

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (STAMP) NO.24931 OF 2019
IN
WRIT PETITION NO.6607 OF 2019

Maharashtra Public Service Commission
through Secretary. .. Petitioners

Vs.

Makrand Subhash Dagadkhair
& Ors. .. Respondents

ALONG WITH
CONTEMPT PETITION NO.386 OF 2019

Makrand Subhash Dagadkhair .. Petitioner

Vs.

The State of Maharashtra, Thru.
Secretary & Ors. .. Respondents

ALONG WITH
REVIEW PETITION (STAMP) NO.26950 OF 2019
IN
WRIT PETITION NO.6607 OF 2019

Shwetambari Vasantrao Bhosale .. Petitioner

Vs.

Makrand Subhash Dagadkhair
& Ors. .. Respondents

**ALONG WITH
REVIEW PETITION (STAMP) NO.26751 OF 2019
IN
WRIT PETITION NO.6607 OF 2019**

Mrudula Laxmikant Ande .. Petitioner

Vs.

Makrand Subhash Dagadkhair
& Ors. .. Respondents

**ALONG WITH
REVIEW PETITION (STAMP) NO.27132 OF 2019
IN
WRIT PETITION NO.6607 OF 2019**

Vijaymala Mahadeo Pawar .. Petitioner

Vs.

Makrand Subhash Dagadkhair
& Ors. .. Respondents

ALONG WITH
REVIEW PETITION (STAMP) NO.27299 OF 2019
IN
WRIT PETITION NO.6607 OF 2019

Shakuntala Sheena Shetty .. Petitioner

Vs.

Maharashtra Public Service Commission
& Ors. .. Respondents

....

Mr. Shrikrishna R. Ganbavale for the Petitioner in RPWST No.24931 of 2019.

Mr. S.B. Talekar with Mr. Madhav Ayyappan i/b M/s. S.B. Talekar & Associates for the Petitioner in RPWST No.26751 of 2019.

Mr. S.C. Naidu i/b Mr. S.P. Shinde for the Petitioner in RPWST No.26950 of 2019.

Mr. Chaitanya Nikte for the Petitioner in RPWST No.27132 of 2019.

Ms. Gauri Godse for the Petitioner in RPWST No.27299 of 2019.

Mr. A.P. Kulkarni for the Petitioner in C.P. No.386 of 2019.

Mr. A.P. Kulkarni with Mr. Rahul Kulkarni i/b Mr. Sagar Kasar for the Petitioner in W.P. No.6607 of 2019.

Mr. S.S. Pakale with Mr. P.M. Palshikar and Mr. Santosh Parad for Respondent No.3-MCGM.

Mrs. M.P. Thakur, A.G.P. for the State.

CORAM : SHRI RANJIT MORE &
SMT. BHARATI DANGRE, JJ.

RESERVED ON : 10TH OCTOBER, 2019

PRONOUNCED ON : 17TH OCTOBER, 2019.

JUDGMENT:- [Per: Smt. Bharati Dangre, J.]

The Quote - “*All great changes are preceded by chaos*” may not hold true every time.

Utter chaos and confusion on part of the Maharashtra Public Service Commission (“MPSC”) in the selection process to the post of the Assistant Commissioner of Municipal Corporation of Greater Mumbai (“MCGM”) has resulted in seven Review Petitions in our lap, assailing the order passed by us on 18th July, 2019 in Writ Petition No.6607 of 2019. Since all the aforesaid Review Petitions seek review of the same order, they have been heard together and are being disposed of by this common

judgment.

