

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7565 OF 2008

WITH

CIVIL APPLCIATION NO. 11784 OF 2016

CIVIL APPLICATION NO. 15409 OF 2016

CIVIL APPLICATION NO. 15416 OF 2016

Maruti S/o. Chandoji Gaikwad,
Age: 38 Years, Occu.: Nil,
R/o.: Hadoli (J), Taluka: Loha,
District: Nanded

.. **Petitioner**

Versus

1. The State of Maharashtra,
Through its Secretary,
Rural Development Department,
M. S., Mantralaya, Mumbai – 32.
2. The Chief Executive Officer,
Zilla Parishad, Nanded.
3. The Member-Secretary &
District Animal Husbandry Officer,
Zilla Parishad, Nanded.
District Selection Committee, Nanded.
4. Ravindra S/o. Sheshrao Patil,
Age: 36 Years, Occu.: Service,
R/o.: C/o. Zilla Pashu Sanvardhan
Adhikari, Zilla Parishad, Nanded,
District: Nanded.

5. Balaji S/o. Waman Mendhewad,
Age: 34 Years, Occu.: Service,
R/o.: C/o.: zilla Pashu Sanvardhan
Adhikari, Zilla parishad, Nanded,
District: Nanded.
6. Anil S/o. Ramrao Thete,
Age: 37 Years, Occu.: Service,
R/o.: C/o.: Zilla Pashu Sanvardhan
Adhikari, Zilla Parishad, Nanded,
District: Nanded.
7. Shankar Mohanrao Tamlurkar,
Age: 35 Years, Occu.: Service,
R/o.: C/o.: Zilla Pashu Sanvardhan
Adhikari, Zilla Parishad, Nanded,
District: Nanded.
8. Pujerwad Laxman Poshti,
Age: Major, Occu.: Service,
R/o.: Ambedkar Nagar Ratnali,
Tal.: Dharmabad, Dist.: Nnaded.
9. Mohite Ramesh Bhagwat,
Age: Major, Occu.: Service,
R/o.: Sapthpeth Sangola Road Pandharpur,
Tal.: Pandharpur, Dist.: Solapur,
10. Gavli Tanagi Shinkar,
Age: Major, Occu.: Service,
R/o.: Kudli Post vajar,
Tal.: Deglur, Dist.: Nanded.
11. Budhewar Vandana Gangaram,
Age: Major, Occu.: Service,
R/o.: Jarikot, Tal.: dharmabad,
Dist.: Nanded.

12. Uthalwad Mina Shivaji,
Age: Major, Occu.: Service,
Himayat Nagar, Dist.: Nanded.
13. Bhise Sunita Tulsiram,
Age: Major, Occu.: Service,
Tal.: Bhokar, Dist.: Nanded.
14. Jadhav Dipak Gangadhar,
Age: Major, Occu.: Service,
Ambedkar Nagar, Biloli,
Tal.: Biloli, Nanded.
15. Jadhav Kailas Namdev,
Age: Major, Occu.: Service,
R/o.: Gondwad Gunge,
Tal.: Pathri, Dist.: Parbhani.
16. Kamble Praneeta Nivratti,
Age: Major, Occu.: Service,
R/o.: Borgaon Post Bhoker,
Tal.: Bhoker, Dist.: Nanded.
17. Tambare Vitthal Bhimrao,
Age: Major, Occu.: Service,
R/o.: At. Post. Nandgaon,
Tal.: Kinwat, Dist.: Nanded.
18. Ukey Jagdish Vasantrao,
Age: Major, Occu.: Service,
R/o.: Nalkhed (K), Tal.: Neir,
Dist.: Yewatmal.
19. Mawaskar Poorna Batu,
Age: Major, Occu.: Service,
R/o.: Sutarda, Tal.: Gharni,
Dist.: Amrawati.

