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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2053 OF 2021

Shri. Vijay Appaso Dhavale,
Aged 31 Years, Occ. At Present
Nil, R/o. Shaniwar Peth, Bhagat
Galli, Madhav Nagar, Sangli –
416 406. } ...Petitioner

Versus

1. The State of Maharashtra,

2. The General Manager /
Managing Director, Maharashtra
State Power Generation Company
Ltd., Estrella Batteries,
Extended Building, Ground
Floor, Labour Camp, Dharavi
Road, Matuna, Mumbai – 400 099.

3. The Superintendent
Enginner, Energy Board, Prakash
Bhavan, 5th Floor, Pune – 400
099. } ...Respondents

Mr. Satyajeeet A. Rajeshirke for the Petitioner.
Mr. A.A. Alaspurkar for Respondent Nos. 2 and 3.
Ms. M.S. Bane, AGP, for the Respondent – State.

CORAM : PRASANNA B. VARALE &
S.M. MODAK, JJ.

DATE : DECEMBER 06, 2021.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Rule. Rule made returnable forthwith. With the
consent of learned Counsel appearing for the respective
parties, matter is taken up for hearing and disposal,

at admission stage.

2. The issue for consideration in the present matter is, the candidate who initially submitted his application for post by claiming benefit of reservation namely, belonging to OBC category and additional advantage being a sports person and subsequently after enlisted in the list of candidates on his merit and as such, requesting the Authority that his claim be considered as an open category candidate waiving his claim from the category either of reserved candidate can be denied the opportunity on the ground that he initially submitted claim as reserved category candidate.

3. The facts giving rise to the present Petition can be summarized as under:

The Petitioner is belonging to OBC category having a validity certificate issued by the competent Scrutiny Committee on 30th June, 2020, had participated in sports activity particularly, gymnastics submitted his applications in response to an advertisement issued by Respondent No. 2 for various posts. The

advertisement is placed on record at page 30 to the Petition and caption of the advertisement reads as "तंत्रज्ञ-३ पदाची सरळसेवा भरती जाहिरात क्र. ०४/२०१९". Perusal of the advertisement show that as the Respondent was in need of the candidates for the post of Technician – Grade 3, the advertisement was issued. The requirement was of 373 persons, the reservations horizontal ad vertical were referred to, for the OBC candidates there were 71 posts reserved, for open category 93 posts were available, 5% in total 18 posts were reserved under sports quota, out of these 18 pots 4 posts were available for OBC candidates whereas, 5 posts were available for the open category candidates. The advertisement also referred to educational as well as academic qualifications in clause 2. It is very useful for our purposes to refer to the conditions / guidelines mentioned in the advertisement in relation to the reserved category candidates under the caption "मागासवर्गाचे आरक्षणासंबंधी अटी/नियम". Clause 2 refers to the production of the validity certificate issued by the competent Scrutiny Committee. It is stated that if the claim is pending before the Committee the necessary document to show that the claim is pending before the

Committee be submitted to the Respondent No. 2 and on submission of such document only the candidate would be appointed on purely temporary basis. Clause 3 is very important and it reads as: "मागासवर्गीय उमेदवाराची गुणवत्तेवर निवड झाल्यास त्याची निवड ही खुल्या प्रवर्गात झाल्याचे समजण्यात येईल". Meaning thereby, if a candidate from reserved category is selected on his merit such selection would be treated as a selection from open category. Then there are other conditions/guidelines referring to submit the non-creamy layer certificate, discharge certificate, physical disability, etc. Clause 11 refers to the requirement of certificate issued by the competent authority in cases wherein the candidate claim the benefit of sports quota. Clause 11 states that such certificate issued by the competent officer must be of the date prior to the last date of filling of the application or prior to that or even prior to that. Clause 12 stated that the candidate claiming the benefit under the sports quota ought to have submitted his certificate for verification to the office of the Divisional Deputy Director prior to submitting his application. Clause 13 then refers to the submissions of all documents at the stage of verification of

documents. It may not be out of place to state here that the procedure for submitting the application was by way of an online process.

