

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5339 OF 2015

Suresh Y. Shingda	...Petitioner
Versus	
The State of Maharashtra	...Respondent

Mr. P.G. Kayande for the Petitioner.
Mr. N.C. Walimbe, AGP for the State – Respondent.

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

DATE : 2nd MAY 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 4th March 2015 by the Maharashtra Administrative Tribunal (MAT), Mumbai in O.A. No. 348 of 2012 instituted by the petitioner questioning the termination of his services as Clerk in the office of

Tehsidlar, Ta. Vikramgad, Dist. Thane (Now Palghar).

4] The petitioner applied for appointment to the post of Clerk against the reserved category in pursuance of advertisement dated 15th September 2011. In the written examination, the petitioner secured 73 marks out of 200, but despite the same, the petitioner was appointed as a Clerk by order dated 12th December 2011. Within less than two months from the date of such appointment, the respondent realised that since the petitioner had not secured the minimum passing percentage of 45% at the written examination, the petitioner's appointment was infirm and on the said basis, by the impugned order dated 1st February 2012, the services of the petitioner came to be terminated.

5] Mr. Prashant Kayande, learned counsel for the petitioner, does not dispute the aforesaid facts, but he submits that the respondent - State is bound to grant relaxation in minimum passing percentage and prescribed such minimum passing percentage at 35% in case of reserved category candidates like the petitioner. He

submits that such relaxation has been granted to one member of the reserved category in the same selection process. He submits that the Chief Minister of the State, in some instances, has granted similar relaxation in favour of the candidature from the reserved category. He submits that such relaxation has to be granted in terms of law laid down by the Hon'ble Supreme Court in case of ***Comptroller and Auditor General of India, Gian Prakash NEW vs. K.S. Jagannathan and anr. - AIR 1987 SC 537, Dr. Preeti Srivastava and anr. vs. State of M.P. And ors. - AIR 1999 SC 2894*** and ***Rohtas Bhankhar and ors. vs. Union of India and anr. - (2014) 8 SCC 872***. For all these reasons, Mr. Kayande submits that the impugned judgment and order made by the MAT may be set aside and the reliefs as prayed for by the petitioner in the O.A. be granted along with all consequential benefits.

6] Since, a positive statement was made in the petition that the Chief Minister of the State has granted relaxation in the minimum passing percentage up to 35% in favour of the candidates belonging to the reserved category, we

made an order on 3rd August 2016 to direct the respondent – State to consider if any such relaxation is possible, since, there was no dispute that the petitioner belongs to reserved category.

7] Mr. Walimbe, learned AGP for the respondent – State, on the basis of written instructions on 25th April 2018, states that in terms of the Government Resolution, the minimum passing percentage in the written examination for selection to the Clerk cadre is 45% and there is no provision for grant of any relaxation. He states that no such relaxation has been granted by the Hon'ble Chief Minister of the State and since there is no provision for grant of relaxation, it will not be possible for the State Government to grant relaxation to the petitioner. Mr. Walimbe submits that grant of any relaxation to the petitioner, may constitute a precedent and therefore, it is not possible to consider the request of the petitioner for relaxation.

8] The MAT has considered the contentions of the petitioner in some detail. The MAT has held that in terms of G.Rs., obtaining a minimum percentage of 45% in the

written test is mandatory and since, there is no provision for relaxation, there is no question of considering the petitioner's plea for relaxation of this requirement. The MAT, in fact called for and perused the original records and has noted that apart from the petitioner there was only one other candidate, who has secured less than minimum prescribed 45% marks in the written examination. The MAT has then noted that such other person was not offered any appointment at all and the petitioner was appointed, but upon realising the mistake his services were terminated within less than two months. On this ground, the MAT has correctly held that the petitioner cannot claim any discrimination.

9] Mr. Kayande, however, relied upon the provisions of Articles 16(4B) as well as the aforesaid judgements, to submit that the petitioner is entitled to relaxation up to the extent of minimum percentage of 35% in the passing marks, as a matter of right and there is a corresponding duty upon the respondent to so grant relaxation. Despite grant of several opportunities, however, Mr. Kayande was unable to produce any rules or even executive instructions,

which provides for relaxation reducing minimum percentage to 35% or conferring any power of relaxation.

10] The provisions of Article 16(4B) of the Constitution of India are only enabling in nature. This means that if the State were to make any provisions for reducing the minimum passing percentage in favour of the reserved category candidates, then perhaps, such a provision, would be legal and valid. However, the provisions of Article 16(4B) of the Constitution of India do not mandate the State to make such provisions. Therefore, the MAT was justified in not issuing any directions to the State to grant relaxation.

