

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3945 OF 2019

ALONG WITH

CIVIL APPLICATION NO. 2055 OF 2019

AND

INTERIM APPLICATION NO. 1 OF 2019

IN

WRIT PETITION NO. 3945 OF 2019

Shri Santosh Pandurang Lokhande]
 Age 35, Occ. Service,]
 R/at. 304/A, Nav Amrut Kumbh CHS,]
 Birla School Road, Kalyan (W),]
 Dist. Thane.]...Petitioner

Versus

1. **The State of Maharashtra**]
 Through the Secretary,]
 Home Department, Mantralaya,]
 Mumbai 400 032.]
2. **The Secretary,**]
 Maharashtra Public Service Commission]
 5th, 6th and 7th floor,]
 Cooprej Telephone Exchange Bldg.,]
 Maharshi Karve Marg,]
 Cooprej, Mumbai 400 021.]
3. **Vikas Babasaheb Gunjal,**]
 Age 29 years, Occ. Service,]
 R/o. Pimpalgaon, Malvi,]
 Tq.Nagar, Dist. Ahmednagar]
4. **Shekhar Narayan Domale**]
 Age : 30 years, Occ. Service,]
 R/o. Appegaon, Tq. Shegaon,]
 Dist. Ahmednagar]
5. **Ankush Bhausahab Navale**]
 Age : 30 years, Occ. Service,]

- R/o. Chnad Bu. Tq. Karjat,]
 Dist. Ahmednagar]
6. **Sandeep Gawajiram Darwade**]
 Age : 31 years, Occ. Service,]
 R/o. Tarvadi, Tq. Navasa,]
 Dist. Ahmednagar]
- 7 **Prashant Tukaram Malvade**]
 Age : 27 years, Occ. Service,]
 R/o. Nandani, Tq. Shirol,]
 Dist. Kolhapur]
8. **Govind Laxman Phad**]
 Age : 31 years, Occ. Service,]
 R/o. SRPF, Gul. No. 14,]
 Satara Parisar, Dist. Aurangabad]
9. **Pawar Deepak Gangadhar**]
 R/at. Room No. 60, Bldg. No. 9/B,]
 Senapati Bapat Marg, New Police Line,]
 Mahim, Near Raheja Hospital,]
 Mumbai 400 016.]
10. **Sonawane Gopal Bhagwan**]
 R/at. Mhatre Chawl, 201 Bandhu Prem]
 Building, 3rd Floor, Room No.1, Main]
 Road,]
 Ghansoli Gaon, Navi Mumbai,]
 Thane 400 701.]
11. **Rathod Gajendradatta Mahadeo,**]
 Age : 28 years, Occ. Service,]
 R/o. Laman Tanda, Waghuluj,]
 Beed – 414202.]
12. **Mangesh Vijaykumar Kendra**]
 Age : 28 years, Occ. Service,]
 R/o. Ruddha, Tq. Ahmadpur,]
 Latur – 413 515.]

13. **Sagar Bapu Sangave**]
 Age : 28 years, Occ. Service,]
 R/o. Room No. 17, Building – C,]
 Driver Police Line,]
 Prabhakar Hegade Marg,]
 Court Naka, Central Ground,]
 Thane – 400 601.]
]
14. **Usha Shankar Chavan,**]
 Age : 29 yrs. Occ. Service,]
 R/o. Fatatewadi, Post. Hotagi Station,]
 Hotagi, Solapur – 413 215.]
]
15. **Jayshri Bhaskar Tribhuwan**]
 Age : 28 years, Occ. Service,]
 R/o. 4/11, 154, Bhanudas Nagar,]... Respondents
 Jawahar Colony,
 Aurangabad – 413 001.

Mr. Sandeep Dere, for petitioner.

Mr.A.A.Kumbhakoni, Advocate General a/w. Mr.P.P.Kakade and Mr.Akshay Shinde- APP 'B' Panel counsel for State-Respondent nos.1 & 2.

Mr.A.G.Damle, Senior Advocate i/by Mr.Vinod Sangvikar, for Respondent Nos.3 to 5, 7 and 8.

Mr.Mohit Bharadwaj for Respondent no.6.

Mr.Abhinav Chandrachud i/b Mr. Nilesh Mohan Wable, for Applicant in CAW 2055/2019.

CORAM : **RANJIT MORE & N.J. JAMADAR, JJ.**

Reserved for Judgment on : 11th October 2019.

Judgment Pronounced on : 18th October 2019.

JUDGMENT (PER N.J. JAMADAR)

1. Rule. Rule made returnable forthwith and heard finally at the

admission stage.

