

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

**WRIT PETITION NO. 6539 OF 2012**

Vijay Gyanobarao Ghogare and others .. Petitioners

**Versus**

The State of Maharashtra and others .. Respondents

Miss P. S. Talekar, Advocate h/f Shri S. B. Talekar, Advocate for  
Petitioners.

Shri A. V. Deshmukh, A.G.P. for Respondent Nos. 1 to 3.

Shri V. D. Salunke, Advocate for Respondent Nos. 4 and 5.

**CORAM : S. V. GANGAPURWALA AND  
S. M. GAVHANE, JJ.**

**Closed for orders on : 11.09.2018**

**Order pronounced on : 25.10.2018**

**FINAL ORDER :**

. The petitioners applied for the posts of Jawans and Petty Officers pursuant to the requisition received from the Collector Office, Nanded, District Social Welfare Officer, Nanded and District Employment Exchange Officer, Nanded. The petitioners were unsuccessful in the selection process. The petitioners approached the Maharashtra Administrative Tribunal challenging the select list prepared on 23.10.2000. The Tribunal

allowed the original application filed by petitioners. The candidates whose selection and appointments were quashed by the Tribunal assailed the judgment of the Tribunal before this Court. This Court set aside the judgment of the Tribunal and upheld the select list. The petitioners assailed the judgment and order dated 05.12.2002 passed by this Court in Writ Petition No. 4834 of 2002 setting aside the judgment of the Tribunal before the Apex Court. The Apex Court confirmed the judgment delivered by this Court and dismissed the special leave petition on 14.02.2003.

2. The petitioners again approached the Maharashtra Administrative Tribunal, Aurangabad challenging the select list on the ground that same is contrary to the guidelines contained in the Circular dated 03.10.1998. The contention of the petitioners is that, subsequently petitioners got the knowledge that the selection process was not conducted pursuant to the circular dated 03.10.1998 and in the enquiry conducted by the Collector and Chairman the same was confirmed.

3. The petitioners withdrew the original application with liberty to approach the authority. The petitioners approached the Commissioner of State Excise, Maharashtra State, Mumbai on or about 07.06.2009 requesting to act upon the report of enquiry dated 13.12.2006. It is the contention of the petitioners

that, the respondents did not decide the representation, as such approached this Court by filing writ petition. This Court in Writ Petition No. 6002 of 2011 under order dated 24.08.2011 directed the Commissioner, State Excise, Maharashtra State to decide the representation within three months. The application/representation was rejected. The petitioners filed Original Application No. 895 of 2011 before the Maharashtra Administrative Tribunal, Aurangabad. The Tribunal dismissed the original application with costs. The petitioners have assailed the said judgment by filing present writ petition.

4. Miss Talekar, the learned advocate for petitioners submits that, only because earlier judgment of the Tribunal is set aside by this Court and the judgment of this Court is upheld by the Apex Court would not be an embargo for the Tribunal to consider the case of petitioners on merits, as the earlier judgment has been rendered because of the suppression of material facts by respondents. The enquiry has been conducted subsequently by the Collector and Chairman, District Selection Committee, Nanded and the enquiry report is submitted on 13.12.2006, wherein it is categorically observed that the selection of Jawan made in October/December 2000 was not in accordance with guidelines prescribed under Circular dated 03.10.1998. If the earlier judgment is obtained by fraud and or by suppression, the subsequent proceedings would not be a bar for the Court to

exercise its powers. The learned counsel relies on the judgment of the Apex Court in a case of Ramchandra Ganpat Shinde Vs. State of Maharashtra and others reported in (1993) 4 SCC 216. The learned counsel also relies on the judgment of the Apex Court in a case of Deepa Gourang Murdeshwar Ktre Vs. Principal V.A.V. College of Arts and others reported in (2007) 14 SCC 108 and in a case of A. V. Papayya Sastry and others Vs. Government of A. P. and others reported in (2007) 4 SCC 221.

5. The learned counsel relying on the judgment in a case of K. Venkatachalam Vs. A. Swamickan and another reported in (1999) 4 SCC 526 submits that, this Court can exercise jurisdiction under Article 226 of the Constitution of India, when there is an act against the provisions of law or violative of Constitutional provisions.

6. Miss Talekar, the learned counsel further submits that, dismissal of special leave petition in limine by the Apex Court and confirming judgment of this Court would not tantamount to merger. The learned counsel relies on the judgment of the Apex Court in a case of Kunhayammed and others Vs. State of Kerala and others reported in (2000) 6 SCC 539.

