

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

WRIT PETITION NO. 1610 OF 2005

Smt. Ranu d/o Rakhmaji Muley,
aged 42 years, occ. Nil
R/o Block No. 6, Shiva Apartment
Ajintha Nagar, Deolgaonraja Road,
Jalna ...Petitioner

VERSUS

- 1] The High Court of Judicature
of Bombay, (Through its
Registrar-General),
Mumbai,
- 2] The Registrar (Legal),
High Court of Judicature at Bombay,
(Appellate Side), Mumbai,
- 3] The District & Sessions Judge,
Jalna ...Respondents

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Shri Avinash S. Deshmukh, advocate for petitioner
Shri Nitin B. Suryawanshi, advocate for respondent

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CORAM : S.V.GANGAPURWALA & K.L.WADANE, JJ.

DATE OF RESERVING
THE JUDGMENT : 10.2.2017

DATE OF PRONOUNCEMENT
OF JUDGMENT : 31.3.2017

JUDGMENT : (Per K.L.Wadane, J.)

By this petition, the petitioner assails

the order passed by the Disciplinary authority respondent no.3 dated 16.12.1994 and the order passed by the appellate authority dated 17.11.2004 with the following reliefs : -

“(A) To quash the impugned orders dated 16th December 1994 removing the petitioner from service, passed by the Disciplinary Authority and District Judge, Jalna as well as the order dated 17.11.2004 in Administrative Appeal No. A&R/1057/2004 rejecting the appeal passed by the High Court, by issuing a writ of certiorari or any other appropriate writ, order or direction, as the case may be.

(B) To direct the respondents to reinstate the petitioner with continuity of service and full back wages.”

2. The case of the petitioner is that the petitioner applied for the post of Clerk-cum-Typist pursuant to an advertisement dated 13.5.1981 to be filled in at District Court, Jalna and the petitioner came to be selected for the

post of Junior Clerk/Typist by the Advisory Committee on the basis of her qualification and performance in the written examination as well as viva voce test. The petitioner did not apply for the post reserved for Other Backward Class. She was selected in the open category.

3. One Mr. Digambar Gaikwad filed complaint to the District Magistrate, Jalna alleging that the petitioner had secured Government job by using false caste certificate. The District Magistrate, Jalna was pleased to reject the said complaint vide order, dated 9.6.1989. The District Magistrate, Jalna reopened the complaint and held that the caste certificate obtained by the petitioner was false and forwarded his finding to the respondent no.3 District Judge, Jalna.

4, On receipt of such finding from the District Magistrate, respondent no.3 appointed the Inquiry Officer who issued charge sheet. First charge was of obtaining false caste certificate

and second was that on the basis of false caste certificate secured Government job. The petitioner submitted her reply/defence statement in writing to the charge and denied article of charges. The Inquiry Officer/the then Additional District Judge, Jalna after recording the evidence of two witnesses submitted report to respondent no.3, however, the Disciplinary Authority and the District Judge, Jalna did not agree with the finding given by the Inquiry Officer regarding obtaining Government service by the petitioner on the basis of caste certificate. Respondent no.3 directed further enquiry. Thereafter evidence of one witness was recorded and Enquiry Officer submitted further additional report.

4. On 16.3.1994 the Disciplinary Authority and the District Judge issued show cause notice to the petitioner calling upon her to show cause as to why she shall not be dismissed from service. On 16.3.1994 the Disciplinary Authority held the petitioner guilty of both the charges and passed

an order removing her from service. The petitioner preferred an Administrative Appeal. The Administrative Judge of the High Court of Bombay dismissed the appeal.

5. The petitioner challenged the order dated 16.12.1994 and the order passed by the Appellate Authority dated 17.7.1995 in Writ Petition No. 993 of 1996. This Court remanded the matter to the Appellate Authority with direction to decide the appeal afresh after giving opportunity to the petitioner of being heard. The petitioner was called for personal hearing on 16.10.2004. The petitioner came to know that her Administrative Appeal was rejected by the Appellate Authority on 17.11.2004. Hence this Writ Petition.

