

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3996 OF 2014

Uma Shankar Sinalkar and another. ... Petitioners.
V/s.
Maharashtra Public Service Commission
and others. ... Respondents.

WITH

WRIT PETITION NO. 4658 OF 2014

Ms.Jayashree Vaman Kulkarni and others. ... Petitioners.
V/s.
State of Maharashtra and others. ... Respondents.

WITH

WRIT PETITION NO. 4659 OF 2014

Mrs.Suvarna Jalinder Bhosale. ... Petitioner.
V/s.
State of Maharashtra and others. ... Respondents.

M.S.Karnik i/b. Vaibhav A. Sugdare for the petitioners (in WP No.3996/14).

A.V.Anturkar, Senior Counsel i/b. S.B.Deshmukh and Rishikesh Barge
for the petitioners (in WP Nos.4658/14 and 4659/14).

A.B.Vagyani, Govt. Pleader with P.G.Sawant, AGP for the respondents.

Javed R. Shaikh for the intervener.

CORAM : NARESH H. PATIL AND
A.S. GADKARI, JJ.

RESERVED ON : 4th February 2-015

PRONOUNCED ON : 23rd February 2015.

PC.

The petitioners seek direction to hold and declare that the deletion of proviso to rule 3 of Assistant Public Prosecutor, Group-A in Directorate of Public Prosecutions, Maharashtra State (Recruitment) Rules, 1995 ("Rules of 1995" for short) is in violation of Articles 14, 16, 19(1)(g) and 21 of the Constitution of India. They seek further declaration that the petitioners, who are presently working as Special Assistant Public Prosecutors appointed under section 25(3) of Code of Criminal Procedure, 1973 ("Cr.P.C.:" for short), are eligible and entitled to be considered for appointment to the post of Assistant Public Prosecutors. The petitioners further seek direction to quash and set aside the communication by the respondent- State dated 18th March 2014 thereby rejecting their representation.

2. It is contended by the petitioners that they were appointed as Special Assistant Public Prosecutors as per section 25(3) of Cr.P.C. They were working in the said capacity for a period of three to ten years. Their appointments were made by the District Magistrate in consultation with the District Judge of the respective districts in which they were posted to work as Special Assistant Public Prosecutors. The Maharashtra Public Service Commission ("MPSC" for short) issued advertisement dated 13th March 2012 inviting applications for appointment of Assistant Public Prosecutors. Under clause 4.2 of the said advertisement the age limit as on 1st July 2012 was prescribed, for the candidates belonging to open category as 33 years and for candidates belonging to backward category as 38 years.

3. In exercise of powers conferred by proviso to Article 309 of the Constitution of India, the Governor had made Rules of 1995. Rule 3 of the said rules reads as under:

3. Appointment to the post Assistant Public Prosecutor in the Directorate shall be made by nomination from amongst the persons who,-

- (i) are not more than 33 years, and in case of Backward Class, 38 years of age; and
- (ii) possess a degree in law;
- (iii) possess experience of working as an advocate in the High Court or in a Court Subordinate thereto, for a period of not less than five years:

Provided that the provisions of clauses (i) and (iii) shall not apply to the persons working as Police Prosecutor in the service of the Government.

By notification dated 21st April 2009, the Governor, in exercise of powers conferred by proviso to Article 309 of the Constitution, made Assistant Public Prosecutor, Group-A in Directorate of Public Prosecutions, Maharashtra State (Recruitment) (Amendment) Rules, 2009 deleting the proviso to rule 3 of Rules of 1995 by amending the said rules. The relevant rule reads as under:

2. In rule 3 of the Assistant Public Prosecutor, Group-A, in Directorate of Public Prosecutions, Maharashtra State (Recruitment) Rules, 1995 (hereinafter referred to as the "Principal Rules") the proviso shall be deleted.

Some of the petitioners approached this Court by filing Writ Petition No.3103/2012. By an order dated 9th April 2012, the Division Bench passed following order:

“ Having regard to the fact that the applicants are likely to get age barred and they questioned the applicability of rule which bars their candidature according to the age, we consider it appropriate to

permit the applicants to submit their forms to respondent no.1, subject to further orders in the petition. It is made clear that the petitioners shall not claim any equity on the basis of interim order.”

