

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 268 OF 2013

Pratibha Mangilal Chavan

Age: 44 years, Occ: Service in the

Public Health Department, BMC

R/o- 42/358, Unnat Nagar CHS Ltd.,

Unnat Nagar-II, Near Sai Clinic SV Road,

Goregaon (W), Mumbai 400 062.

... Petitioner

Vs.

1. The Municipal Corporation of
Greater Mumbai, a statutory body
established under the provisions of
the Bombay Municipal Corporation Act,
1888 and Office at Mahapalika Marg,
Opp. CST, Mumbai - 400 001.
 2. The Municipal Commissioner,
The Municipal Corporation of Greater
Mumbai, having office at Mahapalika Marg,
Opp. CST, Mumbai - 400 001.
 3. The State of Maharashtra
Through its Department of Urban
Development, Mantralaya, Mumbai
 4. Maharashtra Public Service Commission,
Through its Chairman,
Having office at Bank of India Building,
3rd Floor Mahatma Gandhi Road,
Hutatma Chowk, Mumbai 400001.
 5. Devgune Manisha Savleram
C/o Maharashtra Public Service Commission,
Having office at Bank of India Building,
3rd Floor Mahatma Gandhi Road,
Hutatma Chowk, Mumbai 400001.
- ... Respondents

**WITH
WRIT PETITION NO. 345 OF 2013**

Smt. Chayadevi D/o Udaysinh Shisode
Age: 38 Yrs., Occu. Service as
Assistant Commissioner (Enquiry),
In the office of the Divisional Commissioner,
Aurangabad, R/o C-103, Sai Arcade,
Cannought Place, CIDCO, Aurangabad.

... Petitioner

Vs.

1. The Municipal Corporation of Greater
Mumbai, Through its Municipal Commissioner,
Greater Mumbai, 1, Mahapalika Marg,
Fort, Mumbai 400 001.

2. The Maharashtra Public Service Commission,
Bank of India Building, 3rd Floor,
M.G. Road, Hutatma Chowk,
Mumbai 400 001,
Through its Secretary.

3. Smt. Manisha Savaleram Devgune,
Age: Yrs., Occu. Service as
Child Development Project Officer,
Kalyan Panchayat Samitee,
District Thane.

... Respondents

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Mr. Y.S. Jahagirdar, Senior Advocate a/w Mr. Ashok T. Gade for the
Petitioner in WP 268/2013.

Mr. Amol Gatne a/w Mr. S.B. Deshmukh for the Petitioner in
WP345/2013.

Mr. S.S.Pakale a/w Mr. H.C. Pimple for Respondent No.1 in
WP/345/2013 & for Respondent Nos. 1 and 2 in WP/268/2013.

Mr. Rajiv Mane, Assistant Government Pleader for Respondent Nos.
3 & 4 in WP/268/2013.

Ms. P.H. Kantharia, Government Pleader for Respondent No.2 in
WP/345/2013.

Mr. Uday P. Warunjikar for Respondent No.3 in WP/345/2013 and
Respondent No.5 in WP/268/2013.

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**WITH
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11028 OF 2013

1. Maharashtra Public Service Commission
Through its Secretary,
3rd floor, Bank of India Bldg.
Fort, Mumbai.
 2. The First Appellate Officer and Deputy
Secretary,
Maharashtra Public Service Commission
3rd Floor, Bank of India Bldg.,
Fort, Mumbai.
 3. Public Information Officer and
Under Secretary,
Maharashtra Public Service Commission,
3rd Floor, Bank of India Bldg.,
Fort, Mumbai.
- ... Petitioners

vs.

1. Pratibha Mangilal Chavan
42/358, Unnatnagar Coop. Housing
Society, Unnatnagar No.2, Near Sai Clinic
S.C.Road, Goregaon (W), Mumbai-62.
 2. State Information Commissioner
Maharashtra State, Mumbai.
- ... Respondents

**WITH
WRIT PETITION NO. 6781 OF 2012**

Shri Umesh Wamanrao Rathod
Age adult, Occ; Service
Residing at Room No.252/11/Type II,
R.C.F. Colony, Chembur,
Mumbai 400 071.

... Petitioner

vs

1. The Commissioner
Mumbai Municipal Corporation, Mumbai.

2. The Maharashtra Public Service Commission, Mumbai.

3. Mrs. Manisha Savleram Deogune
Aged adult, Occ. Service,
Residing at...
Office at Bank of India Building,
3rd Floor, Mahatma Gandhi Road,
Hutatma Chowk, Mumbai-1.
(VPP stand dismissed as against
R.Nos. 1 and 3 as per Court's order
dated 20.11.2012)

... Respondents

**WITH
WRIT PETITION NO. 6987 OF 2012**

Smt. Smita Anant Bandarkar,
Age : 52 years, Occupation: Service,
residing at Flat No. 15,
Building No.5, Government Colony,
Near Lala Lajpatrai Colony,
Haji Ali, Mumbai - 400 034.

... Petitioner

vs.

1. Maharashtra Public Service Commission,
Having office at Bank of India Building,
Third Floor, Mahatma Gandhi Road,
Hutatma Chowk, Mumbai - 400 001.
2. Municipal Commissioner,
Municipal Corporation of Greater Mumbai,
having office at B.M.C. Headquarters,
Mahapalika Marg, Mumbai-400 001.
3. Smt. Manisha Sawalaram Devgune,
Age: Adult, Occupation: Service,
having address (which is at record
of MPSC).
Maharashtra Public Service Commission,
having office at Bank of India Building,
Third Floor, Mahatma Gandhi Road,
Hutatma Chowk, Mumbai - 400 001.
(VPP stand dismissed as against
R.Nos. 2 and 3 as per Court's order
dated 20.11.2012)

... Respondents

Mr. S.K. Shinde a/w Ms. Sushma Bhende, AGP, Ms. Tanaya Goswami, Ms. Sneha G. Sanap i/b. Mr. Makarand P. Panchakshari for the Petitioner in WP/11028/2013, for Respondent No.2 in WP/6781/2012 and for Respondent No.1 in WP/6987/2012. Mr. N.P. Deshpande for the Petitioner in WP/6781/2012. Mr. Ajit R. Pitale for Petitioner in WP/6987/2012 Mr. Y.S. Jahagirdar, Senior Advocate i/b. Mr. Ashok T. Gade for Respondent No.1 in WP/11028/2013. Mr. Uday Warunjikar for Respondent No.2 in WP/11028/2013. Ms. Sushma Bhende, AGP for State in all Writ Petitions.

