

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**WRIT PETITION NO. 15045 OF 2019
WITH
CA/15102/2019 IN WP/15045/2019
WITH
CA/15103/2019 IN WP/15045/2019
WITH
CA/15104/2019 IN WP/15045/2019
WITH
CA/15105/2019 IN WP/15045/2019**

...

**GAJANAN BABULAL BANSODE AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS**

...

Advocate for Petitioners : Mr. Deshpande Ajay S.
Addl.G.P. for Respondents No. 1 to 3 :
Mr. S. B. Yawalkar
Advocate for Respondents No. 5 & 6 :
Mr. Avinash S. Deshmukh
Advocate for Intervenors / Applicants (C.A.Nos.
15103/2019 & 15104/2019) : Mr. R. N. Dhorde,
Senior Advocate a/w. Mr. V. R. Dhorde and
Mr. P. S. Dighe
Advocate for Intervenor (C.A. No. 15105/2019) :
Mr. S. P. Shah

...

**CORAM: S. V. GANGAPURWALA &
SHRIKANT D. KULKARNI, JJ.**

Reserved for orders on:	20.02.2020
Order Pronounced on:	06.03.2020

ORDER (Per S. V. Gangapurwala, J.):

1. The petitioners are members of police constabulary at Aurangabad. The petitioners had filed Original Application No. 722 of 2019. The petitioners had challenged the Government Resolution dated 22.04.2019. Under the said Government Resolution, the Government decided to accommodate 636 candidates from the selection process of 2016. These 636 candidates exceed posting of the notified vacancies as per the advertisement. Initially, the tribunal passed order of *status-quo* on 18.10.2019. The same is vacated while allowing the Miscellaneous Application No. 545 of 2019 on 30.11.2019. The Miscellaneous Application No. 545 of 2019 was filed by the interested persons affected by the order of *status-quo* and were amongst the 636 candidates to be accommodated as per the impugned Government Resolution. The petitioners have assailed the said order in the present writ petition. Original Application No. 722 of 2019 is

pending for final disposal before the Maharashtra Administrative Tribunal.

2. Shorn of necessary details, the facts relevant to decide the present matter can be culled out as under.

3. Respondent no. 1 published advertisement to fill up 828 vacancies by promotion of in service candidates on the basis of limited competitive examination conducted by the Maharashtra Public Service Commission (MPSC). The Police Sub-Inspector (Recruitment) Rules, 1995 provides 50% posts to be filled in by nomination through MPSC from open competition, 25% by promotion on the basis of the selection through limited competitive examination conducted by MPSC and 25% by promotion on the basis of departmental examination conducted by the Director General of Police.

4. Pursuant to the advertisement, large number of candidates participated in the selection process. Two petitioners participated in the selection process. The remaining petitioners did

not participate in the selection process as they were either not eligible or for some other reasons. The two petitioners who participated did not qualify and were not in the select list, 828 vacancies are to be filled in. It appears that, the reservations were made applicable in the promotional post while preparing the select list and appointment orders were issued to them. Realising the same, the Government deputed additional 154 open merit candidates for Police Sub-Inspector (*PSI*) training i.e. 154 more candidates were also issued with the posting orders.

5. It appears that, representations were made by the candidates and by the peoples' representative that the candidates who have secured more marks than those who are already selected on the basis of the reservation i.e. more than 230 marks are left out and are not accommodated and less meritorious candidates have found place in the same list and are issued with the appointment orders. The Government under the impugned

Government Resolution dated 22.04.2019 decided to accommodate 636 next candidates from the same selection process of the year 2016 who had secured 230 marks and more. The said Government Resolution is a subject matter of consideration before the Maharashtra Administrative Tribunal in the Original Application No. 722 of 2019 filed by the petitioners.

6. Mr. A. S. Deshpande, learned counsel for the petitioners eruditely canvassed his submissions. The gravamen of the petitioners case is that the State could not have filled in more posts than the advertised. The same would be against the basic and elementary principles of service jurisprudence, such a recourse is not permissible. Only those vacancies for which the advertisement has been given can be filled in. Appointment cannot be made beyond the number of vacancies advertised. To buttress his submission, the learned counsel relied on the judgment of the Apex Court in case of *Secretary, A.P. Public Service Commission Vs. B. Swapna and others* reported in

(2005) 4 SCC 154 and in case of *Smt. K. Lakshmi Vs. State of Kerala and others* reported in 2012 AIR SCW 1825. The learned counsel further emphasized that the authority cannot make appointment beyond number of posts advertised even if large number of posts were available besides those advertised and the same would be violative of Article 14 and 16 of the Constitution. The candidates who would have chosen not to apply could have also applied if they had known that other vacancies would also be under consideration for filling up. To substantiate his contention, the learned counsel relies on the judgment of the Apex Court in case of *Arup Das and others Vs. State of Assam and others* reported in (2012) 5 SCC 559.