2. On hearing learned counsel for the Petitioners and the Respondents, we issue Rule and make it returnable forthwith.

3. Writ Petition No.6607 of 2019 came to be filed by one Makrand Subhash Dagadkhair, who had applied for the post of Assistant Commissioner of Municipal Corporation, which was advertised by the MPSC vide Advertisement No.53 of 2016. It advertised seven posts, out of which five posts were reserved for 'backward class' and two posts were to be filled in from the 'open category'. By applying Horizontal reservation, one post of backward category was reserved for woman candidate. Pursuant to the said advertisement, applications from eligible candidates were invited for a written examination which prescribed a minimum qualifying marks to be declared as qualified. The MPSC invited 25 candidates for the interview which included the Petitioner before us and the interviews were scheduled on 04th / 5th May, 2018. Pursuant to the interview, a merit list was

prepared by the MPSC and this included the names of 13 candidates taking into consideration the horizontal and vertical reservations and 7 candidates were recommended by MPSC for appointment to the post of Assistant Municipal Commissioner as per requisition from MCGM. The Petitioner before us Makrand Subhash Dagadkhair stood first in the select list, having secured 176 marks and he was placed in category of 'open candidate' though he belongs to NT(D) category. Since no post was available for him, his name was not recommended by MPSC. On recommendation of the seven candidates, one Shwetambari Vasantrao Bhosale, whose name was recommended against a post reserved for "OPEN-F" and one Nitin Narayan Katekar whose name was recommended for SBC-NCL-YES did not resume their duties. In the light of the aforesaid development, the Petitioner approached this Court by filing Writ Petition No.6607 of 2019 seeking a direction to the MPSC to recommend his name for the post of Assistant Commissioner of MCGM falling vacant in the light of the refusal of Ms. Shwetambari Vasantrao Bhosale joining the post.

4. The Petition came to be heard by us on 18th July, 2019 and, on consideration of the rival claims, we allowed the said Writ Petition by passing a detailed order. On the contention of the Petitioner, who staked his claim for the “OPEN-F” post, which fell vacant since Ms. Shwetambari Vasantrao Bhosale did not join the said post, we held that the Petitioner was justified in relying on the Government Resolution dated 25th May, 2001 issued by the State Government, setting out the Guidelines for filling up 30% of posts reserved for women category. Relying upon Clause (7) of the said Government Resolution stipulating that in absence of a female candidate, the post should be filled in by a male candidate of the same category from which the post was to be filled in, we considered and found that the Petitioner was eligible to take up the said post. We also dealt with the objection of the MPSC to the effect that Makrand Subhash Dagadkhair belongs to NT(D) category and we also dealt with the contention advanced on behalf of MPSC based on the Government Resolution dated 13th August 2014. Relying on the judgment in the case of **Rajesh**

Kumar Daria v. Rajasthan Public Service Commission & Ors.
reported in (2007) 8 SCC 785, we ruled that it is permissible for a reserved category candidate to compete against a seat reserved for 'open category' in a contingency when he takes the seat on the basis of his merit and that the said seat taken by him will not be counted as "filled in from the reserved category" and one more candidate from the said category will be eligible to take another seat from that particular category. We, therefore, did not find merit in the stand of the MPSC to deny the claim of the Petitioner, in the light of the Government Resolution dated 19th December, 2018 which gave effect to the decision of the Apex Court and noting that the action of the MPSC in not recommending the name of the Petitioner was liable to be set aside, we issued a mandamus directing the MPSC to recommend the name of Makrand Subhash Dagadkhair to the post of Assistant Commissioner and directed MCGM that an appointment order be issued in his favour within a period of six weeks.

5. MPSC filed a Review Petition which came to be numbered as Review Petition (St.) No.24931 of 2019 on 30th August, 2019. It sought review of our order on the grounds stated therein and placed before us certain new facts which were not brought to our notice when we passed the order on 18th July, 2019.

We have perused the Petitions and also heard learned counsel Mr. Ganbavale representing the Review Petitioners i.e. MPSC. In the Review Petition, the MPSC make a reference to the Corrigendum dated 19th December, 2018 issued to the earlier Government Circular dated 13th August, 2014 regarding horizontal reservation in the recruitment process and according to the Review Petitioner, the Corrigendum made it clear that it would be implemented with effect from 19th December, 2018. The MPSC admits that they received a communication from MCGM on 24th May, 2019 requesting it to recommend two eligible candidates since the two candidates recommended on 06th July, 2018 have failed to resume their posts and the MCGM have cancelled their appointments. It is stated that the MCGM made specific request to send two other candidates from the waiting list,

each from SBC and Open (female) category.

