

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 2331 OF 2019

- | | | |
|--------|-------------------------------------|-----------------|
| 1. | Krantikumar Kishanrao Kaulwar |) |
| | Age 37 years, Occupation Advocate, |) |
| | Residing at Hari Om Building, |) |
| | Jijamata Colony, CIDCO, Nanded, |) |
| | C/o. Mr. Siddhesh Ashok Pilankar |) |
| | Residing at Building No.L-10, |) |
| | Room No. 1201, Swapnapurti |) |
| | Complex, Sector 36, Kharghar, |) |
| | Dist. Raigad |) |
|
2. |
Prashant Balaji Wattamwar, |
) |
| | Age 37 years, Occupation Advocate |) |
| | Residing at Matruchaya Niwas, |) |
| | Near Shani Mandir, Sanmitra Colony, |) |
| | Nanded. |)...Petitioners |

Versus

- | | | |
|--------|--|-----------------|
| 1. | Maharashtra Public Service |) |
| | Commission, MPSC, |) |
| | Having office at Bank of India |) |
| | Building, 3 rd Floor, Fort, |) |
| | Mumbai – 400 001 |) |
|
2. |
State of Maharashtra |
) |
| | Through Secretary, |) |
| | Law and Judiciary Department, |) |
| | Mantralaya, Mumbai |) |
|
3. |
The Registrar General, |
) |
| | High Court, Mumbai |)...Respondents |

Dr. Uday P. Warunjikar, Mr. for the Petitioners
Dr. Milind Sathye, Senior Counsel a/w. Mr. Sanjay Udeshi a/w.

Mr. Netaji Gawade i/b. M/s. Sanjay Udeshi & Co. for
Respondent No.3
Mr. A.A. Alaspurkar, AGP - State

**CORAM : S. S. SHINDE &
N. B. SURYAWANSHI, JJ.**

DATED : 23rd JANUARY, 2020

JUDGMENT – [PER N.B. SURYAWANSHI, J.]

1. Heard. Rule. Rule is made returnable forthwith by consent of parties.

2. This petition is filed by the Petitioners, seeking following reliefs:

- “(i) That this Hon’ble Court be pleased to call for the record and proceedings of the CJJD an JMFC Preliminary Examination of 2019 being Advertisement No.2 of 2019 to the extend of 7.1.1 which prescribes upper limit of 35 years of age as well as the Maharashtra Judicial Service Rules 2008, more particularly, Table ‘C’, paragraph 3 in (C) (i) to the extend of 35 years of age and after going through the same and after satisfying about the legality, validity and propriety thereof be pleased to hold and declare that the same are contrary to the 103 Constitutional Amendment and the policy decision of the State of Maharashtra

dated 25th April, 2016 and be pleased to enhance the outer age limit by issuing a writ, order and direction;

(ii) During pendency of the petition, be pleased to direct the Respondents herein to accept the application of the present Petitioners herein for the said preliminary examination and considered the candidature of the present Petitioners on such terms and conditions as this Hon'ble Court may deem fit and proper.

(iii) Ad-interim relief in terms of prayer clause (ii)."

3. Brief facts leading to this petition are as follows:

4. The Petitioners, who are practicing Advocates, pursuant to the Advertisement No.2 of 2019 issued by the Maharashtra Public Service Commission (for short 'MPSC') are desirous to apply for the posts of Civil Judge, Junior Division ('CJJD') and Judicial Magistrate, First Class (JMFC), Preliminary Examination. The advertisement prescribed that the upper age limit for the candidates to apply for the said examination is 35 years. On 11.2.2019, the Petitioners made a representation thereby requesting that the MPSC has for other examinations prescribed upper age limit 38 years for open category.

Therefore, for the Preliminary Examination, 2019, for the post of CJJD and JMFC may be enhanced.

Thereafter, on 12.2.2019, the State of Maharashtra issued Government Resolution thereby providing reservation of 10% for the economically backward class in open category in government services and educational institutions. The Petitioners contend that benefit of the said G.R. ought to be given to them and the age limit needs to be increased to 38 years.

