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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1203 OF 2012

1. The State of Maharashtra
through Additional Chief Secretary,
Home Department, Mantralaya,
Mumbai.

2. The Chairman/Secretary,
MPSC, having office at 3rd floor,
Bank of India Building, Fort,
Mumbai.

3. The DG and IGP, Maharashtra
State Mumbai, having office at
Shahid Bhagatsingh Marg, Mumbai.

4. The Director,
Maharashtra Police Academy,
having office at Nasik.

...Petitioners
(Original Respondent)

Vs.

1. Shri Deepak Namdev Jagtap
Age : adult, Occ. : Service,
residing at : B-36, Shiva Nagar,
Police Colony, Pune.

2. Shri Vitthal Murlidharrao Wachaure,
Age : Adult, Occ. : Service,
residing at : Twinkle Apartments,
A-2-13, 3rd floor, Saibaba Nagar,
Kalyan (E), Dist : Thane.

3. Shri Sopan Kashiram Kadam
Age : adult, Occ. : Service,
residing at : D.P. Jadhav Chawl,
1/2 Bhatwadi, Ghatkopar,
Mumbai.

4. Shri Santosh Shamrao Dhanlagade,
Age : Adult, Occ. : Service,
residing at Police Head Quarters,
Near Police Kalayan Kendra's
Room No. 505, Block No. 41,
Ahmednagar.

5. Shri Harischandra Govind Pansare
Age : Adult, Occ. Service,
residing at : Dalaj No.2,
Taluka Indapur, Dist. : Pune.

...Respondents
(Original Applicants)

.....
Mr. N.C. Walimbe, AGP for the State/Petitioner.

Mr. R.S. Apte, Senior Advocate i/by Mr. M.S. Lagu, Advocate for
the respondent Nos. 1 to 5.

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

RESERVED ON : 7th FEBRUARY, 2018

PRONOUNCED ON : 27th FEBRUARY, 2018.

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

The petitioner – State of Maharashtra has filed this petition under Article 226 and 227 of the Constitution of India challenging the judgment and order dated 15/3/2011 passed by the Maharashtra Administrative Tribunal, Mumbai Bench, Mumbai ('the Tribunal' for short) in O.A. No. 1235 of 2010 and 1265 of 2010.

2. Before the Tribunal the respondents challenged a communication dated 10/11/2010 issued by the petitioner No.1 to petitioner No.3 to submit recommendations of the candidates in the order of merit to the extent of notified posts and that a wait list shall not be maintained.

3. The facts of the case in a nutshell are thus :-

The respondents who are working as Police Constables/Police Naik appeared for the Limited Departmental Examination ('the said examination' for short) held by the MPSC for selection to the post of Police Sub-Inspector ('PSI' for short) in the year 2006. The petitioner No.1 set in motion the selection

process to fill up 533 vacancies of PSI through the said examination and accordingly, based on the requisition to that effect forwarded by the petitioner No.1, the petitioner No.2 - MPSC published an advertisement calling for applications from eligible candidates. The respondents appeared for the preliminary examination and main examination, followed by physical test and interview. The MPSC published the recommendations list on 12/11/2009 and each of the respondents were individually communicated marks obtained by them in the said examinations.

4. The MPSC recommended 533 candidates for sending them for basic training of PSI. The present respondents made an application to the petitioners on 17/9/2010 pointing out that some candidates could not be sent for training due to some administrative reasons. The respondents pointed out that from amongst 533 recommendations made only 521 joined for training. The respondents therefore requested that as the advertisement is for 533 posts, there are 12 candidates who

could be accommodated. The respondents were immediately next in the order of merit after 533 candidates and therefore, it was imperative that the respondents should be sent for training as they could be accommodated in these 12 vacancies.

5. By a communication dated 10/11/2010 the petitioner No.1 informed the respondents that the candidates will be recommended in the order of merit only to the extent of notified posts and further that the wait list of the candidates shall not be maintained. The communication dated 10/11/2010 was challenged by filing the O.As. before the Tribunal.