6. In the Review Petition, it is stated that the MPSC has prepared an amended merit list and it is mentioned that the name of Makrand Subhash Dagadkhair cannot be recommended in terms of our order as against “Open (F)” category as another female candidate is available for recommendation. For the first time, a reference was made to the amended merit list prepared by MPSC taking into consideration the Corrigendum dated 19th December, 2018 in terms of directions issued by this Court.

7. When the matter was listed on 27th September, 2019, we asked the MPSC to file a detailed Affidavit with supporting documents indicating as to when the revised list of candidates was prepared by it. Pursuant to the said direction, one Mr. Pradeep Kumar working as Secretary, MPSC, has placed on record an Affidavit dated 04th October, 2019. With the assistance of the learned counsel Mr. Ganbavale, we have perused the Affidavit along with the accompanying documents. After perusal of the

same, we feel justified in using words “Utter chaos and confusion on part of the MPSC” in the promotional part of our order.

In the said Affidavit, reference is made to an order passed by the Division Bench of this Court in three Writ Petitions i.e. Writ Petition (L) No.1485 of 2018, Writ Petition (L) No.1576 of 2018 and Writ Petition (L) No.1463 of 2018.

On 02nd May, 2018 when the Writ Petition filed by one Mrudula Laxmikant Ande, who was aggrieved since she was not called for the interview, was listed before the Division Bench of this Court (Shri Shantanu S. Kemkar and Shri M.S. Karnik, JJ), by way of ad-interim order, the Court directed the MPSC to allow the Petitioner to participate in the interview for the post of Assistant Commissioner scheduled on 4th & 5th May, 2018. It, however, made it clear that there shall be no declaration of results without the leave of the court. This Writ Petition was then listed on 28th June, 2018 along with two other Writ Petitions filed by Ms. Shakuntala Sheena Shetty and Ms. Vijaymala Mahadeo Pawar seeking similar relief as sought by Ms. Mrudula Laxmikant Ande on a motion being moved by MCGM seeking a relief that MPSC

be permitted to declare the results of the interview conducted by it. On the motion being accepted, by Order dated 28th June, 2018, the order passed by the court on the earlier occasion came to be modified by directing the MPSC to declare the results of selection process conducted by it for the post of Assistant Municipal Commissioner. The Court however made it clear that while issuing the appointment order, the MCGM shall specify in the order of appointment of the candidates, that their appointments will be subject to the outcome of these pending petitions and the candidates will not be entitled to claim any right or equity on the basis of it. The Court also observed that if the Petitioners were found suitable, their names shall also be forwarded to MCGM for further process to be undertaken by it. We observe with regret that these orders passed by this court were never placed before us by MPSC when we dealt with the claim of Makrand Subhash Dagadkhair.

8. To complete the chronology of events, it is necessary to have a look at the documents placed before us. When the

Petition was placed before the Court on 28th June, 2018, the merit list which was prepared including the names of the candidates who were interviewed pursuant to the orders passed by the Division Bench in their favour, was tendered in a sealed envelope before the Division Bench and it is tendered before us during hearing of Review Petitions. The modified select list which was prepared on 21/06/2018 in terms of the orders of the High Court included the name of Ms. Mrudula Laxmikant Ande, the Petitioner in Writ Petition (L) No.1463 of 2018 and it also included the name of Ms/ Vijaymala Mahadeo Pawar, Petitioner in Writ Petition (L) No.1576 of 2018. Ms. Mrudula Laxmikant Ande, who was granted relief of being interviewed pursuant to the orders of the Court, secured 129 marks whereas, Vijaymala Mahadeo Pawar secured 103 marks. Name of Ms. Mrudula Laxmikant Ande is at Sr. No.11 of the select list and in the “Remark Column”, it is ascribed as ‘recommended against “OPEN-F” seat’. Pertinent to note that the said list was captioned as “PART (B)” and what was placed before us was a select list of the candidates in terms of Government Resolution dated 13th

August, 2014 was captioned as “PART (A)”. Both the lists were prepared on 21st June, 2018 and tendered in this Court (Before Bench headed by Kemkar, J.) during the hearing on 28th June, 2018. This we could discern from the office noting which is placed before us. The office noting also makes following recording.

