

DDR

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11970 OF 2017

Vinod Dadasaheb Dhore & anr. ..Petitioners

Vs.

The Secretary Maharashtra Public
Service Commission, Mumbai & ors. ..Respondents.

.....
Mr. Rajiv Chavan, Senior Advocate along with Ms. Priyanka Chavan i/by Ms. Aarti A. Patil, Advocate for the petitioner in W.P.No.11970/17.

Mr. A.B. Vagyani – G.P. along with Mr. O.M. Kulkarni, AAGP for the State/respondent Nos. 2 to 4.

Mr. Gunratan Sadavarte along with Ms. Jayshree Patil, Advocate for respondent Nos. 5 to 41.

Mr. Nitin P. Dalvi, Advocate for respondent No.1/M.P.S.C.

.....

**CORAM : SMT. V.K. TAHILRAMANI ACTING C.J.
AND M.S.KARNIK, J.**

RESERVED ON : 5th DECEMBER, 2017.

PRONOUNCED ON : 20th DECEMBER, 2017.

ORDER (PER : M.S. KARNIK, J.) :-

Rule. Rule heard forthwith by consent of parties.

2. By this petition filed under Article 226 and 227 of the Constitution of India, the challenge of the petitioners is to an order dated 2nd November, 2017 passed by the Maharashtra Administrative Tribunal (hereinafter referred to as “the Tribunal” for short) in O.A.No.524 of 2016 with O.A.No.841 of 2017.

3. The petitioners filed O.A.No.841 of 2017 before the Tribunal. The petitioners are working on the post of Police Constables in the Police Force of the Government of Maharashtra. The respondent No.1 - The Maharashtra Public Service Commission (“MPSC” for short) conducts the “Limited Competitive Departmental Examination” (hereinafter referred to as “the said examination”) for the post of Police Sub-Inspector. Through the channel of the said examination the petitioners are seeking entry in the higher post i.e. Police Sub-Inspector.

Having applied pursuant to the advertisement and upon passing the written examination, the petitioners are included in the select list of the Open merit category candidates. The grievance of the petitioners is that the select list also includes those candidates (viz. respondent Nos. 5 to 41) who have availed concession in payment of examination fees and also applied with the claim that their names would be considered only in the category or seats reserved for concerned reserved class of citizens and not Open merit category. It is the contention of the petitioners that the respondent Nos. 5 to 41 had applied for the seats reserved for the class of citizens to which they belong and that they have availed concession in payment of examination fees. They had declared that they intended to be considered only against reserved seats. They also had knowledge of MPSC's standing orders and uniform policy/practice which is duly notified that they cannot be considered for appointment on open merit competition category. The prayer of the petitioners in O.A., therefore, is that the respondent Nos.5 to 41 be de-listed from Open merit category and should be listed in the category meant

for reservation of class of citizens to which they belong.

4. The Tribunal by the impugned judgment and order was pleased to dismiss the original application.

5. Learned Senior Counsel Shri Rajiv Chavan appearing for the petitioners assailing the order of the Tribunal, invited our attention to the policy of the MPSC in respect of the consideration of Backward Class candidates availing concession for migration to the Open merit category post. Learned Senior Counsel further invited our attention to the communication dated 13th August, 2013 whereby the UPSC had informed the respondent No.1- MPSC that a reserved category of candidate who avails the concession or relaxation in age, fee or any eligibility criteria is not recommended against a general category post. He also invited our attention to the Minutes of the Meeting of the 16th National Conference of Chairpersons of State Public Service Commissions wherein it was explained that if a reserved category candidate avails any relaxation of age, number of

attempts, etc., he may be considered only for the reserved post. The Minutes further go to record that if the reserved category candidate, who has not availed of any relaxation and also qualifies as per general eligibility, in that case only he is considered for the Open merit category post as meritorious reserved category candidate.

6. Learned Senior Counsel also invited our attention to the standing order dated 14th July, 2014 issued by the MPSC thereby pointing out that it is clearly mentioned that those reserved category candidates who have availed concession or relaxation in respect of the age, examination fee or qualifications prescribed, such candidates cannot be considered for the Open category post as meritorious reserved candidates. He also invited our attention to the portion in the standing order which provides that in all examinations held after 14th July, 2014, if the reserved category candidate has availed of the concession of age relaxation or examination fee or any other concession regarding eligibility criteria, such candidates will not

be considered as against the Open merit category post.