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**CORAM : S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATE : DECEMBER 22, 2016.

ORAL JUDGMENT:- (Per S. C. Dharmadhikari, J.)

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2. The petitioner in Writ Petition No. 268 of 2013 seeks a writ of certiorari or any other appropriate writ, order or direction to call for the records of the selection process carried out by the Maharashtra Public Service Commission (for short "MPSC") in pursuance of an advertisement dated 16th November 2011. That advertisement was issued to fill up the posts of Ward Officer/Assistant Commissioner in the Brihan Mumbai Municipal Corporation (for short "BMC"). The further prayer is that on a scrutiny and verification of these records, the process stand set aside. It is then claimed that the selection of respondent no.5 is

illegal for the simple reason that she does not belong to a category for which there was a reservation of the post in the said advertisement.

3. The third prayer is seeking direction to the respondents to consider the petitioner for the post of Ward Officer from the category of De-notified Tribes (A).

4. The facts in a nutshell are that the posts of Ward Officer/Assistant Commissioner are on the establishment of the 1st respondent. The 3rd respondent is the State of Maharashtra through its Department of Urban Development, which controls and supervises working of the Municipal Corporations across the State of Maharashtra. The 4th respondent is the MPSC, a Commission whose establishment and functioning is traceable to Articles 315 to 323 of the Constitution of India. It conducts examinations for recruiting and appointing candidates to fill up the civil posts. The 5th respondent belongs to NT-B category. She is selected for the said post and her name has been recommended by the 4th respondent Commission.

5. The petitioner has passed her M.B.B.S. degree examination. She has also obtained a diploma in Public Health and in Hospital & Health Care Management. She is serving the Municipal Corporation for last 17 years. The advertisement dated 16th November 2011 was

published inviting applications for the posts of Assistant Commissioner (Ward Officer). In all 13 posts were to be filled in, 5 out of them were reserved. The minimum educational qualification was also prescribed. There is a criteria for experience which should be also fulfilled. Reliance is placed on paragraph no. 2.1 which indicates as to how there would be a reservation of posts (total 5) and paragraph 2.2 of this advertisement provides for interchangeability. That is on account of non availability of a suitable candidate for the said post. The petitioner claims that she belongs to DT(A) category and as per the advertisement, one clear post was reserved for DT(A) category.

6. In terms of this advertisement, the written examination was scheduled and held on 22nd January 2012. In all 42 candidates cleared the said examination and were held eligible to go further and appear at an interview. The petitioner relies upon **Annexure "C"** which is a copy of the list of candidates who were called for interview. The argument is that the sole criteria for selection is the combined performance of a candidate in the written test as well as the oral interview. The petitioner states that after the results of the written test were declared, her name was appearing at serial no.1 in the merit list of DT(A) category and 7th in the overall merit list. The petitioner states that on 8th May 2012 and 9th May 2012, the

interviews of the successful candidates were held and conducted by respondent no.4. The allegation is that though 42 candidates were selected for interview, respondent no.4 subsequently added 4 more candidates. Presently, out of these 4 candidates, 3 are selected in various categories and their names are recommended by respondent no.4 for selection. Reliance is placed on **Annexure "D"** which is a copy of the list showing names of those subsequently added 4 persons. On 21st June 2012, the 4th respondent published the final list of candidates who were recommended for appointment. Though the petitioner stood first in the reserved category and overall 7th, her name was not recommended. On the contrary, respondent no.4 recommended the name of respondent no.5 who belongs to a distinct category, namely, NT(B). The further argument is that one candidate for the post of NT(B) category was already recommended by respondent no.4. Hence, in no circumstances, the 5th respondent could have been nominated for the post which has been reserved for DT(A) category. The petitioner states that, according to her information, she has secured more marks than the 5th respondent. She also stands higher in the overall merit list. Therefore, there was no reason or occasion for the 4th respondent to deny appointment to her. It is urged that while recommending the name of respondent no.5, respondent nos. 1 to 4 have relied upon paragraph 2.2 of the advertisement which provides for interchangeability amongst the

reserved categories in the event a suitable candidate is not found. The respondents have relied upon the Government Resolution dated 5th December 1994 for such interchangeability. After setting out the terms of this Government Resolution, what is urged is that this Government Resolution was challenged in Writ Petition No. 3077 of 2011. An order was passed on 29th September 2011 (**Annexure "G"**) by this court therein staying the effect and implementation of this Government Resolution. Therefore, there is no question of relying on paragraph 2.2 of the advertisement and this Government Resolution.

7. The petitioner also complains that she moved under the Right to Information Act, 2005 and sought information with regard to the marks obtained by the petitioner and the other candidates. **Annexure "H"** is a copy of this application. Thereafter, the Writ Petition goes on to analyze various paragraphs of the advertisement. It is stated then that on account of her experience and merit, the petitioner should have been selected.

8. It is in these circumstances that this Writ Petition has been filed in this Court seeking the above reliefs. The Writ Petition was filed on 2nd July 2012.

