

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

RAJESH
VASANT
CHITTEWAN

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WRIT PETITION NO.10040 OF 2016

Poonam Hanamantrao Khamkar ... Petitioner

Versus

The State of Maharashtra

And Others

... Respondents

Mr. Chetan Nagare i/b Mr. Sachin C. Daswadikar for the Petitioner.

Ms. A.A. Purav, AGP for Respondent No.1.

Mr. A.I. Patel for Respondent No.2.

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

DATE : 24 NOVEMBER, 2021

P. C. :

. Heard Mr. Chetan Nagare, learned Counsel appearing for the Petitioner, Ms. A.A. Purav, learned AGP appearing for Respondent No.1-State and Mr. A.I. Patel, learned Counsel appearing for Respondent No.2-MPSC.

2 The Petitioner having a requisite qualifications, submitted her claim application for the post advertised in Advertisement No.58 of 2013 in Water Resources Department in Group 'A' Category of Maharashtra Civil Service Commission ("MPSC"). A copy of the

advertisement is placed on record at Pg.52, Exhibit 'F'. Learned Counsel appearing for the Petitioner invited our attention to the references in respect of the posts to be filed, namely, 28 bifurcated in two categories, General 25 posts and Backlog 3 posts. Learned Counsel appearing for the Petitioner, then, by inviting our attention to very document, submitted that though advertisement referred to various reserved categories, like Scheduled Caste, Schedule Tribe, Economically Backward Class etc., the advertisement fails to mention category of candidates belonging to NT-C category. The advertisement also refers to two posts reserved for candidates, one post for sportsman quota and one post for physically disabled person, namely, loco-motors disability. Learned Counsel appearing for the Petitioner submitted that the Petitioner submitted her application as required under the proforma application. Perusal of the copy of the application submitted by the Petitioner placed on record at Exhibit 'G' (Pg.54), shows that the Petitioner stated in the application that she belongs to NT (C) category and entitled to claim benefit as a candidate of non-creamy layer. Then there is also a reference to the academic qualifications earned by the Petitioner at Pg.55, and it shows that the Petitioner is an Engineering Graduate,

i.e. B.E. in branch, namely, Automobile Engineering and cleared B.E. Examination with a distinction. As advertisement was not referring to NT-C category. The Petitioner so as to clarify the position by taking recourse to the provisions of Right to Information Act, sought information from the Respondent-MPSC by putting certain queries in the application. In response to the application, the Petitioner was communicated by way of information dated 22 June, 2015, a copy of the same is placed on record at Pg.58. A query was made by the Petitioner seeking information as to whether there was any option available in the advertisement for filling up the application by mentioning whether the applicant is desirous to apply from open category or reserved category. The query was replied, stating that no such option made available, either in the advertisement published or on the website of MPSC. It is further stated in the communication dated 22 June 2015 that when the process of filling up the posts was going on, the Government Resolution dated 13 August 2014, was effected and the process of filling up the posts was completed and remaining process was completed in view of Government Resolution dated 13 August 2014. The Petitioner came across the publication of document under the caption “उमेदारांचे चाळणी परीक्षेतील व मुलाखतीचे एकत्रित गुण”,

a copy of the same is placed on record at Pg.67. Learned Counsel appearing for the Petitioner invited our attention to the portion at the concluding part of the document and it reads as under :-

