

Pradnya Bhogale

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

WRIT PETITION NO. 11582 OF 2019

Maharashtra Public Service Commission	... Petitioner
Vs.	
Santosh Natha Salunkhe and Ors.	... Respondents

Mr. Ashutosh M. Kulkarni for the petitioner.
Ms. R.M. Shinde, AGP for State.
Ms. Vaishali Jagdale for respondent No.1.

**CORAM : RANJIT MORE &
M. S. KARNIK, JJ.**

DATE : 29th NOVEMBER, 2019.

P. C. :

. Heard learned counsel for the respective parties.

2. So far as the respondent No.3 is concerned, he was already recommended by the petitioner and therefore, his presence for deciding this petition is not necessary.

3. The petitioner-Maharashtra Public Service Commission (for short 'MPSC') has approached this Court invoking jurisdiction under Articles 226 and 227 of the Constitution of India to quash and set aside the impugned judgment and order dated 19.06.2019 passed by the Maharashtra Administrative Tribunal (for short 'MAT') in Original

Application No.315 of 2017. The Original Application was filed by the respondent No.1 and by the impugned order the Maharashtra Administrative Tribunal allowed the said application in terms of prayer clauses (a), (b) and (c) thereby the communications dated 15.10.2015 and 09.03.2017 not recommending the name of respondent No.1 were set aside. The Tribunal directed the petitioner to recommend respondent No.1's name and the State Government was further directed to appoint him in the post on which Smt. Swati Kadam was earlier recommended but did not join.

4. The present petition is concerned about the requisition made by the State Government dated 01.11.2013 to the MPSC in pursuance of which advertisement No.90 of 2013 was issued inviting applications for in all 71 posts of Principal/Vice Principal, Industrial Training Institute, Maharashtra Education Service, Class I (Junior). The respondent No.1 applied in response to this advertisement. The petitioner-MPSC conducted screening test on 09.03.2014 for shortlisting the candidates. The respondent No.1 was qualified in the screening test as per the cut off marks fixed for the said post reserved for open female category. The final results were declared on 02.09.2015 and the respondent No.1 stood at Sr. No.50 in the merit list of open category class.

5. Initially waiting list was valid for a period of two years from the date of preparation of the wait list or declaration of subsequent

examination whichever is earlier. These provisions were made during the period from 2005 to 2011 and after 2011 the period of waiting list was reduced to one year and this position remained after substitution of the new rules in the year 2014. As on today, there is no dispute that the waiting list was to remain valid for a period of one year from the date of result. It appears that the MPSC recommended 71 names to be appointed against 71 posts requisitioned by the Government. Out of that, 16 vacancies arose because successful candidates did not join. The Government accordingly vide letter dated 04.02.2016 communicated to the petitioner to recommend the names from the waiting list for the vacant post.

6. Meanwhile, Smt. Rajani Khobragade filed a Writ Petition No.10103 of 2015 in the Bombay High Court Bench at Aurangabad and on 16.04.2016 the Bombay High Court Bench at Aurangabad passed an interim order thereby restraining the MPSC from issuing appointment letters to those candidates who secured 56 or less marks and those who were selected against female reservation and those candidates who were selected from male candidates against the female reservation.

7. One recommended candidate namely Smt. Swati Kadam did not remain present for the document verification, however, her vacancy was not immediately communicated to the MPSC by the State Government. On 23.01.2017 respondent No.1 approached the

Government with a representation to appoint him on the post which became vacant because of non joining of Smt. Swati Kadam. The Government accordingly sent requisition to the MPSC on 09.02.2017 requesting to send the name of respondent No.1 for the vacant post due to non joining of Smt. Swati Kadam from the waiting list. There is no dispute amongst the parties to the petition that respondent No.1 was eligible to be appointed on a post which became vacant due to non joining of Smt. Swati Kadam. However, it was stand of the petitioner-MPSC that waiting list was not valid as the period of one year had expired on 01.09.2016 and therefore they refused to recommend the name of respondent No.1 to the Government for filling the post because of non joining of Smt. Swati Kadam. The communications dated 15.10.2015 and 09.03.2017 were placed before the Tribunal by the respondent No.1. As stated above the Tribunal quashed and set aside these communications with further direction to the MPSC to recommend the name of respondent No.1 to the State Government and to appoint him on the post of Smt. Swati Kadam.

8. The dispute in the present case is very narrow in as much as it is the contention of Mr. Kulkarni, learned counsel for the petitioner-MPSC that MPSC is bound by their own rules. According to him, the MPSC rightly rejected the request to recommend the name of the respondent No.1 due to expiry of the period of waiting list. The respondent No.1 on

the other hand relied upon the standing order dated 31.05.2016 by the petitioner-MPSC particularly clause (d) where the period during which the recruitment process was stayed by the Courts required to be excluded. The case of the respondent No.1 was that during the period between 16.04.2016 to 31.03.2017 there was interim stay as referred earlier passed by the Bombay High Court Bench at Aurangabad in Writ Petition No.10103 of 2015 filed by Smt. Rajani Khobragade and therefore, if this period is excluded then the MPSC was bound to recommend the respondent No.1's name and the Government was further bound to appoint him on the post which was vacant due to non joining of Smt. Swati Kadam. This argument of respondent No.1 was accepted by the MAT and accordingly the impugned order was passed.