20. Tenalwar Shivprasad Suryakant,
Age: Major, Occu.: Service,
R/o.: Old Sarafa, Degloor,
Tal.: Degloor, Dist.: Nanded.
21. Ghute Prabhakar Madhukar,
Age: Major, Occu.: Service,
R/o.: Sulaj, Tq.: Jalgaon,
Dist.: Buldhana.
22. Petkule Vijay Pandurang,
Age: Major, Occu.: Service,
R/o.: Ghoti, Tal.: Kinwat,
Dist.: Nanded.
23. Choudhary Gopal Vinodrao,
Age: Major, Occu.: Service,
R/o.: Mahur, Tal.: Mahur,
Dist.: Nanded.
24. Vibhute Vijay Nagorao,
Age: Major, Occu.: Service,
R/o.: Deogaon (Naygaon Bo.),
Tal.: Naygaon, Dist.: Nanded.
25. Krale Gajanan Dayaramji,
Age: Major, Occu.: Service,
R/o.: Knzara, Tal.: Manglur pir,
Dist.: Washim.
26. Chilkewar Sandeep Pandurang,
Age: Major, Occu.: Service,
R/o.: Angankhed, Tal.: Aani,
Dist.: Yewatmal.
27. Babilwad Ravikiran Gangadhar,
Age: Major, Occu.: Service,
R/o.: Gandhewar Colony, Bhokar,
Tal.: Bhokar, Dist.: Nanded.

28. Chavan Rahul Kundlik,
Age: Major, Occ.: Service,
R/o.: Bhausar Chouk, Taroda Naka,
Nanded, Dist.: Nanded.

.. **Respondents**

Shri P. S. Anerao, Advocate for the Petitioner.

Shri S. N. Morampalle, A. G. P. for Respondent No. 1.

Smt. Yogita M. Kshirsagar, Advocate for Respondent Nos. 2 & 3.

Shri U. B. Bilolikar, Advocate for Respondent Nos. 4 to 12 and 19 to 28.

Respondent Nos. 13 to 18 served.

CORAM : **R. D. DHANUKA &**
SUNIL K. KOTWAL, JJ.

DATE : **4th September, 2017**

ORAL ORDER (*PER: R. D. DHANUKA, J.*):

1. By this petition filed under Article 226 of the Constitution of India, the petitioner prays for a writ of Certiorari *inter alia* praying for quashing and setting aside the selection list of the post of Livestock Supervisor pursuant to an advertisement dated 4th May, 2007 and also seeks order and direction to the respondents to select the petitioner on the post of Livestock Supervisor by applying the criteria prescribed under Clause No. 22 of the advertisement dated 4th May, 2007 published by the Zilla Parishad in daily Lokpatra.

2. The petitioner further seeks a declaration that the Government Resolution dated 18th May, 2007 shall have no application to the post advertised prior to 18th May, 2007 issued

by the Deputy Secretary to Government, Rural Development and Water Conservation Department. The petitioner seeks an order and direction against respondent Nos. 1 to 3 to appoint the petitioner as Livestock Supervisor as against future vacancies, pending hearing and final disposal of this writ petition. Some of the relevant facts are as under.

3. Pursuant to the advertisement dated 4th May, 2007 issued by Zilla Parishad for appointment of the suitable candidates for 25 posts from various categories, the petitioner applied for the post of Livestock Supervisor. According to the petitioner, out of 25 posts, 12 to 13 posts were required to be filled in from open category, whereas 12 to 13 posts were to be filled in from reserved category. The petitioner belongs to the open category. He possesses the qualification of Bachelor of Arts (B.A.), Diploma in Dairy Farm Management and Animal Husbandry (D.D.F.M. & A.H.). The petitioner has worked for two years in Balaji Dudh Utpadak Co-operative Society Maryadit, Hadoli. The petitioner had also worked for three years as part time worker under the scheme floated by the State Government under its Resolution dated 19th March, 1998.

4. It is the case of the petitioner that the District Selection Committee directed him to remain present before the committee on 19th March, 2008. He accordingly appeared before the said committee. The petitioner however was not considered for

appointment on the said post. The petitioner accordingly filed this writ petition *inter alia* praying for various reliefs. The learned counsel for the petitioner invited our attention to the advertisement issued by the Zilla Parishad, and various degree certificates obtained by the petitioner and also the other annexures to the petition.

5. It is submitted by the learned counsel that out of 25 posts advertised by the Zilla Parishad, 50% of the posts were required to be filled in by appointing candidates from open category. The Zilla Parishad, however, has appointed only ten candidates from the open category. He submits that if the the Zilla Parishad would have reserved 50% posts for the candidates from open category, the petitioner would have been selected on one of the said posts.

