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**(1997) 04 BOM CK 0062**

**Bombay High Court (Goa Bench)**

**Case No:** Writ Petition No. 223 of 1991

Shri S. Srinivas Rao

APPELLANT

Vs

Marmugao Port Trust

RESPONDENT

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**Date of Decision:** April 3, 1997

**Acts Referred:**

- Major Port Trusts Act, 1963 - Section 124, 21, 23, 25, 27

**Citation:** (1998) 3 BomCR 196

**Hon'ble Judges:** T.K. Chandrashekhara Das, J; R.M.S. Khandeparkar, J

**Bench:** Division Bench

**Advocate:** J.E. Coelho Pereira, A.A. and J. Godinho, for the Appellant; L.V. Talaulikar and G.V. Tamba, Central Govt. Standing Counsel, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

T.K. Chandrashekhara Das, J.

The petitioner is a head-draughtsman, working for Engineering Civil Department of the respondent No. 1. His next promotion under the existing rules was the Assistant Engineer. While the petitioner was holding the post of estimator and Senior draughtsman Grade I, and as the incumbent holding the post of head draughtsman, was unqualified to be promoted to the post of Asst. Engineer and as he was getting stagnated and since many of the petitioner's colleagues who had joined even after him to the field section, had already superseded the petitioner, the petitioner represented by various representations from the year 1982 to 1990 to amend the rules and provide the petitioner avenue of promotion to the post of Assistant Engineer. In response to those representations, it is averred in the writ petition that by letter dated 23-1-1990, the Chairman of the respondent No. 1 assured the petitioner that he would be considered for the promotion as a direct recruit for the post of Assistant Engineer. This, in fact, did not materialise. Disappointed by the inaction of the respondent No. 1 for not giving promotion to the post of Assistant

Engineer, the petitioner has filed this writ petition, praying inter alia that the rules "Exhibit A" be declared as null and void and also mandamus directing the respondent No. 1 to fill up the post of Assistant Engineer in terms of rules "Exhibit B". Under Exhibit B Schedule to Marmugao Port Employees" (Recruitments, Seniority and Promotions) Regulations, 1964, the promotion to the post of Senior Draughtsman, was the Assistant Engineer II. An amendment was effected in the year 1984 to the schedule of recruitments rules, whereby the post of Sr. Draughtsman, was ceased to be a feeder post of Assistant Engineer II vide Exhibit A. If the rules had not been amended by Exhibit "A" the petitioner would have been eligible to be considered for the post of Assistant Engineer. However, the petitioner did not choose to file any writ petition when the post of Assistant Engineer fell vacant or when he has become eligible to be considered for the post of Assistant Engineer. As all these relevant points are lacking in the writ petition, the writ petition would have been liable to be dismissed on that count alone. But, since the petitioner has raised an important question, namely the authority of amending the Rules by the Chairman, we are persuaded to examine that argument of the Counsel for the petitioner.

2. Evidently Exhibit "A" came into being as amendment to the existing Rules Exhibit "B" by the Chairman. Learned Counsel for the petitioner Shri Coelho Pereira contended that under the statute or rules or regulations, the Chairman is not empowered to amend the rules relating to the service conditions of the employees of the Port Trusts, particularly of those employees whose maximum pay exceeds Rs. 1,000/-. He brought to our notice the relevant provisions of the Act. This writ petition has been taken up for hearing as early as August, 1996. In view of the contentions raised by the Counsel for the petitioner, we, vide order dated 10-7-1996 have called upon the respondents to clarify the points, which are extracted below :

" (1) The date on which the rules Exhibit "A" came into force.

(2) How the amended rules were notified amongst the employees and

(3) Whether the approval of the Central Government , as contemplated u/s 21 of the Major Port Trust Act, 1963 was obtained by the Board, if so, the date of such approval."

In view of these points raised by us, the respondent No. 1, M.P.T. has filed its reply on 27th March, 1997. But that reply partly explained our query and we were not fully satisfied with the answers given in that reply. Again arguments ensued between the parties before this Court on the merits and demerits of the case, but, ultimately, we passed an order on 14-8-1996 whereby we have stated thus :

"..... The Counsel (or the petitioner submitted that even though such regulation has been made, it has not been made by complying with the procedure prescribed u/s 124. Apart from this contention, we notice that section 28 gives power to the board to make regulations regarding the terms and conditions of service relating to

employees of the Major Port Trust. Whether amending that provision of the regulation, the Board can delegate that power to frame regulation to any other authority and whether or not in such circumstances approval given by Central Government to such amendment is legal. In order to clarify this position, we think it necessary that Central Government should be made a party to this petition. The petitioner is therefore directed to implead the Central Government in this petition. Leave to amend is allowed. ...."

