

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 819 OF 2020

- 1) State of Maharashtra,
through the Secretary, Finance
Department, Mantralaya,
Mumbai – 400 032.
- 2) The Director of Accounts and
Treasuries, Thakarsy House,
3rd Floor, Mumbai Port Trusts,
Bellared Estate, Mumbai 400 001.
- 3) The District Treasury Officer,
Chandrapur.

.... **PETITIONERS**

VERSUS

- 1) Ajay s/o Dalvirsingh Rathod,
Aged about 43 years,
Occupation – Service, Junior Clerk,
Office of District Treasury Officer,
Chandrapur.
- 2) The Maharashtra Public Service
Commission, Department of
Examinations, through its Secretary,
Mumbai – 400 021.

.... **RESPONDENTS**

Mrs. Ketki Joshi, Add.G.P for the petitioner,
Mr. R.A. Singh, Counsel for respondent 1.

CORAM : ROHIT B. DEO & MRS. VRUSHALI V. JOSHI, JJ.
DATED : 6th APRIL, 2023

ORAL JUDGMENT : (PER : R.B. DEO, J.)

The State of Maharashtra is assailing the judgment dated 08-10-2018 rendered by the learned Maharashtra Administrative Tribunal, Bench at Nagpur (MAT) in Original Application 361/2017 whereby the original application is allowed in terms of prayer clauses 10(1),(2) and (3A).

The prayer clauses in terms of which Original Application 361/2017 is allowed read thus :

“(1). To allow this Original Application, and to direct the respondents, to include the name of the applicant, in the select list prepared for promotion to MFAS cadre Class – II, at appropriate place, in the order of his merit, obtained by him in the MFAS examination of Class-II conducted by Public Service Commission from 27-5-2015 to 30-5-2015, after setting aside impugned select list published vide circular no. Sanleko/12-2016/prasha arap/salea, nini/nano.2.2011/1252 dated 16-12-2016 marked as Annexure A-1.

(2) Also to declare that directions of Maharashtra Public Service Commission or by Maharashtra Administrative Tribunal, are not necessary, as the applicant has duly passed MFAS examination, after clear orders from Hon’ble Tribunal, and once applicant was allowed to appear examination, Public Service Commission cannot withheld result, in respect of applicant.

(3A) Be pleased to declare that the applicant will be entitled to get deem date of promotion above his juniors who had secured less marks in MFAS examination of May, 2015.”

2. The State has culled out the facts meticulously in the memo of petition, which we note to the extent necessary.

(a) Respondent 1-Mr. Ajay Rathod is the applicant in Original Application 361/2017 (hereinafter referred to as the ‘applicant’). He was borne on 01-1-1975 and was appointed as Junior Clerk on the establishment of the District Treasury Office, Chandrapur in November 2007. He cleared the Post Recruitment Examination in 2008 and the Maharashtra Accounts Clerks Examination in November 2009. The result of the latter examination was declared in 2010.

(b) The eligibility for appearing at the Maharashtra Finance and Accounts Services Class-III Examination (MFAS Class-III Examination) which is conducted by the Maharashtra Public Service Commission (MPSC) was twin fold. The Government servant was required to clear the Maharashtra Accounts Clerks Examination and to complete five years of continuous service.

The State contends that the applicant became eligible for appearing MFAS Class-III Examination in November 2012.

(c) The State contends that while the applicant did submit his application form for the MFAS Class-III Examination on 16-1-2013, the MFAS Class-III Examination was not conducted in April-May 2013, October-November 2013, April-May 2014 and October-November 2014, in view of administrative exigencies. The failure of the State and the MPSC to conduct the examination from April-May 2013 to October-November 2014 is extremely significant in the context of the issue involved, and we shall address the said aspect at a later stage.

(d) The State asserts that the MFAS Class-III Examination is conducted in view of and accordance with the Government Resolution dated 01-2-1965 and the Maharashtra Finance and Accounts Services Class-III Examination Rules (Rules). Rule 7 prescribes that the upper age limit for appearing in the examination shall be 40 years. The State emphasises that the Rules do not envisage power of relaxation of the upper age limit,

and if a candidate crosses the age of 40 years, he is rendered ineligible to appear at the examination.

(e) The State is candid in submitting that the Rules prescribe that the MFAS Class-III Examination be conducted twice in a year in April-May and October-November. The State submits that it is, however, not binding on the MPSC to hold the said examination as prescribed by the Rules.

(f) It is common ground that the applicant completed the age of 40 years on 31-12-2014. The State contends that the examination was scheduled to be held in April-May 2015 and the cut-off date was 10-2-2015 which rendered the applicant ineligible to appear at the examination and he was accordingly communicated the ineligibility.

(g) The applicant challenged the communication which informed him that he was ineligible to appear at the examination, by filing Original Application 196/2015 which was heard by the MAT on 21-5-2015 and an *ad interim* order was passed directing the respondents in the original application to permit the applicant to appear for the MFAS Class-III Examination scheduled to be held

in May 2015. The considerations which weighed with the MAT in passing the *ad interim* order were (a) that the employee crossed the age limit since the examination was not held twice in a year as prescribed, and (b) a similar interim order was passed in Original Application 129/2013 (P.R. Shahare v. State of Maharashtra and others).