The petitioners, accordingly, applied and participated in the examination. The said petition was disposed of the Division Bench by passing following order:

- “(i) As far as Petitioner Nos.4, 5, 7, 10, 11, 13, 14 and 15 are concerned, that petition stands dismissed;
- (ii) As far as other Petitioners are concerned, we grant permission to withdraw the petition with liberty to prosecute the representation already made to the Chief Minister of State of Maharashtra;
- (iii) It will be open for the Petitioners to make a supplementary representation within a period one week from today;
- (iv) We expect that the representations will be decided as expeditiously as possible and preferably within a period of four months from today.”

The petitioners had, accordingly, made representation to the State which came to be rejected by the State and decision was communicated to the petitioners. By interim orders passed in these petitions, this Court observed that the petitioners' posts at respective places shall not be filled in by the State Government. Accordingly the petitioners are continued as Special Assistant Public Prosecutors.

4. Shri Anturkar, learned senior counsel, appearing for some of the petitioners submit that the decision taken by the government is not proper. It is unreasonable decision and, therefore, the State Government is required to be directed to pass a fresh order on the representation submitted by the petitioners. The petitioners are working as Special

Assistant Public Prosecutors since last more than 3 to 10 years and have legitimate expectation to continue in that position. In the submission of the counsel, the deletion of the proviso to rule 3 of Rules of 1995 is unreasonable and arbitrary and, therefore, requires to be struck down. There is no rational basis for prescribing age limit of 33 years and 38 years for appointment of advocates to represent the State as Assistant Public Prosecutors. The State should have allowed more experienced Advocates to participate in the recruitment process which would have benefited the the litigants, and the institution.

5. Shri Karnik, learned counsel appearing for some of the petitioners submits that, in fact, the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 ("MCSR" for short) prescribes power to relax age restriction which power ought to have been exercised in the facts of the case in favour of the petitioners. The State ought to have considered that the lawyers get matured by age and experience. Therefore, there is no logic in the averment of the State that it was the policy of the State to attract and invite young talent to the job. It was submitted by learned counsel that deletion of proviso to rule 3 of Rules of 1995, as stated above, is arbitrary and unconstitutional.

6. Learned Govt. Pleader, appearing for the State, submits that doctrine of legitimate expectation would not be applicable in this case. The State would not give any promise of continuation of appointment to the petitioners. The appointments of petitioners were made under section 25(3) of Cr.P.C. purely on temporary basis. They were of contractual nature. The petitioners, therefore, cannot claim as of right that they should be allowed to hold the same post and continue in that

capacity to the detriment of successful candidates who deserve to be appointed in accordance with notification issued by MPSC and the selection process carried forward in accordance with Rules framed under Article 309 of the Constitution. Learned Govt. Pleader placed reliance on the following judgments:

Secretary, State of Karnataka v. Umadevi and ors., AIR 2006 SC 1806(1); order dated 10th August 2011 passed by learned single Judge of Punjab & Haryana High Court in Civil Writ Petition No.14574/11 (***Jaswinder Singh v. State of Punjab***); order dated 19th December 1991 passed by the Aurangabad Bench of this Court in W.P.No.4001/1991 (***Shri Badribishan A. Darak v. The State of Maharashtra***) and order in SLP No.16854/1992 arising out of the said order.

7. Learned counsel appearing for the intervenor submits that prescribing age limit for participating in the examination is a matter of policy decision. At the behest of the petitioners, the said decision cannot be altered. The petitioners cannot claim benefit of power of relaxation as they are not government servants. They were appointed by virtue of section 25(3) of Cr.P.C. In the State of Maharashtra, 19 such persons would be benefited, if the argument of the petitioners is upheld. In his submission, like petitioners the intervenor participated in the examination and succeeded. They have legitimate expectation and not the petitioners. Learned counsel relied upon the following judgments:

S.B.Shahane v. State of Maharashtra, 1995 Supp (3) SCC 37; ***Jamaluddin v. State of Jammu and Kashmir***, (2011) 14 SCC 725; ***Pradip Kumar Maity v. Chinmoy Kumar Bhunia***, (2013) 11 SCC 122; ***Union of India v. Arulmozhi Iniarasu***, (2011) 7 SCC 397; ***Chairman, Public Service Commission, J & K v. Sudarshan Singh Jamwal***, (1998) 9 SCC 327.

