

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

WRIT PETITION NO. 11977 OF 2019

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Smt. Sujata Sampat Mane	}	Petitioner
Versus		
The State of Maharashtra and Anr.	} }	Respondents

Mr. A. V. Anturkar, Senior Advocate with Mr. Vishwanath S. Talkute, Advocate for the petitioner.

Mr. N. K. Rajpurohit, AGP for the respondents.

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

DATE: AUGUST 25 2022

ORAL JUDGMENT (Per Chief Justice):

1. An original application (Original Application No. 159 of 2017) instituted by the petitioner before the Maharashtra Administrative Tribunal, Mumbai (hereafter "Tribunal", for brevity) was dismissed by a judgment and order dated 4th October 2018. The petitioner applied for a review of such judgment and order. By an order dated 12th July 2019, the Tribunal dismissed the review application too.

2. Aggrieved by the judgment and order dated 4th October 2018 of dismissal of the original application, the petitioner presented this writ petition on 13th September 2019. The prayers in the writ petition are for setting aside of the judgment and order under challenge and to allow the original application that was instituted before the Tribunal.

3. Shorn of unnecessary details, what we find from the pleadings is that an advertisement dated 25th February 2013 was issued by the Maharashtra Public Service Commission (hereafter "MPSC", for short) inviting applications from eligible aspirants for appointment on 5 (five) vacant posts of Joint Charity Commissioner; that of the said 5 (five) vacancies, 1 (one) each was reserved for the members of the Scheduled Caste (SC), Scheduled Tribe (ST), Vimukta Jati (VJ) and Other Backward Class (OBC) while the last was an open/unreserved vacancy; that the petitioner, a general category candidate, offered her candidature for the open/unreserved vacant post of Joint Charity Commissioner; that having taken the written examination conducted by the MPSC as well as attended the interview that followed, the petitioner secured 63 (sixty three) marks out of 100 marks in the written examination and was awarded 10 marks out of 25 (twenty five) marks earmarked for the interview; that despite aggregating 73 (seventy three) marks out of 125 (one hundred twenty five) marks, the petitioner was not included in the merit list; and that such exclusion was owing to the reason that she had not obtained more than 40% marks in the interview.

4. Before the Tribunal, the respondents relied upon the Maharashtra Public Service Commission Rules of Procedure, 2014 which, admittedly, came into force on 16th May 2014. A provision in such rules to the effect that an aspirant must obtain 41% marks in the interview was referred to for not including the petitioner's name in the merit list. However, the Tribunal overlooked that the 2014 Rules was not relevant for the purpose of the selection process which was set in motion

by the advertisement dated 25th February 2013. Mr. Anturkar, learned senior advocate for the petitioner is right in contending that the rules for selection could not have been changed once the process of selection commenced. Reliance has been placed by him on the decision of the Supreme Court in **K. Manjusree vs. State of Andhra Pradesh**, (2008) 3 SCC 512.

5. Mr. Anturkar further contends that the particular general instruction which was invoked to the detriment of the petitioner would apply only in case the interview is of 100 marks. Here, only 25 (twenty five) marks having been earmarked for the interview, such general instruction had no application. He also contends that the other reason assigned by the MPSC that the merit list had expired should not be accepted because in the reply affidavits, the MPSC has not stated the date on which the merit list was prepared and when it expired.

6. In fine, equal right in the matter of public employment guaranteed by Article 226 of the Constitution, contends Mr. Anturkar, has been brazenly violated.

7. Next, according to Mr. Anturkar, Hemant Suresh Satbhai (hereafter 'Hemant', for short), a general category candidate who had figured as the first candidate in the merit list was recommended for appointment on the open/unreserved vacancy; however, Hemant was not even eligible to apply since he had not put in 10 (ten) years' of practice as an advocate which was a mandatory qualification for appointment. He further contends that it is on the basis of the petitioner's complaint that Hemant was excluded from the

merit list. It is also contended by him that once the name of Hemant was excluded from the merit list, the vacancy remained unfilled. Such vacancy still remains, where the petitioner could be accommodated; hence, relief as prayed for should be granted to the petitioner.

8. Based on the contentions urged by Mr. Anturkar, dismissal of the original application by the Tribunal, upon acceptance of the version of the MPSC, seemed to us for a moment not to have been legal and valid. In such circumstances, we were proceeding in the direction of grant of relief to the petitioner.

9. However, while examining the petitioner's claims in-depth, we came across a material circumstance constituting an important point to deny relief to the petitioner, hitherto unnoticed. Such point had the effect of tilting the scales completely against the petitioner. Mr. Anturkar was apprised of such a point and on his prayer, we had granted him a day's adjournment to return prepared to answer the same. Having heard Mr. Anturkar, we find no reason to grant any relief to the petitioner. Of course, we would be failing in our duty if we do not record that such point has not been taken in the reply affidavits to the original application or to the writ petition by the MPSC. We shall appropriately deal with Mr. Anturkar's contention that such point not having been raised by the MPSC in either of its reply affidavits, the same ought not to weigh in our minds to deprive the petitioner of relief.