6. On behalf of the respondent, affidavit-in-reply is filed on record. It is contended that the committee has selected the petitioner by giving additional marks only because of her caste shown as O.B.C. It is further contended that on

careful scrutiny of marks mentioned in the list it is clear that when the petitioner was interviewed, the Selection Committee has given consolidated total 36 marks to the petitioner in that interview. One Ranjana Inamdar secured 38 marks and one Mr. Gawali secured 37 marks. Ranjana Inamdar and Mr. Gawali were candidates from open category. If the petitioner was considered as a non-reserved or a general candidate, the Advisory Committee would have given priority to those candidates who have secured higher marks than the petitioner. This fact shows that the petitioner was selected as she represented herself as a member of O.B.C. otherwise Ranjana Inamdar was to be selected in the place of petitioner. The petitioner misrepresented herself to be O.B.C. candidate. So, according to the respondents, the petitioner secured the job representing herself to be member of Other Backward Class, therefore, she has committed serious misconduct. Considering the report submitted by the Inquiry Officer the petitioner was dismissed from service and the said

dismissal was also confirmed by the appellate authority.

7. We have heard Mr. A.S.Deshmukh, learned counsel for the petitioner and Shri N.B.Suryawanshi, learned counsel for the respondents. We have also perused the documents on record.

8. Looking to the rival contentions of both the parties, short question that arises for our consideration is whether the petitioner secured the Government job i.e. the post of Clerk-cum-Typist on the basis of false caste certificate.

9. On scrutiny of record, it reveals that the advertisement dated 13.5.1981 was published inviting applications for 32 different posts to be filled in the District Court, Jalna. It was not mentioned in the advertisement that a particular post is reserved for Other Backward Class or other reserved categories nor the respondents have

claimed so.

10. The real controversy centers around the caste certificate which is stated to be obtained by the petitioner by misrepresentation claiming her to be belonging to Other Backward Class. The caste certificate is dated 12.8.1980 much prior to the date of advertisement. Therefore, it cannot be said that the petitioner has obtained the caste certificate in anticipation that the post reserved for Other Backward Class would be advertised and for taking undue advantage of such advertisement in future she obtained the caste certificate. It is true that the petitioner represented herself belonging to Other Backward Class and the Executive Magistrate had issued the caste certificate in her favour. However, on complaint made by one Digambar Gaikwad the certificate issued in favour of the petitioner was cancelled.

11. We are aware that the appreciation and re-

appreciation of evidence is not permissible in the Writ Petition under Article 226 of the Constitution of India. Contentions of the petitioner appear to be acceptable on the basis of the face value of the statement of the witnesses recorded during the departmental proceedings, such statements are to be considered. Therefore, it is necessary to refer certain statements of the witnesses.

12. Initially the disciplinary authority has examined witness Manohar Agnihotri, Assistant Superintendent of District Court, Jalna. At the relevant time, he was serving in the District Government Pleaders's office. He stated that he was serving as Nazir with Mr. Bhavthankar the then Chief Judicial Magistrate, Jalna. He was shown the list of the candidates prepared by witness Bhavthankar and the marks shown against the candidates, however, he was unable to identify the hand writing in the ink against the candidate (petitioner) at Sr. No. 58. Looking to the

statement of second witness Mr. Kanhekar, the then Civil Judge, Senior Division, Jalna, it appears that he was one of the member of the Advisory Committee present at the time of interview along with the then Chief Judicial Magistrate Mr. Bhavthankar and the then District Judge Mr. I.G.Shah. During his deposition this witness has stated that the name of present petitioner in the list of candidates is at Sr. No. 58 and at the time of interview and till this witness signed the list, the words O.B.C. in column no.5 were not written. He does not know who has written such words subsequently. He further stated that the petitioner had not submitted her caste certificate and her selection was from the open merit. During cross-examination this witness has stated that the petitioner is selected on merit.

13. During the deposition, the list of the selected candidates was shown to the then District Judge Mr. I.G.Shah and this witness has stated that the selection of the petitioner was on the

basis of merit. 20 candidates were selected in which the petitioner stood at Sr. No. 5. He further stated in clear words that even if the petitioner was not belonging to O.B.C. still she could have been selected.

14. So looking to the statement of these witnesses and taking into consideration its face value, it is crystal clear that the petitioner did not apply for the post of reserved category nor she submitted caste certificate along with the application. The petitioner was not considered as a candidate belonging to O.B.C. nor she availed the benefit of reservation. Basically nowhere it appears from the record that particular post was reserved for a particular category. In absence of such record and the pleadings on behalf of the respondents, it is difficult to accept that a particular post was reserved for a particular category.

15. In affidavit-in-reply on behalf of the

respondents, it is contended that the petitioner was considered to be belonging to O.B.C. Therefore, additional marks were given on this count, but the statement on behalf of respondent nos. 1 to 3 is without any basis since none of the member of the Advisory Committee have stated anything about the same.