9. There is an affidavit which has been filed on behalf of the MPSC. While this affidavit admits that the advertisement was published, it also admits that there was a reservation of posts. The requisite qualification also is as notified. It is claimed that paragraph 2.2 of the advertisement enables filling up of the posts by recommendation of a suitable candidate from DT(A)/NT(B)/NT(C)/NT(D). If a suitable candidate is not found, then the Government's policy permits recommending any of the candidates from these categories on the basis of merit list. The affidavit places reliance upon another Government Resolution dated 29th March 1997. It is claimed that any candidate from the reserved category to be called for interview needs to secure minimum 30% marks in written examination. All the candidates need to secure minimum 41 marks in the interview so as to find a place in the merit list. It is stated that the final selection would be from the merit list on the basis of merit-cum-availability of posts. The Commission clarifies that it received total 1663 applications for the post of Assistant Municipal Commissioner. After the written examination, candidates in the ratio of 1:3 were called for the interview. The interviews were conducted. The petitioner was also interviewed on 8th May 2012. The final result was declared on 20th May 2012. The petitioner did not succeed in obtaining 41 marks in the oral interview. For selection, she has to obtain minimum 41 marks in the oral interview

so as to qualify for the post. The marks obtained below 40 is taken as below average scale. Therefore, such candidates are not considered for recommendation and selection. Once the petitioner, though belonging to DT(A) category, had not qualified, then, there is no reason to consider her candidature. On this ground alone, the Writ Petition deserves to be dismissed.

10. The petitioner then filed an affidavit-in-rejoinder and submitted that none of the allegations in the Writ Petition have been denied or controverted. The petitioner relies upon a judgment of the Hon'ble Supreme Court in the case of ***Ashok Kumar Yadav vs. State of Haryana***, reported in ***AIR 1987 (SC) 454***. It is submitted that in terms of this judgment, more than 12.2% of the total marks in any examination cannot be assigned for *viva voce* test also known as oral or personality test. Once these are binding directions of the Hon'ble Supreme Court, then, the petitioner proceeds to question the stipulation in the advertisement of securing minimum 41 marks in the oral interview. She also relies upon an order passed in Writ Petition No.4089 of 2012 before the Aurangabad Bench of this Court. The petitioner, in such circumstances, repeats her allegations and prays for the reliefs in terms of the prayers of this Writ Petition.

11. There is an additional affidavit-in-reply filed by respondent no.4. In that, it is stated that the petitioner qualified in the written test and she was called for interview. It is not because of any order passed by this Court that she was interviewed. That was an error and which is sought to be corrected.

12. After filing of this Writ Petition, the petitioner has moved a Notice of Motion and has sought a restraint against respondent no.4 Commission from taking any steps in furtherance of the advertisement published on 25th November 2016.

13. In the affidavit-in-support of this Notice of Motion, it is submitted that this Writ Petition has been pending in this Court from 2012. There is an ad-interim order passed in favour of the petitioner. The petitioner came across an advertisement published on 25th November 2016 for the same post of Assistant Municipal Commissioner. Though the matter is subjudice, this advertisement is published. That is how, in terms of this advertisement, the selection process may commence. That should be stayed. Then it is submitted that even in the fresh advertisement, there is same lacuna or defect which the petitioner pointed out in her main pleadings.

14. It is on this material that we have heard the learned counsel appearing for the parties. Mr. Y.S. Jahagirdar, learned Senior Counsel appearing in Writ Petition No.268 of 2013 for the petitioner would submit that there are three contentions which the petitioner has raised in support of the prayers. The first contention is that the Commission could not have relied upon any policy of the Government permitting interchangeability or intertransferability. It is argued that once the post is reserved for a category (a reserved category) then if a suitable candidate is not available to fill in that post, it is not possible in that event to rotate the reservation. If any other candidate, though belonging to the reserved category is accommodated against such a post, that would mean the reservation is transferred or there is an interchangeability. Precisely, such a course was held to be legally flawed. That is why one of the candidates approached this Court by filing a Writ Petition. Relying upon the order passed in that Writ Petition, a copy of which is at **Annexure "G"** (page 35 of the paper book) Mr. Jahagirdar would submit that, eventually, this Writ Petition was allowed by the Aurangabad Bench of this Court. The final judgment is available. The judgment of this Court is that such interchangeability or intertransferability is impermissible in law.

15. The second contention of Mr. Jahagirdar is that there is no authority to assign more than 12.5% marks for the oral interview/viva voce test. Assigning of more than 12.5% marks would vitiate the whole process. If there is a selection and which would entail a composite exercise namely written test and oral interview, then the law of the land is that excessive and arbitrary marks cannot be allowed for the oral interviews. In the present case, the assignment of marks for the oral interview exceeds 12.5%. Therefore, relying upon the judgment of the Hon'ble Supreme Court in the case of ***Ashok Kumar Yadav*** (*supra*), Mr. Jahagirdar would submit that the process is vitiated completely. Post written examination, there were interviews held, and from that stage, the procedure adopted cannot be sustained in law in the light of this authoritative pronouncement in the submission of Mr. Jahagirdar. His next contention is that there is a flaw in the advertisement itself. In that regard, he relied upon paragraph 2.2 and paragraph 5 of the advertisement. Mr. Jahagirdar would submit that the same defect or lacuna continued even in the fresh advertisement.

16. The 4th contention is that there were 4 candidates interviewed and selected. However, they did not take written test. Once the MPSC's action is of this nature, then, there is no sanctity to the selection process. The MPSC cannot act arbitrarily or in an illegal

manner and violate the mandate of Article 14 and 16 of the Constitution of India. Mr. Jahagirdar also made a faint attempt by urging that there has been a tampering, that the petitioner's marks of oral interview have been tampered.