5. When the petition was placed for admission before this Court (Coram: R.M. Borde & Pushpa V. Ganediwala, JJ), the learned Counsel for Petitioners prayed for interim relief in terms of prayer clause (ii), and by a detailed order, this Court, on 22.2.2019 refused to grant interim relief. Thereafter, the Petitioners amended the petition with a leave of Court and further brought on record the timetable published by MPSC on 20.11.2019, which provided that in the month of January, 2020, new advertisement will be issued. The Petitioners further brought on record, Official Gazette dated 30.11.2018, thereby

creating new Socially Economically Backward Class (for short 'SEBC') category and providing reservation for the candidates from said category. The Petitioners further contended that the MPSC has implemented the said SEBC reservation. However, no amendment was made to Maharashtra Judicial Service Rules, 2008. The Petitioners, therefore, prayed that the similar benefit like already given in case of candidates from SEBC, needs to be given to the Petitioners, since the Petitioners are also from the economically weaker section group. Though the reservation provided under the SEBC Act is not a Constitutional reservation, the same is implemented, likewise, the 10% reservation meant for economically weaker section group needs to be extended to the present Petitioners.

6. Respondent No.3 contested the petition by filing reply, mainly contending that the Hon'ble Administrative Judges Committee in meeting dated 28.2.2019 unanimously resolved that, since recruitment process was started on the basis of the existing recruitment rules, which do not envisage any such relaxation in favour of Economically Backward Classes, the

Committee found that it was not feasible to provide for any such relaxation in relation to the present recruitment process. However, the larger issue of granting any such relaxation which may also require amendment to the statutory recruitment Rules, may be considered after full deliberations. The basis of opposition to the petition is, in absence of amendment to the Maharashtra Judicial Services Rules, 2008 (for short 'MJS Rules'), the age relaxation claimed by the Petitioners cannot be considered. It is further averred in the reply that in the absence of proper challenge to the validity of sub-rule- c (i) of Rule 3 of MJS Rules, it is not possible to accept the contentions of the present Petitioners. Vague grounds are raised by the Petitioners to challenge the said rules. It was further contended that the State has no role to play while controlling appointment of District Judges under Article 233 or appointment of Judges to the subordinate judiciary at grass-root level under the District Judiciary and the Governor is entrusted the task, which he has to take under the consideration of High Court and by framing of appropriate rules for recruitment of the judiciary of grass-root level by enjoying under Article 234. The affidavit in

reply is also filed by the State, opposing the petition, contending that the post to which the Petitioners are aspiring are governed by judicial service rules, and without consultation with the High Court, there cannot be amendment to the rules, and in absence of amendment in the rules, the Petitioners cannot claim any benefit.

7. Heard learned counsel for the Petitioners, the Learned Additional Government Pleader for the State and the Learned Senior Counsel, representing Respondent No.3. Perused the pleadings, the documents annexed with the petition and the respective replies with the assistance of the Learned Senior Counsel, representing Respondent No.3.

8. The learned counsel for the Petitioners pointed out that, a fresh advertisement is issued by the MPSC for filling up the posts of CJJD and JMFC on 20.11.2019 and the last date for applying for the post is 22.1.2020. He further made a grievance that the same condition as to the age limit of 35 years is mentioned in the present advertisement also.

Therefore, it is prayed that the Petitioners may be permitted to apply for the post of Civil Judge, Junior Division subject to the decision of this petition and Petitioners would not claim equity. The learned Counsel vehemently argued the amended petition on merits contending that, when the MPSC has permitted a SEBC reservation in other advertisements, the benefit, like provided to persons of SEBC is required to be extended to the Petitioners, and the Petitioners cannot be discriminated by denying them benefit provided for economically backward class in open category. The learned counsel by pointing out the G.R. dated 12.2.2019 issued by the State Government, by reading its first and second paragraph, claims that the State Government has provided 10% reservation for Economically Backward Class. He contends that since the said GR provides for 10% reservation to Economically Backward Class, which is given in addition to the benefit of reservation granted to the backward class under Article 15(4), 15 (5) and Article 16(4) in the educational institutions etc and in second paragraph, it provides 10% reservation in direct recruitment in the government and semi government establishments,

corporation etc. By placing reliance on the same, he urged that the same benefit needs to be extended to the present Petitioners as by extending of age limit to 38 years, as made applicable in cases of reserved category candidates. He, therefore, prays that the petition deserves to be allowed.

