



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

WRIT PETITION NO.4906 OF 2024

Chaya Rajendra Shende ... Petitioner
- Versus -
The State of Maharashtra and others ... Respondents

Mr. S.M. Vaishnav, Advocate for the petitioner.
Mr. N.R. Patil, AGP for respondent nos.1 and 2.

CORAM : BHARATI DANGRE &
ABHAY J. MANTRI, JJ.
DATED : OCTOBER 09, 2024.

P.C. :

1. The petitioner is the widow of one Rajendra Ataram Shende, who was appointed on the post of Assistant Teacher in the Respondent No.3-Zilla Parishad on 27.08.1998 and who passed away during his service, on 09.06.2014.

The petitioner, being desirous of appointed on compassionate ground in the Zilla Parishad, is aggrieved by the Government Resolution, dated 28.03.2001, as it imposes a disqualification on account of having three children and has filed the present writ petition seeking the following reliefs :

(i) Quash and set aside the Government Resolution dtd. 28-3-2001 Annexure-B, to the extent it denies benefits of compassionate

appointment to the family in which two children are born out of single delivery by erroneously making the bar of third child applicable, with kind consideration and in the interest of justice and fair play.

(ii) Quash and set aside the impugned communication dtd. 29-3-2023 and 3-5-2023 issued by Resp. no.4 Annexure-A, with kind consideration and in the interest of justice and fair play.

(iii) Allow the Writ Petition thereby quashing impugned communication dtd. 29-3-2023 and 3-5-2023 issued by Resp. no.4 Annexure-A and further holding that the petitioner is entitled for compassionate appointment and the disqualification provided by G.R. dtd. 28-3-2001 would not be applicable, with kind consideration and in the interest of justice and fair play.

(iv) Direct the resp.no.3 and 4 to issue appointment order in favor of petitioner as per the waiting list dtd.1-2-2023 in a time bound manner, with kind consideration and in the interest of justice and fair play.

2. We have heard Mr. Vaishnav, the learned counsel for the petitioner and Mr. Neeraj Patil, the learned Assistant Government Pleader for the respondent nos.1 and 2.

The learned counsel for the petitioner, while narrating the facts involved, would submit that the husband of the petitioner was an employee of the Zilla Parishad and he demised on 09.06.2014, while in service.

During the subsistence of the marriage between the petitioner and her deceased husband, the couple was blessed with twins on 06.05.2005, they being born out of single delivery. On 10.06.2007, the couple was blessed with one more child and it is this factor, which is holding back the appointment of the petitioner on compassionate ground, as the respondent-authorities are pressing into service the condition in the Government Resolution dated 28.03.2001, of having a third child, as an impediment in appointing her on compassionate ground.

According to Mr. Vaishnav, on demise of her husband, the petitioner preferred an application for appointment on compassionate ground and her name was incorporated in the waiting list published on 01.02.2023. However, when the occasion arose to grant appointment, by communications dated 29.03.2023 and 03.05.2023 issued by the Zilla Parishad, the appointment was refused by stating that the petitioner have a third child born after the issuance of the Government Resolution dated 28.03.2001 and, therefore, she is not entitled for being appointed on compassionate ground in the wake of the embargo created by the said Government Resolution.

This has constrained the petitioner, who raise challenge to the condition imposed in the Government Resolution, which deny the benefit of appointment on compassionate appointment to the family, in which two children were born out of single delivery by making the bar of the third child applicable.

3. Our attention is invited to the Government Resolution, dated 28.03.2001, relating to the appointment on compassionate

ground, and while modifying the conditions stipulated in the Government Resolution, dated 26.10.1994, and the subsequent Government Resolutions, dated 23.08.1996 and 12.03.1997, pertaining to the appointment on compassionate ground and revising the conditions applicable, one of the condition incorporated is, non-suited a dependent of an employee, who seek appointment on compassionate ground, if the third child is born, after 31.12.2001.

In addition to the Government Resolution, our attention is also invited to the Maharashtra Civil Services (Declaration of Small Family) Rules, 2005 published by the Notification, dated 28.03.2005, which has defined 'Small Family' to mean wife and husband including two children.

We must also reproduce the explanation appended to the definition of small family, which reads thus :

2. *Definitions* – *In these rules, unless the context otherwise requires -*

- (a)
- (b)
- (c)
- (d) *"Small family" means wife and husband including two children.*

Explanation – For the purposes of this clause -

- (i) *Where a couple has only one child on or after the date of such commencement, any number of children born out of single subsequent delivery shall be deemed to be one entity;*
- (ii) *"Child" does not include an adopted child or children.*

(iii) Words and expressions used in these rules but not defined shall have the same meaning respectively assigned to them in the Maharashtra Civil Services Rules.