6. The learned counsel for the petitioner invited our attention to the chart annexed at Exhibit "J" collectively of the petition. He submits that according to the said chart, the Zilla Parishad had appointed various candidates from open category. The learned counsel submits that the petitioner was also entitled to the benefit of five additional marks under the Government Resolution dated 19th March, 1998 in view of the fact that the petitioner had worked for three years as part time worker under the scheme floated by the Government under the said Resolution. He submits that the total marks obtained by the petitioner were

48.5 marks comprising of 5.5 marks in interview and 43 marks in written test. He submits that if the benefit of five marks under the said Government Resolution dated 19th March, 1998 would have been given to the petitioner, the petitioner would have been at serial No. 4 in the list of open category candidates appointed by Zilla Parishad.

7. It is submitted by the learned counsel for the petitioner that he made various representations to the Zilla Parishad seeking justice. The representations of the petitioner however came to be rejected.

8. By our order dated 22nd August, 2017 which was passed after hearing the learned counsel for the parties, in view of the statement made by the learned counsel for respondent No. 7 that there were two posts lying vacant on which either petitioner or the respondent No. 7 could be accommodated, this Court indicated that this court has proposed to set aside the appointment of one of the candidates who have secured the lowest marks in open category and accordingly granted time to the learned counsel for Zilla Parishad to take instructions to find out whether there were any other additional posts on which the respondent No. 7 could be accommodated.

9. Pursuant to the said order passed by this Court, the learned counsel for Zilla Parishad submits a letter addressed by

the Zilla Parishad to the learned counsel for Zilla Parishad. She submits that though there is one post reserved for open category, she has no instructions to make any statement before this Court whether one of the respondents who may be displaced by the order proposed to be passed by this Court can be appointed by Zilla Parishad in the vacant post or not.

10. We have, therefore, heard the learned counsel for parties in detail today on various issues.

11. In so far as the case of Zilla Parishad is concerned, our attention is invited to the affidavit in reply filed by the Zilla Parishad in this writ petition dated 9th July, 2009. Learned counsel for Zilla Parishad submits that the petitioner had submitted his form under project affected category. She submits that in the list of project affected persons category, the petitioner did not get the highest number of marks. The petitioner was accordingly not appointed on the said post. It is submitted that the respondent No. 4 had secured highest marks and thus was selected from the project affected category.

12. It is submitted by the learned counsel that the petitioner and the respondent Nos. 5 and 7 are considered by the Selection Committee for selection from purely open category and since the respondent Nos. 5 to 7 admittedly secured more marks in the written test and viva-voce test than that of the petitioner, the

respondent Nos. 5 and 7 came to be selected by the selection committee from open category.

13. Learned counsel for the Zilla Parishad submits that in any event since the petitioner had participated in the interview before the selection committee, the petitioner cannot challenge the selection process in this writ petition filed under Article 226 of the Constitution of India. In support of this submission, learned counsel for the Zilla Parishad placed reliance on an unreported judgment of the Supreme Court delivered on 6th April, 2017 in case of Deepa E. V. Vs. Union of Inida and others in Civil Appeal No. 3609 of 2017 and in particular paragraphs 6 to 10. Learned counsel for Zilla Parishad also placed reliance on the judgment of Supreme Court in case of Madra Institute of Development Studies & another Vs. K. Sivasubramaniyan and others 2015 AIR(SC) 3643 and in particular paragraphs 5 to 21 in respect of this submission. It is submitted by the learned counsel that in any event since the petitioner had applied under project affected category, he could not have been even otherwise considered from the open category.

14. In so far as appointment of respondent No. 7 is concerned, learned counsel for Zilla Parishad submits that, even if, this Court sets aside the appointment of respondent No. 7, he or any other candidate cannot be appointed in the post reserved for any other category.

15. Learned counsel for respondent Nos. 4 to 12 and 19 to 28 submits that his clients were rightly appointed to various posts based on the marks secured by his clients and also on merit. He submits that in any event if it is held that the petitioner was entitled to five additional marks in view of the Government Resolution dated 19th March, 1998, the appointment of his clients who are in the employment for last more than ten years shall not be displaced by this Court. He submits that there is a post admittedly available with the respondent Nos. 2 and 3 for Nomadic Tribe. In his alternate submission, he submits that either the petitioner or one of the respondents who is likely to be displaced by this order can be accommodated on one of the said posts.

16. Learned counsel for the respondent Nos. 4 to 12 and 19 to 28 submits that if the petitioner is to be appointed in the open category, in that event the respondent No. 7 who had applied under the OBC category and had secured 51 marks out of 100 was considered in the open category by the Zilla Parishad, his appointment may be considered in the OBC category and confirmed at serial No. 1. He submits that in that event respondent No. 24 Mr. Vibhute Vijay Nagorao who had secured the lowest marks in the OBC category will have to be displaced.