“प्रस्तुत निकाल हा शासन परिपत्रक क्रमांक एसआरव्ही 1012/ प्र.क्र.16/12/16-अ दिनांक 13 ऑगस्ट, 2014 च्या अनुषंगाने आयोगाने निर्गमित केलेल्या स्थायी आदेश क्रमांक 06/2014 दिनांक 23 सप्टेंबर, 2014 मधील तरतुदींच्या अनुषंगाने तयार करण्यात आला आहे. अराखीव (महिला) वर्गवारीसाठी विहित केलेल्या अर्हतामानानुसार मुलाखतीसाठी अर्हताप्राप्त ठरलेले व मुलाखती झालेल्या मागास वर्गातील NAMRATA RAMANAND BAGDE, MUJAWAR IMRAN IBRAHIM, HANKARE CHAITALI RAJARAM, KHOLE UDAYKUJMAR KHOLE, KAMBLE BHAGWAT TATYABA, POONAM HANMANTRAO KHAMKAR, AMIT TULSIRAM BHANGE, MOHITE DHANANJAY PRAKASH, PANCHSHILA NARAYAN GAIKWAD, BHUSE SANDEEP VISHWAS, GOVIND TRUPTI RATNAKANT, JAYDIP PRALHAD SONAWANE, KAMALAKAR SWATI MAHADEO उमेदवारांना शासन परिपत्रक व आयोगाच्या उपरोक्त स्थायी आदेशातील तरतुदीनुसार अंतिम निकालासाठी वगळण्यात आले आहे.”

3 Learned Counsel vehemently submitted that the Petitioner had submitted her claim for the post of 'Deputy Engineer' in response to the advertisement as an open category candidate and her claim ought to have been considered purely on merits. Learned Counsel

appearing for the Petitioner, then, invited our attention to the affidavit-in-reply of the Respondent-MPSC and stated that the ground raised for rejection of the Petitioner is not only unsustainable, but also runs contrary to judicial views expressed in the judgments of this court as well as the Apex Court. Our attention was invited to paragraph-20 of the affidavit-in-reply. It would be useful for our purpose to refer to the relevant statements. It is stated that the Petitioner got 59 marks (38 marks in a written examination and 21 marks in an interview). It is further stated that the last candidate recommended from the open female category, secured 52 marks, which are less than the marks secured by the Petitioner.

emphasis supplied by us

4 It is further submitted that, however, as per Government Circular dated 13 August 2014, only an open category candidate is eligible for the open female post and hence, the Petitioner was not recommended for open female category post. Then interested stand is taken by the commission in further statement and the statement reads that “the Petitioner cannot be considered for the open female category post even if she got more marks than the cut off for open

female category. In the final result, the Petitioner has not received as much marks as were required for her consideration for recommendation from the open general category. Hence, her name was included in the final result.” On a bare perusal of the statement, it can be safely said that a bare perusal of the statements would show that the statements are self explanatory. On one hand the commission in a clear unambiguous term admits that the Petitioner secured more marks than last candidate placed in the list and selected candidate, i.e. the Petitioner secured 59 marks, whereas the last candidate recommended, secured 52 marks.

5 Learned Counsel appearing for the Petitioner, then invited our attention to the judgment passed by the Division Bench of this court at Aurangabad Bench in the case of **Charushila d/o Tukaram Chaudhari And Others Vs. The State of Maharashtra**¹. The very circular, which was placed for rejection of the claim of the Petitioner by the Respondent-MPSC, was considered by the Division Bench. The reference is made to Government Resolution in paragraph-22 of the judgment. It would be very useful and material for all purposes

1 W.P. no.4149-18 and connected petitions, decided on 8 August 2019

to refer that. The Division Bench then refers to corrigendum carried to the circular dated 13 August 2014 and the Government resolution or circular if substituted with certain modifications. Substituting modifications reads thus :

“(अ) प्रथम टप्पा खुल्या प्रवर्गातील (अराखीव पदे) उमेदवारांची गुणवत्तेच्या निकषानुसार निवड यादी तयार करावी. या यादीत खुल्या प्रवर्गात गुणवत्तेच्या आधारावर मागासवर्गीय उमेदवारांचाही (अनुसूचित जाती, अनुसूचित जमाती, वि.जा.भ.ज., वि.मा.प्र., इ.मा.व. व एसईबीसी) समावेश होईल. या यादीत समांतर आरक्षणानुसार उमेदवारांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणानुसार आवश्यक उमेदवारांची संख्या पर्याप्त नसेल तर समांतर आरक्षणाची पदे भरण्याकरीता सदर यादीतील आवश्यक पर्याप्त संख्येइतके शेवटचे उमेदवार वगळून पात्र उमेदवारांपैकी आवश्यक पर्याप्त संख्येइतके समांतर आरक्षणामधील गुणवत्तेनुसार पात्र उमेदवार घेणे आवश्यक आहे.”

