

**The State of Maharashtra and The Director of Health Services,  
Maharashtra State, Bombay, Sent Georges Hospital Compound, 4th Floor,  
Near V.T. Station, Bombay Vs Dr. Mrs. Pratibha Gulhane and Dr. B.M.  
Dama, Deputy Director of Health Services, Aurangabad Division,  
Aurangabad**

**Court:** Bombay High Court

**Date of Decision:** Oct. 21, 2011

**Acts Referred:** Constitution of India, 1950 " Article 226, 227, 309  
Maharashtra Civil Services (Pension) Rules, 1982 " Rule 10(4), 3

**Citation:** (2012) 4 ALLMR 634 : (2011) 113 BOMLR 3879

**Hon'ble Judges:** S.A. Bobde, J; M.N., J; Gilani, J

**Bench:** Full Bench

**Advocate:** B.H. Dangre, Addl.G.P, for the Appellant; P.H. Gulhane, for respondent no.1., for the Respondent

### Judgement

M.N. Gilani, J.

Rule. Heard finally by consent of the parties.

2. This petition under Article 226 and 227 of the Constitution has been filed by the Public Health Department, Government of Maharashtra

challenging the decision dated 15/4/2010 passed by the Maharashtra Administrative Tribunal (for short "Tribunal") in Transfer Application

No.3872/1991 in Writ Petition No.214/1990.

3. The respondent no.1 was appointed as Medical Officer -II in the Health Services of the Government of Maharashtra by order dated

10/4/1968. In the year 1974 the respondent no.1 was promoted and brought in the cadre of Medical Officer, Class-I. The respondent got second

promotion to the post of Deputy Director of Health Services w.e.f.18/11/1982. The respondent no.2 is holding similar post and in the seniority list

published on 22/6/1989 he was shown next below the respondent no.1 whereas one Dr. V.D. Sontakke is senior to respondent nos.1 and 2. The

next promotional post is of Joint Director, Health Services. By order dated 23/1/1990 the petitioner promoted both Dr. V.D. Sontakke and Dr.

B.M. Dama as Joint Directors of Health Services. Aggrieved by her supersession the respondent no.1 approached this Court by filing writ petition

on 24/1/1990 being Writ Petition No.214/1990.

4. This writ petition was transferred to the Maharashtra Administrative Tribunal as Transfer Application No.3872/1991. Learned Tribunal by

order dated 15/4/2010 allowed this Transfer Application with following directions.

The respondents are directed to promote the applicant to the post of Jt. Director of health Services w.e.f. 23.1.1990 as deemed date of promotion

with all consequential benefits as per her entitlement under the Rules.

The petitioners take an exception to this very order.

4. In the cadre of Deputy Director of Health Services, Class-I, she is placed at serial no.10 in the seniority list published on 10th of March 1980.

The respondent no.2 is placed at serial no.11 and is apparently junior to her. She holds qualification as M.D. in Obstetrics and Gynecology and

diploma in public health services. As compared to the qualification which she possess the respondent no.2 is less qualified. Despite this the

respondent no.2 was promoted to the post of Joint Director. As regards promotion of Dr. V.D. Sontakke she had no grievance since he was

senior to her. When the respondent no.1 had become due for consideration for promotional post of Deputy Director, she was wrongfully

superseded and therefore, she filed Writ Petition No.1749/1985 which was decided in her favour. The SLP filed by the petitioner was dismissed

and thereafter only orders promoting her to the Deputy Director was issued. Since the date she joined as Deputy Director, her superiors and her

colleagues were harbouring grudge against her. On 8th of august 1988 she was communicated adverse remarks pertaining to the years 1983 -

1984 and 1985-1986. On receipt of the same, she made representations on 19th September 1988 and on 20th November 1988. Thereafter she

received communications about adverse entries for the years 1988-1989. On the basis of such adverse entries which were illegally and malafidely

made in her service record, she was superseded by promoting the respondent no.2 as Joint Director of Health Services. She was not given an

opportunity of being heard before superseding her. Even before the representations against the adverse entries were decided, promotion order was

issued. It was her case that while denying her promotion the petitioner violated the principles of natural justice. On all these grounds she prayed for

quashing of the order dated 23/1/1990 promoting the respondent no.2 to the post of Joint Director of Health Services and in turn prayed for

direction to post her as Joint Director of Health Services.

5. Before the Tribunal Mrs. Nalini Pathak, the Under Secretary to the Government of Maharashtra, Public Health Department filed an affidavit. In

that, it was categorically admitted that the Department of Public Health proposed 6 names falling under zone of consideration to the establishment

board on 9/10/1989. However, in that name of the petitioner, although she stood at serial no.10 i.e. above the present respondent no.2 herein, her

name was excluded. Based on this factual aspect, she canvassed that the decision to eliminate her was not that of establishment board but of the

Public Health Department which has no jurisdiction to decide the matter of promotion vis-a-vis supersession of the senior. In a nutshell, it was her

case that the elimination of her name at the stage of sending proposal by the Public Health Department is evidence of wrongful denial of promotion

in utter disregard to the service jurisprudence.

