificate dated 2-5-2006 issued by the Civil Surgeon, General Hospital, Buldhana.

6. It appears that on the basis of complaint lodged by one Ataula Khan alleging that Mr. Sheikh Mukhtar Sheikh Gafur had altered disability certificate and availed certain concessions, an enquiry was initiated. Mr. P. L. Gajbhiye, the Civil Judge Senior Division, Buldhana was appointed as Enquiry Officer. Mr. Gajbhiye conducted a preliminary enquiry and found *prima*

facie substance in the allegations. A regular enquiry was then conducted in which finding of guilt was returned. Mr. Sheikh Mukhtar Sheikh Gafur was imposed the punishment of withholding with cumulative effect three ensuing increments vide order dated 1-9-2008. It appears that Mr. Sheikh Mukhtar Sheikh Gafur accepted the finding and the punishment.

7. Simultaneously, offence punishable under Sections 420, 468 and 471 read with Section 34 of the Indian Penal Code was registered against Mr. Sheikh Mukhtar Sheikh Gafur on the basis of complaint lodged by Civil Surgeon Dr. M. R. Ghorpade. The trial was conducted before the Judicial Magistrate First Class, Buldhana. The trial culminated in judgment of conviction dated 22-2-2013 and Mr. Sheikh Mukhtar Sheikh Gafur was sentenced to undergo simple imprisonment for one year and to payment of fine of Rs. 2,000/- (Rupees Two Thousand).

8. On the basis of the conviction recorded by the Judicial Magistrate First Class, the Principal District and Sessions Judge, Buldhana passed order dated 28-2-2013 dismissing Mr. Sheikh Mukhtar Sheikh Gafur from service by invoking the provisions of

Rule 13(1) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979.

9. Mr. Sheikh Mukhtar Sheikh Gafur challenged the order of dismissal by preferring an administrative appeal under Rule 17 of the Discipline and Appeal Rules supra before the Registrar, High Court of Bombay. In view of the demise of Mr. Sheikh Mukhtar Sheikh Gafur during the pendency of the administrative appeal, the appeal stood abated. Petitioner's mother did request the Registrar, High Court of Bombay, Nagpur Bench, Nagpur to reconsider the abatement, but in vain. The appeal was not restored on the assumption that there is no rule which permitted the legal heirs of the employee to prosecute the appeal.

10. During his lifetime, Mr. Sheikh Mukhtar Sheikh Gafur challenged the judgment of conviction in Criminal Appeal 11/2013. Since Mr. Sheikh Mukhtar Sheikh Gafur expired during the pendency of the criminal appeal, the legal heirs preferred an application seeking permission to prosecute the appeal, which was allowed by the Principal District and Sessions Judge, Buldhana.

Criminal Appeal 11/2013 was allowed by judgment dated 18-2-2017 and Mr. Sheikh Mukhtar Sheikh Gafur was acquitted.

11. In view of the judgment of acquittal, the legal heirs of Mr. Sheikh Mukhtar Sheikh Gafur including the petitioner preferred an application dated 8-6-2017 seeking release of retiral benefits of the deceased employee and for appointment on compassionate grounds.

12. The petitioner and other legal heirs were, however, informed by the Office of the District and Sessions Court, Buldhana that since Mr. Sheikh Mukhtar Sheikh Gafur was dismissed from service, his legal heirs are neither entitled to death-cum-retiral benefits nor can appointment on compassionate grounds be granted.

13. The petitioner and other legal heirs approached the High Court in Writ Petition 5896/2017. By judgment dated 2-4-2018, the High Court allowed the petition and directed the authority to release the retiral benefits due and payable to Mr. Sheikh Mukhtar Sheikh Gafur in favour of the legal heirs, who were also held entitled to regular family pension.

14. The petitioner and the other legal heirs then preferred application dated 2-5-2018 requesting the Principal and District Judge, Buldhana to appoint the petitioner on compassionate grounds, in view of the judgment of acquittal and the judgment of High Court supra.

15. The application dated 2-5-2018 is rejected by the order impugned. It is discernible from the order impugned dated 22-6-2018 that no reason is spelt out for denial of appointment on compassionate grounds. However, perusal of the note-sheet, which the petitioner has placed on record, reveals that the appointment on compassionate ground is not considered on the premise that in the judgment dated 2-4-2018 in Writ Petition 5896/2017, there is no direction issued for granting appointment on compassionate grounds.

16. At this stage, we may refer to certain findings and observations in the judgment of the Division Bench in Writ Petition 5896/2017. The Division Bench observed that after the criminal appeal was allowed, the order of termination ought to have been withdrawn or cancelled no sooner the judgment of

acquittal was brought to the notice of the authority. The Division Bench further observed that the only course open to the authority was to treat Mr. Sheikh Mukhtar Sheikh Gafur as having expired while in service on 25-11-2014. As a sequitur, the Division Bench directed that the retiral benefits payable to Mr. Sheikh Mukhtar Sheikh Gafur be released in faovur of the legal heirs.

17. The judgment of the Division Bench admits of no other understanding than that Mr. Sheikh Mukhtar Sheikh Gafur was held to be in continuous employment till his death.

