

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6779 OF 2019

Deepak s/o. Marotirao Narwad,

Age : About 34 Years, Occ. Service as a
Junior Security Officer,
Thermal Power Station,
Parali Vaijanath Tq. Parali Dist. Beed.
R/o. New TPS Colony, Quarter No.E5/6,
Parali Vaijanath Tq. Parali Dist. Beed.

.. Petitioner

VERSUS

1. The Maharashtra State Power Generation
Company Limited,
Through its Chairman and Managing Director,
Address: Prakash Gadh, Anant Kanhekar Road,
Bandra East, Mumbai- 400051.

2. The Executive Director (HR),
MAHAGENCO (Maharashtra State
Power Generation Company Limited.),
Address : Prakash Gadh, Anant Kanhekar
Road, Bandra East, Mumbai- 400051.

..Respondent

...

Mr. Ajinkya Reddy, Advocate for petitioner

Mr. A. M. Gaikwad, Advocate for respondents no. 1 and 2

...

CORAM : SUNIL P. DESHMUKH AND
ABHAY AHUJA, JJ.

DATE : 15th February, 2021

JUDGMENT:

Rule. Rule made returnable forthwith and heard finally, with
the consent of the parties.

2. Petitioner is in employment of respondents as Junior Officer

(Security) from 27-11-2012. Respondents had issued an advertisement dated 16-01-2017 for various posts, *inter-alia*, nine posts of Deputy Manager (Security). From said nine posts, one post was reserved for V.J. (A) category along with other reserved and open posts, as under -

Sr.No.	Category	Number of Posts
1	S.C.	1
2	S.T.	1
3	V.J. (A)	1
4	O.B.C.	1
5	Open	5

3. Petitioner had applied for the post of Deputy Manager from V.J. (A) category. As required, he had participated in selection process. Petitioner appeared at *online* examination and also was interviewed. A list was published on 19-07-2017 which has been referred to as provisional list. One Nagnath Hanumanth Pachave was shown to have been selected from V.J.(A) category. Petitioner was shown to be at serial no. 2 in wait list from V.J. (A) category containing two names. One Mithun Prem Rathod was above petitioner in said list. Based on said provisional list, candidates were called for document verification on 03-08-2017. On verification, it had surfaced that two persons above petitioner in the provisional list, namely, Mr. Pachave and Mr. Rathod did not fit into the eligibility criteria for the post of Deputy Manager (Security).

After that the respondent - company came out with lists of eligible/non-eligible candidates on 22-09-2017. According to petitioner, the list of eligible candidates was the final select list. Petitioner was listed at serial no. 16 in the eligible candidates' list annexed to the petition at Exhibit 'J' as displayed on respondents' site portal/website, showing him from wait list.

4. However, for quite sometime, since there were certain orders passed by court putting restraint on recruitment, no appointments were made. Subsequently in 2018, while appointment orders were issued by the respondents, since petitioner did not receive any, he had approached respondents. He had made a representation to the respondent-company, but except oral assurances, no action was taken in that direction. He, thus, has approached this court by present writ petition.

5. It is submitted that from the very eligible-final select list dated 22-09-2017, the respondent-company has issued appointment orders to those candidates, who were held to be eligible for appointment along with petitioner in the same selection process, but the petitioner has been arbitrarily singled out and is discriminated, considering him to be on wait list.

6. It is the case of petitioner that in final select list, petitioner is the only eligible candidate as against the post of Deputy Manager (Security) reserved for V.J. (A) category. It is

submitted on his behalf that the candidate at serial no. 1 in the final list, who though is shown to be of V.J. (A) category, being eligible according to score from open category had in fact been so put in the final select list.

7. The respondent - company has filed its reply contending that the petitioner does not have any vested right to be appointed and since there is no such legal right, no *mandamus* can be issued. It is also contended that the company has taken decision not to operate the wait list and not to appoint anyone on the post of Deputy Manager except those given appointment letters. It is also contended that the company has not issued appointment letter to any wait listed candidate. It is further submitted that the guidelines dated 27-07-2017 specifically make it clear that the select /wait list are purely of provisional nature and the respondent-company reserves right to cancel the selection of the selected/wait listed candidate based on operational needs of the company.