7. Learned Senior Counsel placed much emphasis on the Rules called as Maharashtra Public Service Commission (Rules of Procedure) 2014 (hereinafter referred to as “the Rules of 2014”). He contends that the MPSC made the said rules in exercise of the functions as stipulated in Article 320 of the Constitution of India and the said Rules of 2014 have been adopted to regulate the internal procedure of work of MPSC. The material portion of sub-rule 3 of Rule 4 reads thus :-

“4(3). Any case in which a decision is required to be taken regarding framing of Schemes for holding a Competitive Examination for Recruitment or Departmental Examinations or their modification.”

8. Our attention is also invited to Rule 18 of the said Rules which reads thus :-

“18. Matters not regulated. - In dealing with the matters for which no provision is made in these Rules, the Commission may regulate the proceeding in such a manner as they deem fit.”

9. The proclamation issued by the MPSC dated 19th and 25th September, 2014 reiterated this position.

10. The respondents-State of Maharashtra by Government Resolution dated 27th June, 2016 initiated the process for appointment of Police Sub-Inspectors/Police Constables/Police Naik through the Limited Departmental Competitive Examination-2016. Clause 7.10 and 9 of the said Government Resolution are relevant in the submission of the learned Senior Counsel. Relying on the said clauses learned Senior Counsel reiterated his submissions and contended that even this Government Resolution supports his contentions. According to him, the general guidelines dated 17th May, 2013 issued by the MPSC specifically clause 3.11.4 reiterates this position. Learned Senior Counsel also relied upon the clauses 5.1.4 and 5.1.8 in support of his contentions.

11. In the submission of the learned Senior Counsel, even the information obtained from the MPSC under the Right to Information Act in respect of the said exams clearly mentions

that in respect of those candidates who comply with all the conditions mentioned in the examination notifications are required to pay examination fee of Rs.523/- and only those candidates are considered as against the Open category. However, if reserved category candidate is not complying with the age requirement or if is not complying with the other eligibility criteria prescribed then he has to pay examination fee of Rs.323/- and they would be considered only against the merit list of reserved categories. It was also informed that those who have paid fee Rs.323/- are not eligible for recommendation in the Open category post. Learned Senior Counsel thus submits that the Tribunal has committed an error in clearly overlooking the mandate of the MPSC in support of the concessions availed by the respondents.

12. In the submission of the learned Senior Counsel for the petitioners, the decision of the respondents in allowing the respondent Nos. 5 to 41 to migrate to the open category is unreasonable and contrary to the rules and the policy of the

respondent Nos. 1 to 4.

13. Learned Senior Counsel for the petitioners relied upon the following decisions of the Apex Court in support of his contentions :-

- (a) R.K. Sabharwal & ors. Vs. State of Punjab & ors., (1995) 2 SCC 745 ;
- (b) Gaurav Pradhan & Ors. Vs. State of Rajasthan & Ors., 2017 SCC OnLine SC 1099
- (c) Deepa E.V. Vs. Union of India and Ors., 2017 SCC OnLine SC 384.
- (d) Jitendra Kumar Singh & anr. Vs. State of Uttar Pradesh & ors., (2010) 3 SCC 119.

14. Per contra, learned Government Pleader appearing on behalf of the State Government supported the order passed by the Tribunal. By an affidavit filed in August, 2017, before the Tribunal, a stand was taken by the State of Maharashtra that as the MPSC had taken a decision to allow the respondents who had availed of the concession in fees for recommendation against any Open category post for selection to the post of Police

Sub-Inspector, it is for the MPSC to support the decision taken.