In pursuance of that order, Union of India has been impleaded, but no affidavit has been filed on behalf of the Union of India. Affidavit, of course, has been filed by the respondent No. 1 purporting to be the answer to the queries raised by this Court (I) the order dated 10-7-1996. We are still not satisfied with the explanation given by the respondent No. 1 in this case. Important doubt that is expressed in that order still exists. The only option left to us in these circumstances is to decide the matter with pleadings and the documents that are available on records. The short question that remains in this case is whether the Chairman has power to amend the regulations, whereby service conditions of the employees, whose maximum salary is above Rs. 1000/- per month. On going through the relevant records and rules, and, after hearing the Counsel (or the petitioner, our answer is that the Chairman was not authorised to do so for the following reasons:

Sections 27 and 28 of the Major Port Trusts Act, 1963, read as under :-

"27. Notwithstanding anything contained in section 23, the power to create any post, whether temporary or permanent, shall :-

(a) in the case of a post the holder of which is to be regarded as the head of a department or in the case of a post the maximum of the pay-scale of which (exclusive of allowances) exceeds such amount as the Central Government may, by notification in the Official Gazette, fix, be exercisable by that Government;

(b) in the case of a post (other than a post referred to in clause (a) ), the maximum of the pay-scale of which exceeds such amount as the Central Government may, from time to time, by order fix in this behalf, or where no such amount has been fixed, is not less than one thousand rupees, be exercisable by the Board with the previous sanction of the Central Government;

(c) in the case of any other post, be exercisable by the Chairman.)

28. A Board may make regulations, not inconsistent with this Act, to provide for any one or more of the following matters, namely :-

(a) the appointment, promotion, suspension, (reduction in rank, compulsory retirement,) removal and dismissal of its employees;

(b) their leave, leave allowances, pensions, gratuities, compassionate allowances and travelling allowances and the establishment and maintenance of a Provident

Fund or any other fund for their welfare;

(c) the terms and conditions of service of persons who become employees of the Board under Clause (f) of sub-section (1) of section 29;

(d) the time and manner in which appeals may be preferred under sub-section (2) of section 25 and the procedure for deciding such appeals;

(e) any other matter which is incidental to, or necessary for, the purpose of regulating the appointment and conditions of service of its employees."

It has been submitted by the Counsel for the respondent No. 1, Shri Talaulikar that in 1964, regulation has been framed as contemplated u/s 28 of the Act. Regulation 7, reads as under :

"FILLING UP OF VACANCIES : The manner of filling up of vacancies by direct recruitment and departmental promotion and the age limit, educational qualifications and experience for direct recruits in respect of the various grade or posts shall be laid down by the authority competent to create such posts."

By virtue of this amendment, according to him, the Chairman has got power to bring amendment to service rules Exhibit "A". What has been done by the amendment is that instead of "Board" the "Authority" to create posts has been substituted. It is this, amendment which has been challenged by the Counsel for the petitioner. According to him, this amendment is unauthorised and illegal, We find considerable force in the argument for the Counsel for the petitioner. As per sub-section (a) and (b) of section 27, as above, the power to create different categories of posts has been enacted in that section. The posts have been classified according to the position and salary. Top most posts have been classified and powers to create such posts have been given to the Central Government; power to create some other posts is given to the Board and the Chairman. Learned Counsel for the petitioner Shri Coelho Pereira submits that the petitioner is under one of those posts contemplated under sub-section (b) of section 27. According to that sub-clause, only the Board can create the post of Assistant Engineer, which is in question, whose maximum salary is Rs. 1,000/- in the scale of Rs. 980-50-1330-EB-50-1680-E8-1930. Therefore, as per the amended Regulation 7, since the Board has been substituted by the competent authority to create the post, position spelt out by sub-section (b) of 27 did not undergo any change. It might have changed in respect of categories of posts mentioned by sub-section (a) of section 27. Section 28 clearly says that any regulation that is being framed, should not be inconsistent with the Act. Therefore, under the regulation and also under the Act, the Board was competent authority to create post of Asst. Engineer and to frame rules with regard to the qualifications, methods of promotion and age, etc., All the powers are vested in the Board and any amendment to the rules brought in by the Chairman held to be unauthorised.

3. Learned Counsel for the respondent No. 1 Shri Talaulikar drew our attention to section 21, and submitted that as per section 21, the Chairman is empowered by the Central Government with all duties and powers. Therefore, the Chairman, can also amend the regulation. We cannot agree with this submission. When sections 27 and 28 specifically deal with particular contingencies, it goes without saying that section 21 cannot be invoked. Section 21 gives only the powers to be authorised by the Central Government to the Chairman, which were not elsewhere enacted. Learned Counsel for the respondent Shri Talaulikar also brought to our notice an unreported decision of the Madras High Court in Writ Appeals No. 149 and 150/1980, *Harry Supta v. The Madras Port Trust, Madras*, wherein, according to him, a similar question has been answered by the Madras High Court and it was found that the Chairman has got power to regulate the service conditions of the employees. With great respect, we cannot agree with the learned Counsel for the respondent No. 1. First of all, that judgment has not taken into account the implications of section 27. As we pointed out earlier, section 27 gives specific power to specific authority to create posts of specific categories of employees. Regulation 7 says that the authority to prescribe conditions of service and method of appointment, qualification and age is the competent authority to create the posts. Therefore, any matter touching the service conditions of the employees, cannot be examined on the basis of the provisions of section 21. Therefore, the ratio laid down in the Madras High Court decision is not applicable to the case in hand in the light of submission and the position of law, brought to our notice by the Counsel for respondent No. 1.

4. In view of the above discussions, we find that the amendment Exhibit A is liable to be quashed and set aside as it has been done by an authority other than that competent to do it. It has been done in violation of section 27 of the Act.

5. In the result, the writ petition is partly allowed. Rule made absolute in terms indicated above. There is no order as to costs.

After pronouncing the judgment, the learned Counsel for the respondent No. 1 prayed for leave to appeal to the Supreme Court. We are not inclined to grant leave as there is no substantial question of law of general importance involved.

We also reject the oral prayer made by the Counsel for the respondent No. 1 to stay the operation of the judgment.

6. Petition partly allowed.