11] To our specific query as to whether the ruling in *K.S. Jagannathan (supra)*, stands overruled, Mr. Kayande, learned counsel for the petitioner, maintained that the case has not been overruled. In the first place, the ruling in *K.S. Jagannathan (supra)* is distinguishable on facts. In any case, the ruling in *K.S. Jagannathan (supra)*, stands impliedly overruled by the Constitution Bench in ***Indra Sawhney vs. Union of India - AIR 1993 SC 477***. This

position is clarified by the Hon'ble Supreme Court in case of **Ajit Singh (II) v. State of Punjab,(1999) 7 SCC 209**, where it is observed as follows:

“32.....It is true that in Jagannathan case the three -Judge Bench issued a mandamus, after referring to Article 142, that the Government must add 25 marks to SC/ST candidates who had taken the SAS Examination for promotion as Section Officers and also that, in future, a reduced minimum marks must be provided and announced before the examination. The Court also observed that the Department had not passed orders as per a general OM of the Government dated 21-9-1977. But the attention of the Court was not drawn to the judgment of the Constitution Bench in C.A. Rajendran case, and other cases to which we have referred earlier. Further, if the State is of the opinion that in the interests of efficiency of administration, reservation or relaxation in marks is not appropriate, then it will not be permissible for the Court to issue a mandamus to provide for reservation or relaxation.”

12] In **Gulshan Prakash (Dr) and ors vs. State of Haryana and ors - (2010) 1 SCC 477** and **Food Corporation of India vs. Ashis Kumar Ganguly - (2009) 7 SCC 734**, the Hon'ble Supreme Court has expressly overruled *K.S. Jagannathan (supra)*. In these cases, the Hon'ble Supreme Court has held that Article 16(4) of the Constitution confers a discretion and does not create any constitutional duty and obligation. Therefore,

the view in *K.S. Jagannathan (supra)* that a mandamus can issue either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches. The ruling in *K.S. Jagannathan (supra)*, therefore, cannot be held to be laying down the correct law.

13] In ***Union of India vs. R. Rajeshwaran - (2003) 9 SCC 294***, a direction was sought to apply the rule of reservation of the Scheduled Castes and Scheduled Tribes in respect of those seats, which are set apart from all-India pool in MBBS/BDS list. In the present context, the following conclusion which recorded at paragraphs 9 and 10 (page 298) is relevant:

*“9. In Ajit Singh (II) v. State of Punjab this Court held that Article 16(4) of the Constitution confers a discretion and does not create any constitutional duty and obligation. Language of Article 15 (4) is identical **and the view in Comptroller and Auditor General of India v. K.S. Jagannathan and Superintending Engineer, Public Health v. Kuldeep Singh that a mandamus can be issued either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches and, therefore, these two judgments cannot be held to be laying down the correct law.** In these circumstances, neither the respondent in the present case could have sought for a direction nor the High Court could have granted the same.*

10. Hence, we allow the writ appeal transferred to this Court and set aside order made in the writ petition. The appeal also shall stand disposed of accordingly.

(emphasis supplied)”

14] *Dr.Preeti Srivastava (supra)* is a case where the prescription of the cut-off percentage 35% in favour of the reserved category candidates as against cut-off percentage of 45% for general category candidates, was under challenge. In this context, the Hon'ble Supreme Court held that prescription of a lower cut-off percentage in favour of reserved category candidates is legal and valid. This decision is of no assistance to the petitioner because, in the present case, the State has not prescribed any lower standard for reserved category candidates. *Dr. Preeti Srivastava (supra)*, is certainly not an authority on basis of which, a writ of mandamus can be issued to the State go grant relaxation or to prescribed relaxed standards in favour of the reserved category candidates.

15] In *Rohtas Bhankar (supra)*, the office memorandum which had prescribed relaxed standards in favour of reserved category candidates was challenged. Relying upon Article 16(4A) of the Constitution of India, the Hon'ble

Supreme Court held that prescription of such relaxed standards is permissible. Again, *Rohtas Bhankar (supra)* is not an authority for the proposition that the courts or tribunals, relying upon an enabling provisions like Article 16(4A) or (4B), can issue a writ of mandamus directing the State to provide for relaxation standards or to grant relaxation in favour of members of SC & ST.

16] In ***Suresh Chand Gautam vs. State of Uttar Pradesh - (2016) 11 SCC 113, Central Bank of India vs. SC/ST Employees Welfare Association - (2015) 12 SCC 308*** and ***Census Commissioner vs. R. Krishnamurthy - (2015) 2 SCC 796***, the Hon'ble Supreme Court held that the provisions under Article 16(4A) and 16(4B) are only enabling and no writ of mandamus can be issued to the State to enforce such enabling provisions. In fact, the Hon'ble Supreme Court has held that any directions to the State to make a provision for relaxation or to frame rule or regulation would amount to entering into the domain of legislation. A writ of mandamus of such a nature cannot be issued.

17] For all the aforesaid reasons, we see no good ground to interfere with the impugned judgment and order made by the MAT. The petition is therefore, dismissed. Rule is discharged. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)