7. The learned counsel submits that, the selection

process/procedure has to be scrupulously followed. The strict adherence to the selection process is required to be followed. The selection process as contemplated under the Circular dated 03.10.1998 was not followed, as such the selection process is vitiated. The learned counsel relies on the judgment of the Apex Court in a case of **Bednaga Talukdar Vs. Saifudaulla Khan and others** reported in **(2011) 2 SCC 85**.

8. The learned counsel further submits that, injury has been caused by the fraud played by respondents. The legal rights of the petitioners are denied. The benefit has been derived to the respondents to the detriment of the petitioners. The fraud would vitiate every solemn act. This Court by exercising its jurisdiction would set right the fraud. The learned counsel relies on the judgment of the Apex Court in a case of **Bhaurao Dagadu Paralkar Vs. State of Maharashtra and others** reported in **(2005) 7 SCC 605**. The learned counsel submits that, under the Right to Information Act, the petitioners received information about report of Collector and thereafter proceedings are filed. The respondents followed the guidelines of 1994 and circular issued by the Home Department and ignored the 1998 circular, which was in vogue thereby resulting into erroneous selection process giving advantage to the respondents and to the detriment of the petitioners. It is observed by the authorities in the enquiry report that the 1998 circular has to be made

applicable and guidelines of 1998 circular were not followed.

9. According to the learned counsel for petitioners selection of the candidates was to be done on the basis of aggregate marks secured in the written as well as oral interview as per the guidelines in the circular dated 03<sup>rd</sup> October, 1998. Eighty marks were prescribed for written examination and twenty marks for viva voce test. However, deviating from the said guidelines and relying on the circular of the year 1994, the respondent authorities conducted physical test for the purpose of qualifying in the written examination. Accordingly physical tests were conducted. The candidates who secured 50 marks out of 100 were held to be eligible and they were called for written examination. The selection committee prepared the merit/select list on the basis of aggregate marks secured in the written examination as well as physical test contrary to the recruitment rules 1992 thereby vitiating the entire selection process. This aspect needs to be considered by the Court. The respondents be directed to appoint the petitioners.

10. The learned Assistant Government Pleader for respondent Nos. 1 to 3 and Mr. Salunke, the learned counsel for respondent Nos. 4 and 5 submit that, the present petition is hit by principle of *res-judicata*. The petitioners had initially filed original application that was allowed. The respondent Nos. 4 and 5 filed

writ petition before this Court. This Court allowed the writ petition and set aside the judgment of the Tribunal. The present petitioners filed special leave petition before the Supreme Court. The Special Leave Petition is dismissed. In view of that proceedings for the same relief would not be tenable. It is further submitted that the High Court in the earlier round of litigation has held that the selection list prepared by the selection committee by following guidelines laid down in the circular dated 14.02.1994 was not vitiated merely because of non observance of guidelines provided under circular dated 03.10.1998. The star question raised in the State Legislative Assembly was answered and answer was given by the Superintendent of State Excise, Nanded stating that the selection was done strictly as per the guidelines provided in circular dated 03.10.1998 and no injustice was caused to the petitioners. The Tribunal has not committed any error in dismissing the original application filed by petitioners.

11. We have considered the submissions canvassed by the learned counsel for respective parties.

12. This is the second round of litigation between the parties. The earlier litigation culminated in the judgment of the Apex Court dismissing the Special Leave Petition filed by present petitioners.

13. The petitioners were unsuccessful in the selection process for the post of Jawans and Petty Officers. The petitioners filed Original Application bearing Original Application No. 309 of 2002 challenging the selection and appointment of present Respondent Nos. 4 and 5. The Tribunal allowed the Original Application under judgment and order dated 20.10.2002. Present Respondent Nos. 4 and 5 filed Writ Petition No. 4834 of 2002. This court allowed the Writ Petition filed by present Respondent Nos. 4 and 5 thereby setting aside the judgment of the tribunal in Original Application No. 309 of 2002 under judgment and order dated 05<sup>th</sup> December, 2002. Present petitioners assailed the judgment dated 05<sup>th</sup> December, 2002 passed by this court in Writ Petition No. 4834 of 2002 before the Apex Court by filing Special Leave to Appeal (Civil) No. 2021 of 2003. The Apex Court on 14.02.2003 dismissed the Special Leave Petition filed by present petitioners confirming the judgment and order of this court. The Respondent Nos. 4 and 5 are officiating on the said posts since the day of their selection and appointment.