8. In re-joinder, petitioner contends that the candidate by name Satish Sevakram Birkhede from O.B.C. category has been moved from select list to wait list in view of the fact that the Assessment and Testing Agency (ATTEST) based on application made by one Mr. Tushar Velis, has corrected his score which moved him into the select list and Mr. Birkhede in the process would move from select to wait list. It is sought to be pointed out The ATTEST

result is of 03-07-2018. Appointment order came to be issued to Satish Birkhede on 10.09.2018. It was, thereafter, appointment order dated 19-07-2019 has been issued to Tushar Velis. The petitioner has referred to that the appointment of Mr. Tushar Velis is of the 7th candidate coming from the O.B.C. category on the post of Deputy Manager (Security).

9. The learned counsel for the petitioner Mr. Ajinkya Reddy submits despite petitioner stands selected in the selection process, he came to be branded as wait list candidate and it is now being argued that there has been decision not to appoint wait list candidates and it is prerogative of the employer to appoint or not to appoint or to operate or not to operate the select list or wait list. It is being referred to that it is not the case that posts are not available or vacant pursuant to the advertisement. Learned counsel Mr. Reddy submits that, petitioner's candidature is not being treated properly, the same is receiving discriminatory treatment.

10. He submits, post reserved for V.J.(A) category has not been filled up. Petitioner is the only candidate from V.J. (A) category, available in the eligible list (final select list) continued with tag of wait list. His claim to the post of Deputy Manager (Security) which is reserved for V.J. (A) category ought to be considered being entitled to be in select list. Learned counsel contends that in this situation, petitioner's name had ascended from

wait list to eligible list dated 29-09-2017 and his name ought to be considered as in the select list. In the eligible list published referred to above, the remark in respect of petitioner wrongly considered him to be from wait listed candidates. It is submitted that the respondents have deliberately and with a view to deny the petitioner of his legitimate claim, considered the petitioner to be on the wait list and arbitrarily have not given the appointment order.

11. He submits that all the arguments in resistance in petitioner's case, have not come in the way when Mr. Velis' case has been considered. Initially, Mr. Velis had been shown to have scored less marks and did not stand in merit and thus had not figured in any list at all, yet, he has been selected and appointed from open category after revision of marks by ATTEST. It is being contended that in such a case, there has been increase in open category appointments. Whereas, unlike Mr. Velis' case, in the selection process, petitioner's name had figured in the eligible list when candidates above him were not eligible. He submits that appropriate treatment is required to be given to the petitioner. Petitioner's case stands on even better footing than that of Mr. Velis.

12. He submits that candidate from O.B.C. category Mr. Birkhede, from select list gets relegated to wait list and to him too appointment order has been issued, upon correction made by the

ATTEST in the case of Mr. Velis, then why should not the petitioner, who is branded as wait list candidate although he ought to be and indeed is in select list from V.J. (A) category and the post is lying vacant in view of the order passed by this court on 12-06-2019, continued from time to time, be appointed to the post of Deputy Manager (Security). He, therefore, submits that the act / omission of the respondent- company is not only discriminatory but is also arbitrary. Petitioner also reiterates that there is no other candidate eligible for being appointed in this category as the only other candidate from said category, has already been appointed in the open category on merits.

13. Learned counsel for the petitioner, during the course of submissions, has relied on a decision of a division bench this court in writ petition no. 6368 of 2019 with writ petition no. 6471 of 2019 filed against present respondents, wherein in paragraph No. 22 it has been observed, thus,

“ 22. but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they exist on the date of advertisement ”

He points out that the division bench had relied on the Supreme Court decision in the case of *N.T. Devin Katti and others Vs. Karnataka Public Service Commission and others* reported in (1990) 3 SCC 157. Learned counsel submits that the State or its organ or an outfit

would not be able to act arbitrarily and on whims and fancies of the personnel occupying the authoritarian posts. Learned counsel submits that while posts were advertised and are available and are vacant, there is no justification for the decision about not to appoint a person who legitimately deserves the post.