17. Learned counsel tenders a copy of the statement obtained under the provisions of Right to Information Act from Zilla

Parishad and submits that there is no one post admittedly vacant for Nomadic Tribe. He submits that since the Zilla Parishad had appointed the respondent No. 24 considering his merit and if this Court comes to the conclusion that he was wrongly appointed by the Zilla Parishad, Zilla Parishad shall be directed to appoint respondent No. 24 in the said one post reserved for Nomadic Tribe which can be filled in by appointing the respondent No. 24 who belongs to OBC. He lastly submits that if this Court directs the Zilla Parishad to appoint the respondent No. 24 to the said post reserved for Nomadic Tribe, his client will not claim the deemed date of the original date of appointment and such appointment can be considered as fresh appointment.

18. Learned counsel for Zilla Parishad submits that in so far as the said one reserve post is for Nomadic Tribe is concerned, the said post can be filled in at the discretion of the selection committee. She submits that she has no instructions to make any statement before this Court whether respondent No. 7 or respondent No. 24 can be appointed to the said post. The learned officer who is instructing the learned counsel for Zilla Parishad is not in a position to make any such statement before this Court.

19. Learned counsel for the petitioner in rejoinder submits that the case of the petitioner was not considered by the Zilla Parishad as project affected person but was considered in the

open category. In support of this submission learned counsel invited our attention to various averments made by the Zilla Parishad in its affidavit-in-reply. He submits that the petitioner is not responsible for the respondent Nos. 2 and 3 illegally appointing some of the respondents to various posts by rejecting the appointment of the petitioner in the open category.

20. It is submitted by the learned counsel that if this Court directs the Zilla Parishad to appoint the petitioner from the date on which the petitioner ought to have been appointed pursuant to the said advertisement as prayed in the writ petition, petitioner be granted the deemed date of appointment with continuity of service and in that event his client will not claim any backwages.

21. A perusal of the record indicates that the Zilla Parishad had invited applications for filling 25 posts. According to Zilla Parishad out of 25, 10 posts were reserved for candidates from open category. The petitioner belongs to open category and had applied under the said category.

22. A perusal of the affidavit-in-reply filed by the Zilla Parishad before this Court dated 9th July, 2009 clearly indicates that the case of the petitioner was considered by the Zilla Parishad in open category. It is not in dispute that though the petitioner had worked on part time basis for a period of three

years and was entitled to be granted five additional marks under the Government Resolution dated 19th March, 1998, the same was not considered while considering the application of the petitioner for appointment on the said post in open category.

23. A perusal of the affidavit-in-reply filed by the respondent Nos. 2 and 3 indicates that in paragraph 4 of the affidavit, the Zilla Parishad has admitted that the selection committee did not give the additional marks to the petitioner. The Zilla Parishad however has contended that even if the said additional five marks are given to the petitioner in written test in that situation also the respondent Nos. 4 to 7 would be higher on merit than that of the petitioner. In our view this stand of the Zilla Parishad is factually incorrect. A perusal of the list of marks on record clearly indicates that the petitioner had obtained 5.5 marks in interview and 43 marks in written test. If five marks based on the said Government Resolution dated 19th March, 1998 are considered, the total marks of the petitioner would be 53.5. In that event the petitioner would be at serial No. 4 in the list of open category candidates and was eligible to be appointed to one of the post in open category.

24. In so far as submission of learned counsel for Zilla Parishad that the petitioner would be entitled to only 5% of the remaining 25 marks i.e. 1.5 marks and if this is considered the petitioner would be still lower in the list of selected candidates is

concerned, in our view this submission of the learned counsel for Zilla Parishad is contrary to the said Government Resolution dated 19th March, 1998. A perusal of the affidavit-in-reply filed by the Zilla Parishad further indicates that it is an admitted position that the petitioner was not given five marks as per Government Resolution dated 19th March, 1998 and more particularly in paragraph 4 of the said affidavit-in-reply. We are thus not inclined to accept this submission of the learned counsel for the Zilla Parishad across the bar which is contrary to the stand taken by the Zilla Parishad in affidavit-in-reply.

25. It is thus clear that the petitioner who ought to have been appointed as an open category candidate has wrongly not been appointed by the Zilla Parishad.