6. The respondents relied upon the Rules framed by the Government of Maharashtra under Article 309 of the Constitution. The Rule 3 of the same

is reproduced below.

3. -Appointment to the post of Joint Director of Health Services in the Directorate shall be made either,

(a) by promotion of a suitable person on the basis of selection from amongst the persons holding the post of Deputy Director of Health Services,

Maharashtra Medical and Health Services Class-I in the Directorate; or

(b) by transfer of a suitable officer from any other Government Department, possessing the qualifications and experience prescribed for

appointment by nomination in clause (c) of this rule; or

(c) by nomination from amongst candidates who,

(i) unless already in the service of Government, are not more than forty-five years of age;

(ii) possess M.B.B.S. Degree or any other qualification specified in the first or second Schedule to the Indian Medical Council Act, 1956;

(iii) possess a Master's degree in Obstetrics and Gynaecology or Paediatrics, or in Preventive and Social Medicine specified in the First or

Second Schedule to the Indian Medical Council Act, 1956 or any other qualification declared by the medical Council of India to be equivalent

thereto;

(iv) possess experience of health administration, Medical relief or family welfare for a period of not less than 7 years gained after acquiring the

qualification mentioned in sub-clause (iii), in a Government Department or Local Authority established by the Government.

Provided that age limit may be relaxed by Government on the recommendation of the Commission in favour of candidates having exceptional

qualification or experience or both.

7. At the relevant time there were two vacancies. In October 1989 the Public Health Department proposed 6 names to the establishment board

for consideration sans the name of the petitioner. Meanwhile, the special review committee recommended to the establishment board to retire the

respondent no.1 prematurely in the public interest. The recommendations of the special review committee were accepted by the high power

establishment board and accordingly on 25th May 1990 three months notice, as required under Rule 10(4) of Maharashtra Civil Services Pension

Rules, was issued. Under these circumstances, the respondent no.2 was selected and promoted to the post of Joint director superseding the

respondent no.1. Further the case of the petitioner was that the post of Joint Director being selection post, on merits the respondent no.1 was

denied the promotion to the said post. Accordingly the allegations of mala fide, bias or animus have been denied.

8. In Transfer Application No.3872/1991 the respondent no.1 had joined the Director of Health Services as respondent no.2 and while defending

her case made certain personal allegations against Dr. Mrs. Malti Chandrikapure, Director of Health Services.

9. In her affidavit in reply, Dr. Chandrikapure, narrated the procedure of filling the post on promotion in the Department of Public Health of

Government of Maharashtra. According to her the selection to the promotional post is made by establishment board with which she has no

concern. She denied the allegations of mala fides, bias levelled against her. As regards adverse entries appearing in the service record of the

petitioner she submitted that they were communicated to the respondent no.1.

10. Learned Tribunal held that the case of the petitioner for promotion was not at all considered by the establishment board since her name was

not forwarded by the concerned department. Learned Tribunal arrived at this conclusion and, rightly so, by referring to the affidavit filed by Nalini

Pathak, the Under Secretary, Government of Maharashtra Public Health Department. Since the contents in the affidavit clinches the issue, we

consider it appropriate to reproduce the relevant excerpt from the same as follows:

(c) At the relevant time, there were only two vacancies in the said posts for being filled up by selection under Clause (a) Rule 3 as mentioned

above.

(d) I say that having regard to the vacancies in the said posts 6 names were sent by the Public Health Department to the Establishment Board on

9th October, 1989 for filling the said posts. The petitioner's name figured in the seniority list of Deputy Directors only in March, 1988 after her

writ petition in the Nagpur High Court for promotion to the post of Deputy Director came to be finally decided in the said seniority list as on 1st

March, 1988, the petitioner is shown at Serial No.10.

(e) However, the petitioners name did not come to be included in the list of 6 names sent by the Public Health Department to the Establishment

Board on 19th October 1989 for the purposes of considering promotion on merits/by selection to the posts of Joint Directors.

(f) The Special Review Committee of the Government of Maharashtra has since considered the case of the petitioner and recommended her

compulsory retirement under clause 10(4)(a) of the Maharashtra Civil Services (Pension) Rules, 1981. Accordingly, a compulsory retirement

notice dated 25th May, 1990 has been issued to the petitioner.

(g) In the above circumstances, B.M. Dama (respondent no.3) has come to be selected by the Establishment Board for the purpose of the said

post of Joint Director and accordingly appointed by the order of the Government of Maharashtra dated 23rd January, 1990.

11. The law on the point that an employee has no right to be promoted, however, he has a right to be considered for a promotion is well settled. In

case of Bhagwandas Tiwari and others V/s. Dewas Shajapur Kshetriya Gramin Bank and others reported in (2006) 12 Supreme Court Cases

574 the Supreme Court held that :

In all services, whether public or private there is invariably a hierarchy of posts comprising of higher posts and lower posts. Promotion, as

understood under the service law jurisprudence, is advancement in rank, grade or both and no employee has right to be promoted, but has a right

to be considered for promotion.