14. Learned counsel goes on to submit that as per settled law, the appointing authority cannot and shall not deny appointments on its whims and when a person has been selected and there is a vacancy which can be offered to him, keeping in view his merit position, then ordinarily there is no justification to ignore him for appointment. He refers to paragraph no. 10 of the decision of the Supreme Court in the case of *R. S. Mittal Versus Union of India [(1995) Supp (2) SCC 230 Head Note A]* to emphasise this point. He further submits that as demonstrated, the act of the respondent i.e. company in not appointing the petitioner to the post of Deputy Manager (Security) is arbitrary and discriminatory. He submits that in matters of issuance of appointment orders the State does not have a licence to act in arbitrary manner and no discrimination can be permitted.

15. The learned counsel submits that the writ of *mandamus* can always be issued and is warranted when denial of appointment is due to arbitrary and discriminatory decision of the recruiting authority. In case of discrimination, the reasons apply with equal

force. He relies upon decision of the Supreme Court in the case of *Shankarsan Dash Versus Union of India [(1991) 3 SCC 47]* and *Manoj Manu and another Versus Union of India and others [(2013) 12 SCC 171, Head Note 'C']*.

He submits test for determining arbitrariness or discriminatory act on the part of respondent - employer would be conduct, granting appointment to the similarly placed candidate ignoring legitimate claim of the persons like petitioner. He submits that said test is an exception to the proposition of the law that selected candidate has no absolute right to claim appointment. He relies upon the decision of this court (Aurangabad Bench) in the case of *Suresh s/o. Bhujangrao Ingole Versus State of Maharashtra and others (Writ Petition No. 10904 of 2016)*.

16. He refers to *Prem Prakash Versus Union of India And Others [1984 (supp) SCC 687]* submitting that once person is declared successful and once the person is selected candidate, appointing authority has the responsibility to appoint him even if the number of vacancies undergo change. Mr. Reddy submits, it is amply demonstrated in present matter, discrimination is writ large and the act and/or omission in not issuing appointment order to petitioner is absolutely arbitrarily. He, therefore, urges to allow the writ petition and direct the respondent to appoint him as V.J.(A) category as Deputy Manager (Security).

17. Learned counsel Mr. Anil M. Gaikwad, appearing on

behalf of respondents reiterates the contentions in affidavit-in-reply and submits that there is no substance in the submission on behalf of petitioner for the reason that when the selected candidate has no indefeasible right to appointment then a wait listed candidate would have none. He submits that petitioner has been in waiting list declared on 19-07-2017 which has also been so shown even in the eligibility list published subsequently. He submits that appointment orders have been issued to only the selected candidates from the list and not a single candidate on the wait list has been appointed. He submits that there is clear term in the advertisement that number of vacancies given in the advertisement would be fluctuating and it is open for the respondents to appoint or not to appoint candidates who have been selected pursuant to the advertisement. There were two candidates above petitioner, though, those turned out to be ineligible in the verification process, decision has been taken not to appoint wait listed candidates. As such, petitioner is not entitled to *mandamus* as sought. He submits that even the period of one year has been over after publication of the select list and life of the waiting list is only for a year. He submits that authorities had taken decision not to appoint waiting list candidates, and therefore, there is no question of invoking powers of extending the life of wait list for the petitioner.

18. He submits that so far as the Velis' case is concerned, it is on different footing altogether. Initially in the selection process,

his merit score had been seen less but later on, in the corrective process, there had been rectification raising his score which enabled him to be eligible to be considered. It was not his fault and, therefore, his case has been treated accordingly and he has been appointed in the post meant for open category.