17. For all these reasons, he would submit that the petition must succeed.

18. Mr. Jahagirdar's arguments are controverted by the respondents. They would submit that the petitioner cannot question the whole process after being a participant therein. The petitioner applied for the post, took written examination and also appeared for the viva voce/oral interview. Having not been selected, she has now turned around to question the advertisement. This is not permissible and by the principle of estoppel, the petitioner cannot, after taking her chance, make unfounded allegations of arbitrariness and *mala fides*. There is no substance in the Writ Petition. Then, the argument is that the petitioner sought information under the Right to Information Act. The petitioner was supplied with all the information and as sought. Our attention is invited to the application under the Right to Information Act, a copy of which is at **Annexure "H"**. The petitioner desired to know the final results (written examination marks + oral marks) for the post of Assistant Municipal Commissioner (Ward Officer) of all the female candidates

(unreserved and reserved categories). That information was supplied. She was informed as to how many candidates took examination. The female candidates belonging to the reserved categories and unreserved category are those whose names appeared in a list which is styled as **Annexure "A"** at page 39. The MPSC has also produced the records before this Court which would show as to how the marks have been assigned. It would also show, according to the MPSC, that the process is transparent and has, at no stage, been questioned by any candidate. Ms. Kantharia has produced for our perusal, the list of candidates who have taken the interview. The petitioner's name figures in the same. The remark against her result is that she has failed to secure minimum 41 marks in the interview, hence, she was not recommended. It is argued that the process of selection consists of a written examination and thereafter, if successful therein, an oral interview. It is the total of both, which is taken into consideration and in order to find out whether the candidate has secured the minimum. In the event the candidate fails to obtain marks (41) then, there is no question of such candidates being recommended. Our attention is also invited to the information that was sought under the Right to Information Act and which was supplied. Thus, it is argued by the MPSC that there is no substance in any of the allegations and particularly of arbitrariness and *mala fides*.

19. Mr. Pakale appearing on behalf of the 1st respondent Municipal Corporation has relied upon the judgments of the Hon'ble Supreme Court, particularly, in the case of ***State of Uttar Pradesh vs. Rafiquddin and others***, reported in 1987 (Supp) SCC 401, to submit that the law throughout is that one has to obtain minimum qualifying marks in both, the written examination as well as the oral interview. Once the selection process comprises of a written test as well as *viva voce*, then, the candidate must clear both. It is only when the candidate clears both the tests, that he can qualify.

20. We have also heard Mr. Warunjikar, learned counsel appearing on behalf of the successful candidate, who has not been able to obtain any benefit of the appointment and selection on account of the pendency of these legal proceedings. Mr. Warunjikar would submit that there is no fault of this respondent. Once the petitioner has participated and without any complaint, and has taken her chances, then the Writ Petition does not deserve to be allowed. It should be dismissed.

21. We would first consider the arguments of Mr. Jahagirdar with regard to the alleged tampering in the marks of the petitioner. Mr. Jahagirdar fairly concedes that there is substance in the

objection of Mr. Warunjikar, that there are no pleadings on this point. In the entire Writ Petition, there is no allegation that the marks of the petitioner in the oral interview have been tampered. However, Mr. Jahagirdar states that in the affidavit-in-rejoinder, the petitioner has made a specific allegation about said tampering. Therefore, it is not as if there is no pleading at all.

22. We are unable to accept the contention of Mr. Jahagirdar. In the Writ Petition, the petitioner has made a statement on oath that she noticed the advertisement, placed her application, took a written test was successful and then invited for an oral interview. The petitioner, at page 7 of the petition, states that after the results of the written test were declared, she found that she stood first in the list of DT(A) candidates and 7th in the overall merit list. Surely, the petitioner cannot have any complaint when such is her placement in the merit list. She is therefore, not complaining about any tampering with the marks insofar as the written test is concerned. If there is a tampering in her marks of the oral interview, then, we do not find in her whole petition, any statement that her marks of oral interview have been tampered. On the other hand, what she alleges in the petition is that names of 4 persons were subsequently added after publication of the cut off list. The allegation is that out of these 4 subsequently added candidates, 3 have been duly selected and are

recommended by the respondent for the post from respective categories. As far as this allegation is concerned, we do not find any material in the Writ Petition at all. Far from the presence of these selected candidates, it was incumbent upon the petitioner to aver and substantiate as to how these candidates, who have taken examination, appeared for the oral interview, came to be selected after the merit list was drawn and finalized. These are not the allegations.

23. We find, therefore, much substance in the objection raised by Mr. Pakale and Mr. Warunjikar that the petitioner, after having taken her chance, but not being successful, has turned around to question the whole process. She has chosen to make wild and baseless allegations. It is noticed that often unsuccessful candidates and at such public examinations, initiate litigations after being not selected and in such litigation, they go to the extent of making allegations which are not based on any complaint or accusation which they have raised or leveled prior to the finalization of the process. They do not find fault, a defect or lacuna much less a serious legal infirmity so long as they are successful. It is only after being unsuccessful that such irresponsible challenges are raised.

24. Be that as it may, once we have found from a perusal of the original record that the petitioner was indeed interviewed, the interview was held by the experts, the petitioner could not secure the minimum marks at such interview, then, at her instance, we do not see any reason to interfere in our extraordinary, equitable and discretionary jurisdiction.

25. The only contention which requires an answer is the assignment of marks and as complained. In that regard, what we have noticed is that in the advertisement, the method of selection is elaborated. In paragraph 5, titled as "Selection Process", appears such. Paragraph 5.1 states that there is an objective test and an oral interview and the selection must go through these stages. On 8th January 2012, a written test was to be held at Mumbai center. The information in relation to this examination could be obtained from the website.

26. Paragraph 5.2, which is material for our purpose states that the objective test would be of 200 marks. Its duration is 2 hours. There was to be a negative marking in the ratio of 3:1. As far as the written examination is concerned, a general category candidate had to obtain minimum 35% of marks, whereas, a reserved category candidate had to obtain 30% marks therein. There is a relaxation for

the physically challenged. In that category, minimum 20% marks ought to be obtained. Thereafter, there would be an oral interview of 100 marks, in which minimum 41 marks should be secured.