9. Mr. Kulkarni has invited our attention to the interim order of the Bombay High Court Bench at Aurangabad in Writ Petition No.10103 of 2015 and submitted that the restraining order of the Division Bench of Bombay High Court Bench at Aurangabad was restricted to issue appointment letters to those candidates who have secured 56 or less marks, the candidates who were selected against female reservation and those candidates who were selected from male candidates against the female reservation. Mr. Kulkarni submits that the case of the respondent No.3 does not fall in any of these categories and therefore MAT was not right in quashing the impugned order on the ground that the period when the stay was in operation has to be excluded.

10. We are not inclined to interfere with the Tribunal's order in the light of the Government's stand in the affidavit filed before the MAT on 30.06.2018 by one Shri Santosh Vitthal Rokade, Under Secretary in the office of the Skill Development and Entrepreneurship, Mantralaya, Mumbai. In paragraph (ii) the following averments are made :-

“(ii) Also in another related case in relation to the same advertisement viz. 89/2013, 90/2013, 91/2013 one candidate Smt. Rajani Khobragade filed a writ petition 10103/2015 in High Court Bombay, Aurangabad Bench. The Hon'ble High Court on 16.04.2016 stayed the issuing of Appointment letters to those candidates who secured 56 or less marks and those who were selected from male candidates against the female reservation. Hence the Whole procedure related to appointments was stayed and Respondent No.1 could not take any action. Recently Hon'ble High Court in its judgment on 31.03.2017 dismissed the writ petition of Rajani Khobragade.”

11. Reading of the above averments makes it clear that pursuant to the interim order of the Bombay High Court Bench at Aurangabad, the Government stayed the recruitment process. Be that as it may, as a matter of fact what is also disclosed from the affidavit of the Government is that Smt. Swati Kadam did not remain present for document verification. From the affidavit, it reveals that document verification of respondent No.1 was done prior to 04.02.2016. Therefore, the Government ought to have considered non joining of Smt. Swati Kadam for document verification to the post in question as a vacancy while sending letter dated 04.02.2016 to

the MPSC for recommending the names from the waiting list for the vacant posts in question. We are of the opinion that as a matter of fact, one vacancy was created because of non joining of Smt. Swati Kadam prior to 04.02.2016 and that is within a period of lapsing of the waiting list. Merely because the Government failed to make a request to the MPSC for filling of this post within the period of lapsing of the waiting list can not deprive respondent No.1 from the benefit, moreso when the Government has later made a request to the MPSC to recommend the name of respondent No.1 against the post which remained vacant as Smt. Swati Kadam did not join the post. The Government being the appointing authority called for recommendation from the MPSC. The Government in its affidavit-in-reply has clearly stated that the stay granted by Aurangabad Bench of this High Court was construed by them as a stay to the recruitment process.

12. Reading of the standing order dated 31.05.2016 reveals that it is not as if in every case where the period of 1 years has expired the waiting list will lapse. The period during which recruitment process was stayed by the Courts has to be excluded. As the Government being the appointing authority has clearly understood the stay granted by the Aurangabad Bench of this High Court to mean that there could be no recruitment during the period the stay was in operation, therefore, while calling for the recommendation of respondent No.1, the Government

proceeded on the footing that the said period should be excluded from the period of 1 year. Our attention is invited to the standing order dated 31st May, 2016 issued by the MPSC, which is at page 232. Once the State Government being the appointing authority has proceeded on the footing that the stay granted by this Court would have the effect of extending the validity period of the waiting list, there was no reason then for the petitioner-MPSC to have taken a stand contrary to the one taken by the State Government. The petitioner does not dispute that the standing order permits exclusion of the period when the stay of the Court to the process of recruitment is in operation for the purpose of extending the validity of waiting list beyond one year. If the State Government as an appointing authority upon forming a perception based on the materials and in view of the stay granted by the Aurangabad Bench of the High Court is satisfied that this period needs to be excluded, then it is not appropriate for the petitioner to come to its own conclusion for the purpose of construing the effect of stay. The petitioner-MPSC is virtually questioning the stand of the Government as being contrary to the Rules. Undoubtedly the Rules provide for validity of wait list to be for one year which petitioner is bound to follow; nonetheless when admittedly the standing order of the petitioner itself permits exclusion of the period when the recruitment process is stayed for operating the waiting list beyond one year, it cannot be said that the approach of the State Government is contrary to the Rules. In these circumstances, refusal on petitioner's part

to recommend the candidate though the Government had asked the petitioner to recommend the name of respondent No.1 is unwarranted.

13. It is pertinent to note that the State Government-respondent No.2 has accepted the impugned order passed by the Tribunal in as much as they have not challenged the same. This is also one of the reason we are not inclined to interfere with the impugned order in the present petition. Taking an overall view of the matter and facts of the present case we are find no merit in the petition and we are not inclined to interfere with the impugned order for the reasons we have indicated in this order. The petition is accordingly dismissed.

14. Mr. Kulkarni at this stage prays for stay to this order. We are not inclined to grant stay. However, at the same time we are inclined to request the MAT to defer the hearing of the Contempt Petition filed by the respondent No.1 for compliance of the impugned order for a period of six weeks from today.

[M. S. KARNIK, J.]

[RANJIT MORE, J.]