26. The question that however arises is that if the petitioner is placed at serial No. 4 in the open category of candidate the respondent No. 7 who has secured 51 marks which would be the lowest marks in the open category will have to be displaced.

27. Learned counsel for respondent Nos. 4 to 12, 19 to 28 however rightly invited our attention to the fact that when the Zilla Parishad considered the appointment of respondent No. 7 with 51 marks though he had secured highest number of marks in the OBC category, his case was considered in the open category since he was able to compete with the other candidates

in the open category. He submits that if this Court come to the conclusion that the petitioner is required to be placed in the list of open category candidates his client could not be made to suffer because of his appointment in the open category candidate though he had secured highest marks in OBC category. He submits that in that event, he will be at serial No. 1 in the list of OBC and his appointment in that category be approved. The learned counsel fairly pointed out that in that event, the respondent No. 24 who is placed at serial No. 6 of the list of OBC candidates who had secured 37.8 marks which were the lowest marks in that category may be displaced by this Court.

28. Learned counsel however at the same time prays before this Court that since the Zilla Parishad is responsible for such appointments contrary to law, and since the Zilla Parishad was actually responsible by not appointing the petitioner on merits at the relevant time and his clients have completed more than 10 year in service, this Court shall direct Zilla Parishad to appoint respondent No. 24 in one of the post reserved for Nomadic Tribe which is permissible in law. He states that in that event, his client will not claim the deemed date of his original appointment but can be considered as fresh appointment in these circumstances. Statement is accepted.

29. In our view the Zilla Parishad was totally responsible in refusing to appoint the petitioner in the open category illegally,

by admittedly not giving benefit of five additional marks under the said Government Resolution dated 19th March, 1998. If the Zilla Parishad would have given the benefit of these five additional marks to the petitioner under the said Government Resolution, the Zilla Parishad would have appointed the petitioner on merit and at serial No. 4 in the list of open category. In our view at the same time, respondent No. 7 who had secured highest marks in OBC category can not suffer because of his appointment in open category by the Zilla Parishad.

30. In our view since the Zilla Parishad is responsible for appointing respondent No. 7 who had applied under the OBC category by appointing him in the open category in view of the respondent No. 7 at that point of time competing with the other candidates in the open category and had illegally refused to appoint the petitioner in one of the posts earmarked for open category, the respondent No. 24 is likely to be affected by this order. In our view the request of the learned counsel for respondent No. 24 to direct the Zilla Parishad in these circumstances to appoint him to the said post reserved for Nomadic Tribe which appointment is at the discretion of the selection committee deserves to be accepted. We are, however, not inclined to grant any benefit of deemed date to the respondent No. 24 as the date of his initial appointment made by the Zilla Parishad. At the same time we are also not inclined to

award any backwages to the petitioner. At this stage learned counsel for the petitioner has fairly stated that his client does not press the relief of backwages if he is given the deemed date of the date of initial appointment. Statement is accepted.

31. We therefore pass the following order:

ORDER

(I) The Zilla Parishad is directed to appoint the petitioner to the post of Livestock Supervisor with effect from the date of appointment given to the other candidates appointed in the open category with continuity of service. It is however made clear that the Zilla Parishad will not be liable to make any payment of backwages to the petitioner.

(II) The appointment of respondent No. 7 shall be considered as appointment made in the category of Other Backward Class (OBC) candidates from the date of his appointment in the open category.

(III) The Zilla Parishad is directed to appoint the respondent No. 24 to the post reserved for Nomadic Tribe as described in communication dated 1st September, 2017 by Zilla Parishad to the learned counsel for Zilla Parishad and also reflected in the communication dated 24th April, 2017 addressed by the Zilla

Parishad to the petitioner under the provisions of Right to Information Act, produced on record by the learned counsel for respondent Nos. 4 to 12 and 19 to 28 within four weeks from today.

(IV) It is, however, made clear that the appointment of the respondent No. 24 to the said post shall be treated as fresh appointment and he will not be entitled to the deemed date of appointment which was the deemed date of his initial appointment.

(V) The Zilla Parishad shall act on the authenticated copy of this order.

(VI) Writ petition is disposed of in aforesaid terms. Rule is made absolute in aforesaid terms. There shall be no order as to costs.

(VII) In view of disposal of this writ petition, civil application Nos. 11784 of 2016, 15409 of 2016 and 15416 of 2016 are also disposed of.

[SUNIL K. KOTWAL, J.]

[R. D. DHANUKA, J.]

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