

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6808 OF 2015

Mahendra N. Pardeshi ...Petitioner
Versus
The State of Maharashtra and ors. ...Respondents

Mr. Pradeep J. Thorat for the Petitioner.
Mr. C.P. Yadav, AGP for Respondent No.1.
Mr. Vivek V. Salunke for Respondent No.3.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 05.06.2018.

ORAL JUDGMENT:

1] Heard learned counsel for the parties.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the judgment and order dated 15.12.2014 made by the Maharashtra Administrative Tribunal (MAT), Mumbai in O.A. No. 177 of 2012 seeking *inter alia* the following reliefs :

(a) By a suitable order/ direction, this Hon'. Tribunal may be pleased to hold and declare that since the post of Deputy Director of Town Planning – Group A was available by way of backlog to the candidates belonging to VJ/A reserved category, that the Petitioner being the only candidate belonging to VJ/A being called for the interview, that the Respondent No.1 should have recommended only the Petitioner for the said post; and accordingly, the Petitioner be granted consequential benefits.

(b) By a suitable order/direction, this Hon.Tribnal may be pleased to quash and set aside the order dated 11.1.2012 issued by the Respondent No.1 under which the Respondent No.2 belonging to NT/C reserved category came to be recommended for appointment in the post of Deputy Director of Town Planning (Group A) reserved for VJ/A, and accordingly, the Petitioner be granted all the consequential service benefits.”

4] The Maharashtra Public Service Commission (MPSC) vide advertisement date 28.03.2011 invited applications for filling up of the two posts of Dy. Director of Town Planning (Group -A post) by direct recruitment. One of the post was reserved for Scheduled Caste (SC) and the other for De-notified Tribes (Vimukta Jatis – VJ/A). On 4.5.2011, the MPSC issued a Corrigendum to the advertisement dated 28.03.2011. In terms of the Corrigendum, it was made clear that in case no candidates from VJ/A category are found to be suitable, then, candidates from NT, i.e., NT (B), NT(C) and NT(D) may be considered for appointment.

The petitioner who belongs to VJ/A category, in response to the advertisement, applied for the post of Dy. Director of Town Planning.

5] As a part of prescribed selection procedures, the petitioner was called upon and attended the interview. At the interview, the petitioner secured 35 marks out of 100. The MPSC Standing Order No. 1 of 2002 dated 20.03.2002 provides that in case of selection by interview only, a candidates scoring less than 40 marks out of 100 is to be rated as below average and such candidate cannot be recommended for appointment. Since, the petitioner is reported to have secured only 35 marks out of 100 at the interview, the MPSC, did not recommend the petitioner for appointment to the post of Dy. Director of Town Planning. Instead, the MPSC, recommended respondent No.3 for appointment to the post of Dy. Director of Town Planning, since, he is reported to have secured 45 marks out of 100 at the interview. The petitioner, aggrieved by his non-selection and consequent selection of respondent No.2 to the post of Dy. Director of Town Planning instituted O.A. No. 177 of 2012 before the MAT. The MAT vide impugned

judgment and order dated 15.12.2014 has since dismissed the O.A.. Hence, the present petition.

6] Mr. Pradeep J. Thorat, learned counsel for the petitioner, has made the following submissions in support of the petition:

a] Standing Order No. 1 of 2002 dated 20.03.2002 which prescribes that candidates securing less than 40 marks must be rated as below average, itself provides that this requirement must be made known to the candidates in the letter inviting them to attend the oral interviews. Mr. Thorat submits that in the present case, since such requirement was never made known to the petitioner, the MPSC was not at all justified in applying the Standing Order No. 1 of 2002 to the case of the petitioner;