2. This petition takes exception to the judgment dated 27th March 2019 passed by Maharashtra Administrative Tribunal, Mumbai Bench ('Tribunal') in Original Application No.387 of 2018, whereby the original application filed by the petitioner herein came to be dismissed.

3. The background facts necessary for determination of this petition can be stated in brief, as under :-

(a) The State Government had initiated the process to fill in 332 posts of Police Sub-Inspector under Rule 3(b) of the Police Sub-Inspector (Recruitment) Rules, 1995 which provide for promotion to the said post on the basis of the performance in the limited Departmental examination to be conducted by the Maharashtra Public Service Commission ('Commission'), from amongst the Police Constables. The advertisement was issued on 14th June 2017. The petitioner was eligible to appear for the said examination. The Commission held the Preliminary Examination on 10th September 2017. In conformity with the policy, posts were reserved for the categories for whom the reservation was provided in terms of the

Government Resolution dated 25th May 2004. The said Government Resolution providing reservation in promotion was struck down by this Court in Writ Petition No.2797 of 2015. The stay granted by this Court to the operation of the said judgment and order expired on 27th October 2017. However, the results of the Preliminary Examination conducted by the Commission were declared taking into account the provision for reservation.

(b) The petitioner averred that the Commission committed a grave error in carrying out the exercise of short-listing of the candidates for the Main Examination, applying the criteria of reservation, when the Government Resolution, dated 25th May 2004 was quashed and set aside and it was legally impermissible to short-list the candidates for Main Examination applying the principle of reservation and lowering the cut-off marks for the candidates belonging to the reserved category. This exercise deprived the petitioner an opportunity to compete in the Main Examination. Had the reservation been not applied, the petitioner

would have become eligible to appear for the Main Examination.

(c) To complete the narration of facts, it may be noted that the advertisement for the Main Examination was conducted on 24th December 2017. The results of the Main Examination were declared by the Commission on 6th April 2018. On 20th April 2018, the petitioner and the other five candidates filed Original Application No. 387 of 2018, assailing the action of the Commission and the State.

(d) The petitioner had sought the following reliefs :

“10(a) This Hon’ble Court may be pleased to call for record and proceeding in the case of present applicant, and this Hon’ble Tribunal may further be pleased to issue appropriate direction to the Respondent Nos.1 and 2, to declare the result of Pre-LDCE-2017 dated 18.11.2017 on the basis of judgment dated 4.8.2017 passed by Hon’ble High Court in C.W.P. No. 2797 of 2015 and accordingly the Respondents may be pleased to further direct to conduct the Main-LDCE-2017 Exam on the basis of merit of result Pre-LDCE-2017.

(b) The Respondent no.2 may further be pleased to direct to conduct the fresh examination of meritorious candidate of Pre-LDCE-2017, without applying the criteria of reservation.”

(e) The State and the private respondent Nos. 3 to 8-respondent Nos. 3 to 8 herein, resisted the application. It was, *inter-alia*, contended that, having participated in the selection process, it was not open for the applicants to challenge the process of selection. The locus of the applicants to file the original application was also called in question.

(f) The Tribunal framed the following question for its consideration :-

“Whether applicants are entitled to be substituted in place of Respondent no.3 to 8 on the basis of judgment and operative order of Hon’ble High Court contained in para 3 of order passed in W.P. 2797/2015 dated 4.8.2017 (quoted at page 9 & 10) of the memo of O.A.).”

(g) The Tribunal was persuaded to answer the said question in the negative. The Tribunal extensively extracted its observations in the judgment rendered in Original Application No. 394 of 2018, in which, the Tribunal had dealt with the consequences which ensued post the judgment of the Supreme Court in the case of *Jarnail Singh & Ors. Vs. Lachhmi Narain Gupta & Ors.*¹ and thereafter concluded that the judgment of this Court

1 2018 (10) SCC 396

in the case of *The State of Maharashtra through the Chief Secretary Government of Maharashtra & Anr. vs. Shri Vijay Ghogre & Ors.*² is impliedly overruled by the judgment of the Supreme Court in the case of *Jernail Singh* (Supra) and, thus, there was no legal or constitutional bar in reserving the vacancies for SC, ST, OBC etc.

4. Being aggrieved by the impugned judgment of the Tribunal, the petitioner-applicant No.1 has approached this Court.

5. We have heard Shri Sandeep Dere, for the petitioner, Shri A.A.Kumbhakoni, the learned Advocate General for the respondent Nos.1 & 2-State, Shri A.G.Damle, the learned Senior Counsel for the respondent Nos.3 to 5, 7 and 8 and Shri Mohit Bharadwaj, the learned counsel for the respondent No.6.