9. Per contra, the Learned Senior Counsel, representing Respondent No.3, would urge that the MJS Rules are framed by exercising the powers under Article 233, 234 and proviso to Article 309 r/w 235 of the Constitution of India, 1950. Chapter III Rule 5, Table (C) provides for method of recruitment, minimum qualification, age limit etc. for CJJD, the eligibility criteria is provided in Rule V Table (C) unless and until, the MJS Rules are amended, no benefit as claimed by the Petitioners can be extended to them. He further contends that the interpretation of G.R. of 12.2.2019 as is sought by the learned counsel for the Petitioners is not correct.

10. It is further urged that in fact, the Petitioners are seeking a writ of mandamus to the High Court to legislate and amend the

2008 Rules in pursuance of Constitution (One Hundred and Third Amendment) Act, 2019. By placing reliance in case of **National Federation of Blind, Maharashtra vs. High Court of Judicature at Bombay [2018 (5) Mh.L. J. 903 (para 13)**, he contends that, writ of mandamus of this nature cannot be issued and, in any case, certainly not against the Chief of High Court to legislate and frame rules. It is further argued that Article 16(4), 16(4-A) and 16(5) inserted by 103rd Constitutional Amendment are enabling provisions conferring upon the State to make a law providing for reservations and if such a law is made by the State, it will not be violative of Article 14. He, therefore, contends that however, if law made by the State (including rules) does not provide for such a reservation, it cannot be assailed as violative of the provisions of Article 16(4), 16(4-A) and 16(5). He then argued that since the recruitment to the judicial posts, both the District Judges and grass- root level (Subordinate Judiciary), is within the exclusive domain of the High Court as set out, unless and until the Judicial MJS Rules are amended by known process of law, i.e. on recommendation of the High Court, the recruitment

cannot be in any other manner but in conformity with such rules. The provisions of Civil Service Rules or Laws providing for reservations do not ipso facto apply to the judicial post when there being appropriate amendment. By placing reliance on exposition in **State of Bihar & Anr. vs. Balmukund Sah & Ors. [(2000) 4 SCC 640]**, the Constitution Bench of the Hon'ble Supreme Court held that the State law providing for reservation in judicial services is unconstitutional, as the State Legislature is incompetent to make such a law. Such a reservation can only be provided by making rules under Article 234 of the Constitution by the Governor in consultation with the Chief Justice of the High Court. It is, therefore, urged that Government Resolutions issued by the State Government can never govern/regulate the appointments in Judicial Services. Therefore, the Government Resolutions tried to be relied upon by the Petitioners will have no application and only the MJS Rules can be followed and in absence of amendment to the same, the Petitioners cannot get any relief. He, therefore, urge that the petition is practically rendered infructuous, as the challenge raised in 2019 advertisement, no

longer survives and the Petitioners are not entitled for any reliefs, as there is no corresponding amendment in the MJS Rules. He, therefore, prays that the petition deserves to be dismissed at the threshold.

11. The Additional Government Pleader has adopted the arguments of the Learned Senior Counsel for Respondent No.3.

12. It is a matter of record that the challenge in the petition, and final relief claimed in terms of the prayer clause (a) of the Petition has become infructuous, since the interim relief was refused to the Petitioners by a reasoned order dated 22.2.2019.

