

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1545 OF 2000

Sudhir S/o Nathu Raktate
Age : 45 years, Occ : Govt. Service,
(Deputy Collector)
at present working as
Special Land Acquisition Officer
at Nashik, Dist. Nashik (Minor Irrigation),
(Minor Irrigation)

...PETITIONER

VERSUS

1. The State of Maharashtra,
Through its Secretary,
General Administration Department
Mantralaya, Mumbai.
2. Maharashtra Public Service Commission
Office at Bank of India Building
Mahatma Gandhi Road, Mumbai-23.

...RESPONDENTS

...

Mr.Sujeet D. Joshi Advocate for Petitioner.
Mr.V.S. Choudhari, A.G.P. for Respondent
Nos.1 and 2.

...

**CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.**

**DATE OF RESERVING JUDGMENT : 28TH FEBRUARY, 2018.
DATE OF PRONOUNCING JUDGMENT: 9TH MARCH, 2018.**

JUDGMENT [PER S.S. SHINDE, J.] :

This Petition is filed with the following
prayers :-

"B) Issue writ of certiorari or any order, direction or writ in the nature of writ of certiorari and call for relevant records from the respondents and after perusal quash the direction in the Notification Ex."H" dt. 19.5.1987 to the extent that the benefit of the judgment reported at A.I.R. 1984, Bombay page 434, Exh.B read with Judgment of Supreme Court of India Exh.C is prospective and hence the selection list prior to 19.10.1984 ought not to be revised.

C) Call for Record and proceeding of Transfer Application No.2309/1992 (Writ Petition No. 1831/1987) from the file of Maharashtra Administrative Tribunal, Bombay and after perusal quash and set aside the Judgment Exh."L" dt. 6.1.2000.

D) Issue a writ of mandamus or any other order, direction or writ in the nature of writ of mandamus to both respondents directing to revise the selection list of batch of 1982 by ignoring the 46% reservation made in favour of Economically weaker section society, struck down.

E) Issue a writ of mandamus or any other, direction or writ in the nature of writ of mandamus directing respondents to give appointment to the petitioner as Probationary Dy. Collector with effect from 21.8.1984 with consequential service benefits including promotions and difference of pay.

G) Issue Notice of contempt under Article 215 of the Constitution of India against the respondent no.1 and its concerned officers for not giving effect to Judgments

Exh."B" and Exh."F" pertaining to the selection list of 1982 batch to which the petition belongs and pass appropriate order as regards punishment as deemed fit."

2. The brief facts leading to file the present Petition, as stated in memo of the Petition, in brief, are as under :-

It is the case of the petitioner that, his date of birth is 19th December, 1955 and place of birth is situate in Ahmednagar district. In the contest of reservation, he belongs to advanced classes coming in general category. The petitioner passed his M.A. from University of Bombay in June, 1977. The petitioner also passed LL.B. from University of Bombay in the year 1981. Respondent no.1 through respondent no.2 issued an advertisement on 17th March, 1982, inviting applications for combined competitive examination for the posts of Probationary Dy. Collectors,

Probationary Tahsildars and other posts. By this advertisement 80% posts were reserved, leaving only 20% posts for general category. Total number of posts for Probationary Dy. Collector were 22, leaving only 4 posts unreserved, and out of 18 reserved, 7 were reserved for economically weaker section of the society. Further there were 13 posts of probationary Tahsildars, out of which only two posts were unreserved, and amongst reserved posts, four posts were reserved for economically weaker section of the society.

3. It is the case of the petitioner that, the reservation for economically weaker section was to the extent of 46% and along with other reservation, the total reservation was 80%, which was contrary to the law laid down by the Supreme Court of India in catena of judgments. According to the petitioner, Article 16(1) of the Constitution of India provides that there shall be equality of opportunity in matters relating to

employment or appointments to posts under the State employment. Article 16(4), however carves an exception by allowing the State in making any provision for the reservation of appointments or posts in favour of any section of the society not adequately represented in the services/employment under the State. Persons belong to 'economically weaker' section of society by itself, do not come within the scope of Article 16(4) of the Constitution of India.

It is the case of the petitioner that, one Shivaji and another filed Writ Petition No.2180/1983 (Shivaji and another V/s Chairman, Maharashtra Public Service Commission, and another) against the respondents in the Bombay High Court. The Division Bench of the Court on 3rd April, 1984 struck down the reservation in respect of economically weaker section.