15. Learned Government Pleader pointed out that thereafter pursuant to the directions of the Tribunal to place an unambiguous stand of the Government on record, the General Administration Department (GAD) has filed an affidavit dated 10/10/2017 affirmed by one Shri Vikas Vilasrao Deshmukh of GAD. Learned Government Pleader relied upon para 5, 6, 7 and 8 of the affidavit which though quoted in the order of the Tribunal, are reproduced herein for the sake of convenience :-

“5. I say and submit that from time to time vide G.R. dtd. 09.04.1965, 25.01.1991 and 18.10.1997, the Government of Maharashtra has issued a policy of appointment of members of backward class on the vacancies for open category, if they are otherwise considered suitable for such appointments on merits. Copies of G.Rs. Dated 09.04.1965, 25.01.1991 and 18.10.1997 are annexed hereto and marked as **EXHIBIT 'R-1'**, **EXHIBIT 'R-2'** and **EXHIBIT 'R-3'** collectively.

6. I say and submit that the Government of Maharashtra in last para (1st page) of the G.R. Dtd. 09.04.1965 provides that -

“These percentages represent the minimum number of vacancies to be filled by the appointment of members of the Backward Class and Government desires to make it clear that it is open to the appointing authorities to recruit members of the Backward Class in excess of these percentage if they are otherwise considered

suitable for such appointment vis-a-vis other candidates on merit.”

7. I say and submit that clarification regarding the candidates belong to Backward Class and selected on merit should not be counted against reserved post earmarked for them, is issued vide G.R. dtd.25.01.1991. It is clarified in last 3 lines of para 2 (2nd page) of the said G.R. that besides the 6 reserved posts, if the members of backward class selected on merit then they should be considered on the 11 open category posts as per their order of merit.

8. I say and submit that in para 2(2) of the G.R. dtd. 18.10.1997, it is clearly prescribed that candidates belong to Backward Class and selected on merit should not be counted against reserved post earmarked for them and their appointments should not be shown on the roster point. They should be counted against open/general category.”

16. Learned Government Pleader relied upon various Government resolutions and in support of his contentions relied upon the following decisions of the Apex Court :-

- (a) Indira Sawhney etc. Vs. Union of India & ors., AIR 1993 SC 477
- (b) Union of India & ors. Vs. Virpal Singh Chauhan etc., Air 1996 SC 448
- (c) R.K. Sabharwal & ors. Vs. State of Punjab & ors. (supra)
- (d) Gaurav Pradhan & Ors. Vs. State of Rajasthan & Ors.(supra)
- (e) Deepa E.V. Vs. Union of India and Ors.(supra)

(f) Jitendra Kumar Singh & anr. Vs. State of Uttar Pradesh & ors.(supra).

17. Learned Government Pleader thus submitted that no error can be found in the approach of the Tribunal upholding the decision of the respondent Nos. 1 to 4 allowing migration.

18. Learned Counsel Shri Nitin Dalvi appearing for MPSC has invited our attention to the affidavit-in-reply filed before the Tribunal by one Shri Dilip Arjun Waghe, working as Under Secretary, in the office of Secretary, MPSC. He has invited our attention to para 2 to para 6 of the said affidavit which read thus :-

“2. I say and submit that MPSC have already recommended the candidates in the month of May, 2017 by declaring the results and now the process of appointment is within the power of the State Government and therefore the relief claimed for by the Applicants in the present O.A. cannot be considered by the MPSC. The merit list cannot be reviewed now and therefore unless the affected persons are made parties to the Petition no relief can be granted.

3. I say and submit that the declaration dated 25.09.2014 is not applicable in the facts and circumstances of this case. The purported general instructions have not been taken into consideration by the MPSC e.g. the criteria of payment of fees by the Backward Class candidates. The MPSC while

issuing the advertisement and making the recommendation strictly adhered to the conditions mentioned in the Government Circular dt. 27.06.2016 and the rules thereon. The general guidelines or instructions issued in other matter cannot be uniformly applicable as has been contended by the applicants in this Original Application.

4. I say and submit that the age for open category and backward class candidates were relaxed as per the Judgment and order passed by the Hon'ble Tribunal in O.A.No.856 of 2016 and 695 of 2016. Accordingly, the candidates who were between age of 35 to 38 years and become qualified in open category but, could not get chance to apply for open category, their cases were considered in that category. The relaxation of upper age limit was directed to be considered retrospectively by this Hon'ble Tribunal, which the MPSC has taken into consideration and complied the same.