Reference can also be made to the decision in case of Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, .

12. Obviously, the right of the respondent no.1 to be considered for promotion to the post of Joint Director, Health Department has been denied

to her. We, therefore, affirm the findings of learned Tribunal recorded in para 21 which are reproduced below.

it so happened that Dr. B.M. Dama (R-3) who was junior to the applicant (being at sr. no.11 in the seniority list as on 1.3.1988) was selected and

appointed to the post of Jt. Director of Health Services. Thus, the applicant was superseded. This, supersession is obviously wrong in as much as

her name was not at all considered by the Establishment Board in its meeting held on 20.11.1989. The supersession is thus illegal and needs to be

set aside. The supersession is accordingly set aside.

However, we do not agree that it was within the domain of learned Tribunal to direct the promotion of the respondent no.1 to the post of Joint

Director without there being scrutiny of her service record and application of mind regarding her suitability or otherwise to hold the promotional

post of Joint Director. This is within the exclusive domain of the establishment board. Ordinarily, where the Tribunal or the High Court exercises

jurisdiction of judicial review it merely quashes the order under challenge and the consequential legal effect is that but for the order under challenge

the remaining part of the proceeding stands automatically revived before the authority with the need for fresh consideration and disposal by fresh

order. We believe that the High Court or the Tribunal substituting its own order for the order quashed by them is impermissible particularly in the

circumstances of the present case. {relied decision in case of Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others, }

13. In State of Mysore Vs. C.R. Sheshadri and Others, the Supreme Court elaborately explained the jurisdiction of the High Court in such matter

by observing as follows.

(ii) In our constitutional scheme, a broad three-fold division exists, viz.

(a) The power to promote an officer belongs to the Executive and the judicial power may control or review government action but cannot extend

to acting as if it were the Executive.

(b) The court may issue directions but leave it to the Executive to carry it out.

(c) The judiciary cannot promote or demote officials but may demolish a bad order of Government or order reconsideration on correct principles.

14. In State Bank of India and others Vs. Mohd. Mynuddin, dealing with the same issue vis-a-vis power of the High Court under Article 226 it

was observed that :

If promotion has been denied arbitrarily or without any reason ordinarily the court can issue a direction to the management to consider the case of

the officer concerned for promotion but it cannot issue a direction to promote the officer concerned to the higher post without giving an opportunity

to the management to consider the question of promotion. Where the State Government or a statutory authority is under an obligation to promote

an employee to a higher post which has to be filled up by selection the State Government or the statutory authority alone should be directed to

consider the question whether the employee is entitled to be so promoted and the court should to ordinarily issue a writ to the Government or the

statutory authority to promote an officer straightway.

15. Learned counsel for the respondent relied upon the decision in Badrinath Vs. Government of Tamil Nadu and Others, . It was a case of

wrongful denial of promotion to super-time scale. It was held that the appellant was entitled to promotion to super-time scale. Instead of remitting

the matter to the State Government the Supreme Court issued mandamus to grant super-time scale to the appellant from the date that scale was

granted to his junior. The facts of the case in hand are that the case of the petitioner was not at all brought before the establishment board and

consequently not considered.

16. The learned Tribunal, to justify the deviation from the settled principle of law, relied upon the decision of the Division Bench of the Calcutta

High Court in Dr. Sibdas Roy V/s. State of West Bengal and others reported in 2009 (3) SLR 544. With respect, we do not agree that the ratio in

the case supra governs the case in hand. The well settled principle that while exercising power of judicial review, the Tribunal or the Court should

not substitute its own order for the order quashed by it, was not discussed and 13 considered in the aforesaid case. This is not a case where the

establishment board which had considered the promotion of respondent no.2 who was junior to respondent no.1 had completely lacked

jurisdiction. In that event on quashing of the proceeding by the Tribunal or the High Court there is no revival at all of the proceedings before the

establishment board.

17. For the foregoing reasons, we partly allow the writ petition.

(i) The finding, recorded by the learned Tribunal that the non-consideration of name of the respondent no.1 by the establishment board in its

meeting held on 20/11/1989 amounts to denying her right of being considered for the promotional post, is affirmed.

(ii) The directions issued by the Tribunal to promote the respondent no.1 to the post of Joint Director of Health Services w.e.f. 23/1/1990 are

quashed and set aside.

(iii) The matter is remanded back to the establishment board for considering the case of petitioner as it stands on 20/11/1989 vis-a-vis other

candidates who were under zone of consideration on that particular date without being influenced by notice of premature retirement dated

25/5/1990.

(iv) Considering the fact that the Public Health Department had for no reason wrongfully declined to forward the name of respondent no.1, though

she was in zone of consideration, to the establishment board for filling two vacancies of the post of Joint director, Health Services; we direct that

the petitioners shall pay costs quantified at Rs.10,000/-(Rs. Ten Thousand Only) to the respondent no.1.

(v) Rule made absolute in above terms.