5 The learned Advocate General appearing for the State before the Aurangabad Bench of this court, submitted that reference to the open category in circular dated 13 August 2014 is a comprehensive in nature and is inclusive of all categories, reserved and unreserved. It is further submitted that the confusion that was created by making reference to words, “open category” in Circular dated 13 August

2014 has been set at rest by deleting the said words and by substituting the words, “candidates eligible for horizontal reservation catetory seat on the basis of individual merit”. Considering the explanation tendered and in view of the corringendum, there should be no confusion that the candidates claiming reservation would be entitled to occupy the post on the basis of individual merit while filing up vacancies from amongst the horizontal reservation category and that the induction of a candidate is not restricted to open category, in any case as excluding the reservation category candidates. Then reference is made to the judgement of the Hon’ble Apex Court in paragraphs 25 and 26, namely, in the matter of **Anil Kumar Gupta and Ors. Vs. State of U.P. and Ors.**² It may not be necessary for us to reiterate the observations of the Apex Court in the judgment of **Anil Kumar Gupta**. There is also reference to certain other judgments, namely, **Public Service Commission, Uttaranchal Vs. Mamta Bisht and Others**³, **Deepa E.V. Vs. Union of India and Others**⁴, **Gaurav Pradhan & Ors Vs. State of Rajasthan & Ors.**⁵ and **Smt. Kanchan Vishwanath Jagtap Vs. Maharashtra Administrative**

2 (1995) 5 SCC 173

3 AIR 2010 S.C. 2613

4 (2017) 12 SCC 680

5 (2018) 11 SCC 352

Tribunal, Nagpur Bench & Ors.⁶ etc. The Division Bench further observed in paragraph-40, it reads “Even in case of compartmentalized horizontal reservations, the seats that are allotted to open category or quota, can be claimed by anybody and everybody, who is entitled to claim a seat or post on the basis of merit, which will include candidates even belonging to open category i.e. all candidates even belonging to any reserved category whichever, horizontal or vertical. However, the only exception can be carved out, as has been stipulated in the judgment of the Hon’ble Supreme Court that if the applicable rule or the advertisement specifically provide to the contrary, such migration shall not be permitted from the reserved category to the open category for claiming compartmentalized reservation provided for open category. Those candidates belonging to reserved category, who have already enjoyed the benefits during the process of selection, such as concession in fees, relaxation of age, relaxation in the merit criteria, would not be eligible to claim benefits of migration from reserved category to open category for claiming a seat or post.” By considering various judicial pronouncements, ultimately, disposed of

6 Writ Petition No.1925 of 2014, decided on 16 December 2015

the writ petitions with observation that observations and directions so as to follow the procedure in respect of preparation of the select list of candidates, set out in clause (VI) of the judgement.

6 Considering all these aspects, we find considerable merits in the submissions of learned Counsel appearing for the Petitioner that rejection of the claim of the Petitioner is unsustainable and unjustifiable as such. Resultantly, the writ petition is disposed of by partly allowing the petition by setting aside the part of the communication page 58 of the petition, in reference to the deletion of claim of **Poonam Hanamantrao Khamkar**, i.e. the Petitioner. We further direct that the Respondents to consider claim of the Petitioner afresh and particularly on the backdrop of the judgment of the Division Bench at Aurangabad dated 8 August 2019 in Writ Petition No.4159 of 2018 and other connected petitions. The exercise of consideration of the claim of the Petitioner on the basis of merits of the Petitioner afresh to be undertaken and completed as expeditiously as possible and preferably within **eight** weeks from today.

(S. M. MODAK, J.)

(PRASANNA B. VARALE, J.)