4. Section 3 of the Act stipulates the necessity of declaration of Small Family, with a proviso to the effect, that a person having more than two children on the date of commencement of these rules shall not be disqualified by appointment under these clause so long as the number of children he had on the date of such commencement does not increase, with a further proviso, that a child or more than one child born in the single delivery within the period of one year from the date of such a commencement shall not be taken into consideration for the purposes of disqualification.

Rule 5 of the Rules of 2005, prescribe that the Rules of 2005 shall not be made applicable where the selection process was started before the date of commencement of these rules.

5. Relying upon the Rule 5 of the Rules of 2005 read with the Government Resolution dated 28.03.2001, an attempt is made on behalf of Mr. Vaishnav to urge that those employees who are recruited prior to issuance of the Government Resolution dated 28.03.2001, they shall not suffer a disqualification as the appointment process was already over before the rule came into force.

For no reason, can we permit such an interpretation, which is sought to be canvassed before us.

6. The learned Assistant Government Pleader Mr. Patil has placed before us the decision of the Full Bench in case of ***Sunita w/o Dinesh Gaikwad and another .vs. State of Maharashtra and another, 2023 (5) Mh.L.J. 40***, revolving around the Government Resolution dated 28.03.2001 and offering a clarification as regards Clause (E) of the said Government Resolution, which was declared unconstitutional in ***Kashabai Sheshrao Wagh .vs. Zilla Parishad, Nashik and others, 2019 Mh.L.J. Online 220***, the Full Bench, on due consideration of the relevant clause and the earlier decision, has specifically concluded thus :

“In view of the above, we are unable to accept the contention of the petitioner that the declaration in Kashabai (supra) would have a binding effect in perpetuity. The said conclusion would, at best, be restricted only to the facts of the said case. For the reasons recorded herein above, in the light of the law crystallized by the Honourable Supreme Court, the declaration in Kashabai (supra) that clause E of the Government Resolution dated 28-3-2001 is unconstitutional, shall not be deemed to have been so declared for other matters and would be restricted to the facts of the said case. We answer the issue addressed to us, accordingly.”

7. The petitioner definitely is not entitled to avail the benefit of the second proviso appended to Section 3 of the Rules of 2005, as the proviso only cover a scenario where a child or more than one child is born in a single delivery within a period of one year from the date of commencement of the Rules. However, as far as the petitioner is concerned, the twins were born on 06.05.2005 and

assuming that at the time of coming into force of the Rules 2005, the petitioner could have gained the benefit, as she was on her family way, when these rules came into effect, but after coming into effect of the Rules-2005, she has delivered a third child on 10.06.2007 and the benefit of the twins born during the first delivery do not extend to her by virtue of the second proviso appended to Rule-3 of the Rules-2005.

In addition, as far as the policy governing the appointment on compassionate ground, it clearly created an embargo for seeking appointment if the third child was born after 31.12.2001 and in the case of the petitioner, all the three children are born after 31.12.2001 and when her eligibility is to be determined for being appointed on compassionate ground in place of her husband, since three children are born to the couple after 31.12.2001, she has incurred a disqualification for being considered for the appointment on compassionate ground.

8. The decision of the Apex Court in case of *Javed and others .vs. State of Haryana, 2003 (8) SCC 369* thus clearly covered the case of the petitioner, as in Paragraph 4 thereof, the Apex Court observed thus :

“4. Placed in plain words the provision disqualifies a person having more than two living children from holding the specified offices in Panchayats. The enforcement of disqualification is postponed for a period of one year from the date of commencement of the Act. A person having more than two children up to the expiry of one year of the commencement of the Act is not disqualified. This postponement for one year takes care of any conception on or around the commencement of the Act, the normal period of gestation being nine months. If a woman has conceived at the commencement of the Act then anyone of such couples would

not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices, incurs a disqualification by giving birth to a child one year after the commencement of the Act he becomes subject to disqualification and is disabled from continuing to hold the office. The disability is incurred by the birth of a child which results in increasing the number of living children, including the additional child for one year after the commencement of the Act, to a figure more than two.”

9. In the wake of the aforesaid observations, we do not find any sufficient justification in interfering with the order dated 29.03.2023 passed by the Zilla Parishad thus communicating the petitioner that she is not found eligible for being appointed on compassionate ground, in the wake of the Government Resolution dated 31.12.2001.

Finding no merit in the petition, the same is dismissed.

(ABHAY J. MANTRI, J.)

(BHARATI DANGRE, J.)