27. Mr. Jahagirdar has relied upon a judgment of the Hon'ble Supreme Court in the case of "**Ashok Kumar Yadav**" (*supra*). As far as **Ashok Kumar Yadav** is concerned, Haryana Public Service Commission invited applications for appointment to 61 posts in Haryana Civil Service (Executive) and other allied services. The procedure for recruitment was governed by the Rules, details of which are to be found in paragraph 2 of the Supreme Court's judgment. The Rule there required a competitive examination to be held. The results of that examination were to be prepared in accordance with the further Rules. There were certain compulsory subjects and certain optional. The result was that the written examination carried an aggregate of 700 marks for candidates in general and for ex-servicemen it carried an aggregate of 400 marks, while in the case of both, the viva voce carried 200 marks. The Regulation 3 of the Regulations are reproduced and they say that no candidate shall be eligible to appear in the viva voce test unless he/she obtains 45% marks in the aggregate of all subjects including at least 33% marks in each of the language papers in Hindi (in Devnagri Script) and Hindi Essay provided that if at any

examination a sufficient number of candidates do not obtain 45% marks in the aggregate, the Commission, at their discretion, may lower this percentage to not below 40% but for the language papers percentage remaining unchanged.

28. After setting out as to how many candidates applied, took the examination and were interviewed, it is stated that the first 119 candidates alleged in the pleadings that all the 1300 and more candidates who qualified for the viva voce test were invited for the interview. The interviews lasted for almost half a year. Though originally applications were invited for 61 posts, the number of vacancies rose during the time taken up in the written examination and the viva voce test and ultimately 119 posts became available for being filled. 119 candidates were selected and recommended by the Public Service Commission to the State Government. There were some candidates who had obtained very high marks at the written examination but owing to rather poor marks in viva voce test, they could not come within the first 119 candidates. They were consequently not selected. Thus, aggrieved candidates then filed Civil Writ Petition in the High Court of Punjab and Haryana challenging the validity of the selections. They claimed that the marks in viva voce test should be ignored and selections should be made only on the basis of marks obtained by the candidates in

written examination. If that was done, they would be within first 119 to be selected. The other allegations are not material for our purpose. The Writ Petition was heard by the Division Bench of the High Court of Punjab and Haryana and it delivered a judgment on 20th October 1983, allowing it. The Writ Petition also condemned the out of hand practice by the Haryana Public Service Commission of calling all the candidates who obtained more than 45% marks in the written examination and who thus proved themselves eligible for viva voce test. A view taken by the Division Bench was that the number of candidates to be called for interview should not exceed twice or three times the number of vacancies required to be filled up. The Division Bench also observed that the allocation of 200 marks for the viva voce test was arbitrary and excessive, as it introduced a larger amount of subjective discretion in the process of selection which subordinates the objective test or written examination and this constituted denial of equal opportunity in public employment. The Division Bench came to the conclusion that the candidates who have obtained high marks in written examination have been depressed by awarding low marks in the viva voce test and the candidates who have obtained low marks were pulled up by awarding more marks in viva voce test. The entire selection process was vitiated by an "obvious oblique motive" and tainted by nepotism, favouritism, caste considerations and political pressures. It is in such backdrop, the

Hon'ble Supreme Court made the observations which have been heavily relied upon by Mr. Jahagirdar. However, while delivering its judgment in the case of **Ashok Kumar Yadav**, the Hon'ble Supreme Court found that while a written examination assesses candidates' knowledge and intellectual ability, a viva voce test seeks to assess overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. The Hon'ble Supreme then proceeds to hold as under:-

“24. It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others,

adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated, perhaps with some degree of error, by a viva voce test, much depending on the constitution of the interview Board.

25. *Glenn Stahl has pointed out in his book on Public Personnel Administration that the viva voce test does suffer from certain disadvantages such as the difficulty of developing a valid and reliable oral test, the difficulty of securing a reviewable record of an oral test and public suspicion of the oral test as a channel for the exertion of political influence and, as pointed out by this Court in Ajay Hasia' case (AIR 1981 SC 487) (supra), also of other corrupt, nepotistic or extraneous considerations, but despite these acknowledged disadvantages, the viva voce test has been used increasingly in the public personnel testing and has become an important instrument whenever tests of personnel attributes are considered essential. Glenn Stahl proceeds to add that "no satisfactory written tests have yet been devised for measuring such personnel characteristics as initiative, ingenuity and ability to elicit cooperation, many of which are of prime importance. When properly employed, the oral test today deserves a place in the battery used by the technical examiner." There can therefore be no doubt that the viva voce test performs a very useful function in assessing personnel characteristics and traits and in fact, tests the man himself and is therefore regarded*

as an important tool along with the written examination. Now if both written examination and viva voce test are accepted as essential features of proper selection in a given case, the question may arise as to the weight to be attached respectively to them. "In the case of admission to a college for instance", as observed by Chinnappa Reddy, J. in Liladhar's case, (AIR 1981 SC 1777), "where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life, greater weight has perforce to be given to performance in the written examination" and the importance to be attached to the viva voce test in such a case would therefore necessarily be minimal. It was for this reason that in Ajay Haisa's case this Court took the view that the allocation of as high a percentage of marks as 33.3% to the viva voce test was "beyond all reasonable proportion and rendered the selection of the candidates arbitrary". But, as pointed out by Chinnappa Reddy, J., "in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way subject to basic and essential academic and professional requirements being satisfied". There may also be services "to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise" and in case of such services where sound selection must combine academic ability with

personality promise, some weight has to be given to the viva voce test. There cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. It is essentially a matter for determination by experts. The Court does not possess the necessary equipment and it would not be right for the Court to pronounce upon it, unless to use the words of Chinnappa Reddy, J. in Liladhar's case "exaggerated weight has been given with proven or obvious oblique motives."