(b) The MPSC exceeded its authority in selecting and recommending respondent No.3 for appointment to the post of Dy. Director of Town Planning, which post was reserved for VJ/A category. Mr. Thorat submits that there is no dispute that respondent No.3 does not

belong to VJ/A category, but belongs to the category of NT(C). Mr. Thorat submits that upon conjoint reading of section 4(3) and section 6(1) of the Maharashtra State Public Services (Reservation For Scheduled Castes, Scheduled Tribes, De-Notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 (said Act). It is quite clear that the vacancy reserved for VJ/A category, if unfilled, had to be carried forward upto 5 years and only then, could the issue of inter transferability arise. Mr. Thorat submits that since the reserved post had not been carried forward for 5 years as prescribed in Rule 6(1) of the said Act, there is serious legal infirmity in the MPSC recommending respondent No.3 for appointment to the reserved post and the State Government appointing respondent No.3 to the reserved post of Dy. Director of Town Planning. In support, Mr. Thorat relies upon the decision of this court in case of ***Magas Varga Karmachari-Adhikari Suraksha Mahasang vs. The State of Maharashtra and ors. - 2013 (4) ALL MR 680.***

7] Mr. C.P. Yadav, learned AGP for respondent No.1 and Mr. V.V. Salunke, learned counsel for respondent No.3 refute the contentions raised by Mr. Thorat and submit that the view taken by the MAT is legal and valid and therefore, warrants no interference. They submit that the MPSC was obliged to follow its own Standing Order and refrain from recommending candidates who failed to secure less than 40 marks out of 100 at oral interview. They submit that the Standing Order has not been challenged by the petitioner and the so called failure to indicate to refer the Standing Order in the letters inviting the candidates to attend the interviews cannot be said to be any significant breach of mandatory requirement. They submit that the petitioner has neither alleged any *mala fides* nor has he questioned the award of only 35 marks to him at the oral interview. In these circumstances, they submit that there is nothing illegal or arbitrary on the part of MPSC in not recommending the petitioner for appointment to the post of Dy. Director of Town Planning.

8] Learned counsel for the respondent Nos.1 and 3 submit section 4(3) of the said Act inter transferability is

specifically provided between posts reserved for categories mentioned at numbers (3) to (6) (both inclusive) in the table under sub-section (2) of section 4 of the said Act. They point out that the MPSC had in fact issued a corrigendum on 4.5.2011 to the advertisement originally issued on 28.03.2011, in which, it was made absolutely clear that in case no candidates from VJ/A category are found to be suitable, then, candidates from NT, i.e., NT(B), NT(C) and NT (D) may be considered for appointment. They point out that the petitioner did not challenge this corrigendum, but took part in the selection process. They submit that now that the petitioner has been unsuccessful in the selection process, the petitioner, cannot be permitted to challenge the selection which is based upon the corrigendum dated 4.5.2011. They submit that such conduct on the part of the petitioner dis-entitles him to any equitable rights under Articles 226 and 227 of the Constitution of India. For all these reasons, they submit that this petition may be dismissed.

9] The rival contentions now fall for our determination.

10] The MPSC constituted in terms of Article 315 of the Constitution of India vide Standing Order No. 1 of 2002 dated 20.03.2002 has taken a decision that for a selection by interviews only, candidate, who secures less than 40 marks out of 100 at the interview will not be recommended for appointment. There is no challenge to this decision, which, in any case, is a decision which, a constitutional body like a public service commission is quite competent to arrive at. The Standing Order states that this position should be indicated in the letter inviting candidates to attend the interview.

11] In the present case, it is true that the record does not indicate that the letter inviting the petitioner to attend the interview had made a reference to this position. However, in our opinion, failure to make such reference cannot preclude the MPSC from applying its decision incorporated in Standing Order No. 1 of 2002 to the case of the petitioner. The MPSC is entitled to determine a cut of percentage below which, it may not recommend a candidate for appointment. In the absence of any allegations of *mala fides* or the application of this principle

with an unequal hand, we do not deem it appropriate to uphold the petitioner's contention that the MPSC was duty bound to ignore its own Standing Order and recommend the case of the petitioner for appointment even though, he had secured less than 40 marks at the interview.

12] The second contention of the petitioner is in fact nothing but challenge to the advertisement dated 28.03.2011 as corrected by Corrigendum dated 4.05.2011. Significantly, the petitioner has not directly challenged the advertisement or Corrigendum. The relief which the petitioner seeks, however, is to question the selection and consequent appointment of respondent No.2 as Dy. Director of Town Planning, even though, the appointment and selection is in terms of the advertisement dated 28.03.2011 as corrected by Corrigendum dated 4.05.2011.