14. It is the case of the petitioners that the earlier judgment has been rendered by this court in favour of Respondent Nos. 4 and 5 because of suppression of material facts by respondents. The petitioners are relying on enquiry report dated 13.12.2006 of

the Collector and Chairman District Selection Committee, Nanded to submit that the selection process conducted in October/December-2000 was not in accordance with the guidelines prescribed under circular dated 03.10.1998. The earlier judgment rendered by this court was on account of suppression of facts by respondents and was by fraud.

15. There can not be any dispute with the proposition that the fraud vitiates every solemn act and if, the order has been obtained by fraud or suppression of material facts then the court has power to recall its own order obtained by fraud, suppression or misrepresentation.

16. The question is whether it can be said that the earlier judgment of this court has been obtained by fraud.

17. The contention of the petitioners is that the selection process ought to have been conducted as per the guidelines prescribed under the circular dated 03.10.1998. The respondent authorities instead of preparing the selection list as per the guidelines prescribed under the circular dated 03.10.1998, prepared the select list on the basis of circular of the year 1994 and same has resulted in erroneous select list being prepared.

18. The tribunal had accepted the contention of the petitioners

and had set aside the select list and appointment orders of Respondent Nos. 4 and 5. The Respondent Nos. 4 and 5 filed Writ Petition No. 4834 of 2002 before this court against the judgment of the Tribunal. This court while allowing the writ petition filed by present Respondent Nos. 4 and 5 considered the circular dated 14.02.1994 and 03<sup>rd</sup> October, 1998. It is not that the circular dated 03<sup>rd</sup> October, 1998 was not brought to the notice of the court. This court observed that selection process was conducted by following the guidelines contained in circular dated 14.02.1994. The entire selection was made on the basis of guidelines contained in said circular dated 14.02.1994. This court further observed that the tribunal allowed the original application filed by present petitioners by relying on the guidelines contained in annexure to the circular dated 03<sup>rd</sup> October, 1998. This court interpreted the guidelines in the circular dated 14.02.1994. This court also held that Tribunal committed an error in holding that the guidelines contained in circular dated 3<sup>rd</sup> October, 1998 were in general and they were applicable to all future selection. It will be relevant to reproduce the observations of this court while allowing the earlier Writ Petition No. 4834 of 2002 under judgment and order dated 05<sup>th</sup> December, 2002. Paragraphs Nos. 18, 19, 20 and 21 of the said judgment read thus :

"18. Coming to the merits of the Selection Process completed in September/October, 2000 by the Respondent No. 2 it is pertinent to

consider the stand taken by the said officer is his reply submitted before the Tribunal. It was made clear that the selection process was undertaken by following the guidelines contained in circular dated 14<sup>th</sup> February, 1994 issued by the Inspector General of Police Mumbai and the selection committee had prepared a select list along with waiting list containing 7 names against the vacancies and another 7 names as wait listed.

It was in fact, clarified that the entire selection was made on the basis of the guidelines contained in the said circular dated 14.02.1994. The Tribunal did not agree with these submissions and it held that the physical test which was followed by the selection committee was applicable for the police constables and not for the excise constables. The Tribunal referred to the guidelines contained in annexures to the circular dated 3<sup>rd</sup> October, 1998 and recorded a finding that the final select list was required to be made on the basis of the marks secured in the written and oral tests (Out of 100 marks). There is no dispute that the annexure to the circular dated 3<sup>rd</sup> of October, 1998 stated that the select list would be made on the basis of the marks secured in the written and oral tests. It appears that the Tribunal's reliance on this circular is totally misplaced. The circular stated that on 15<sup>th</sup> of October, 1993 the State Government had imposed ban on further recruitment and the same was lifted by resolution dated 25<sup>th</sup> of March, 1998 and accordingly in all 122 vacant posts of constables were required to be filled in the year 1998-99. The Government granted approval for the said recruitment the guidelines attached in the annexures would be followed. It is, thus obvious that the guidelines were set out for recruitment of 122 constables in the year 1998-99 and they were not of general nature. These guidelines could not be made

applicable for the subsequent recruitments unless the competent authority had issued further circulars or communications to that effect. There is one more reason why these guidelines could not be applicable to the subject selection undertaken in September/October, 2000. the 1998 guidelines stated, inter alia, that in the written test passing marks would be 20 and the candidates who have passed shall be called for oral interview in the ration of 1:2. that means, to fill the 7 posts of constables 13 candidates would be called for interview. Whereas, the selection committee headed by the Collector, in the impugned selection process, called the candidates for oral interview in the ration of 1:3 and this has not been challenged in both the original applications moved by the Respondent Nos. 3 and 4.