26. We may now, in the background of this discussion, proceed to consider whether the allocation of as high a percentage of marks as 33.3 per cent in case of ex-service officers and 22.2 per cent in case of other candidates, for the viva voce test renders the selection process arbitrary. So far as ex-service officers are concerned, there can be no doubt that the percentage of marks allocated for the viva voce test in their case is unduly high and it does suffer from the vice of arbitrariness. It has been pointed out by the Division Bench in a fairly elaborate discussion that so far as the present selections in the category of ex-service officers are concerned, the spread of marks in

the viva voce test was inordinately high compared to the spread of marks in the written examination. The minimum marks required to be obtained in the written examination for eligibility for the viva voce test are 180 and as against these minimum 180 marks, the highest marks obtained in the written examination in the category of ex-service officers were 270, the spread of marks in the written examination thus being only 90 marks which works out to a ratio of 22.2 per cent. But when we turn to the marks obtained in the viva voce test, we find that in case of ex-service officers the lowest marks obtained were 20 while the highest marks secured were 171 and the spread of marks in the viva voce test was thus as wide as 151 in a total of 200 marks, which worked out to an inordinately high percentage of 76. The spread of marks in the viva voce test being enormously large compared to the spread of marks in the written examination, the viva voce test tended to become a determining factor in the selection process, because even if a candidate secured the highest marks in the written examination, he could be easily knocked out of the race by awarding him the lowest marks in the viva voce test and correspondingly, a candidate who obtained the lowest marks in the written examination could be raised to the topmost position in the merit list by an inordinately high marking in the viva voce test. It is therefore obvious that the allocation of such a high percentage of marks as 33.3 per cent opens the door wide for arbitrariness, and in order to diminish, if

not eliminate the risk of arbitrariness, this percentage needs to be reduced. But while considering what percentage of marks may legitimately be allocated for the viva voce test without incurring the reproach of arbitrariness it must be remembered that ex-service officers would ordinarily be middle aged persons of mature personality and it would be hard on them at that age to go through a long written examination involving 8 subjects and hence it would not be unfair to require them to go through a shorter written examination in only 5 subjects and submit to a viva voce test carrying a higher percentage of marks than what might be prescribed in case of younger candidates. The personalities of these ex-service officers being fully mature and developed, it would not be difficult to arrive at a fair assessment of their merits on the basis of searching and incisive viva voce test and therefore in their case, the viva voce test may be accorded relatively greater weight. But in any event the marks allocate for the viva voce test cannot be as high as 33.3 per cent.”

29. Once the Hon'ble Supreme Court had before it the allocation or percentage of marks which were not identical in the case of ex-service officers and the other candidates (33.3% in the case of ex-service officers and 22.2% in case of other candidates), it eventually held that there can be no doubt that the percentage of marks allotted for viva voce test in the case of ex-service officers is unduly high and

it does suffer from arbitrariness. The Hon'ble Supreme Court, therefore, eventually agreed with the Division Bench of Punjab and Haryana High Court, as is clear from a reading of paragraph 27. Yet in paragraph 28, the Hon'ble Supreme Court concluded that if the selections are set aside, it will upset large number of appointments already made on the basis of such selection and the integrity and efficiency of the entire administrative machinery would be seriously jeopardised. Therefore, the Hon'ble Supreme Court gave certain directions and which are to be found in paragraph 29.

30. Thus, it is not as if the last word was spoken either in *Liladhar* (*supra*) or *Ashok Kumar Yadav* (*supra*). The decision in the case of **Ashok Kumar Yadav** was considered in several subsequent judgments and all of which have been extensively referred in the recent judgment delivered in the case of **Pradeep Kumar Rai and others vs. Dinesh Kumar Pandey and others**, reported in *(2015) 11 SCC 493*. The Hon'ble Supreme Court found in this batch of Special Leave Petitions that recruitment of candidates in the post of Sub-Inspector had been undertaken by the Government of Uttar Pradesh. There was a direct recruitment and by promotion of Constables and Head Constables. The Government orders were issued and there was complete pattern of the examination and process of selection and promotion. There was a

preliminary written examination and infantry test/physical test, main written examination and then interview. The candidates who qualified preliminary examination and the infantry test/physical test were eligible to appear in the main written examination. The argument was that the unsuccessful candidates complained inter alia with regard to allocation of marks. They found the allocation to be excessive. The Hon'ble Supreme Court, in considering such challenge, came to the conclusion that firstly, there are limits to judicial review. There is a minimal interference by the Court which is warranted only when there are oblique motives or there is miscarriage of justice. The Court reiterated the principle that the challenge to selection process after participating in the interview and declaration of results which may be adverse, is not maintainable once there were no objections raised. The candidates, who were unsuccessful, cannot be permitted to challenge the process after being unsuccessful. They cannot approbate and reprobate. Either they should not have participated in the interview and challenged the procedure or they should have challenged the procedure immediately after the interviews were conducted.