18. During the course of hearing, we suggested to the learned counsel appearing on behalf of the Principal District and Sessions Judge, Buldhana, that as an integral part of justice dispensation system, and as an employer who wields the sovereign judicial power of the State and is expected to act as model employer, the grievance of the petitioner may be revisited. We penned our prima facie view in the order dated 26-4-2023 and paragraphs 6, 7 and 8 of the said order read thus :-

“6. The learned counsel for the respondents Mr. Abhay Sambre would submit that the claim is barred by the principle of constructive res judicata.

We may gently remind the respondents, that as an integral part of the justice dispensation system, it does not behave the respondents to deny compassionate appointment by invoking the principle of constructive res judicata. The legal heirs of the deceased employee were forced to approach the High Court for retiral benefits since the respondents illegally and arbitrarily withheld the same. To suggest, that because in that petition, the relief of compassionate appointment was not sought, the principle of constructive res judicata would apply would only be adding insult to the injury. If the petitioner is otherwise entitled to compassionate appointment, then it was the bounden duty of the respondents, not only as model employer, as the authority wielding judicial power of the State, to frame its actions in consonance with reason.

7. We were inclined to allow the petition. However, since the learned counsel for respondents Mr. Abhay Sambre is confident that he would be in a position to dispel our prima facie view after filing an affidavit, we adjourn the hearing till after vacations.

8. Needless to observe, the articulation supra is our prima facie view, and if necessary, in view of the disclosures made in the additional affidavit, may be revisited by us.”

19. The averments in the petition have gone unrebutted.

However, we may hasten to observe, that the ground of refusal of appointment on compassionate grounds is on record and is articulated in the note-sheet. It appears, that although the power

to sanction appointment on compassionate grounds is vested in the High Court, for reasons inexplicable, the then Principal District and Sessions Judge, Buldhana did not forward the proposal to the High Court and ventured to reject the same at his level.

20. In the order of rejection or in the note-sheet, there is no other reason given for not considering the claim of the petitioner for compassionate grounds. The only reason recorded is that in the judgment dated 2-4-2018 in Writ Petition 5896/2017, the High Court did not grant the relief of appointment on compassionate grounds.

21. Mr. Abhay Sambre would argue that principles analogous to *res judicata* would apply to proceedings under Article 226 of the Constitution of India. The extension of the submission is that the petitioner having sought the relief of appointment on compassionate grounds, in addition to the death-cum-retiral benefits of his father, and the High Court not having granted the said relief, the present petition is barred by the principles of constructive *res judicata*. Mr. Abhay Sambre would

submit that perusal of the judgment of the High Court reveals that no submissions appeared to have been canvassed in support of the prayer for appointment on compassionate grounds and, therefore, the said issue is not addressed by the High Court.

22. We are not inclined to accept the submission that the doctrine of constructive *res judicata* fetters the power of the High Court to grant relief even where the facts are glaring and the injustice manifest.

23. The application preferred by the petitioner seeking compassionate appointment was rejected by the Principal District and Sessions Judge, who was expected to forward the same to the High Court. The petitioner was entitled to appointment on compassionate grounds. The Principal District and Sessions Judge was unfortunately neither alive to the duty and obligation of forwarding the proposal to the High Court nor did the Principal District and Sessions Judge realize that it was only in view of the illegal order of denial of retiral benefits and grant of compassionate appointment that the petitioner and the other legal heirs were forced to approach the High Court.

24. We have already observed in the order dated 26-4-2023 that the submission invoking the doctrine of constructive *res judicata* only adds insult to the injury and it is most unfortunate that the administration of the District Court, Buldhana, which is vested with the sovereign judicial power of the State, should take recourse to such doctrinaire approach.

25. We have no hesitation in rejecting the submission of Mr. Abhay Sambre that the principles of constructive *res judicata* fetters our power to grant relief. We are satisfied that the petitioner is entitled to appointment on compassionate grounds. We would be failing in our constitutional duty if we accept the submission of the administration of the District Court, Buldhana that despite having made out the case for relief, the petitioner must be not suited on the principle of constructive *res judicata*.

26. We quash and set aside the communications/orders dated 29-6-2017 and 22-6-2018 and hold that the petitioner cannot be denied appointment on compassionate grounds by invoking principle analogous to constructive *res judicata*.

27. We further direct the administration of District Court, Buldhana to forward the proposal for compassionate appointment to the High Court on its administrative side within seven days from the date the petitioner appears before the concerned officer and submits the relevant documents/material.

28. We request the Registrar (Personnel) to ensure that the proposal which may be submitted by the administration of District Court, Buldhana be placed before the appropriate committee/authority within 15 days from its receipt.

29. At this stage, learned counsel Mr. Abhay Sambre submits that the petitioner may be directed to contact the Registrar of the District and Sessions Court, Buldhana and to make available any relevant document or material which may be required to facilitate forwarding the proposal to the High Court. We direct the petitioner to do the needful.

30. The petition is allowed in the aforestated terms.

(M. W. Chandwani, J.)

(Rohit B. Deo, J.)

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Digitally signed by AVINASH
YUVRAJ WASNIK
Signing Date: 30.06.2023 12:04