6. Shri Dere, the learned counsel for the petitioner mounted a multi-pronged challenge to the impugned judgment. First and foremost, according to the learned counsel for the petitioner, the Tribunal committed a grave judicial impropriety in recording an observation that the judgment passed by this Court in *Shri Vijay*

² 2018 (1) BCR 251

Ghogre & Ors. (Supra) has been impliedly overruled by the Supreme Court in the case of ***Jernail Singh*** (Supra). Amplifying the submission, it was urged that the Tribunal had fallen into an error in opining that quantifiable data was not required even to address the issue of “inadequacy of representation”, in view of the judgment of the Supreme Court in the case of ***Jernail Singh*** (Supra). Secondly, the substance of the matter has been completely lost sight of by the Tribunal. The moot question which warranted consideration was whether the respondent Nos.1 and 2 could have determined the cut-off marks for eligibility to appear for the Main Examination by applying the principle of reservation. Since the decision of this Court in the case of ***Shri Vijay Ghogre & Ors.*** (Supra) was rendered on 25th July 2017 and stay to its operation, concededly, expired on 27th October 2017, the results of Preliminary Examination could not have been declared on 18th November 2017 by applying the principle of reservation. Thirdly, according to Shri Dere, the Commission had committed an illegality not only by applying the principle of reservation while determining the cut-off marks but also in allowing the candidates who sought to compete in the open category despite availing the benefits of reservation, like age relaxation, on the strength that they belonged to the reserved category. Thus, had the

principle of reservation been not applied and the cut-off marks for eligibility to appear for the Main Examination were determined on the basis of strict merit, which the respondent Nos.1 and 2 were legally enjoined to do, the petitioner would have become eligible to appear for the Main Examination. Shri Dere, thus, urged with tenacity that the entire selection process suffers from the vice of unconstitutionality.

7. Before we note the submissions of the learned Advocate General, in opposition to the petition, it may be apposite to notice the import of the judgment of the Supreme Court in the case of *Jernail Singh* (Supra), the consequences it has upon the parameters postulated in the case of *M.Nagraj and Ors. Vs. Union of India & Ors.*³ In the backdrop of the controversy, it would suffice to extract the observations of the Supreme Court in the case of *M. Nagraj* (Supra) in paragraph No.86. It reads as under :

“86 Clause (4A) follows the pattern specified in clauses (3) and (4) of [Article 16](#). Clause (4A) of [Article 16](#) emphasizes the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of [Article 16](#) is an enabling provision. It gives freedom to the

*State to provide for reservation in matters of promotion. Clause (4A) of [Article 16](#) applies only to SCs and STs. The said clause is carved out of [Article 16\(4\)](#). Therefore, clause (4A) will be governed by the two compelling reasons "backwardness" and "inadequacy of representation", as mentioned in [Article 16\(4\)](#). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further in *Ajit Singh (II)*³, this court has held that apart from 'backwardness' and 'inadequacy of representation' the State shall also keep in mind 'overall efficiency' ([Article 335](#)). Therefore, all the three factors have to be kept in mind by the appropriate Government by providing for reservation in promotion for S.Cs and S.Ts."*

8. In the case of ***M. Nagraj*** (Supra), the Constitution Bench thus expounded that in providing reservation in promotion for Scheduled Caste and Scheduled Tribe, it was obligatory to have regard to three factors, namely, "backwardness", "inadequacy of representation" and "overall efficiency".

9. In the case of ***Jernail Singh*** (Supra), the correctness of the aforesaid decision of the Supreme Court in the case of ***M. Nagraj*** (Supra) was considered by the Constitution Bench. The Supreme Court observed that when ***M. Nagraj*** (supra) requires the States to collect quantifiable data on backwardness, in so far as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to the

Indra Sawhney Vs. Union of India ⁴ and would have to be declared to be bad on this ground. The Supreme Court, thus, concluded as under :-

“21 Thus, we conclude that the judgment in Nagaraj (supra) does not need to be referred to a seven-Judge Bench. However, the conclusion in Nagaraj (supra) that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in Indra Sawhney (1) (supra) is held to be invalid to this extent.”

10. The learned Advocate General submitted that in view of the aforesaid pronouncement of the Supreme Court and the fact that the decision of this Court in the case of ***Shri Vijay Ghogre & Ors.*** (Supra) striking down the Government Resolution dated 25th May 2004, which provided for reservation in promotion, the legal position which currently holds the field is that the State cannot provide for reservation in promotion. To this extent, the submission on behalf of the petitioner cannot be faulted at, urged the learned Advocate General, with usual candour.