6. The Tribunal was of the opinion that the petitioner No.1 – State of Maharashtra could not have prevented the MPSC from even maintaining the wait list. The Tribunal was of the opinion that Rule 10(7) of the Maharashtra Public Service Commission Rules of Procedure, 2005 (hereinafter referred to as “the Rules of 2005”) would prevail over GR dated 8/2/1996. According to the Tribunal, Rule 10(7) of the Rules of 2005 clearly provides that the Commission may maintain a reserve list

up to the 10% of the vacancies in each category. The Tribunal held that GR dated 8/2/1996 of the petitioner is clearly contrary to Rule 10 (7) of the Rules of 2005. The Tribunal did not find logic and justification in the stand of the petitioner No.1 preventing the petitioner No.2 from maintaining a wait list category of candidates. The Tribunal held that maintaining a wait list category would come in handy if some of the selected candidates do not join which normally happens. The Tribunal was therefore pleased to allow the OA.

7. Learned AGP assailing the order passed by the Tribunal contends that the requisition of the State Government is very clear in as much as MPSC was called upon to submit its recommendations in the order of merit only to the extent of notified posts and further that the wait list of the candidates shall not be maintained. Learned AGP submits that it is not obligatory for the State Government to have called upon MPSC to maintain the wait list. Furthermore, it is not mandatory for MPSC to maintain the wait list. Learned AGP would contend

that the State Government has to make appointments strictly adhering to the order of merit as recommended by the Public Service Commission and it cannot disturb the order of merit. Learned AGP contends that it is open to the Government to decide how many appointments will be made. He further stated that the process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus. Learned AGP submits that once the respondents submitted themselves to the selection process pursuant to the advertisement, they cannot thereafter insist that the petitioners must maintain the wait list.

8. Learned Senior Counsel for the respondents on the other hand supported the order passed by the Tribunal. He invited our attention to the reasoning of the Tribunal. He further invited our attention to the provisions of the Maharashtra Public Service Commission Rules of Procedure, 2005 (hereinafter referred to as “the said Rules of 2005”). According to learned

Senior Counsel, sub-rule 7 of Rule 10 of the said Rules of 2005 clearly provides that the Commission has to maintain a reserve list up to the 10% of the vacancies in each category. He submits the very object of the Rule is that in the event some of the selected candidates do not join then those on the wait list can always be recommended. This according to him is in the interest of the petitioners so that the posts for which the selection is held are not left unoccupied. In his submission, the rule itself provides that the wait list shall not be operative for any additional number of posts, other than those advertised. Learned Senior Counsel would therefore submit that the object of the rule is to ensure that all the posts which are advertised are duly filled up in the selection process which is already held.

9. Learned Senior Counsel placed reliance on the decision of the Apex Court in the case of **Manoj Manu and another Vs. Union of India and others** reported in (2013) 12 SCC 171. He pointed out that the Apex Court held that the decision of UPSC not to forward names of appellants therein

from reserved/supplementary list was found to be arbitrary and discriminatory. A mandamus was issued to UPSC to forward names and appointing authority to appoint the similarly situated persons on reserve list. Learned Senior Counsel would therefore contend that in these circumstances it cannot be said that the view of the Tribunal is untenable.

10. Heard learned Counsel. It is not in dispute that so far as 2006 examination is concerned the result was declared on 12/11/2009. The Notification was for 533 posts. MPSC recommended 533 candidates of which 521 candidates joined for training as PSI. 12 recommended candidates out of 533 candidates did not join for various reasons. It is against these 12 vacancies that the Tribunal has directed the petitioners to operate the wait list and recommend the names of the respondents. It is also pertinent to mention that after declaration of the result of 2006 examination on 12/11/2009, the results of the next examination were declared on 2/12/2010. O.A. was filed on 1/12/2010 i.e. the day before the reserve list could have

lapsed or expired.

11. The question that arises for consideration is whether it is mandatory for the petitioners to maintain a wait list/reserve list. The further question that arises for consideration is whether under Rule 10(7) of the said Rules of 2005 is it mandatory for the MPSC to maintain a wait list despite specific instructions of the State Government not to maintain any wait list and only send the list of most meritorious candidates to the extent of notified posts for which the selection is held.

12. GR dated 8/2/1996 of the State Government does not permit maintaining wait list/reserve list. GR dated 8/2/1996 in so far as it pertains to the posts of PSI/PC/PN provides that in the examination held for selection to these posts there will not be a wait list. The Commission will recommend the candidates in the order of merit only to the extent of notified vacancies to be filled in. By a communication dated 10/11/2010 which is based on GR dated 8/2/1996 the State Government reiterated

this position. Even the MPSC by communication dated 16th October, 2010 addressed to one of the candidates clearly took a stand that it is only upon requisition of the State Government that a wait list is maintained.

