

AGK

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

**WRIT PETITION NO. 4814 OF 2017
WITH
INTERIM APPLICATION NO. 318 OF 2021**

Shital Suresh Mali

...Petitioner

V/s.

Dr. Balasaheb Sawant Konkan

Krishi Vidyapeeth & Ors.

...Respondents

Mr. Mahindra B. Deshmukh for the petitioner.

Mr. O. Mohandas with Mr. J. P. Kapadia, Ms. Jenima Chelliah
and Mr. Rudraksh Maurya, i/by Little & Co., for respondent
nos. 1 to 3.

Mr. M. M. Pabale, AGP, for respondent no. 5-State.

**CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

DATE: MARCH 22, 2022

P.C.:

1. The respondent no. 1/University published an advertisement dated 12th December 2014 inviting applications from eligible candidates for appointment on the post of Junior Engineer (Civil). By the process of recruitment which was initiated, three (3) vacant posts were sought to be filled up. While two (2) were unreserved vacancies, one (1) vacancy was reserved for the Other Backward Classes (hereafter "OBC", for short) community.

2. The petitioner, belonging to OBC community, had applied for appointment on the sole vacant post that was reserved for the community to which he belongs. After the duly constituted

selection committee assessed the merits of the aspirants, separate merit lists were prepared for filling up the unreserved vacancies and the vacancy reserved for the OBC community. In the merit list prepared for the OBC community, the 1st candidate obtained 112 marks while the petitioner secured the 2nd position having obtained 106 marks. Insofar as the unreserved vacancies are concerned, the 1st and the 2nd candidates obtained 115 and 102 marks, respectively. The gentleman who figured at serial no. 2 of such merit list, Mr. Mundada Maheshkumar Kacharulal (hereafter "Mundada", for short), was appointed on the 2nd unreserved vacancy on 8th March 2017 overlooking the fact that the petitioner, who figured at serial no. 2 of the merit list prepared for candidates belonging to the OBC community, had obtained more marks than the said Mundada.

3. Aggrieved by the appointment offered to Mundada, the writ jurisdiction of this Court was invoked by the petitioner by presenting this application under Article 226 of the Constitution of India on 13th April 2017.

4. The question that we are tasked to decide is whether the petitioner could have been treated to be a candidate belonging to the OBC community and thus entitled to claim appointment on the solitary post reserved for such community only, or whether, by dint of his merit and having secured more marks than Mundada, he ought to have been preferred for appointment on the 2nd unreserved vacancy.

5. On the last occasion, we were informed by Mr.

Mohandas, learned advocate for the respondent no. 1/University that the candidate who was appointed on the 1st unreserved vacancy has since been dismissed from service and that Mundada had resigned on 28th December 2018. We had, accordingly, requested Mr. Mohandas to obtain instructions from the respondent no. 1/University as to whether the petitioner could be accommodated in any of the unreserved vacancies qua the posts of Junior Engineer (Civil) which had since fallen vacant because of dismissal and resignation, as aforesaid.

6. Today, on instructions, Mr. Mohandas submits that the petitioner cannot be accommodated in view of a circular dated 19th October 2007 issued by the State of Maharashtra, which required the respondent no. 1/University to prepare separate merit lists for candidates belonging to open category and reserved categories and that the merit list having been exhausted with appointments offered therefrom to the 1st and the 2nd candidates, a fresh process of recruitment has to be started.

7. We have heard Mr. Mohandas to submit, on the basis of the decisions of the Supreme Court in **Deepa E. V. V/s. Union of India & Ors.**¹ and **Niravkumar Dilipbhai Makwana V/s. Gujarat Public Service Commission & Ors.**² that the petitioner cannot claim migration from the OBC category to the general category only on the basis of marks obtained by him.

¹ (2017) 12 SCC 680.

² (2019) 7 SCC 383.

8. The contentions raised by Mr. Mohandas do not impress us.

9. Much water has flown under the bridge since the circular dated 19th October 2007 was issued. The position in law is now well-settled by the Supreme Court by its various decisions on the point. We may only usefully refer to the three-Judge Bench decision in **Saurav Yadav & Ors. V/s. State of Uttar Pradesh & Ors.**³ It is law declared that if a candidate belonging to a reserved category is entitled to be selected on the basis of his own merit, his selection cannot be counted against the quota reserved for the category for vertical/horizontal reservation to which he/she belongs.

10. Having regard to such position of law, we have no hesitation to record that the respondent no. 1/University caused gross failure of justice by not treating the petitioner as a general candidate and considering him for appointment on the 2nd unreserved vacancy and, on the contrary, in offering appointment to Mundada.

11. The decisions in **Deepa** (supra) and **Neeravkumar** (supra) cited by Mr. Mohandas have been considered by us. In both the decisions, the reserved category candidate had availed of the benefit of age relaxation while participating in the selection process. It is in view of such special circumstance that the Supreme Court had the occasion to observe that such a candidate could not claim any right for migration to the open category.

³ 2021 (4) SCC 542.

12. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts. This is what the Supreme Court has said in its decision in **Regional Manager & Anr. V/s. Pawan Kumar**.⁴ The petitioner did not avail any age relaxation for participating in the recruitment process and, therefore, the decisions in **Deepa** (supra) and **Neeravkumar** (supra) are clearly distinguishable.

13. In view of the above, we have no other option but to grant partial relief claimed in the writ petition. Since Mundada has resigned from service, there is no question of setting aside his selection and appointment in terms of prayer clause (a) at this distance of time. However, since the petitioner was illegally denied appointment and he approached the writ court within a month of appointment of Mundada, there has been no delay or laches on his part. Accordingly, there shall be an order in terms of prayer clause (b), which is quoted hereunder: -

“(b) The Respondents No. 1 to 3 be directed to issue Selection Order thereby selecting Petitioner on the post of Junior Engineer (Civil) reserved for OBC on the establishment of Respondent No. 1-University pursuant to advertisement dated 12.12.2014;”

4 AIR 1976 SC 1766.

14. Let offer of appointment be issued to the petitioner as early as possible but not later than a month from date.

15. The writ petition stands allowed without costs.

16. In view of this order, nothing survives for decision on the interim application and the same is disposed of accordingly.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)

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