11. However, according to the learned Advocate General, there are two fundamental grounds on which the petition does not deserve to be entertained. One, the application before the Tribunal suffered from

⁴ 1992 Supp. (3) SCC 217

delay and latches to such an extent that it did not deserve consideration. What further exacerbates the situation is the fact that there is no semblance of explanation for the delay. Since the petitioner was aggrieved by the declaration of the results of the Preliminary Examination by applying the principle of reservation, the petitioner could not have leisurely waited till the declaration of the results of the Main Examination to challenge the selection process, urged the learned Advocate General. Two, the petitioner would not have been eligible to appear for the Main Examination, having scored only 42 marks, even if the principle of reservation was not applied and the candidates were allowed to appear for Main Examination strictly on the basis of the merit. Resultantly, at the instance of the petitioner, the entire selection process cannot be interjected at this stage.

12. Though the submission on behalf of the respondent Nos.1 and 2 as regards delay and latches on the part of the petitioner in approaching the Tribunal, cannot be said to be wholly unmerited, yet, in the facts of the case, we find that the second objection raised by the learned Advocate General to the tenability of the challenge to the process, at the instance of the petitioner, is of critical significance and goes to the root of the matter. We are, therefore, impelled to note the

said objection to the consideration of the grievance of the petitioner in a little detail.

13. In the additional affidavit filed on behalf of the respondent No.2-Mr.Vipul Pawar, Deputy Secretary of the Commission, the said ground is articulated in the following terms :-

[A] The Commission had initiated the process of filling up 322 posts. In accordance with the Maharashtra Public Service Commission Rules of Procedure 2014, amended with effect from 6th December 2017, the number of candidates to be called for Main Examination was, “12 times of the notified vacancies”. The said amendment is deemed to have come into force from 25th September 2017 as the Standing Order No.11/2017/5 was issued on that day. Applying the said ratio, the number of candidates to be made eligible for the Main Examination worked out to ‘3864’ (322 x 12). Consequently, the cut-off score in Preliminary Examination was required to be worked out to make 3864 candidates available for the Main Examination. With the cut-

off of 43 marks, 4429 candidates became eligible for the Main Examination as against the requirement of 3864. As with the cut-off of 43 marks, more than the required number of candidates became available, it was not necessary to lower the cut-off to '42' (which the petitioner had secured).

[B] Since the Commission had applied reservation to the selection process, it had to exclude 482 candidates belonging to the reserved category, who had availed various benefits available to the reserved candidates, such as relaxation of age and therefore could not be considered for the purpose of employment through the open category. By this process, the number of candidates available worked out to '3864' at cut-off of '44'. Thus, the cut-off was taken as '43' with 4429 candidates. Instead of '44' with '4063' candidates. The said cut-off of 43 was not required to be lowered for any category except scheduled tribe and NT-C.

[C] A chart titled the cut-off report is annexed to the affidavit. It is extracted below :

CATEGORY	POSTS	COUNT	CUT OFF MARKS	EXCESS CANDIDATES
OPEN AND OBC	158*12=1896	2214	43	318
SC	44*12=528	636	43	108
ST	36*12=432	455	36	23
DT-A	5*12=60	268	43	208
NT-B	10*12=120	191	43	71
SBC	6*12=72	119	43	47
NT-C	36*12=432	460	41	28
NT-D	27*12=324	395	43	72
TOTAL				874

TOTAL POSTS : 322 * 12 = 3864

NO. OF QUALIFIED CANDIDATES = 4738

[D] An another Chart (III) which gives the break-up of the candidates who were made eligible for Main Examination from ST and NT-C category, lowering the cut-off of 43 is also annexed. It reads as under :-

UP TO MARKS	ST (REQUIRED 432)	
	AVAILA BLE	SHORT FALL
43	214	218
42	235	197
41	267	165
40	303	129

UPTO MARKS	NT-C (REQUIRED 432)	
	AVAILAB LE	SHORT FALL
43	392	40
42	428	4
41	460	FULFILL

39	345	87
38	381	51
37	408	24
36	455	FULFILL

[E] The aforesaid Charts cumulatively indicate that 309 candidates, who have secured less than 43 marks (from ST and NT-C category) were allowed to appear for the Main Examination. Out of these candidates, only 18 candidates have qualified in the Main Examination. The break-up thereof is as under :-