13. Another contention raised by the Petitioners in respect of the present advertisement and discriminatory approach of the Respondents in as much as, in some of the advertisements issued by the MPSC, reservation is shown for SEBC categories, however, for the post of CJJD and JMFC Preliminary Examination, no such age relaxation is prescribed

in the advertisement is concerned, we are not impressed by the said submission. Though the learned counsel for the Petitioners by placing reliance of the Government Resolution dated 12.2.2019, strenuously urged that since the Government has prescribed 10% reservation for direct recruitment posts for Economically Backward Class, the Petitioners are entitled to rely upon the same and the Petitioners are justified in claiming age relaxation as the age relaxation is contemplated in the eligibility criteria clause (क) (५) which prescribes that for Economically Backward Class candidate's age, examination fee and other admissible facilities would be in terms of the rules applied by the State Government from time to time for Other Backward Category. The learned counsel, therefore, contends that since that OBC category candidates, upper age limit is 38 years, the same should be made applicable in the case of the Petitioners.

14. We are unable to accept the above argument for the simple reason that the reservation is prescribed qua backward category. As is rightly argued by the Learned

Senior Counsel for Respondent No.3, the reservation contemplated by the Constitution is in terms of Backward Class Category and State can make provision of reservation for Economically Backward Class Category. But unless and until the rules in that behalf are amended, providing reservation for Economically Backward Class, the Petitioners cannot claim any benefit of the same, like age relaxation. We are in agreement with this arguments of the Learned Senior Counsel representing Respondent No.3.

15. This Court, while rejecting interim relief, has elaborately dealt with the arguments advanced by the learned counsel for the Petitioners. This Court has come to the conclusion that since the rules regulating the recruitment to the Maharashtra Judicial Services do not provide for a stipulation in respect of the relaxation of age in case of economically weaker sections from amongst the open category. The rules are framed in exercise of powers conferred under Article 232 and 234 and the Proviso to Article 309 read with 235 of Constitution of India. Since the rules which are applicable do not provide for such relaxation as claimed by the Petitioners, the interim relief does

not deserve to be granted. Nothing has been changed from the date of passing of the order refusing interim relief till date, since there is no amendment to MJS Rules.

16. The observations of the Hon'ble Supreme Court in **Balmukund Sah's case (supra)** are squarely applicable to the present case, wherein it is held that the State law for providing reservation in judicial services is unconstitutional, as the State Legislature is incompetent to make such a law. Such a reservation can only be provided by making rules under Article 234 of the Constitution by the Governor in consultation with Chief Justice of the High Court. In this view of the matter also, the reliance on the part of the Petitioner on the G.R. dated 12.2.2019 is misplaced and misconceived and it does not help the case of the Petitioners.

There is no question of giving discriminating treatment to the class of persons from the economically weaker section group vis-a-vis 'class of persons' from 'SEBC' category, who have applied for the post of CJJD & JMFC, since there is no similarity. So far candidates from SEBC category are

concerned, there is relevant rule enabling the respondents to grant such benefits and in case of candidates from the 'economically weaker section group' yet the High Court administration has not taken decision to amend the Rules, pursuant to the provisions of Constitution (One Hundred and Third Amendment) Act, 2019. We are in respectful agreement with submissions made by Mr. Milind Sathe, Learned Senior Counsel appearing for Respondent No.3 that, provisions of said Act, 2019 would not *ipso facto* apply unless MJS Rules are amended. The question of discrimination would arise when equals are treated unequally by the respondents. As already observed, since the MJS Rules permit/enable respondents to extend benefit in favour of SEBC category candidates, same is reflected in the recent advertisement advertising the post of CJJD & JMFC by the Respondent No.1. However, the MJS Rules are not amended qua economically backward class for open category, the question of discriminatory treatment by respondents to candidates from said category thereby favouring persons from SEBC category, would not arise. These are two separate classes, for SEBC there is enabling

rule providing benefits and in case of EBC, there is no provision under MJS Rules. Hence, contention of the counsel for the Petitioners that, discriminatory treatment is given to persons from EBC, does not arise.

17. In view of the aforestated reasons, we do not find any merits in the writ petition and the writ petition is summarily dismissed.

(N.B. SURYAWANSHI, J.)

(S.S. SHINDE, J.)