4. It is the case of the petitioner that,

Respondent No.1 then filed Civil Appeal No.4117/1984 (State of Maharashtra and another V/s Shivaji Y. Garje and Anr.) in the Supreme Court of India, which came to be decided on 19th October, 1984, upholding the judgment of the High Court, except some observations and concessions made pursuant to submissions made by the Additional Solicitor General, for stepping down reservation for economically weaker section of society from 46% to 21%. However, after the said judgment of the Supreme Court no policy decision to provide for 21% reservation has been taken by respondent no.1, nor any notification has been issued in this behalf. As a result, the reservation made in respect of economically weaker section of society is illegal and *non est*.

5. It is the case of the petitioner that, examination and selection for the post of probationary Dy. Collectors and Probationary Tahsildars was one and the same, and first 22

persons in merit list were to be given an appointment as probationary Dy. Collectors, while remaining 13 persons were to be given an appointment as probationary Tahsildars. In other words, in all 35 persons were to be selected and first 22 persons were to be appointed in higher grade of probationary Dy. Collector. The petitioner, however came to be appointed as Probationary Tahsildar at Sr.No.1 of the recommended merit list of the posts of Tahsildar with effect from 21st April, 1984, when he took charge of the said post.

6. It is the case of the petitioner that, the selection process by which he was selected for the post of Tahsildar, the preliminary examinations were held on 20th June, 1982 and further written examination was held on 25th December, 1982. Thereafter, respondent no.2 published the mark list, wherein the petitioner had secured 461 marks out of 751 marks. Respondent

No.2 then recommended appointment of 22 persons as probationary Dy. Collectors. The merit list itself would show that number of persons shown in the list of probationary Dy. Collectors had secured marks less than the petitioner, and consequently by reducing the reservation of economically weaker section by 30%, at least, though it should be 46% as stated above, the petitioner ought to have been appointed as probationary Dy. Collector. It is the further case of the petitioner that, the petitioner had secured 461 marks and consequently in order of merit, he ought to have been placed at Sr. No.9 in the list and given appointment to the post of probationary Dy. Collector, which is denied to him.

7. It is the case of the petitioner that, the first eight persons in the said list consists of four general category, two economically weaker section of society and two O.B.C. There were no reservation, as such, for O.B.C. Candidates.

Reservation of 34% is for S.C., S.T., D.T. and N.T. The judgment and order in Writ Petition No.2180/1983 (Shivaji and another V/s Chairman, Maharashtra Public Service Commission, and another) was delivered on 3rd April, 1984, and it became effective immediately and was binding on the respondents. It is the case of the petitioner that, the petitioner came to be appointed keeping in view the Government Resolution No.RCT/1283/4519/e-1 on 23rd April, 1984, which was issued 20 days after the High Court struck down the reservation of 46% in favour of economically weaker section of society. As already stated, the High Court judgment came to be confirmed by Hon'ble Supreme Court. As per the directions of the High Court in the operative part, the lists then existing should have been revised, including that of the petitioner, and he ought to have been appointed as probationary Dy. Collector at Sr. No.9.

8. It is further the case of the petitioner that, the judgments of the High Court and the Supreme Court are as regards the candidates from batch of 1979, however, the principle is applicable to the later two selection process and batches of 1980-81 and 1982. The judgments of High Court and the Supreme Court of India were acted upon, and interpreted by the Division Bench of the High Court on 25th February, 1987, in Writ Petition No. 1544/1984 (Dilip Shivilal V/s The State of Maharashtra and another). The said Writ Petition was filed by the candidate, who pertains to batch of 1982. The petitioner was also selected in same selection process in which the petitioner in Writ Petition No.1544/1984 (Dilip Shivilal V/s The State of Maharashtra and another) was selected. The High Court in para 3 of the said judgment directed respondent no.1 to prepare a revised list of candidates, who would qualify for the selection, in consultation with Maharashtra Public Service Commission. The direction is as regards all the

candidates of batch of 1982 and not restricted to the case of petitioner in W.P. No.1544/1984 (Dilip Shivilal V/s The State of Maharashtra and another). It would cover the case of petitioner as well. The said decision of the High Court is binding upon the Respondents in respect of all the similarly situated candidates belong to 1982 batch.

9. It is further the case of the petitioner that, Respondent No.1 filed Civil Misc. Petition No.20374/86 on 1st May, 1986 in the Supreme Court of India seeking relief in the nature of clarification that, the judgment of the High Court was prospective in its application. However, said application came to be rejected on 29th September, 1986, whereby the Supreme Court refused to entertain the said application. It is the case of the petitioner that, in contravention to the order passed by the Supreme Court in the said Civil Application, respondent no.1 on 19th May, 1987

issued Notification No.1086/2709-CN/75/16A, stating that the revision of the lists were not called for or necessary as the judgment of the Supreme Court would operate prospectively.