4. On assessment of the claims, the merit list was prepared by Respondent No. 2 and the Petitioner was placed at serial no. 9 as he had obtained 72 marks out of 75 marks. The copy of the merit list is placed on record at Exhibit – G, page 46. It is an admitted position that the cut off marks for the open category candidates was 70 out of 75 marks. Perusal of this document show that the claim of the Petitioner was considered as candidate from OBC category and it is further stated under the caption selected against vacancy that the Petitioner was selected as an candidate from open category / sports person. As there was some dispute in the organizations of sport i.e. Regional Organization and Amateur Association, the sports certificate issued to the Petitioner was pending for verification. The Petitioner immediately submitted an application to Respondent No. 2 on 02.09.2020. Petitioner submitted that a certificate issued to him by District Gymnastic Association, Adhmapur, Kolhapur

is pending for verification by the competent authority and he had submitted his claim from OBC category and as the Petitioner had secured 72 marks his claim for appointment be considered as a candidate belonging to open category. It was clearly stated by the Petitioner in the application as well as in one affidavit submitted by the Petitioner that he is waiving his claim as reserved category candidate and his claim be considered purely on his merit as an open category candidate. As there was no response from the Respondent No. 2, the Petitioner left with no choice but to approach this Court as such, the present Petition is filed.

5. Learned Counsel appearing for the Petitioner submitted that the Petitioner had submitted all the facts before the authority. Learned Counsel further submitted that the Petitioner was enlisted in the merit list of the candidate and secured 72 marks i.e. more than cutoff marks in the open category. Petitioner also made it clear before the authority that he is waiving his right for selection as reserved category candidate and more particularly, it is vehemently submitted by

the learned Counsel for the Petitioner that in the advertisement itself in clause 3 under the caption of condition/guidelines for the reservation that in case a candidate belonging to OBC category is selected on his merit then such selection shall be treated as a selection of candidate from open category. Learned Counsel thus, submitted that denial of the claim of the Petitioner is not only against the policy of Respondent No. 2 stated in the guidelines of the advertisement but it is also against the judicial view consistently observed by this Court as well as by the Hon'ble the Apex Court. Learned Counsel for Respondent No. 2 on placed reliance on the affidavit-in-reply vehemently submitted that the Petitioner submitted his application under reserved category of OBC that horizontal reservation of sports category to claim the benefit, the Petitioner relied on caste certificate issued in his favour dated 03.04.2013 which was validated by the Scrutiny Committee on 36.06.2020. The Petitioner also claimed the additional benefit from the sports quota and a certificate issued to the Petitioner is till date under verification. It is the submission of learned Counsel for the Respondent No. 2 as the certificate is

till date under verification the claim of the Petitioner from the sports quota is not established. In support of this submission, learned Counsel for Respondent No. 2 referred to Government Resolution dated 01.07.2016 placed on record at Exhibit – B of the affidavit-in-reply. In paragraph 6 of the affidavit-in-reply it is stated that the publication of the list of candidate on 08.02.2020 is not disputed however, it is not correct to say that the Petitioner has been selected purely on merits and hence there is no necessity to consider the Petitioner's claim from OBC or from the Sports category. Mere performance in the online examination will not validate the application which is not duly supported by the documents required for the claims as to category for which he had submitted his application. It is then stated in the affidavit-in-reply the Petitioner was under obligation to substantiate his respective claim by way of OBC as well as the sports and it was found that there was the dispute between two sports organizations and the certificate issued to the Petitioner was from a disputed organization. It is then submitted as the Petitioner has initially submitted his claim from OBC

and sports category. Even though the claim of Petitioner cannot be considered by the Respondent No. 2. By way of an rejoinder affidavit the Petitioner submitted and stated in paragraph 8 and 9 that the Respondent No. 2 and 3 by notification dated 29.04.2021 of candidates selected from EWS category for general posts after changing their category from SEBC to EwsS. In case of such change in category from EWS to general category no one was selected for want of having marks lesser than general merit list. So out of 45 posts of SEBC only 37 were selected and 8 posts remained vacant. It is further stated that even otherwise the Petitioner was highly meritorious and stood at 9th position in merit list. There are 58 posts remaining vacant and 9 posts are pending for appointment. All these posts are available with Respondent Nos. 2 and 3 for the present selection process. Those posts include the general category also. Therefore it is necessary to give appointment to the Petitioner on General merit. It was a mistake on part of Respondent No. 2 and 3 for not selecting the Petitioner from the general category.

6. A list of candidates is placed on record at

page 107 under the caption "अपात्र उमेदवारांची यादी". Then there is another list is placed on record under the caption of "प्रलंबित असलेल्या उमेदवारांची यादी" (list of the deferred candidates). At serial no. 5 Bhagyashree Rajendra Dorle and the remark against this candidate is matter is pending before the Court. Similarly, the Petitioner is at serial no. 9 and there is also remark against Petitioner's name that the matter is pending before the Court. In so far as other candidates are concerned, in this list the remark is the necessary certificate is awaited.