“As the candidate names which are higher than the marks secured by Ms. Shwetambari Bhosale who secured 96 marks and Ms. Mrudula was interviewed, looking to the orders of the High Court, “she is suitable”. So she must be selected based on her performance and merely on the basis of she belongs to “ST” community, it will be unfair to exclude her from the selection and it would be unfair to select a candidate with low marks.”

9. The office noting also discloses that there was some disagreement on the issue as to whether her name has to be included in the merit list in the form of an opinion of the Special Counsel appearing for the MPSC. Be that as it may, the record reflects that Ms. Mrudula Laxmikant Ande who was interviewed pursuant to the ad-interim order passed by this Court was ranked higher in merit list than Ms. Shwetambari Vasantrao Bhosale,

who was then shifted to Sr. No.14 in the merit list having secured 96 marks. Even Ms. Vijaymala Mahadeo Pawar, who had secured 103 marks is also placed above Ms. Shwetambari Vasantrao Bhosale.

10. The MPSC has sought review of our order in the backdrop of the fact that Makrand Subhash Dagadkhair, who was directed to be appointed to fill up the post of “OPEN-F” since Ms. Shwetambari Vasantrao Bhosale had not resumed, was not in fact eligible to occupy the said post and the correct scenario and the correct list was not placed before us. On the other hand, in furtherance of the direction issued by this Court, three female candidates came to be interviewed and their results were also declared and their names were also included in the select list. Going by the said list, according to Mr. Ganbavale, Ms. Mrudula Laxmikant Ande is entitled to take the seat reserved for “OPEN-F”. The list discloses that Ms. Mrudula Laxmikant Ande belongs to “ST” category but since she competed on merit, she takes the seat reserved for “Open - female category”. The submission of

the MPSC is to the effect that the mandamus issued to the MPSC to appoint Makrand Subhash Dagadkhair in the post reserved for “OPEN-F” is erroneous since there is already a female candidate in the merit list and the seat reserved for “Open – Female” must go to her.

11. We have also heard Mr. Talekar, learned counsel appearing for the Review Petitioner – Ms. Mrudula Laxmikant Ande, who has also filed a review petition alleging that the factual position was not brought to the notice of the court and, therefore, an error has crept in. Review Petitions are also instituted by Ms. Shakuntala Sheena Shetty and Ms. Vijaymala Mahadeo Pawar, who allege that the Petitioner Makrand Subhash Dagadkhair as well as MPSC have concealed the relevant information and the factum that the Petitioners came to be interviewed pursuant to the orders of the Court and were placed in the select list barring Ms. Shakuntala Sheena Shetty, who was not found to be qualified to be placed in the select list was not placed before the Court when Writ Petition No.6607 of 2019 was decided.

12. Taking an overall view of the scenario that has emerged before us, we have no doubt in our mind to support the merit of the candidate to be selected and recommended. The factual scenario existing on the date on which we passed the order issuing a mandamus to the MPSC recommending Makrand Subhash Dagadkhair is that on the said date, the MPSC had already recommended Ms. Mrudula Laxmikant Ande on the basis of the marks secured by her and, had this fact been known to us on the date on which we passed the order, our decision would have been surely not the one which we have delivered. The merit list which was placed before us in Writ Petition No.6607 of 2019 clearly reflects that Makrand Subhash Dagadkhair is the candidate at Sr. No.1 in the select list and he secured 176 marks, the highest in the merit list. The candidate to fill up the "OPEN-F" post was Ms. Shwetambari Vasantrao Bhosale at Sr. No. 12, who did not resume her post necessarily requiring the post to be filled in, in terms of the Government Policy by a male candidate belonging to the same category. We were, therefore, perfectly justified in

picking up the Petitioner who was at the top of the merit list and who was entitled to be treated open category candidate and in the light of the judgment in *Rajesh Kumar Daria (supra)*.