Mr. Deshpande, learned counsel further submits that the contention of the respondents that the petitioner does not have any locus to assail the same is unfounded. The petitioners would have locus to maintain challenge to the illegal act of the Government. The filling

up of more posts than advertised would affect the further chances of the petitioners. The learned counsel relies on the judgment of the Division Bench of this court at Aurangabad in Writ Petition No. 3608 of 2010 dated 22.01.2018.

7. Mr. Deshpande, learned counsel for the petitioners further submits that the MPSC under letter dated 11.07.2019 had also expressed that by filling up 636 additional posts, the respondents are committing illegality. The act impugned is without consultation with the MPSC.

8. The learned Additional Government Pleader submits that pursuant to the advertisement the MPSC conducted examination on 21.08.2016 and declared final result on 05.05.2017. In view of the orders of the Hon'ble High Court at Bombay, as well as the Apex Court in the matter of age criteria for the said examination the result declared on 05.05.2017 was modified by MPSC on 12.12.2017. Respondent no. 1 forwarded the recommendation list of 828 candidates received

from respondent no. 4 to respondent no. 3. The said list contains names of about 186 candidates from reserved categories selected on the basis of criteria set for the reserved candidates. During the interregnum, respondent no. 2 received letter dated 29.12.2017 in the matter of reservation in promotion. In the light of letter dated 29.12.2017, one original application bearing no. 13 of 2018 was filed before the Maharashtra Administrative Tribunal, Mumbai seeking implementation of directions in Writ Petition No. 2797 of 2015 of the High Court, Bombay. The opinion was received that all the promotional posts are required to be filled in without reservation and the action of providing reservation in promotion and sending 186 candidates from the reserved category for training does not appear to be in consonance with the decision of the High Court, Bombay dated 04.08.2017 in Writ Petition No. 2797 of 2015. The learned Additional Government Pleader further submits that in view of the opinion received from

the Law and Judiciary Department, the Government decided to send 154 candidates as per merit subject to the outcome of the SLP pending before the Apex Court without withdrawing those 186 reserved category candidates who were already undergoing training at Maharashtra Police Academy, Nasik. Those 154 meritorious candidates joined nine months Police Sub-Inspector training with effect from 09.04.2018 and after completion of their training they are posted for further training. The learned Additional Government Pleader further contends that various candidates submitted applications claiming that in spite of having 230 and more marks they were not sent for training. It was found that reserved category candidates who secured 230 marks were sent for training of Police Sub-Inspector, whereas several other candidates from various categories who had secured more than 230 marks were not sent for training of PSI. All these facts were placed before the Cabinet. The Cabinet on 20.02.2019 took a decision to accommodate 636 candidates who have

secured 230 and more marks in the merit list published by the MPSC. The learned Additional Government Pleader further submits that the State Government has taken a policy decision to accommodate these candidates as per Government Resolution dated 22.04.2019. The petitioners do not have locus to challenge the said Government Resolution as they were not qualified in the selection process. The learned Additional Government Pleader further submits that the proposal is sent by the Director General and Inspector General of Police, Maharashtra State, Mumbai for strengthening the police force and creation of additional 6659 posts of PSI, the same is under consideration of the Government. Therefore, the prospectus of the petitioners remain unaffected. The petitioners have opportunity to contest against the substantive vacancies in their quota.

9. Mr. Dhorde, learned Senior Advocate for the intervenors and Mr. Avinash Deshmukh, learned counsel for respondents no. 5 and 6 submit that

the petitioners had obtained interim order without adding the persons who would be affected by the orders as parties to the original application. The learned counsel submits that the Nagpur Bench of this Court did not grant any interim order wherein also the same selection process was under challenge. The only order that was passed by the Nagpur Bench is that the selection process would be subject to the result of that petition. The said fact was not brought to the notice of the Maharashtra Administrative Tribunal, Aurangabad while the petitioner was granted the interim order. It is only when the miscellaneous application was filed by present respondents all the facts were brought to the notice. The petitioners while seeking interim order before the tribunal relied on the interim order passed at the Principal Seat of the tribunal in Original Application No. 445 of 2019 dated 01.08.2019. The Original Application No. 445 of 2019 has been disposed of as withdrawn and the interim relief is also vacated. Without adding any of the 636

persons as parties, the interim relief was sought. The learned counsel further submit that there is no fundamental right of promotion. The reliance is placed on the judgment of the Apex Court in case of *Union of India and others Vs. Dr. S. Krishna Murthy and others* reported in (1989) 4 SCC 689.

10. It is further contended that two of the petitioners have participated in the selection process, they were unsuccessful and now they cannot again challenge the selection process. The reliance is placed on the judgment of the Apex Court in case of *Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand and others* reported in (2011) 1 SCC 150 and another judgment of the Apex Court in case of *Manish Kumar Shahi Vs. State of Bihar and others* reported in (2010) 12 SCC 576. The learned counsel further submits that, when the petitioners have no locus to challenge the advertisement the further challenge on their part would be impermissible. To substantiate their contention reliance is placed on the judgment of the Apex Court in case of

Vishal Ashok Thorat and others Vs. Rajesh Shrirambapu Fate and others reported in ***2019 AIR (SC) 3616***. There is no public interest involved in the service jurisprudence.