13] As noted earlier, the advertisement as corrected, had clearly provided that in case no candidates from VJ/A category are found to be suitable, then, candidates from NT, i.e., NT (B), NT(C) and NT(D) may be considered for appointment. The petitioner, at no stage, challenged the

advertisement or Corrigendum. Rather, the petitioner took his chance in the selection process without any protest or demur. Now that, the petitioner could not secure 40 marks out of 100 in the interview and therefore, could not be recommended for appointment by the MPSC, the petitioner seeks to challenge the advertisement and the Corrigendum, though, not in clear and precise terms. This is impermissible particularly, in the equitable jurisdiction under Articles 226 and 227 of Constitution of India.

14] In ***Manish Kumar Shahi vs. State of Bihar and ors. - CDJ 2011 SC 492 (Appeal (C) No (s). 26223/2008 dated 19.05.2010)***, the Recruitment Rules for the post of Civil Judge, Junior Division had prescribed the marks for *viva-voce* test. The advertisement, however, prescribed higher marks than what were prescribed in the Recruitment Rules. The applicants in the said case, took part in the selection process despite being aware of this position and it is only after the applicants were unsuccessful in the selection process, that the applicants challenged the advertisement and the selection process in pursuance of such advertisement. In such circumstances,

the Hon'ble Supreme Court upheld the view taken by the High Court that such a petition ought not to have been entertained and that the conduct of such petitioner disentitles him from questioning the selection process. In fact, the Hon'ble Supreme Court, made reference to several decisions, which take this line of reasoning. (See: ***Madan Lal vs. State of J. & K. - (1995) 3 SCC 486, Marripati Nagaraja vs. Government of Andhra Pradesh and others v. State of Uttaranchal and others - (2008) 4 SCC 171, Amlan Jyoti Borooah vs. State of Assam - (2009) 3 SCC 227***).

15] Applying the same principle, we see no good reason to interfere with the view taken by the MAT in rejecting the petitioner's challenge to the selection of respondent No.3 on the ground that a candidate from the NT (C) category could not have been considered for appointment to the post of Dy. Director of Town Planning because the post was reserved for candidates belonging to VJ/A category and in case of non suitability of any VJ/A candidate, the post ought to have been carried forward in terms of section 6 of the said Act.

16] Even otherwise on the construction of sections 4 and 6 of the said Act, we are unable to find any serious fault in the view taken by the MAT in the impugned judgment and order. It is true that two sections have to be read in conjunction. However, section 4(3) of the said Act, which is a special provision, in terms provides that the reservation specified for categories mentioned at numbers (3) to (6) (both inclusive) in the table under sub-section (2) of said Act shall be "*inter transferable*". The category at No.(3) is De-notified Tribes (A), i.e., VJ/A. The categories at Nos.(4), (5) & (6) are NT(B), NT(C) and NT(D).

17] Section 4(3) of the said Act, which deals only with the categories at Nos.(3) to (6) (both inclusive) very specifically states that reservations specified in these categories shall be inter transferable. This aspect is further clarified in section 4(3) itself to mean that if suitable candidates for the posts reserved for any of the said categories are not available for the same recruitment year, the posts shall be filled by appointing suitable candidates from any of the other said categories. This is precisely what has been done in the present case. Thus construed, it cannot be said that

there is any serious legal infirmity with the view taken by the MAT in the impugned judgment and order.

18] In *Magas Varga Karmachari- Adhikari Suraksha Mahasangh (supra)*, the challenge was to the Circular dated 27.10.2008, which prescribed for modalities for filling up posts in case of non-availability of backward class candidates, from amongst different sub-categories. Since the modalities prescribed in the Circular dated 27.10.2008 were found to be in conflict with the provisions of section 6(1) of the said Act, the Circular dated 27.10.2008 was struck down, since, an executive instruction which is contrary to the provisions of a Statute can never be permitted to prevail. Accordingly, the decision in *Magas Varga Karmachari- Adhikari Suraksha Mahasangh (supra)* is of no assistance to the case of the petitioner.

19] For all the aforesaid reasons, we find no good ground to interfere with the impugned judgment and order made by the MAT. This petition is liable to be dismissed and is hereby dismissed. Rule is discharged. The interim order, if any, is hereby vacated. There shall however, be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)