

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6607 of 2019**

Makrand Subhash DagadkhairPetitioner
versus
The State of Maharashtra and ors.Respondents

Mr. P. N. Joshi along with Mr. Rahul Kulkarni and Mr. Amol Wagh i/b.
Mr.Sagar Kasar, advocate for the petitioner.
Smt. M. S. Srivastav, AGP for the State.
Mr. S. R. Ganbavale, advocate for respondent No.2.
Mr. A. Y. Sakhare, senior counsel along with Mr. P. N. Palshikar, Mr.
Santosh Parad and Mr. Vinod Mahadik, advocates for respondent No.3-
MCGM.

**CORAM : RANJIT MORE &
SMT. BHARATI H. DANGRE, JJ.**

DATE : 18th JULY, 2019.

P. C. :

The Municipal Corporation of Greater Mumbai (for short “the MCGM”) published an advertisement on 25th November, 2016 inviting applications for 7 posts of Assistant Commissioner in Municipal Corporation. The advertisement No.53 of 2016 bifurcated 7 posts, out of which, 5 posts were reserved for candidates from various backward categories and 2 posts were reserved for Open Category candidates. The advertisement also reserved one post by vertical reservation in favour of a female candidate. It also stipulated that one post reserved for physically handicapped is inclusive in the posts to be filled in.

Based on the said advertisement, merit list came to be prepared and one Mr. Makrand Subhash Dagadkhair, the present petitioner, is placed at serial No.1, since he has scored highest marks. He belongs to NT(D) category. However, for the purpose of selection process, he has been considered to be an open category candidate and considering his merit, he was placed at serial No.1 in the merit list. The merit list, in total, consists of 13 candidates and out of this, 5 candidates came to be recommended from various reserved categories and candidate at serial No.12-Miss Shwetambari Vasantrao Bhosale (Female) and a candidate at serial No.13 – Gajanan Vinayak Bellale (Open PH– Low Vision) came to be recommended against 2 open category posts (vertical reservation) and the remark column of the merit list reflect that these two candidates were recommended in the category of Open-F-1 and Open-PH-1-Low Vision respectively. Based on the said merit list, 5 candidates from reserved category were issued with orders of appointment. Out of these, 2 candidates viz. Miss Shwetambari Vasantrao Bhosale selected against open category and one – Katekar Nitin Narayan who was recommended against SBC-1 category, did not resume their duties. Resultantly, two posts again remained to be filled in.

2. The petitioner staked his claim for one open post which fell vacant since Miss Shwetambari Vasantrao Bhosale i.e. Open-F-1 did not resume her duties. The said claim is staked on the basis of a

decision of State Government contained in a Resolution dated 25th May, 2001 issued by the Women and Child Welfare Department setting out the guidelines for filling up 30% posts reserved for women category. As a stipulation of the said commitment of reserving 30% posts for women candidates, Clause (7) of the said Government Resolution stipulates that in a particular year of recruitment, if a female candidate is not available, then, the said post should be filled in by a male candidate of the same category from which the post was to be filled. The petitioner fall back on clause (7) of the Government Resolution dated 25th May, 2001 and claim that he is entitled to be recommended by the Maharashtra Public Services Commission (for short “the MPSC”) to the open category post of the Assistant Commissioner.

3. In response to the petition, an affidavit dated 5th July, 2019 is filed by the General Administrative Department through its Deputy Secretary and in the said affidavit, a reference has been made to the corrigendum issued by the State Government on 19th December, 2018, in relation to filling up of the parallel reservation posts and it is admitted that by the said corrigendum, the Government has clarified that a backward class candidate can be selected in open category on the basis of his merit. An affidavit is also placed on record on behalf of MCGM, which supports the case of the petitioner. The petition is opposed by MPSC and the basis of opposition is the corrigendum issued by the State

Government on 19th December, 2018 and Shri, Ganbavale, learned counsel appearing for the MPSC would submit that the State Government has clarified the position which was earlier contained in the Government Resolution dated 13th August, 2014 and now by the corrigendum, the open category seat can be filled in by a candidate from reserved category while filling up the horizontal reservation. However, Mr. Ganbavale would vehemently submit that the said resolution being prospective in operation, the present selection process is not governed by the said corrigendum. It is only on this ground, the recommendation of the petitioner against open category seat, being belonging to NT category, has been opposed.