13. Sub-rule 7 of Rule 10 of the said Rules of 2005 reads thus :-

“10(7) – Wait-list – Based on the merit of the candidates in their respective category, the Commission may maintain a reserve list up to the 10% of the vacancies in each category. Provided further that the candidates from the reserved list may be recommended to the Government only if the candidates recommended earlier are unable to accept the offer of appointment for any reason. This waiting list shall not be operative for any additional number of posts, other than those advertised. Further this reserve list and entire merit list shall be maintained confidentially with the Secretary of the Commission only. This reserve list shall lapse on the declaration of date of subsequent examination for the same category or after a period of two years from the date of preparation of this reserve list whichever is earlier.”

14. The Apex Court in the case of **Jatinder Kumar and**

others Vs. State of Punjab and others reported in (1985) 1 SCC 122 has held that the establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment. It is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject. It is true that they are appointed by Government but once they are appointed their independence is secured by various provisions of the Constitution. Whenever the Government is required to make an appointment to a higher public office it is required to consult the Public Service Commission. The selection has to be made by the commission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. By participating in the selection process the selectee cannot claim as of right that the Government must accept the recommendation of the Commission. If, however,

vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the petitioners. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz., bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus.

15. We may now advert to the decision of the Apex Court in **Manoj Manu's** case (*supra*) which learned Senior Counsel for the respondents heavily relied upon. A useful reference can be made to para 9,10,11 and 12 which read thus :-

9. It can be clearly inferred from the reading of the aforesaid that it is not the case where any of these persons initially joined as Section Officer and thereafter resigned/left/promoted etc. thereby creating the vacancies again. Had that been the situation viz. after the vacancy

had been filled up, and caused again because of some subsequent event, position would have been different. In that eventuality UPSC would be right in not forwarding the names from the list as there is culmination of the process with the exhaustion of the notified vacancies and vacancies arising thereafter have to be filled up by fresh examination. However, in the instant case, out of 184 persons recommended, six persons did not join at all. In these circumstances when the candidates in reserved list on the basis of examination already held, were available and DoP&T had approached UPSC “within a reasonable time” to send the names, we do not see any reason or justification on the part of the UPSC not to send the names.

10. We are conscious of the legal position that merely because the name of a candidate finds place in the select list, it would not give him/her indefeasible right to get appointment as well. It is always open to the Government not to fill up all vacancies. However, there has to be a valid reason for adopting such a course of action. This legal position has been narrated by this Court in [Ms. Neelima Shangla vs. State of Haryana](#) (1986) 3 SCR 785. In that case:

“The appellant was the candidate for appointment to the post of Subordinate Judge in Haryana. Under the scheme of the Rules, the Public Service Commission was required to hold first a written test in subjects chosen by the High Court and next a viva voce test. Unless a candidate secures 45% of the marks in the

written papers and 33% in the language paper, he will not be called for the viva voce test. All candidates securing 55% of the marks in the aggregate in the written and viva voce tests are considered as qualified for appointment. The appellant though secured 55% of the marks was not appointed as her name was not sent by the Public Service Commission to the Govt. The Supreme Court in such fact situation found that the Public Service Commission is not required to make any further selection from the qualified candidates and is, therefore, not expected to withhold the name of any qualified candidate. The duty of the Public Service Commission is to make available to the Govt., a complete list of qualified candidates arranged in order of merit. How should Govt., act is stated by the Supreme Court in the following words:

“Thereafter the Government is to make the selection strictly in the order in which they have been placed by the Commission as a result of the examination. The names of the selected candidates are then to be entered in the Register maintained by the High Court strictly in that order and appointments made from the names entered in that Register also strictly in the same order. It is, of course, open to the Government not to fill up all the vacancies for a valid reason. The Government and the High Court may, for

example, decide that, though 55 per cent is the minimum qualifying mark, in the interests of higher standards, they would not appoint anyone who has obtained less than 60 per cent of the marks.” (Emphasis supplied)

11. The Court after making reference to the decision of the Supreme Court in the case of [State of Haryana vs. Subhash Chander Marwah](#) reported in (1972) IILLJ266 SC further observed as under:

“However, as we said, the selection cannot arbitrarily be restricted to a few candidates, notwithstanding the number of vacancies and the availability of qualified candidates. There must be a conscious application of the mind of the Govt., and the High Court before the number of persons selected for appointment is restricted. Any other interpretation would make Rule 8 of Part D meaningless.” (Emphasis supplied)

12. It is, thus, manifest that though a person whose name is included in the select list, does not acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. Such a decision on the part of the Government not to fill up the required/advertised vacancies should not be arbitrary or unreasonable but must be based on sound, rational and conscious application of mind. Once, it is found that the decision of the Government is based on some valid reason, the Court would not issue any Mandamus to Government to fill up the vacancies.