7. Though, learned Counsel appearing for Respondent No. 2 submitted that no vacancies are available but in the sur-rejoinder in paragraph 5 there is a statement and it reads thus: in case there are few vacancies of the advertised post, if the eligible candidates are not found in sufficient number and when there is no waiting list the post are required to be advertised. The list is placed on record in the rejoinder affidavit is admitted. It is also admitted that claim of certain candidate is kept pending as the documents are under verification but it is stated that

merely because the names are appearing in the pending list, it cannot be construed that they are otherwise selected. It is then stated that the candidates who had filed litigation were already declared ineligible and they cannot claim parity with the candidates who have submitted all the required documents and thereafter to select on merits.

8. The Counsel for Respondent No. 2 placed reliance on the judgment of the Apex Court in the case of Bedanga Talukdar Vs. Saifudaulah Khan and Ors¹. Perusal of this judgment show that the High Court while passing the order relaxed certain conditions. The Apex Court on the facts was pleased to observed that :

32. In the face of such conclusions, we have little hesitation in concluding that the conclusion recorded by the High Court is contrary to the facts and materials on the record. It is settle law that there can be no relaxation in the terms and conditions contained in the advertisement unless the power of relaxation is duly reserved in the relevant rules and/or in the advertisement. Even if there is a power of relaxation in the rules, the same would

¹ (2011) 12 SCC 85

still have to be specifically indicated in the advertisement. In the present case, no such rule has been brought to our notice. In such circumstances, the High Court could not have issued the impugned direction to consider the claim of Respondent no. 1 on the basis of identify card submitted after the selection process was over, with the publication of the select list.

9. Reliance was also placed on the judgment and order of this Court in the matter of Vishal Anil Sanap Versus The State of Maharashtra in Writ Petition No. 6696 of 2016. In the matter of Vishal Sanap (Supra), it was specifically stated in the broucher that while filling up the application by way of an online process the candidate must state his claim from a particular category such as, open category or reserved category. It was also made clear in the broucher that once application is submitted the candidate cannot change his claim and in that matter the Petitioner initially submitted his claim as a candidate belonging to open category and subsequently claimed the benefits as a candidate belonging to reserved category. Though, there cannot be any dispute on the proposition of law

reflected in these judgments, in our opinion, both these judgments are not applicable to the present case.

10. At the cost of repetition, we may state that in the present case the Respondent No. 2 itself stated in the advertisement that if the candidate belonging to OBC category, is selected on his merits and his selection will be considered as a candidate from open category. Secondly, the Petitioner is not claiming benefit as a reserved category candidate but he submits to the authority that his claim to be considered as an open category candidate and admittedly the Petitioner secured 72 marks and cutoff marks for open category candidates is 70.

11. Learned Counsel for the Petitioner was justified in placing heavy reliance on the judgment of the Apex Court in the matter of Saurav Yadav & Ors Vs. State of Uttar Pradesh & Ors². It may be useful for our purposes to refer to the observations of the Apex Court in paragraph 26, 27 and 28 :

26. The principle that candidates belonging to any of the vertical reservation categories are entitled to be

² (2021) 4 SCC 542

*selected in "Open or General Category" is well settled. It is also well accepted that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories for vertical reservation that they belong. Apart from the extracts from the decisions of this Court in **Indra Sawhney**³ and **R.K. Sabharwal**⁴ the observations by the Constitution Bench of this Court in **V.V. Giri vs. D. Susi Dora**⁵, though in the context of election law, are quite noteworthy: (AIR pp. 1326-27, paras 21-22)*

"21. ...In our opinion, the true position is that a member of a Scheduled Caste or Tribe does not forego his right to seek election to the general seat merely because he avails himself of the additional concession of the reserved seat by making the prescribed declaration for that purpose. The claim of eligibility for the reserved seat does not exclude the claim for the general seat; it is an additional claim; and both the claims have to be decided on the basis that there is one election from the double-member constituency.

3 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217

4 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745

5 (1960) 1 SCR 426

22. In this connection we may refer by way of an analogy to the provisions made in some educational institutions and universities whereby in addition to the prizes and scholarships awarded on general competition amongst all the candidates, some prizes and scholarships are reserved for candidates belonging to backward communities. In such cases, though the backward candidates may try for the reserved prizes and scholarships, they are not precluded from claiming the general prizes and scholarships by competition with the rest of the candidates."