19. Admittedly the recruitment rules are silent on the procedure to be adopted for selection from amongst those candidates who were found to be eligible in terms of educational qualifications and physical examination. The term "physical examination" and "physical test" can not be equated for checking the height and chest measurements so that the minimum requirements in this regard, as set out in the recruitment rules, are met. If an candidate did not meet this requirements or the educational requirement, would be treated to be disqualified for the screening itself but those who had met these minimum qualification were subject for physical test which consisted of the parameters as per the guidelines set out in the circular dated 14<sup>th</sup> February, 1994. In the view of the Tribunal this circular could not have been made applicable for selection of police constable. There was not such bar or any specific rules or any guidelines or directions issued by the competent authority. The nature of duties of the Excise Constable are similar may not be the same, as are

carried out by the police constable and both of them are uniformed. If the selection committee decided to follow the guidelines laid down in the circular dated 14<sup>th</sup> February, 1994 and finalise the selection list on the basis of the marks secured in the physical test, written test and oral test, there was no reason to hold that the selection process was vitiated.

When the Tribunal was called upon to examine the validity of the selection process conducted by the duly constituted committee it could not have set aside such a selection unless it was held that it vitiate the recruitment rules or the guidelines or it suffers from extraneous considerations. The Tribunal committed an error in holding that the guidelines annexed to the circular dated 3<sup>rd</sup> October, 1998 were of general nature and they were applicable to all future selections.

20. We have also noted from the record that on 5<sup>th</sup> of September, 2000 the Superintendent of State Excise at Nanded, in his communication to the District Superintendent of Police, had specifically stated that physical test would be conducted and it would be of 100 marks. The assessment has been done as per the parameters for the said physical test and the merit list was prepared on the basis of the marks secured in the physical test written test and oral test of all these 20 candidates and the final selection was based on this merit list. It is an admitted position that the Respondent Nos. 3 and 4 did not secure more marks than any of the appointed 7 candidates as per the 20, who were called for interview and had secured less than 50% marks in the physical test as well as the written test as is reflected from the record.

21. In the result, we hold that the view taken by the Tribunal suffers from errors apparent on the fact of the record and, therefore, the impugned order cannot be sustained. The

petition is allowed and the impugned order dated 28<sup>th</sup> October, 2002 passed by the Maharashtra Administrative Tribunal in Original Application No. 309 of 2002 is hereby quashed and set aside. The order of termination dated 30<sup>th</sup> November, 2002 is hereby quashed and set aside. The Respondent Nos. 1 and 2 shall take further appropriate steps.

19. The observations of this court as reproduced supra would show that this court had considered the circular dated 03<sup>rd</sup> October, 1998, so also the circular dated 14<sup>th</sup> February, 1994 and thereafter has delivered the judgment.

20. It can not be said that earlier judgment rendered by this court was pursuant to any suppression of fact or fraud.

21. As all the aforesaid aspects were considered by this court while deciding the earlier writ petition, the subsequent writ petition on the ground that the guidelines prescribed under circular dated 03<sup>rd</sup> October, 1998 were not followed thereby vitiating selection process cannot be entertained. It would have been another thing, had the circular dated 03<sup>rd</sup> October, 1998 was suppressed by respondents. However, the same is not the fact. This court while delivering the earlier judgment has specifically referred to both the circulars and observed that, if, the selection committee decided to follow guidelines laid down in circular dated 14<sup>th</sup> February, 1994 and finalized the selection list on the basis of marks secured in the physical test, written test

and oral test, there was no reason to hold that the selection process was vitiated.

22. In the light of the above, we are not inclined to accept the contention of petitioners that the earlier judgment was obtained by suppression of material facts or by fraud.

23. In the result writ petition is dismissed. No costs.

**[S. M. GAVHANE, J.]**

**[S. V. GANGAPURWALA, J.]**

*bsb/Oct. 18*