31. Further, in this decision, there is a reference made to earlier judgments of the Hon'ble Supreme Court. In one of the decisions in case of *Director General, Indian Council for*

Agricultural Research and others vs. D. Sundara Raju, 2011(6) SCC 605, the Hon'ble Supreme Court, while taking a review of the earlier judgments, particularly, in the cases of ***Liladhar*** (*supra*) and ***Ashok Kumar Yadav*** (*supra*), came to the conclusion that it is not as if there is a certain percentage which is to be fixed and as an absolute measure for a viva voce test. Everything depend upon the facts and circumstances and in relation to a particular selection process. The Hon'ble Supreme Court found that it is not as if a particular prescription of marks or percentage can be termed as excessive or high. The Supreme Court evolved a test that best talent, and particularly, in relation to higher posts should be available. Interview is an accepted aid to selection and is designed to give the selectors some evidence of the personality and character of the candidates. Once it is taken to be an essential part, then, there is no substance in such complaints which are of general nature. Viva voce can be made a test of the candidate's alertness, intelligence and intellectual outlook. The Hon'ble Supreme Court reproduced certain principles evolved for efficiency of the civil service as an instrument of Government, rather than as a heaven-sent opportunity to find careers for our brilliant students. Thus, some principles would have to be adopted. Thus, it cannot be by applying a formula that one comes to the conclusion that particular percentage of marks can be termed as excessive. As held in the case of ***Inder Prakash Gupta***

vs. State of Jammu & Kashmir, reported in *2004 (6) SCC 786*, for allocation of marks for viva voce test, no hard and fast Rule of universal application which would meet the requirements of all cases can be laid down. The question as to how much marks should be allocated for interview would depend, of course, upon the post and nature of duties to be performed. The nature of duties to be performed of the post of Watchman/Messenger/Attender is not such which requires a high intellectual ability or any particular trait of the candidates which is required to be judged by an expert.

32. Once this is the test evolved by the Hon'ble Supreme Court and in all these judgments, then, we do not see how we can term the present allocation to be excessive and arbitrary. There are total marks which have to be seen and which are now seen while preparing the merit list. Minimum 35% marks have to be obtained in the written examination which is of 200 marks. 100 marks are assigned for oral interview in which 41 marks minimum have to be obtained. The post that was advertised and to be filled in is that of Ward Officer (Assistant Municipal Commissioner). The job of Assistant Municipal Commissioner requires the person to be in contact with the residents, attend to their day to day complaints, handle any situation and which may go out of hand in the best interest of the administration. He would have to perform a balancing

act just as the basic amenities and services ought to be made available to the residents of the locality. Sometimes he would have to take care of a given situation and not allow it to go out of hand. Residents come and complain about lack of clean and hygienic drinking water, cleanliness of surroundings, possibly no or minimal maintenance of sewage and drainage facilities and several such situations. They approach individually or collectively the Ward Officer. Therefore, a candidate who has not only qualified by obtaining the required marks in the written examination, but whose other traits and character can be judged and has been judged in an objective manner at an oral interview has to be selected. None would therefore dispute that this is a responsible post. This is the first Municipal Officer who comes in daily contact with the residents and at the ward level. He has also a team alongwith him which he has to manage. As a part of a team and sometimes performing the role of a leader, he would have to solve the problems of the residents. He would have to maintain the image and reputation of the Municipal Corporation and its administration as well. Once it is he, who is looked at by his superiors for communicating with the public, then, it goes without saying that at an interview, these abilities have to be tested. A candidate cannot be selected merely because he is successful in the written examination. He also has to qualify in the viva voce test. Once his personality is judged and in an overall

manner at such an interview, then assignment of 41% marks out of 100 cannot be termed as excessive and arbitrary. We have found that there are indeed candidates in the present selection process who have attained these marks. Therefore, merely because the petitioner was unable to attain them does not mean that the allocation is excessive and arbitrary. Once again going by the recent pronouncement of the Supreme Court, the petitioner has not challenged this allocation at any time on noticing the advertisement. The petitioner applied for the post by filling up the form. The petitioner took written examination and also appeared for the oral interview. After being unsuccessful, that she turns around and terms the allocation of marks in the viva voce as unduly high or excessive and arbitrary.

33. On both counts, as noted above, we have not found any merit in her contention and in her complaint. The contentions of learned Senior Counsel, therefore, on this point, cannot be accepted.

34. Once we have cleared this ground, then, at the instance of a candidate like the petitioner, we need not examine the issue of interchangeability. The petitioner could have complained about interchangeability or intertransferability and the Rule in that behalf as appearing in the advertisement or the legality and validity of a

Government policy, only if she was successful in obtaining minimum marks in the oral interview. She having failed to attain that, at her instance, we do not think that we should examine this question. It can be left for consideration and decision in a more appropriate case.

35. We have also found no substance in the petitioner's grievance that there is tampering with the marks. The petitioner applied under the provisions of the Right To Information Act and sought details of marks obtained and the mark list in relation to all the candidates. The said information was duly supplied to the petitioner. That, and the original records produced for our perusal, reveal as to how the marks have been allotted to the petitioner. We have not found any overwriting or tampering at all. Far from that, we have also not found that the candidates who have not been successful in the written test have been pushed in by back door method or selected. Once there are no pleadings, no particulars, then such bald allegations need not be probed further.

36. As a result of the above, the Writ Petition is devoid of any merit. Rule discharged. There will be no order as to costs.

37. In the view that we have taken, it is not necessary to take note of the contentions of Mr. Jahagirdar in relation to the validity

and legality of any clause or paragraph of the subsequent advertisement dated 25th November 2016. We also do not take any note of the complaint of Mr. Warunjikar that it is the petitioner and this litigation which has deprived the successful candidate from being appointed. It is for the MPSC and the competent authority to take note of this grievance and reach such decision as is permissible in law or under the Rules.

Writ Petition No. 345 of 2013

38. Since it is conceded that Writ Petition No. 268 of 2013 and Writ Petition No.345 of 2013 involve same challenge, even Writ Petition No. 345 of 2013 fails and for the reasons assigned above, Rule therein is also discharged but without costs.

Writ Petition No. 6781 of 2012

39. Mr. Deshpande submits that Writ Petition No 6781 of 2012 also raises an identical challenge. For the reasons that have been set out while disposing of Writ Petition Nos. 268 of 2013, this Writ Petition also fails and is dismissed. Rule is discharged with no order as to costs.