19. Learned counsel for the respondents Mr. Anil Gaikwad has relied on a few judgments in support of his submissions that, selected candidates have no right to be appointed, existence of vacancy does not give legal right to the candidates in the select list and if there is no legal right, no *mandamus* can be issued *viz*; *The State of Haryana Versus Subhash Chander Marwaha and others*, AIR 1973 SC 2216, *Jatinder Kumar and others Versus State of Punjab and Others*, AIR 1984 SC 1850, *Bihar State Electricity Board Versus Suresh Prasad and others*, AIR 2004 SC 1724, *Union of India and others Versus Kali Dass Batish and another*, 2006 AIR SCW 227. He submits that *Shankrsan Dash Versus Union of India*, AIR 1991 SC 1612 (Constitution Bench), *Dinesh Kumar Kashyap and others Versus South East Central Railway And Others*, (2019) 12 SCC 798 also endorse aforesaid view with a rider that decision shall be *bona fide* and for appropriate reasons. He, therefore, submits that the company is under no legal duty to fill up all or any vacancies. He submits that the posts are occupied on the basis of operational need of the organization depending upon the demand and supply of electricity, and therefore, it may not be possible to appoint the petitioner.

20. The learned counsel Mr. Gaikwad further submits that

the petitioner has come to the court long after expiry of the period of wait list and on that count alone, the petition deserves to be thrown out.

21. During the course of hearing and considering the facts and circumstances of the case, possibility had been explored whether the respondent- company would consider if the matter could be worked out at its end. Learned counsel for the respondent- company has reverted expressing the company's inability.

22. While aforesaid are the submissions on behalf of the parties, it appears to emerge that in the selection process, a provisional list was published on 22-09-2017 and one Mr. Pachave had been shown as selected candidate in the list from V.J.(A) category. Petitioner's name has been shown in the wait list of VJ(A) category at serial no. 2. Above him in said wait list was one Mr. Rathod at serial no. 1. In the scrutiny thereafter, it had transpired that Mr. Pachave from the provisional select list as well as Mr. Rathod at serial no. 1 from the wait list were not eligible resulting in elimination of their candidature from the provisional list. Upon the scrutiny and verification process, a list of eligible candidates had been prepared in which petitioner's name had also figured at serial no. 16. Under the remark column, he was shown to be from wait list. A list of ineligible candidates was also prepared and displayed, listing ineligible candidates with the reasons therefor.

23. Going by the reasons eliminating the cases of Mr. Pachave and Mr. Rathod, their names could not to have figured legitimately in the list of 22-09-2017. In such a case, it emerges, while for V.J. (A) category one post is reserved, the petitioner is the eligible candidate from said category available for appointment as other V.J. (A) candidate was selected in open category. When on the day of preparation of eligible list, going by the reasons of ineligibility of said two persons, who had been ineligible all along, necessary rectification had taken place showing the petitioner in eligible list albeit showing his origin to be from wait list. It appears ineligibility of the persons had been realized on the representation of the candidates on the verification of the documents which took place later. In process, it surfaces that in the present case ineligible candidates had figured in provisional select and/or wait lists above petitioner. The candidature of the petitioner appears to have suffered for no fault of his. Apart from aforesaid while corrective and rectifying action has been taken in the case of Mr. Velis who had not figured in any of the lists at all, since he had participated in the recruitment process, his case has been considered, whereas, the petitioner appears to have been permanently branded as wait listed candidate despite the discrepant / defective applications of the other two V.J. (A) category ineligible candidates.

24. The scenario depicts on the day of verification and scrutiny,

petitioner's candidature deserves treatment as a selected candidate. His name, in fact, has figured in the eligible candidate list, however, under the remark column, he is shown to have been wait listed candidate. Tag of wait list in eligible list would have no significance beyond showing its origin as shown in provisional list of 14-07-2017 and would have no efficacy, as status of the candidate under selection process would undergo evolutionary alteration.

