

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5381 OF 2013

Ms. Reena Deepak Kharate ... Petitioner

Vs

High Court of Judicature at
Bombay and Anr.

... Respondents

WITH

WRIT PETITION NO. 5622 OF 2013

Mr. Umesh Keshao Sorte

... Petitioner

Vs

The State of Maharashtra and Ors.

... Respondents

Mr. U.P. Warunjikar, Advocate for Petitioner in W.P.No.5381 of 2013.
Mr. Abhijeet A. Desai a/w Ms. Vrushali L. Maindad, Advocate for
Petitioner in W.P.No.5622 of 2013
Mr. V.R.Dhond, Senior Advocate, i/b Mr. R.S.Datar, Advocate for
Respondent No.3 in W.P.No.5622 of 2013 and Respondent No.1 in
W.P.No.5381 of 2013.
Mr A.I.Patel, A.G.P for State in both the Petitions.

**CORAM : RANJIT MORE &
R. G. KETKAR, JJ.**

DATE : 30TH SEPTEMBER, 2015.

P.C.: (PER R. G. KETKAR, J.)

Heard Mr. Warunjikar, learned Counsel for the petitioner in Writ
Petition No.5381 of 2013, Mr. Desai, learned Counsel for petitioner in
Writ Petition No.5622 of 2013, Mr. Dhond, learned Senior Counsel for
respondent No.1 in Writ Petition No.5381 of 2013 and for respondent

No.3 in Writ Petition No.5622 of 2013 and Mr. A. I. Patel, learned AGP for respondent-State in both the Petitions at length. Since common questions of law and fact arise in these Petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy raised between the parties, the facts from Writ Petition No.5381 of 2013 are taken into consideration.

2. Petitioner has passed Law in the year 2005. Since then, the petitioner is practicing at Kalyan and other Courts in the surrounding vicinity. On 18.12.2008, respondent No.2-Maharashtra Public Service Commission (MPSC) issued advertisement inviting applications for appointment to the posts of Civil Judge Junior Division / Judicial Magistrate First Class (C.J.J.D. / J.M.F.C.). Petitioner appeared in preliminary written examination and she was declared as not qualified. On 30.06.2010, MPSC issued advertisement once again inviting applications for the posts of C.J.J.D. / J.M.F.C. Petitioner appeared in preliminary written examination. However, she was declared as not qualified therein. On 11.04.2011, MPSC issued advertisement inviting applications for the posts of C.J.J.D. / J.M.F.C. Clause 6.6 thereof laid down that a candidate who could not pass the written examination in 3 successive attempts is debarred from appearing for further

examination. Failure in preliminary written examination shall be counted as failure in written examination. In pursuance of that advertisement, petitioner appeared for preliminary written examination. She cleared preliminary written examination and was shortlisted for appearing for final written examination. Petitioner, however, could not clear the final written examination.

3. On 25.07.2012, MPSC issued advertisement inviting applications for the posts of C.J.J.D. / J.M.F.C. Clause 7 thereof dealt with attempts, which reads thus,

“7. Attempts - A candidate who could not pass the written examination in three successive attempts is debarred from appearing for further examination. Failure in preliminary written examination shall be counted as failure in written examination.”

4. In pursuance of that advertisement, petitioner made application and appeared for preliminary written examination, which was held on 16.09.2012. She was held eligible and was shortlisted for final written examination. Petitioner appeared in the final written examination and she passed that examination. She was called for interview, which was to be held on 26.02.2013. Petitioner appeared for the interview. However, her name was not included in the list of recommended

candidates. Petitioner, therefore, made application seeking information as to why her name is not included in that list. By the impugned communication dated 03.04.2013, the petitioner was informed that in view of clause 7 of the advertisement dated 25.07.2012, petitioner is excluded from the process of declaration of results as it was her fourth attempt. Petitioner has challenged this communication and has prayed for declaration that the said communication is ultra vires of the Maharashtra Judicial Service Rules, 2008 (for short 'Rules of 2008').

5. Mr. Warunjikar strenuously contended that Rules of 2008 and in particular, Rule 6(2)(b) thereof lays down that a candidate who could not successfully pass the competitive written examination in three attempts, consecutively, shall be debarred from appearing for such examination. The phraseology “competitive written examination” means final written examination. In other words, he submitted that the said phraseology will not cover preliminary written examination. He submitted that the petitioner could not clear preliminary written examination in the year 2008 and 2010. The appearance in preliminary written examination held in 2008 and 2010 cannot be construed as attempt as per clause 7 of advertisement dated

25.07.2012. If her appearance in preliminary written examination of 2008 and 2010 is excluded from consideration, the petitioner cleared preliminary examination in the year 2011. She, however could not clear the final written examination. According to the learned Counsel, this can be treated as the first attempt. He submitted that the petitioner appeared for preliminary written examination held on 16.09.2012. She was shortlisted and appeared for final written examination, which she passed. She was also called for interview. He, therefore, submitted that the impugned communication dated 03.04.2013 is ex-facie ultra vires of Rules of 2008. He submitted that clause 7 of the advertisement dated 25.07.2012 is not consistent with Rules of 2008. That apart, in case of inconsistency between the clauses in the advertisement and statutory Rules, the Rules will prevail.