8. In case of *S.B.Shahane v. State of Maharashtra* cited supra arising out judgment and order passed by this Court in SCA No.317/1979, the Apex Court, in para-15 of the judgment had observed as under:

“15. In the result, we allow this appeal, set aside the judgment of the High Court under appeal, make the rule nisi issued on the application of the appellants before the High Court absolute and direct the Government of Maharashtra to constitute a separate cadre of Assistant Public Prosecutors either on district-wise basis or on state-wise basis, by creating a separate Prosecution Department for them and making the head to be appointed for such Department directly responsible to the State Government for their discipline and the conduct of all prosecutions by them before the Magistrates' courts and further free such Prosecutors fully from the administrative and disciplinary control of the Police Department or its officers, if they still continue to be under such control. No costs.”

9. In exercise of powers conferred under Article 309, the Governor of Maharashtra made the Rules of 1995. In the said rules, initially, there was no restriction of age while submitting application by the persons who were working as Police Prosecutors. By amendment to the said rules brought out vide notification dated 21st April 2009, the proviso to rule 3 of Rules of 1995 was deleted meaning thereby the age limit was made applicable to the post of Police Prosecutors. In accordance with the directions given by the Apex Court to the State Government, MPSC issued advertisement for recruiting Assistant Public Prosecutors as a separate cadre. Under the orders of this Court, the petitioners participated in the examination. Some of such identically placed candidates failed in the examination. The petitioners continued

to work as Special Assistant Public Prosecutors even now. It is an admitted position that the petitioners did not comply with the age criteria as prescribed by amending Rules of 1995. The question is as to whether the amendment brought to the Rules of 1995 whereby age limit of 33 years for open category and 38 years for backward class came to be prescribed even to the aspirants including Special Assistant Public Prosecutors is reasonable or not. It is not the case of the petitioners that they are government servants. It is therefore, submitted by the Govt. Pleader that though the petitioners were serving the government, in the strict legal sense, they cannot be refereed to as government servants. Considering the Scheme of amended Rules of 1995 and MCSR, we are of the opinion that rule 4 of MCSR prescribing power of relaxation would not be applicable in the present case to the benefit of the petitioners. It is submitted on behalf of the State that it is a conscious decision to attract young talent and appoint them so as to serve the State for a long time if they desire.

10. In accordance with the Supreme Court judgment, separate cadre of Assistant Public Prosecutor was created and, accordingly, recruitment process was initiated. Except these petitioners all other selected persons were appointed by the State. In facts, no mandamus can be issued in favour of the petitioners directing the government to appoint them since they have failed to show that they have enforceable legal right for being appointed/continued as Assistant Public Prosecutors.

11. In the facts of the case, we are of the opinion that the petitioners have no vested right to seek appointment or continue to work as Special Assistant Public Prosecutor. Considering the order passed by

the Division Bench of this Court at Aurangabad in W.P. No.4001/1991 and order passed by the Apex Court dismissing S.L.P. arising out of the said order directing to create separate cadre in the State, the State Government had framed appropriate rules. The view of the State is that if young talent is invited to join the cadre they would serve the State for a longer time, therefore, the age criterion need not be relaxed. The rules were framed to suit the services to be rendered to separate cadre. Considering this object in mind, the State had, accordingly, taken steps. We do not find that the amended rules violate the provisions of Article 14 and 16 of the Constitution of India.

12. The intervner who participated in the recruitment process and ultimately selected as Assistant Public Prosecutor is not being appointed. In view of the interim order passed by this Court, the petitioners are still continued as Special Assistant Public Prosecutors. We do not find any reason as to why the persons like intervener should be deprived of their legitimate expectation to join as Assistant Public Prosecutor at the selected place.

13. For the reasons stated above, we do not find any merits in these petitions. Writ petitions are dismissed. .

(A.S. GADKARI, J.)

(NARESH H. PATIL, J.)