10. It is the case of the petitioner that, on plain and correct interpretation of the Judgment passed by the Supreme Court, it is crystal clear that, Hon'ble Supreme Court has confirmed the Judgment of High Court thereby striking down 46% reservation for economically weaker section. The aforesaid exposition of law by the Supreme Court had struck down the reservation in favour of economically weaker section with an immediate effect from the date i.e., 19.10.1984 of pronouncement of judgment and as yet no policy decision has been taken by respondent No.1. Respondent No.1 has not acted upon the Judgment dated 25th February, 1987 in Writ Petition No. 1544/1984 (Dilip Shivilal V/s State of Maharashtra and another) passed by the High Court. If the

list is revised then the petitioner ought to have been appointed as Dy. Collector with effect from 21.8.1984, when he took charge of Probationary Tahasildar. As the respondents have not acted upon the said Judgment, they have committed the contempt of High court under Article 215 of the Constitution of India for which proper action may be taken.

11. According to the petitioner, he had given first preference to the post of Probationary Dy. Collector, but he was not selected for that post, as there were only 4 posts of Probationary Dy. Collector available for general category. Petitioner would have been selected, had there been two more posts for general category, as he was placed at Sr. No.1 of the list of Probationary Tahsildar or immediately below the list of Probationary Dy. Collectors. In case the direction given by the High Court on 25.02.1987 in Writ Petition No. 1544/1984 (Dilip Shivilal V/s State of

Maharashtra and another) is implemented, then Respondent No.2 must have sent revised list to Respondent No.1, but it appears that, Respondent No.1 possibly has not acted thereon in view of Notification dated 19.05.1987. At any rate the provisions in Notification, showing the declaration of not revising the list prior to 19.10.1987 is illegal, and therefore, is liable to be quashed and set aside.

12. The petitioner is entitled to get exemption from undergoing common Revenue Officers Departmental Examination and common training course for Probationary Tahsildars and Probationary Dy. Collectors, the reason being that after his appointment as Probationary Tahsildar the petitioner has already undergone the said training course in April 1985.

13. The petitioner filed his first representation on 26.02.1985, which came to be

replied by Respondent No.1 on 02.05.1985. Thereafter, the petitioner submitted another representation dated 15.04.1986, but no heed is given to the said representation. Therefore, the petitioner filed Writ Petition No.1831 of 1987 at the Principal Seat of the High Court at Bombay, in which 'Rule' was issued and subsequently said petition came to be transferred to Maharashtra Administrative Tribunal, Bombay, and the same came to be renumbered as Transfer Application No. 2309 of 1992. The said Application has been dismissed by the Maharashtra Administrative Tribunal on 6th January, 2000.

14. Learned counsel appearing for the petitioner, relying upon the judgment of the Division Bench in the case of **Dilip Shivilal V/s State of Maharashtra and another in Writ Petition No.1544 of 1984, decided on 25th February, 1987,** submits that, the petitioner therein is from the batch of the petitioner, in as much as, he

appeared for the examination with the petitioner in the year 1982. It is submitted that, the directions issued by the High Court in the case of **Dilip Shivlal (supra)** would cover the case of the petitioner as well. The said decision of the High Court is binding upon Respondents. Respondents were obliged to follow the said decision and prepare the revised list of candidates eligible to fill up the posts in consultation with the Maharashtra Public Service Commission. Therefore, according to learned counsel appearing for the petitioner, the conclusion reached by the Maharashtra Administrative Tribunal that the judgment in the case of **Dilip Shivlal (supra)** is a judgment *in personam* and not *in rem*, is not legally sustainable. Learned counsel invites our attention to the exposition of law by the Supreme Court in the case of **State of Uttar Pradesh and others V/s Arvind Kumar Srivastava and others**¹, and submits that, the Supreme Court held that,

¹ (2015) 1 SCC 347

normal rule is that when a particular set of employees is given relief by court, all other identically situated persons should be treated alike by extending same benefit since not doing so would amount to discrimination and be violative of Art. 14 of the Constitution. Therefore, learned counsel submits that, the Petition deserves to be allowed.

15. On the other hand, learned A.G.P. appearing for the Respondent – State, relying upon the averments in the affidavit in reply, submits that, the decision of the High Court in the case of **Dilip Shivlal (supra)** is not applicable in the case of the petitioner, since the said judgment was *in personam* and not *in rem*. It is further submitted that, the Government of Maharashtra by issuing Government Resolution in the year 1987 clarified that, the judgment of the Supreme Court in the case of **Dilip Shivlal (supra)** would apply prospectively and not with retrospective effect.