13. The MPSC has misled us by not inviting our attention to the intervening events which had transpired in the form of ad-interim directions of this Court resulting into preparation of fresh merit list. In any way, we do not intend to trample the merit list and surely we do not intend to deprive a female candidate from taking up the post reserved for woman, in terms of the original advertisement and knowing well that she deserves a seat on merit. At the same time, we take note of the fact that Makrand Subhash Dagadkhair, who tops the list of merit also cannot be blamed since he was declared by us to be eligible to take up the seat meant for "OPEN-F" in terms of the directions of the State Government contained in Government Resolution dated 25th May, 2001. It is all on account of the true facts not being placed before us, an error has crept, which we are attempting to resolve by ensuring that no injustice is caused either to Ms. Mrudula

Laxmikant Ande and Makrand Subhash Dagadkhair, the
Petitioner in Writ Petition No.6607 of 2019.

14. When we enquired from the counsel for the MCGM about the vacancy position since at some point of time, MCGM had modified advertisement to cover 11 posts instead of 7, and again restricted it back to 7, we are informed that 10 more posts of Assistant Municipal Commissioner are vacant and are likely to be requisitioned to the MPSC for its recommendation. Needless to say that the criteria for filling up the said posts remains the same as was prescribed by the advertisement published by the MPSC inviting applications for the seven posts of Assistant Commissioner for MCGM. There being no change in the criteria including the educational qualifications and experience and since it is not in dispute that Makrand Subhash Dagadkhair has undergone the scrutiny by MPSC and he excelled in the selection process and secured a merit position, ignoring the submission of learned counsel for the Corporation that it would amount to the backdoor entry, we direct the MPSC to continue with the

recommendation of his name for one post of Assistant Municipal Commissioner and upon such recommendation being made, the MCGM is directed to issue appointment order to Makrand Subhash Dagadkhair on the post of Assistant Municipal Commissioner. As far as Ms. Mrudula Laxmikant Ande is concerned, the MPSC has already recommended her name and we direct the MCGM to issue an appointment order in her favour within a period of two weeks from today. The appointment order in favour of Makrand Subhash Dagadkhair, on recommendation being made by MPSC within a period of two weeks from today, should be issued by MCGM in the following two weeks, necessarily completing the whole process within four weeks from today.

15. It is pertinent to note that in terms of order passed by the Division Bench of this Court on 28th June, 2018, the appointment order should mention that they are subject to the outcome of the Writ Petitions pending before this court and we are hopeful that Ms. Mrudula Laxmikant Ande, who is one of the Petitioner in the

said Petition is well advised to withdraw her Writ Petition on she being selected and issued with an order of appointment. As far as Ms. Shakuntala Sheena Shetty and Ms. Vijaymala Mahadeo Pawar are concerned, they are at liberty to pursue their respective Writ Petitions and we have not expressed any opinion on the merits of their matter except limited to review which they have sought of our order dated 18th July, 2019.

16. With the aforesaid directions, the Review Petitions are disposed of.

17. As far as the Review Petition of Ms. Shwetambari Vasantrao Bhosale is concerned, we have heard learned counsel Mr. Naidu. We find the said Review Petition to be completely misconceived. It is the specific case of the MPSC that they received a communication from the MCGM on 28th May, 2019 that Ms. Shwetambari Vasantrao Bhosale was directed to resume the post of Assistant Commissioner before 31st March, 2019 but she has not yet resumed and, it is not possible to keep the said post

vacant. The said Review Petition is also liable to be dismissed on another ground viz. that since we have accepted select list – PART (B), which is produced on record by the MPSC and which was prepared by it on 21st June, 2018 and placed before this Court in a sealed envelope, Ms. Mrudula Laxmiknat Ande is placed at Sr. No.11 in the merit list and if she takes the seat reserved for “OPEN-F”, there is no scope for Ms. Shwetambari Vasantrao Bhosale entitled for “OPEN-F” seat. The Review Petition filed by her, therefore, deserves a rejection and is rejected accordingly.

18. As far as Contempt Petition No.386 of 2019 filed by Makrand Subhash Dagadkhair alleging disobedience of the order passed by this Court on 18th July, 2019 is concerned, the same does not survive in the light of the order which we have passed in the above Review Petitions. Resultantly, the Contempt Petition is also disposed of.

(SMT. BHARATI DANGRE, J.)

(RANJIT MORE, J.)