10. It has not been disputed by Mr. Anturkar that except (1) one vacancy, all other vacancies were reserved vacancies. Hemant, the candidate who figured at the first position of the

merit list and was ultimately excluded on the basis of the complaint of the petitioner, was a general category candidate. However, the second and the third candidates according to the order of merit were reserved candidates. Admittedly, these candidates secured more marks than the petitioner. Once Hemant was excluded, Smt. Abha Narayan Tandulkar (hereafter 'Abha', for short), the second ranked candidate who belonged to a reserved category, ought to have been treated as an open/unreserved candidate and elevated to the first position of the merit list.

11. It is not in dispute that Abha has been appointed as Joint Charity Commissioner and is working on such post. Since the open/unreserved vacancy must be deemed to have been filled up by Abha treating her as a general category candidate, no question of the petitioner being appointed in such open/unreserved vacancy would arise at this stage. The resultant vacancy caused because of Abha being treated as a general category candidate, as of necessity, had to be filled up by the next candidate in order of merit in the reserved category to which Asha belongs and not by a general category candidate.

12. The claim of the petitioner is, thus, misconceived.

13. Now, we proceed to deal with Mr. Anturkar's contention that it would not be open to the Court to deny relief to the petitioner based on a ground not raised by the MPSC in its pleadings before the Tribunal or before this Court. He sort of lamented that the Court had been making out a case for the MPSC.

14. We are afraid, the contention is unacceptable. While

exercising high prerogative writ jurisdiction under Article 226 of the Constitution, the Court is not fettered by any procedural law like the Code of Civil Procedure (hereafter "Code", for short). Power of a writ court to adjudicate disputes is plenary and not restricted by provisions akin to Order XIV of the Code although the broad principles thereof may be followed in appropriate cases. In terms of Order XIV of the Code, only the issues of fact and/or law, as explained in sub-rules 2 to 4 of Rule 1 thereof, would fall for consideration and the civil court required to pronounce its judgment on all such issues. However, framing of issues as ordained by Order XIV of the Code and pronouncing judgment on all such issues do not apply *ex proprio vigore* to writ proceedings. Whenever a party in pursuit of justice invokes the writ jurisdiction of a high court under Article 226 of the Constitution and if it appears to such court that in the counter affidavit to the writ petition a respondent has not raised a material proposition of law in the light of certain undisputed facts to constitute its defence, that would not debar the court to examine such material proposition of law arising out of undisputed facts, either traceable in the writ petition or in the records, and to put a relevant point to the party complaining of breach of a legal duty for countering the same. Writ remedy, although intended to protect and enforce legal rights, is a discretionary remedy. Establishment of breach of any non-Fundamental Rights may not *ipso facto* lead to grant of the relief claimed. It would depend upon the 'justice' that the case would demand. Public interest and a host of other considerations are then borne in mind. However, the approach would be a little

different if breach of a Fundamental Right were complained and established. If a grievance is raised by the aggrieved party that his Fundamental Right guaranteed by Article 16 of the Constitution has been breached by arbitrary State action and the claim is acceptable, it would be the duty of the writ court to enforce such right without any fetters of technical considerations unless, of course, a delay in approaching the Court has resulted in accrual of third-party rights or there are other good reasons based whereon a writ could be denied (viz. suppression, *res judicata*, public policy, etc.) and relief declined. The party seeking relief as of right for breach of a Fundamental Right, as distinguished from a pure discretionary relief, must establish before the writ court that his Fundamental Right has been so brazenly violated by someone who has a legal duty to do something that the court is left with no other option but to pass orders for enforcing such right. If this be the approach of the writ court for enforcing a Fundamental Right of a citizen, it matters little if in a case such as this, the MPSC does not raise a material proposition of law or fact as an appropriate defence before the Tribunal or this Court but which, if raised, would have had a material bearing on the outcome of the proceedings. If such material proposition is sufficient enough to rule against the party complaining of breach of a Fundamental Right, it would equally be the duty of the writ court to hold that there has been no violation of any Fundamental Right, as alleged. This approach, however, would be subject to the rider that the party, who would be at the receiving end, is informed in advance so that natural justice and fair play are observed.

15. Therefore, any omission or failure by the MPSC, by itself, cannot deter the writ court from examining whether the petitioner while claiming breach of her Fundamental Right has indeed been deprived of such a constitutionally protected right. If the answer is in the affirmative, the right has to be judicially enforced. Mr. Anturkar was taken by surprise when the point was brought to his notice but we did grant him opportunity to persuade us not to be influenced thereby. Natural justice as well as fair play has thus been duly observed.

16. In view of the aforesaid discussion, we find no reason to hold that the petitioner acquired a right to be included in the merit list for appointment on the open/unreserved vacancy.

17. As a sequitur, though not for reasons assigned by the Tribunal but for a different reason, the writ petition stands dismissed. No costs.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)