27. The High Courts of Rajasthan, Bombay, Uttarakhand, and Gujarat have adopted the same principle while dealing with horizontal reservation whereas the High Court of Allahabad and Madhya Pradesh have taken a contrary view. These two views, for facility, are referred to as the "first view" and the "second view" respectively. The second view that weighed with the High Courts of Allahabad and Madhya Pradesh is essentially based on the premise that after the first two steps as detailed in paragraph 18 of the decision in **Anil Kumar Gupta**⁶ and after vertical reservations are provided for, at the stage of accommodating candidates for effecting

6 Anil Kumar Gupta v. State of U.P. (1995) 5 SCC 173

horizontal reservation, the candidates from reserved categories can be adjusted only against their own categories under the concerned vertical reservation and not against the "Open or General Category".

28. Thus, according to the second view, different principles must be adopted at two stages; in that:-

(I) At the initial stage when the "Open or General Category" seats are to be filled, the claim of all reserved category candidates based on merit must be considered and if any candidates from such reserved categories, on their own merit, are entitled to be selected against Open or General Category seats, such placement of the reserved category candidate is not to affect in any manner the quota reserved for such categories in vertical reservation.

(II) However, when it comes to adjustment at the stage of horizontal reservation, even if, such reserved category candidates are entitled, on merit, to be considered and accommodated against Open or General Seats, at that stage the candidates from any reserved category can be adjusted only and only if there is scope for their adjustment in their own vertical column of

reservation.

Such exercise would be premised on following postulates:-

(A) After the initial allocation of Open General Category seats is completed, the claim or right of reserved category candidates to be admitted in Open General Category seats on the basis of their own merit stands exhausted and they can only be considered against their respective column of vertical reservation.

(B) If there be any resultant adjustment on account of horizontal reservation in Open General Category, only those candidates who are not in any of the categories for whom vertical reservations is provide, alone are to be considered.

(C) In other words, at the stage of horizontal reservation, Open General Category is to be construed as category meant for candidates other than those coming from any of the categories for whom vertical reservation is provided.

12. The submission of the learned Counsel for Respondent No. 2 was in nature of second view which was submitted before the Apex Court. The Apex Court while dealing with such a view in paragraph 38, 39 and 40 observed thus:

38. The second view is thus neither

based on any authoritative pronouncement by this Court nor does it lead to a situation where the merit is given precedence. Subject to any permissible reservations i.e. either Social (Vertical) or Special (Horizontal), opportunities to public employment and selection of candidates must purely be based on merit. Any selection which results in candidates getting selected against Open/General category with less merit than the other available candidates will certainly be opposed to principles of equality. There can be special dispensation when it comes to candidates being considered against seats or quota meant for reserved categories and in theory it is possible that a more meritorious candidate coming from Open/General category may not get selected. But the converse can never be true and will be opposed to the very basic principles which have all the while been accepted by this Court. Any view or process of interpretation which will lead to incongruity as highlighted earlier, must be rejected.

39. The second view will thus not only lead to irrational results where more meritorious candidates may possibly get

sidelined as indicated above but will, of necessity, result in acceptance of a postulate that Open / General seats are reserved for candidates other than those coming from vertical reservation categories. Such view will be completely opposed to the long line of decisions of this Court.

40. We, therefore, do not approve the second view and reject it. The first view which weighed with the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is correct and rational.

13. In the concurring judgment, the Hon'ble Justice S. Ravindra Bhatt, J was pleased to observe thus:

65. In view of these clear decisions, it is too late in the day for the respondent state to contend that women candidates who are entitled to benefit of social category reservations, cannot fill open category vacancies. The said view is starkly exposed as misconceived, because it would result in such women candidates with less merit (in the open category) being selected, and those with more merit than such selected candidates, (in the social/vertical reservation category) being left out of

selection.

66. I would conclude by saying that reservations, both vertical and horizontal, are method of ensuring representation in public services. These are not to be seen as rigid "slots", where a candidate's merit, which otherwise entitles her to be shown in the open general category, is foreclosed, as the consequence would be, if the state's argument is accepted. Doing so, would result in a communal reservation, where each social category is confined within the extent of their reservation, thus negating merit. The open category is open to all, and the only condition for a candidate to be shown in it is merit, regardless of whether reservation benefit of either type is available to her or him.

14. It may not be out of place to state here that the object of reservation policy is to provide the opportunities to such candidates in employment. If the stand taken by the Respondent is accepted the same would result in denial of claim of meritorious candidate and frustrating the object of reservation policy.

15. Considering all the above referred aspects, we are of the opinion that the Counsel for Petitioner made out a case for allowing the Petition. We direct the Respondents to consider the claim of the Petitioner as a candidate from General Category and accordingly, take appropriate steps for appointment of Petitioner in any vacant post available with the Respondent Nos. 2 and 3 as expeditiously as possible and not later than 8 weeks from the date of receipt of judgment of this Court.

(S.M. MODAK, J.)

(PRASANNA B. VARALE, J.)