4. Our attention was invited to the settled position of law in the case of **Rajesh Kumar Daria versus Rajasthan Public Service Commission and ors. (2007) 8 SCC 785** wherein the Apex Court had an opportunity to deal with a similar issue and while dealing with the aspect of filling of social reservations in favour of SC, ST and OBC under Article 16(4), often referred to “vertical reservations”, it has been clarified by Their Lordships that whenever a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for the respective

Backward Class. It was further clarified that if the number of SC candidates, who by their own merit, get selected in open competition vacancies and equals or even exceed the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs stood filled up. But, on the contrary, the entire reservation quota will be intact and available in addition to those selected under open competition category. Similar observation is also made by the Apex Court in **Indra Sawhney versus Union of India, 1992 Supp (3) SCC 217**, where in paragraph 811, it is observed thus :

“811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.”

5. We have referred to the aforesaid dictum of the Hon'ble Apex Court, where it is clearly held that it is permissible for a reserved category candidate to compete with the open category candidates and if a reserved category candidate takes a seat of open category candidate on the basis of his merit, then, the said seat will not be counted as to be filled in from reserved category and one more candidate from the said category is entitled to take another seat from that particular category.

The dictum of the Apex Court, very eloquent and clear, came to be expressed in the aforesaid two judgments. The State Government took necessary steps to rectify its own policy and resultantly it issued a Resolution dated 19th December, 2018. The said resolution in fact is reiteration of the guidelines issued by the Apex Court in the aforesaid 2 judgments and earlier erroneous position which was prevailing in the State of Maharashtra in terms of earlier Government Resolutions dated 16th March, 1999 and 13th August, 2014 came to be clarified by the said Government Resolution dated 19th December, 2018. If the policy of the State Government is brought in tune with the judgment delivered by the Apex Court, we fail to understand how it can be said that this policy would be applied prospectively. In fact, every policy of the State Government must fall in line with the principle of law laid down by the Hon'ble Apex Court by virtue of Article 144 of the Constitution of India, all the authorities, civil and judicial, in the territory of India shall act in aid of Supreme Court. The authoritative pronouncements of the Supreme Court also binds us by virtue of Article 141 of the Constitution of India.

6. In such circumstances, the stand taken by the MPSC to deny the claim of the petitioner on the ground that the policy contained in corrigendum cannot be made applicable retrospectively is a misconception and the petitioner, in fact, is entitled to take the seat meant for open category, particularly, when the seat which went to a

female candidate, who has failed to join and the seat which fell vacant was required to be filled strictly in accordance with the policy of the State Government as contained in its Resolution dated 25th May, 2001.

7. In such circumstances, we are of the clear view that the action of the MPSC in not recommending the name of the petitioner to respondent No.3 for filling up the post of Assistant Commissioner needs to be set-aside and mandamus be issued to the MPSC to recommend the name of the petitioner who finds place at serial No.1 of the merit list published by it, in pursuance of the advertisement. Merely, because the candidate belongs to NT(D)category but since he finds place at the top of the merit list, he cannot be deprived of the said seat which is meant for an open category candidate.

8. In the result , we direct respondent No.2-MPSC to recommend the petitioner for the post of Assistant Commissioner of MCGM in light of the policy of the State Government and, thereafter, an appointment order be issued in favour of the petitioner to the post of Assistant Commissioner within a period of six weeks from today.

9. The writ petition is made absolute in aforesaid terms. No order as to costs.

[SMT. BHARATI H. DANGRE, J.]

[RANJIT MORE, J.]