We may however notice that in **Manoj Manu's** case (supra) the Apex Court was considering a fact situation where the UPSC sent the list of 184 persons recommended by it to the Government for appointment. Six persons out of the said list did not join. It is observed that it is not a case where the Government decided not to fill up further vacancies. On the contrary DoP&T sent requisition to the UPSC to send six names so that the remaining vacancies are also filled up. The Government thus wanted to fill up all the notified vacancies. The requisition of the Government was in consonance with its Clause 4(c) of O.M. dated 14th July 1967. Even when the Government wanted to fill up the post, the UPSC chose to forward names of three candidates. In this context the Apex Court in para 14 observed thus :-

“14. There is a sound logic, predicated on public interest, behind O.M. dated 14th July 1967. The intention is not to hold further selection for the post already advertised so as to save unnecessary public expenditure. At the same time, this very O.M. also stipulates that the Government should not fill up more vacancies than the vacancies which were

advertised. The purpose behind this provision is to give chance to those who would have become eligible in the meantime. Thus, this OM dated 14th July 1967 strikes a proper balance between the interests of two groups of persons. In the present case since the requisition of the DoP&T contained in communication dated 20th November 2009 was within the permissible notified vacancies, the UPSC should have sent the names of six candidates instead of three.

It is in this fact situation the Apex Court held that the decision of UPSC in forwarding three names against requisition of DoP&T for six vacancies was inappropriate.

16. In our opinion, the decision of the Apex Court in the **Manoj Manu's** case (supra) will not be applicable to the facts of the present case. As indicated earlier, based on OM dated 14th July, 1967 that requisition was sent by DoP&T to the UPSC to send six names so that remaining vacancies are filled up. In the present case, however, the State Government had requisitioned MPSC to send a list of selected candidates only to the extent of notified vacancies. In fact the instructions of the State

Government have been very specific in as much as on 10th November, 2010 they have informed MPSC not to maintain any wait list and send the names of most meritorious 533 candidates. No doubt, the purpose of wait list is to ensure that all notified vacancies are filled up so as not to hold further selection for the posts already advertised thus saving unnecessary public expenditure. However, if the State Government has taken a conscious decision not to operate a wait list, in our opinion, the Tribunal was not justified in directing MPSC to prepare a wait list/reserve list and make recommendation on the basis of the said list.

17. The legal position is well settled that even if the name of the candidate finds place in the select list, it would not give him/her indefeasible right to get appointment as well. It is always open to the Government not to fill up all vacancies. However, there has to be a valid reason for adopting such a course of action. It is not the case of the respondents that the selection to the post notified have not been strictly made in the

order in which they have placed by the Commission as a result of the examination. The respondents, however, contend that the action on the part of the petitioners in not maintaining wait list is contrary to sub-rule 7 of rule 10 of the said Rules of 2005. The stand of the MPSC is very specific. According to MPSC, as the requisition of the State Government is to make recommendations in the order of merit for the number of notified vacancies only, no wait list has been maintained. In fact the Government has specifically instructed the MPSC not to maintain the wait list. The respondents have participated in the selection pursuant to the advertisement issued. It is not the case of the respondents that the petitioners had ever indicated that a wait list would be maintained. Having participated in the selection process, in our opinion, the respondents would not be justified in contending that the wait list ought to have been maintained even though the State Government has taken decision not to maintain any wait list. We are of the opinion that sub-rule 7 of Rule 10 of the said Rules of 2005 is not a provision which confers any right on the respondents so as to insist that it

is mandatory for the MPSC to maintain a wait list. On the basis of the requisition of the State Government if the MPSC has taken a decision not to maintain a wait list, the MPSC cannot be compelled to maintain a wait list. For the reasons mentioned above we are inclined to interfere with the order of the Tribunal.

18. The Writ Petition is accordingly allowed in terms of prayer clause (a).

19. Rule is made absolute with no order as to costs.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)