It is submitted that the petitioner is not from the batch of 1989, and therefore, he cannot derive the benefits from the judgment of the Supreme Court. Learned A.G.P. invites our attention to the averments in the affidavit in reply, and submits that, the Petition deserves to be dismissed.

16. We have carefully considered the submissions advanced by learned counsel appearing for the petitioner and learned A.G.P. appearing for Respondent Nos.1 and 2. We have carefully perused the averments in the Petition, grounds taken therein, annexures thereto, Reply filed by Respondent No.1 and the rejoinder affidavit filed by the petitioner. We find considerable force in the argument of learned counsel appearing for the petitioner that, reservation provided in the advertisement/selection process of 1982, for Economically weaker section was to the extent of 46% and along with other reservation the total reservation was 80% which was contrary to the law

laid down by the Supreme Court of India in Catena of matters which has pegged reservation to maximum 55% excess reservation therefore of 25% is contrary to law and therefore *non est*.

17. Upon careful perusal of the order passed by the Maharashtra Administrative Tribunal in Transfer Application No.2309/1992, which was filed by the present petitioner, it appears that, the Tribunal framed as many as four issues for its consideration, viz:- (1) Whether applications are barred by limitation?, (2) Whether, the judgments of the Apex Court has retrospective effect., (3) Whether the applicants can be considered as similarly situated to those applicants in 1979 selection ? and (4) Whether, the judgment in Writ Petition No.1544/84 has application to the cases of the applicant.

18. While answering issue no.(4) above, the Tribunal held that, the judgment in the case of

Dilip Shivilal (supra) is a judgment *in personam* and not *in rem*. Admittedly, the petitioner i.e. Dilip Shivilal in Writ Petition No.1544/1984 in response to the Notification No. 1477-III(A)/82 issued in October, 1982, applied for the post advertised by way of said notification and appeared in the examination. He secured 330 marks out of 550 marks. It would be apt to reproduce hereinbelow, the paras 2 to 5 of the said judgment, which read thus :-

"2. The petitioner has already been in State Government service. In response to the Notification No. 1477-III(A)/82 issued in October 1982 that a combined competitive (main) examination for recruitment to the various posts mentioned in the Circular would be held by the Maharashtra Public Service Commission at different centres from 25th December 1982, the petitioner applied for the post and appeared in the examination. He secured 330 out 550 marks. He was called for viva voce test and secured 80 out of 200 marks.

Thus, he secured in all 410 out of total 750 marks. Though qualified, he was not selected for any of the posts advertised probably on the ground that he was lower down in rank than the posts available for general candidates.

3. It has been contended by Shri Apte, the learned Counsel for the petitioner, that the question of reservation of posts now stands concluded by the decision of the Supreme Court in Civil Appeal No.4117 of 1984 dated 19th October 1984 whereby this Court's decision in the case of Shivaji and another V. The Chairman, M.P.S. Commission reported in A.I.R. 1984 Bom. 434 was confirmed. It is pointed out that the facts in this case were that besides reservation of 34% posts in favour of Scheduled Caste and Scheduled Tribes etc. reservation of another 46% of the posts was made in favour of economically weaker sections of the society. This Court had inter alia struck down the rule providing for advertised reservation of 46% of posts for economically weaker sections of the society and that on

concession by the Government it was held by the Supreme Court in the decision (supra) that reservation for all categories taken together cannot and should not exceed 49% of the posts. Following the Supreme Court decision (supra) we have no difficulty in holding that the position has to succeed to the extent the reservation of posts herein exceed the percentage fixed by the Supreme Court on a concession from the Government. We find that appropriate directions are given by this Court in the case of Shivaji and another V. Chairman, M.P.S.C. (supra) following which we also direct the Government to prepare a revised list of candidates who will qualify for selection in consultation with Maharashtra Public Service commission in the light of the Supreme Court decision (supra).

4. As regards the other contention namely, that allocation of marks for viva voce test coming to about 26% of the total marks is also bad, Shri Apte relied on another Supreme Court decision Ashok Kumar Yadav V. State of Haryana (1985) 4

Supreme Court Cases 417. It is true that 12.2% marks reserved for viva voce test were considered reasonable in that case. However, we do not think that it is desirable to go into this question in this case at this juncture as we are concerned herein with the selection made in 1983. If the selection of candidates who might have already joined services is disturbed at this stage i.e. after more than four years, it will upset a large number of appointments already made on the basis of such a selection and the integrity and efficiency of the entire administrative machinery would seriously be in jeopardy. In fact, Their Lordships of the Supreme Court and also while dealing with the question of allocation of such a high percentage of marks for the viva voce test at page 455 adopted the same course.