25. One more event is worth taking note of that, in the case of Velis there had been a communication dated 03-07-2018 by the ATTEST (Test Conducting Agency), wherein marks secured by Mr. Velis had been increased, and accordingly, there had been an instruction that Mr. Satish Sevakram Birkhede, from O.B.C category, would be relegated from the select list to wait list. Yet, even thereafter, said Mr. Birkhede had been issued appointment order on 10th September, 2018. This is one more instance which shows inconsistency in approach of the respondent which is arbitrary and capricious.

26. It would be pertinent to refer to and reproduce paragraphs 19 and 20 from decision in writ petition no. 6368 of 2019 (*supra*)

" 19. Rule 29 (a) of the Recruitment Regulations, 1961 relates to advertisement, recruitment and wait list of selected candidates. According to Rule 29 (a) of the Recruitment Regulations, 1961 the selection committee

concerned may recommend names of suitable candidates selected after due advertisement which are to be kept on the wait list for consideration against posts reserved for direct recruitment and such list shall be deemed to be valid for twelve months. It further provides that Technical Member, Accounts Member, Member (Administration) and Technical Director concerned are authorized to extend the validity of the wait list of the candidates selected by the various Selection Committees for the posts of their respective wings, even if they are partly operated for a further period of one year, whenever consider necessary. It further provides that such persons who are likely to be absorbed in appropriate vacancies within a reasonable period may be informed of their names having been kept on the wait list for being absorbed in future vacancies.

20. Respondents no. 2 and 3 even though clothed with such powers, went on stating that validity period of wait list/select list of one year is over and appointment orders cannot be issued. There was no hurdle before respondents no. 2 and 3 to exercise their powers vested with them as per Rule 29 (a) of the Recruitment Regulations, 1961. Petitioners cannot be blamed for expiring of validity period of wait list/select list, for inaction on the part of respondents no. 2 and 3 in view of Rule 29 (a) of the Recruitment Regulations, 1961. "

27. It would be imperative to consider, in given facts and circumstances, in *Shankarshan Vs. Union of India (supra)* and in *Dinesh Kumar Kashap and Another Vs. South East Central Railway (supra)* the Supreme Court has observed that a decision not to appoint should be taken *bonafide* and not arbitrarily and that looking at our country's position, lot of candidates are required to spend time and incur expense in the recruitment process and in the same when candidates are declared successful, they have reasonable expectation that they would be appointed, albeit, may

not be as vested right. However, the State must give some justifiable reason for not filling up of the posts. The State is bound to act according to Article 14 of the Constitution of India. It cannot be without any rhyme or rationale decide not to fill up the post. It must give plausible reason for not filling up the post. The justification must be reasonable and should not be arbitrary, capricious or whimsical exercise of discretion.

28. It has been contention of the respondents that there had been a decision not to appoint wait list candidates. However, there has been no material placed on record in respect of the communication issued to the petitioner in June-2019 about decision having been taken that wait list candidates would not be appointed. It is also not the case, the decision, if any, had been preceded by procedure therefor either meeting or resolution. Decision not to fill up the post has to be *bona fide* for appropriate reasons and not arbitrary, whimsical and/or fanciful.

29. Having regard to foregoing facts, circumstances, discussion and looking at the decisions relied on, on behalf of the petitioner and aforesaid Supreme Court decisions, it appears petitioner would have legitimate claim to be considered for appointment. It appears that paragraphs no. 19, 20 and 22 reproduced herein-above earlier from decision in Writ Petition No. 6368 of 2019 and other (*supra*)

would have full play over the situation coupled with the fact that there are no justifiable reasons coming forth and much less supported by any material about the basis there for.

30. As such, we deem it appropriate to direct the respondents to issue appropriate appointment order to the petitioner in right earnest preferably within a period of six weeks from the date of receipt of this order.

Rule made absolute in the aforesaid terms.

31. Writ Petition, as such, succeeds and disposed of, accordingly.

[ABHAY AHUJA]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

YSK/