6. Mr. Warunjikar further submitted that Rule 12 dealing with competitive examinations was deleted vide Notification dated 31.12.2010. Lastly, he submitted that there are ample vacancies and even though, advertisement was for 150 posts, only 51 candidates were recommended by MPSC. Since the petitioner has cleared both, preliminary written examination and final written examination and was called for interview, the impugned communication may be set

aside and MPSC may be directed to recommend the candidature of the petitioner.

7. Mr. Desai appearing for the petitioner in Writ Petition No.5622 of 2013 adopted the submissions advanced by Mr. Warunjikar. He submitted that petitioner appeared for the post of C.J.J.D. / J.M.F.C. In the years 2008, 2010, 2011 and 2012. Petitioner did not qualify in the preliminary written examination in the years 2008 and 2010. Petitioner had passed preliminary written examination in the year 2011. He, however, could not clear final written examination. In the year 2012, petitioner has passed preliminary as well as final written examination and appeared for viva-voce (interview) on 27.02.2013. Petitioner received communication dated 03.04.2013 informing that his name is removed from the process of declaration of final results in view of clause 7 of the advertisement dated 25.07.2010.

8. On the other hand, Mr. Dhond supported the decision. He invited our attention to the affidavit made by Mr. Nijamoddin J. Jamadar, Registrar (Legal and Research), High Court, Appellate Side, Bombay. He submitted that Rule 6(1)(c) of Rules of 2008 lays down that for the purpose of shortlisting the candidates, the Recruiting

Authority may, if necessary, hold preliminary written examination comprising of multiple choice objective type questions, which can be scrutinized by computers and call upon the candidates obtaining the cut-off marks, as may be fixed by the Recruiting Authority, to appear for final written examination, maintaining the ratio of 1:10 of the available vacancies to the successful candidates. He submitted that the candidate has to clear preliminary written examination for the purpose of shortlisting and making him or her eligible for appearing for final written examination. As petitioners, in both the Petitions, have not cleared the preliminary written examination in the years 2008 and 2010, they were not allowed to appear for final written examinations. He further submitted that Rule 6(2)(b) lays down that a candidate who could not successfully pass the competitive written examination in three attempts consecutively, shall be debarred from appearing for such examination. In short, he submitted that appearance for preliminary written examination has to be counted for the purpose of finding out whether the petitioner has successfully cleared the competitive written examination in three attempts. He submitted that clause 7 of the advertisement dated 25.07.2010 is not ultra vires of Rule of 2008. Mr. Patel adopted the submissions of Mr. Dhond.

9. We have considered the rival submissions made by the learned Counsel appearing for the parties. We have also perused the material on record. It is not in dispute that the recruitment to C.J.J.D./J.M.F.C. is regulated by the provisions of Rules of 2008. Rules 6(1)(c) and 6(2)(b) read thus,

“6(1)(c) For the purpose of shortlisting the candidates, the Recruiting Authority may, if necessary, hold preliminary written examination comprising of multiple choice objective type questions, which can be scrutinized by computers and call upon the candidates obtaining the cut-off marks, as may be fixed by the Recruiting Authority, to appear for final written examination, maintaining the ratio of 1:10 of the available vacancies to the successful candidates:

Provided that if there are more than one candidates who have secured identical cut-off marks as fixed by the Recruiting Authority for maintaining ratio of 1:10, all such candidates shall be called upon to appear for final written examination.

...

6(2)(b) A candidate who could not successfully pass the competitive written examination in three attempts, consecutively, shall be debarred from appearing for such examination.”

10. Perusal of Rule 6(1)(c) shows that for the purpose of shortlisting the candidates, the Recruiting Authority may, if necessary, hold preliminary written examination comprising of multiple choice objective type questions, which can be scrutinized by computers and call upon the candidates obtaining the cut-off marks, as may be fixed

by the Recruiting Authority, to appear for final written examination. In other words, discretion is conferred upon the Recruiting Authority to hold the preliminary written examination, if it is necessary. Once the Recruiting Authority holds preliminary written examination for the purpose of shortlisting the candidates, it can call upon the candidates obtaining cut-off marks as may be fixed by it for appearing for final written examination. In our opinion, in respect of candidate, who appears for preliminary written examination and is not shortlisted and consequently, cannot appear for final written examination, the same will constitute an attempt. This is evident from the wording of Rule 6(2)(b) extracted hereinabove. The submission advanced by Mr. Warunjikar and Mr. Desai that even if the candidate does not clear preliminary written examination that cannot be counted as an attempt, cannot be accepted. The candidate has to successfully pass preliminary written examination as also final written examination in three attempts, consecutively. If the candidate does not successfully pass the competitive written examination in three attempts then he is debarred from appearing for such examination. We, therefore, do not find that clause 7 of the advertisement dated 25.07.2010 is ultra vires of Rules of 2008. We also do not find any merit in the submission of Mr. Warunjikar that since the petitioner has cleared preliminary

written examination and final written examination and as the number of vacancies are more than the candidates recommended, respondent No.2 should be directed to recommend petitioner's name as it will be in the teeth of provisions of Rules of 2008. Hence, Petitions fail and the same are dismissed with no order as to costs.

(R.G.KETKAR, J.)

(RANJIT MORE,J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgement / order.