5. In the above view of the matter, the petition partly succeeds. The Government is directed to prepare a revised list of candidates eligible to fill in posts in consultation with Maharashtra Public Service Commission in the light of this

Court's decision in A.I.R. 1984 Bom. 434 and Supreme Court decision dated 19th October 1984, if not already done. The rule is partly made absolute with no order as to costs."

19. In the case of **Dilip Shivilal (supra)**, the Division Bench (Coram : Pendse & Sugla, JJ) observed in para 4 that, if the selection of candidates, who might have already joined services, is disturbed at this stage i.e. after more than four years, it will upset a large number of appointments already made on the basis of such a selection and the integrity and efficiency of the entire administrative machinery would seriously be in jeopardy, and accordingly, directed the State Government to prepare the revised list of candidates eligible to fill in the posts in consultation with Maharashtra Public Service Commission, in the light of decision of the another Division Bench reported in A.I.R. 1984 Bom. 434 and the judgment passed by the Supreme

Court dated 19th October, 1984.

20. We have carefully perused the discussion made by the Maharashtra Administrative Tribunal in the judgment, while answering the issue no.(4), referred hereinabove in paragraph No.12. It appears from the said discussion that, the judgment in the case of **Dilip Shivilal (supra)** has been held the judgment *in personam* and not *in rem*. However, there are observations that, pursuant to the decision in Writ Petition No.1544/1984, the claim of the petitioner therein, was considered by the State Government, however, the petitioner i.e. Dilip Shivilal was not found eligible for the post, even after taking into consideration the judgment of the High Court in his case. It is true that, in Writ Petition No.1544/1984, this Court was not inclined to set aside the selection of other candidates after lapse of four years, but revision of merit list was directed, so as to find out that, whether the petitioner therein i.e. Dilip

Shivlal, was entitled to any relief. In our considered view, the judgment in the case of **Dilip Shivlal** in Writ Petition No.1544/1984 (supra) cannot be restricted to the case of the petitioner therein. The petitioner herein, has appeared for competitive exams held in the year 1982, and pursuant to the selection process undertaken by the Respondents he was appointed as Tahsildar. The petitioner being similarly situated like petitioner in Writ Petition No.1544/1984 (Dilip Shivlal V/s State of Maharashtra and another), the Maharashtra Administrative Tribunal ought to have directed the Respondents to consider the case of the petitioner, so as to find out whether the petitioner in this case was entitled to any relief. This Court granted sufficient time to the State Government to produce the revised merit list of candidates, who participated in the selection process of 1982 along with the petitioner. However, learned A.G.P. informed this Court that due to fire in Mantralaya couple of years back

entire record has been burnt/destroyed. Because of the negligence or inaction of respondent – State Government, the petitioner's legitimate claim in law, cannot be allowed to go unredressed, when the petitioner is fighting the legal battle from the year 1984-85.

21. In the light of discussion hereinabove, the interference in the judgment of the Maharashtra Administrative Tribunal to the extent of holding that, the decision in the case of **Dilip Shivilal (supra)** is a judgment *in personam* and not *in rem* stands quashed and set aside to the extent of present petitioner.

We hold that, the case of the petitioner is covered by the decision in the case of **Dilip Shivilal (supra)** in Writ Petition No. 1544/1984, and accordingly, we direct the Respondents to consider the case of the petitioner in the light of revised merit list of candidates prepared by

the Respondent – State Government, pursuant to the directions issued in Writ Petition No.1544/1989 in the case of **Dilip Shivilal (supra)**, and then find out whether, the petitioner was entitled for the appointment on the post of the Deputy Collector. In case, the Respondents find that, the petitioner was entitled for the post of Deputy Collector, in that case, the notional benefits be given to the petitioner for the purpose of reckoning seniority, continuity and pensionary benefits, as well as other benefits, as permissible under the Rules, on the basis of continuity of service as Deputy Collector, since his appointment till his retirement on attaining the age of superannuation. In case such revised list is not prepared/not available, in that case, the State Government shall proceed on the basis that the petitioner stood at Sr. No.9 in merit list and hence entitled for the benefits available to the post of Dy. Collector. The entire exercise is to be done by the Respondents, as expeditiously as possible, and

preferably within six months from today. We make it clear that, since the petitioner stood retired on attaining the age of superannuation, he will not be entitled to claim arrears of salary on the post of Deputy Collector.

22. The Petition is partly allowed to the above extent. Rule made absolute accordingly.

[S.M. GAVHANE, J.]

[S.S. SHINDE, J.]

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