11. Mr. Dhorde, the learned senior Advocate further submits that it is to salvage the situation wherein less meritorious candidates from reserved category were issued with the appointment orders and more meritorious were left out, the Government in such an exceptional circumstances had decided to consider and select all those who had secured 230 and more marks as the candidates who had secured 230 marks were already sent for training and posted subsequently.

12. We have consider the submissions canvassed by the learned counsel for the respective parties.

13. In the present case, the original application is pending with the tribunal for final adjudication. The present writ petition is only against the order vacating the *status-quo* order passed in favour of the petitioners.

14. The tribunal is required to consider the various facets involved in the matter, such as the locus of the petitioners to assail the Government Resolution sending 636 candidates for the training. Those 636 candidates are more than the posts advertised. The tribunal would also be required to consider whether the exceptional circumstance existed for the Government to issue the impugned Government Resolution.

15. It appears that the MPSC after conducting examination and limited competitive departmental examination published list of 2903 qualified candidates. The Commission recommended 828 candidates for the appointment on the post of PSI viz. advertised posts. Out of 828 candidates, 642 candidates were from open competition category securing 253 marks and above and 186 candidates were from reserved category securing 230 marks and above. After the examination were conducted, this Court at the Principal Seat in Writ Petition No. 2797 of 2015 struck down the Government Resolution dated 25.05.2004 providing reservation in the

matter of promotion. In view of the same, the Government took remedial measure and created 154 more posts for open merit candidates over and above 828 posts advertised. The petitioner did not challenge the appointments of 154 persons earlier made in excess.

16. Representations were made by those candidates who had secured 230 and more marks alleging injustice to them. The Government considered their representations and the Cabinet took a decision which culminated into issuance of Government Resolution dated 22.04.2019. Under the impugned Government Resolution the additional 636 candidates would be absorbed as and when the vacancies would arise in the quota of 25% posts to be filled in by promotion through limited competitive examination. Whether the issuance of said Government Resolution dated 22.04.2019 has been issued in extraordinary circumstances is a matter which will required to be considered and adjudicated finally by the Maharashtra

Administrative Tribunal in the pending original application.

17. In case of *Prem Singh Vs. HSEB* reported in *1996 (4) SCC 319*, the Apex Court was dealing with a situation where the posts in excess of those advertised has been filled up in extraordinary circumstances. In the said case, it was observed that instead of invalidating the excess appointments the relief could be moulded in such a manner so as to struck a just balance between the interest of the State and interest of persons seeking public employment.

18. The legal issues about the locus of the petitioners, the filling of excess posts, whether the State has got the right to fill in excess posts than advertised and the factual aspect as to whether the extraordinary situation existed will have to be considered by the tribunal in the original application. Adjudicating these issues in the present writ petition would preempt the decision of the tribunal in the pending original

application. In our opinion, such a recourse will have to be avoided. We had asked the learned counsel for the parties whether the appointment orders would be issued to these 636 persons immediately, if the interim relief is not granted. The learned counsel for the petitioners, the learned counsel for the respondents, the learned Senior Advocate for the intervenors and the learned Additional Government Pleader are *ad idem* that first these persons will have to be sent for training of nine months and thereafter only appointment / posting orders can be issued. In such a scenario the balance will have to be struck.

19. Considering the debatable issues involved in the matter, we pass the following order.

ORDER

[I] The respondents may send these 636 persons for training of nine (09) months.

[II] We request the tribunal to decide the Original Application No. 722 of 2019,

preferably within a period of nine (09) months so that before the posting / appointment orders are issued the original application would be decided and all the issues would be finally adjudicated in the original application.

[III] The parties shall co-operate in expeditious disposal of the proceedings.

[IV] The applicants in the intervention application filed in the present writ petition shall be arrayed as party respondents by the petitioners.

[V] The parties shall appear before the tribunal on 12.03.2020.

[VI] As the date has been given, it is not necessary to issue separate notice to these intervenors who are added as parties.

20. With the aforesaid observations and directions, writ petition is disposed of.

21. In view of disposal of the writ petition, the civil applications also stand disposed of.

[SHRIKANT D. KULKARNI, J.] [S. V. GANGAPURWALA, J.]

22. The learned counsel for the petitioners seeks continuation of the interim order.

23. The learned counsel for the respondents opposes the said request.

24. We have observed that the posting/appointment orders can be only issued after nine (09) months of training. The training of these respondents and intervenors is yet to commence. In light of that, it would not be necessary to continue the interim order.

[SHRIKANT D. KULKARNI, J.] [S. V. GANGAPURWALA, J.]

marathe