Writ Petition No. 6987 of 2012

40. It is conceded by Mr. Pitale appearing for the petitioner in Writ Petition No. 6987 of 2012 that the grievance in this Writ

Petition is also identical. For the reasons that have been assigned in the above judgment, even this Writ Petition fails. Rule discharged with no order as to costs.

Writ Petition No. 11028 of 2013

41. This Writ Petition is filed by MPSC against an order passed by the Chief Information Commissioner, Maharashtra State dated 22nd February 2013. The order is passed in Appeal No. 783 of 2013 and in Complaint No.1608 of 2012. It is only the last paragraph and the directions therein which are impugned in this Writ Petition.

42. The Chief Information Commissioner, Maharashtra State, in the final paragraph, has directed that the Municipal Commissioner should provide information in relation to the decisions taken by him insofar as the examination and by also disclosing the basis for such decision. Information in relation to these aspects should be provided is the direction. Mr. Shinde appearing for the petitioners in this Petition would submit that the Municipal Commissioner understands this direction to mean disclosing the names of the examiners and the interviewing committee and other details, to the petitioner. We do not see how one can read this paragraph and in the manner suggested by Mr. Shinde. He would further submit that if the said details are provided, that would disclose the identity of the

examiners, and therefore, the whole sanctity and purity of the process would be hampered. Once the candidate, and much less the unsuccessful one, obtains such details including names of the panelists, he would start making baseless and false allegations and question the process as a whole. That is why there is a risk in disclosing such information. In larger public interest, according to Mr. Shinde, the identity of the examiners and panelists should be withheld. We are unable to agree with him for more than one reason. In the facts and circumstances of the present case, the unsuccessful candidate sought details of the marks for written examination and the oral interviews. Secondly, that candidate wanted information as to how the merit list is prepared and where, in order of merit, her name appears in the list. The information sought was as to how many marks have been assigned to the female candidates and particularly of the reserved category in the written and the oral test. Such an application does not seek any details which are personal about the examiners or the interview panelists. The candidate does not wish to seek their identity. The candidate who has taken the public service examination is more concerned and anxious about her or his performance and while questioning the outcome, desires certain information. Merely because such information is sought and in the present case, we do not see how the direction of the Chief Information Commissioner can be read as amounting to disclosing

the identity of the members of the interview committee. There is, therefore, no substance in the Writ Petition

43. On this point, the judgment passed by the Hon'ble Supreme Court in the case of ***Chief Information Commissioner and another vs. State of Manipur and another***, reported in ***AIR 2012 SC 864*** is relevant. It deals with the issue as to how the right to information is inherent and implicit in Article 19(1)(a) of the Constitution of India. Recognition of that right comes in the form of the statute. The statute rather provides that information has to be disclosed. It sets out a complete mechanism for that purpose. The right does not flow from the statute but from the Constitution itself. It is somewhat regulated and in tune with the reasonable restrictions placed in the Constitution itself on such a right.

44. In the second judgment in the case of ***The Institute of Chartered Accountants of India vs. Shaunak H. Satya and others***, reported in ***AIR 2011 SC 3336*** a similar argument as is canvassed before us was canvassed before the Hon'ble Supreme Court by institution of the chartered accountants of India. In the said decision, the two Judge Bench of the Hon'ble Supreme Court had this to observe:

“19. Among the ten categories of information which are exempted from disclosure under section 8 of RTI Act, six

categories, which are described in clauses (a), (b), (c), (f), (g) and (h) carry absolute exemption. Information enumerated in clauses (d), (e) and (j) on the other hand get only conditional exemption, that is the exemption is subject to the overriding power of the competent authority under the RTI Act in larger public interest, to direct disclosure of such information. The information referred to in clause (i) relates to an exemption for a specific period, with an obligation to make the said information public after such period. The information relating to intellectual property and the information available to persons in their fiduciary relationship, referred to in clauses (d) and (e) of section 8(1) do not enjoy absolute exemption. Though exempted, if the competent authority under the Act is satisfied that larger public interest warrants disclosure of such information, such information will have to be disclosed. It is needless to say that the competent authority will have to record reasons for holding that an exempted information should be disclosed in larger public interest.

.....

25. Public authorities should realize that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency. Attaining transparency no doubt would involve additional work with reference to maintaining records and furnishing information. Parliament has enacted the RTI Act providing access to information, after great debate and deliberations by the Civil Society and the Parliament. In its wisdom, the Parliament has chosen to exempt only certain categories of information from disclosure and certain organizations from the applicability of the Act. Additional workload is not a defence.

26. We, however, agree that it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under section 4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption. The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities and Government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.”

45. Pertinently, the Hon'ble Supreme Court emphasizes that examining body like the Institute of Chartered Accountant of India should change their old mindsets and tune them to the new regime of disclosure of maximum information. Public authorities should realise that in an era of transparency, previous practice of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency. Attaining transparency no doubt would involve additional work with reference to maintaining records and furnishing information. The Parliament has enacted the Right to Information Act providing access to information, after much debate and deliberations by the Civil Society and the Parliament. In its wisdom, the parliament has chosen to exempt only certain categories of information from disclosure and certain organizations from the applicability of the Act. As the examining bodies have not been exempted, and as the examination process of the examining bodies has not been exempted, the examining bodies will have to gear themselves to comply with the provisions of the Right to Information Act. Additional work load is not a defence. If there are practical insurmountable difficulties, it is open to the examining bodies to bring them to the notice of the Government for consideration so that any changes to the Act can be deliberated upon.

46. We do not think that we can add anything better and more. We only say that in the present case, none of the exemptions, as carved out by the Act, could have been invoked by the MPSC. The Writ Petition fails and the same is dismissed, however without any costs. We caution the MPSC that hereafter, such petitions would invite heavy costs and to be paid personally by the person in-charge of such Commission.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)