PARTICULAR	COUNT
PRE EXAM. MARKS LESS THAN 43 (OPEN CUT OFF)	
ST	241
NT-C	68
TOTAL	309

ADMITTED FOR MAIN EXAMINATION AMONG ABOVE-MENTIONED 309	298
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PRESENT FOR MAIN EXAMINATION AMONG ABOVE MENTIONED 298	294
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QUALIFIED IN MAIN EXAMINATION AMONG ABOVE MENTIONED 294	
ST	13
NT-C	5
TOTAL	18

14. The learned Advocate General, in the light of the aforesaid position, made a categorical statement that the aforesaid 18

candidates, who have been declared successful in the Main Examination, would not be selected and their names would be removed from the final select list as they would not have been eligible to appear for the Main Examination, but for the application of the principle of reservation. In the additional affidavit of Mr. Vipul Pawar, the aforesaid statement made by the learned Advocate General is reiterated.

15. In the backdrop of the aforesaid facts, the learned Advocate General strenuously urged that the petitioner would not have become eligible to appear for the Main Examination, even if the principle of reservation was not applied in respect of the candidates belonging to the ST and NT-C category. With the cut-off of 43, 4429 candidates, as against the requirement of 3864, were available. Despite exclusion of those ineligible 309 candidates, the cut-off would not have fallen below 43, in any case, as 4120 candidates, with the cut-off marks 43, became available with the ratio of 1:12, as against the requirement of 3864.

16. We find substance in the aforesaid submission of the learned Advocate General. The results of the Preliminary Examination (Chart I

annexed to the additional affidavit), indicate that there were 4063 candidates with the cut-off of 44 marks; whereas with the cut-off of 43 marks, 4429 candidates were available. Even with the application of the principle of reservation, the cut-off was not required to be lowered below '43' in respect of either open or other categories except ST and NT-C, as revealed by Chart (II), extracted above. Chart (III) indicates that 309 candidates of ST and NT-C category, who had secured less than 43 marks, were allowed to appear for the Main Examination. The exclusion of the candidature of those 309 candidates from the 4738 candidates, who were made eligible for the Main Examination, would not bring the cut-off below '43'. The petitioner, who had secured '42' marks, would not have, thus, become eligible for the Main Examination even with the exclusion of those 309 candidates.

17. The learned counsel for the petitioner submitted that the aforesaid latest stand of the Commission is at complete variance with its earlier position as placed before the Court by way of affidavit-in-reply of Mr.Vipul Pawar. Drawing the attention of the Court to Paragraph 13 of the said affidavit-in-reply, especially to the affirmation that the Commission had observed the ratio of 1:14 and

thereby made 4738 candidates eligible for the Main Examination, it was forcefully submitted that the Commission cannot now fall back on the application of ratio of 1:12 and thereby deprive the petitioner of the legitimate right to appear for the Main Examination. If the ratio of 1:14 is applied, and, the ineligible candidates are excluded from consideration, the cut-off would definitely fall below 43 and the petitioner would become eligible, submitted Shri Dere.

18. The submission appeared attractive at the first blush. On close scrutiny, we found that, in the additional affidavit, Mr. Vipul Pawar has justifiably explained the import of the said statement. Though the candidates are required to be shortlisted with the ratio of 1:12, yet, all the candidates who secured identical marks, which is determined as the cut-off, are required to be made eligible for the Main Examination, though the number of candidates may then exceed the requirement. The Chart (III), extracted above, thus, indicates that 874 excess candidates were required to be made eligible as they had secured the marks which were determined as cut-off. Resultantly, the ratio, in effect, worked out to 1:14.

19. The conspectus of the aforesaid consideration is that, firstly, despite the application of the principle of reservation, the candidates

who had secured 42 marks, like the petitioner, would not have become eligible for the Main Examination. Secondly, in view of the statement made by the learned Advocate General that 18 candidates belonging to the Scheduled Caste and NT-C category, who have been declared successful in the Main Examination, would not be included in the final select list, there would be no promotion on the basis of reservation. In this view of the matter, in exercise of the writ jurisdiction, we are not inclined to interfere with the selection process, especially, at such an advanced stage, and at the instance of the petitioner who would not have become eligible for the Main Examination in any event. Resultantly, the impugned judgment does not warrant any interference, though we have not examined the correctness of the legal proposition expounded therein.

20. The petition, thus, stands dismissed. No costs.

Interim order stands vacated.

Rule discharged.

In view of dismissal of the Writ Petition, Civil Application No.2055 of 2019 and Interim Application No.1 of 2019 do not survive and accordingly stand disposed of.

[N.J. JAMADAR, J.]

[RANJIT MORE]