5. I say and submit that the condition mentioned in paragraph No.7.10 of the Circular dt. 27.06.2016 with respect to consideration of backward class candidates for open category the provision of fee is not mentioned and therefore even though they have paid the fees for open category or not, they were considered in open category.

6. I say and submit that the MPSC has taken decision consciously by following the dictat of judgment of this Hon'ble Tribunal and the Hon'ble High Court and the general announcement dated 25.09.2014 is not applied in this case as this general announcement cannot override the rules and the Government Circular and therefore it is rightly not considered by the MPSC for the present examination. In view thereof, the factor of fees for backward class categories is not taken consideration by the MPSC.”

19. Learned Counsel for respondent Nos. 4 to 51 Shri Sadavarte supported the order passed by the Tribunal. He

invited our attention to the provisions of the Police Sub-Inspector Recruitment Rules, 1995 ('Rules of 1995' for short). In his submission, as the recruitment to the said post is governed by the provisions of the said Rules of 1995, the general circulars of proclamation of MPSC regarding reservation category availing the concession of examination fee and the consequence thereof provided by the MPSC will not govern the recruitment made under these Rules. In his submission, if the State Government has taken a decision to permit the migration in respect of those reserved category candidates who have availed only the concession of examination fee, such decision cannot be faulted only on account of some general proclamation issued by the MPSC. In support of his contentions he relied upon the decision of the Apex Court in the case of **Inder Parkash Gupta Vs. State of J&K and others, (2004)6 SCC 786** to contend that the Rules of 1995 which are framed in the exercise of the powers conferred by Clause (b) of Section 5 of the Bombay Police Act would override the rules and the standing orders of the MPSC. He relied upon para 28 of the decision of the Apex Court in

support of his contention.

20. Learned Counsel also relied upon the decision of the Apex Court in the case of **Vikas Sankhala and others Vs. Vikas Kumar Agarwal and others, (2017) 1 SCC 350** and relied upon para 82 of the said decision. Learned Counsel Shri Sadavarte also relied upon the decision of this Court in **Sushant Suresh Salvi Vs. The State of Maharashtra in Writ Petition No.6631 of 2017 dated 28th September, 2017**, the SLP against which decision was also dismissed on 29/11/2017 by the Apex Court. Learned Counsel Shri Sadavarte also relied upon the decision of the Allahabad High Court in the case of **U.P. Power Corporation and another Vs. Nitin Kumar and others, 2015 (5) ADJ 417**, in Special Appeal No. 310 of 2015 decided on 19th May, 2015.

21. **ANALYSIS :-**

We have considered the submissions made on behalf of respective parties. We have also gone through the order

passed by the Tribunal. The petitioners who are working as Police Constables have appeared for the Limited Competitive Departmental Exams for promotion as Police Sub-Inspectors. The said exams are conducted by MPSC. The respondent Nos. 5 to 41 availed of concession in payment of examination fees and also applied with the claim that their names would be considered only in category or seats reserved for concerned class of citizens, and not for Open merit category. The rules and the standing orders of the MPSC provided that those reserved category candidates who have availed of any concession or relaxation in respect of age, examination fee or any eligibility criteria will not be allowed to migrate in open category. According to the MPSC though it is usual practice and policy of the MPSC not to permit such migration, however, for this selection they have deviated from the practice and allowed the migration as the requisition from the State Government did not explicitly contain the condition to that effect. The Government of Maharashtra has issued a policy of appointment of members of backward class on the vacancies for open category, if they are

otherwise considered suitable for such appointments on merits. Learned Government Pleader has taken a categorical stand that as respondent Nos. 5 to 41 had only availed of the concession in examination fees for appearing for the exams, the said concession cannot deprive the respondents from consideration in the Open category and accordingly, the migration has been permitted.

22. The core issue in the present petition which we are called upon to examine is whether the concession in examination fee availed by the respondent Nos. 4 to 51 would fall within definition of “**reservation**” so as to exclude the reserved category candidates from open competition meant for general category candidates. In the background that the respondent Nos. 5 to 41 have availed of only the concession in payment of examination fees and no other concession, we may usefully refer to the decision of the Apex Court in the case of **Jitendra Kumar Singh & anr. Vs. State of Uttar Pradesh & ors.** (supra). Para 48, 49 and 75 of the Apex Court's decision

reads thus :-

“48. In view of the aforesaid facts, we are of the considered opinion that the submissions of the appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the General Category Candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list.

49. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16(1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates on a par with General Category candidates. It is only thereafter the merit of the candidates is to be

determined without any further concessions in favour of the reserved category candidates.

75. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16 (1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the preliminary test as also in the physical test. It is only thereafter that successful candidates have been permitted to participate in the open competition."

23. As discussed earlier, the core issue before the Tribunal was with regard to the filling of general category posts

by candidates belonging to the reserved category despite the reserved category candidates availing the concession in payment of examination fees. The MPSC in the light of the rules framed by them have a general practice of not allowing the reserved category candidates who have availed of any concession to migrate to Open Category. However, it is upon the requisition of the State Government that the migration has been so permitted in the present case. We find that the State has not treated the relaxation in fee as relaxation of standard for selection based on the merit of the candidates in the selection test. In our opinion, therefore, as held by Their Lordships of the Apex Court in the case of **Jitendra Kumar Singh** (supra), such concession of examination fee cannot deprive the reserved category candidates to be considered as against the general category posts on the basis of the merit in the said examination. In our opinion, the concession in fee does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned Senior Counsel for the petitioners that the concession in fee would in any manner be infringement of

Article 16 (1) of the Constitution of India. At the time when the concession is availed, the open competition had not commenced. It commences when all the candidates who fulfill the eligibility conditions are permitted to sit in the main written examination. With the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category the candidate belongs.

24. The MPSC on the basis of the circular issued by the State Government on 27/6/2016 particularly para No.7.10 with respect to consideration of backward class candidates for open category, found the provision of concession in fee is not mentioned. In our opinion, irrespective of whether the respondent Nos. 4 to 51 have paid the fees for open category or not, we do not find any error in the action of the MPSC considering these respondents in the Open merit category. The recruitment to the said post of Police Sub-Inspector is to be

carried out in accordance with the Rules of 1995 and if the State Government upon issuance of the circular dated 27/6/2016 has now taken a stand in favour of backward class candidates who have availed of concession in examination fees to be considered for open category, the said stand cannot be said to be contrary to law. We are of the opinion that by availing the concessions in examination fee, the respondent Nos. 5 to 41 have not been given any advantage in the selection process. Except availing this concession in examination fees the petitioners as well as the respondent Nos. 5 to 41 are otherwise at par had to appear in the same written test and face the same selection process. The concession in examination fees only enabled the respondents in the reserved category to fall within the zone of consideration. The concession in examination fees did not in any manner tilt the balance in favour of the respondent Nos. 5 to 41, in the preparation of final merit/select list.

25. In view of Articles 14, 15, 16 and 38 of the Constitution of India, it is permissible for the State to make

suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. As held by the Apex Court, reservations are a mode to achieve the equality of opportunity guaranteed under Article 16(1) of the Constitution of India. The concessions and relaxations in examination fees or age provided to the reserved category candidates are only to enable them to compete and seek benefit of reservation which is merely an aid to reservation.

26. The concessions in fees placed the respondent Nos.5 to 41 on par with the petitioners. It is only thereafter the merit of the petitioners and respondent Nos. 5 to 41 was determined without any further concessions in favour of the reserved category candidates. It is not in dispute before us that the standard of selection in the present selection process was common to all the candidates. In other words, the standard was not lowered in case of candidates belonging to reserved category viz. respondent Nos.5 to 41.

27. In this view of the matter, we find no reason to interfere with the order passed by the Tribunal. The petition is accordingly dismissed. Rule is discharged with no order as to costs.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)

After the order is pronounced, learned Senior Counsel for the petitioners made request that the status-quo granted on 03/11/2017 be continued for a further period of 6 weeks. This request is opposed by the learned Counsel for respondents. We are however inclined to continue the order of status-quo till 10/01/2018. We make it clear that this interim arrangement would operate only as regards respondent No.5 to respondents No. 41.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)