16. The reference is made in the affidavit-in-reply that other two candidates belonging to open category i.e. Ranjana Inamdar and Mr. Gawali have secured 38 and 37 marks, respectively and the petitioner has secured 36 marks. Therefore, according to the respondents the petitioner was considered from O.B.C. Therefore, even she secured less marks than the aforesaid two candidates, she was selected. If she was not considered from the O.B.C. category, then the candidate who secured highest marks in the oral interview i.e. Ranjana Inamdar could have been selected. The statement of this respondent is incorrect because marks secured by the petitioner

and the aforesaid candidates are only for interview. Merit list is prepared considering the marks secured by the candidates in the written test as well as oral interview. Therefore, it cannot be said that the afore said two candidates are meritorious than the petitioner.

17. Mr. Deshmukh, learned counsel for the petitioner has rightly relied upon the observations in the case of **Vinayak Narayan Navkar vs State of Maharashtra and others**, reported in **2013 (6) ALL M.R. 586**. The relevant observations in para no.9 read as under : -

"9.
In our opinion, the general observations or consequences cannot be the foundation of the order imposing penalty of dismissal from service, on the petitioner. The Appellate Authority, as a fact finding authority, has to advert to the facts, the material, the evidence and the documents on the record and the order has to be on the basis of the factual aspects and in consonance with the documents and the material and the evidence on record.

..... "

The observations are relevant and applicable to

the facts of the present case, as the appellate authority as well as Inquiring Authority have not taken into consideration the material aspects appearing on the record.

18. Mr. Suryawanshi, learned counsel for the respondents relied upon the observations in the case of **Commissioner of Customs (Preventive) vs M/s Aafloat Textiles (I) P.LTd. and Others**, reported in **AIR 2009 SC (Supp) 2320**, particularly in paragraphs 9 and 13, which read as under : -

“ 9. "fraud" means] an intention to deceive; whether it is from any expectation of advantage to the party himself or from [the] ill will towards the other is immaterial. The expression 'fraud' involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

13. In that case it was observed as follows: (Shrisht Dhawan case7, SCC p. 553, para 20)

Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act

or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Law Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of the fact with knowledge that it was false. In a leading **English case Derry v. Peek** what constitutes fraud was described thus: (AC p. 374)

' fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.' "

It was submitted that the petitioner pleaded fraud upon the members of the Disciplinary Committee and thereby secured the job. However, there is nothing to show that the petitioner represented herself to be the member of O.B.C. or that she was selected only because she was considered from O.B.C. On the contrary, from record it is seen that the petitioner was selected on merits.

19. Mr. Suryawanshi, learned counsel further relied upon the observations in the case of **State of U.P. And Anr. Vs Man Mohan Nath Sinha and Anr.**, reported in **AIR 2010 SC 137**, particularly paragraph 12 thereof, which reads as under : -

" 12. The legal position is well settled that the power of judicial review is not directed against the decision but is confined to the decision making process. The Court does not sit in judgment on merits of the decision. It is not open to the High Court to re-appreciate and reappraise the evidence led before the Inquiry Officer and examine the findings recorded by the Inquiry Officer as a court of appeal and reach its own conclusions. In the instant case, the High Court fell into grave error in scanning the evidence as if it was a court of appeal. The approach of the High Court in consideration of the matter suffers from manifest error and, in our thoughtful consideration, the matter requires fresh consideration by the High Court in accordance with law. On this short ground, we send the matter back to the High Court. "

20. In the present, we have not appreciated or re-appreciated the evidence on record, but in fact, we have considered the aspects which are not considered by the Disciplinary Committee or Appellate Authority. Therefore, it cannot be termed as appreciation or re-appreciation of the evidence. We have only considered the material

which the Disciplinary Committee and Appellate Authority have kept out of consideration. The ruling cited by the learned counsel for the respondents are not applicable to the present case.

21. From the record it appears that the date of birth of petitioner is 11.10.1958. Therefore, she must have been retired from service on 10.10.2016 on attaining her age of superannuation. Since the petitioner has retired from service, question of her reinstatement does not arise.

22. In view the above, we allow the Writ Petition. The order passed by the Disciplinary authority respondent no.3 on 16.12.1994 and the order passed by the Appellate Authority on 17.11.2004 are quashed and set aside. The service of the petitioner till her retirement be treated as continuous for the purposes of pensionary

benefits. However, the petitioner shall not be entitled for back wages.

23. Rule is made absolute in above terms. No costs.

(K.L.WADANE)
JUDGE

(S.V.GANGAPURWALA)
JUDGE

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