(h) The State again fairly and candidly submits that the order dated 21-5-2015 rendered by the MAT was not challenged and the applicant was permitted to appear for the MFAS Class-III Examination. The State further submits that no application for modification or clarification of the order dated 21-5-2015 was preferred nor was the MAT called upon to clarify that the result of the examination shall be subject to final adjudication.

(i) The applicant appeared for the MFAS Class-III Examination held between 27-5-2015 to 30-5-2015 of which the result was declared on 15-10-2016. The applicant emerged successful.

(j) The State submits that Original Application 196/2015 was listed before the MAT on 12-4-2016 and a statement was

made on behalf of the applicant that the purpose of filing the original application is served inasmuch as the final relief sought in terms of prayer clause 10(i) is granted. The MAT passed order dated 12-4-2016 recording the submission and disposed of Original Application 196/2015 as infructuous. The State contends that inasmuch as the order dated 12-4-2016 was not rendered on merits, the State could not have challenged the said order.

(k) The State contends that seniority list was published on 16-12-2016 in which the name of the applicant was not included on the premise that he was over age. The applicant protested, but in vain. The applicant preferred Original Application 361/2017 in which MAT issued notice. The State filed an affidavit-in-response dated 21-9-2017. The applicant amended the original application and an additional affidavit-in-response to the amendment application was filed. The MAT heard the parties and allowed the original application by the order impugned.

3. We may now note the grounds on which the order impugned is assailed, and consistent with which the learned Additional Government Pleader Mrs. Ketki Joshi has argued.

(a) The State contends that while the Rules do prescribe that the MFAS Class-III Examination will be held twice in a year, there is no compulsion as such, and if due to administrative reasons the examination is not held, the loss of opportunity to the Government servant, while unfortunate, does not create any legal right in favour of the Government servant.

(b) The next contention is that Original Application 196/2015 having been disposed of in view of the statement of the learned Counsel for the applicant, there was no decision rendered on merits, with the result that the applicant was precluded from subsequently filing Original Application 361/2017.

(c) The other ground is that the MAT failed to appreciate that the applicant was permitted to appear at the MFAS Class-III Examination in view of the interim order in Original Application 196/2015, and there was no decision on merit.

4. Before we advert to the submissions canvassed by the learned Counsel for the applicant-employee, we may note an extremely important and relevant aspect. The State submits that

one vacancy is not filled in in view of the pending *lis*. Since while issuing notice in the present petition, we stayed the judgment of the MAT, we enquired from the learned Additional Government Pleader Mrs. Ketki Joshi whether one post is still kept vacant, and the answer is in the affirmative.

5. The learned Counsel for the applicant has addressed submissions consistent with the affidavit-in-response dated 22-11-2021 and it would suffice if we broadly note the averments in the affidavit. The applicant submits that his date of birth is 01-1-1975 and he completed the age of 40 years on 31-12-2014. On 30-1-2014, while he was well within the age limit, he did apply for appearing in the examination scheduled in April-May 2014. The applicant emphasises that even earlier he submitted application dated 16-1-2013 for the examination scheduled in April-May 2013, and application dated 30-7-2013 for the examination to be held in October-November 2013. The applicant submits that there was no examination held either in April-May 2013 or October-November 2013, and as a fact, between 06-12-2012 and 15-10-2016 only two examinations were

conducted by the MPSC. The first examination which ought to have been conducted in April-May 2012 was conducted in February 2013 and the second which ought to have been conducted in October-November 2012 was conducted in May 2015.

6. The applicant submits that admittedly he was prevented, for no fault of his, from appearing at the examination when he was well below the upper age limit since in contravention of the Rules, no examination was conducted, much less twice in the relevant year. The applicant has referred to several instances of indulgence shown to similarly situated employee. We are not inclined to delve deeper in the said aspect inasmuch as we are more than satisfied that the MAT committed no error in granting the relief to the applicant.

7. Facts are not in dispute. The State admits that the Rules prescribe that the MFAS Class-III Examination will be conducted twice in a year, ordinarily in April-May and October-November. While the State argues that there is no compulsion, in our

considered view, the argument which is premised on the word “will” is clearly untenable. The discretion and flexibility is as regards the timeline which is clear from the reading of the relevant Rule which provides that ordinarily the examination will be held in April-May and October-November. However, it does not lie in the mouth of the State, which is expected to act as a model employer, to contend that there is no compulsion and, therefore, no right created in favour of the employee.

8. Even *de hors* the said aspect, we note that the State has made no attempt to bring on record the pressing administrative exigency which prevented the State and the MPSC from holding the examination. The State was obligated to satisfy judicial conscious that the administrative exigency was such, that the State was prevented from holding the examination as prescribed by the extant Rules, which the State clearly failed to do.

9. We do not appreciate the stand of the State, which is that while loss of opportunity is unfortunate, the Government servant has no legal right to insist that he be permitted to appear at the

examination held belatedly. The constitutional philosophy mandates that the State actions must be fair and reasonable in every sphere. Government servants and the indeed every citizen, legitimately expects that he shall not be prejudiced by the inaction or the failure to act in accordance with law, of the State. We may gently remind the State of the maxim “*nullus commodum capere potest de injuria sua propria*” (no man can take advantage of his own wrong).

10. We are not impressed by the submission of the State that the MAT has not considered the issue on merit. In any event, we find the facts too glaring to consider a remand. Indeed, the facts are admitted and the law clear, at least to us. As writ Court, we must be loath to, and will not, drive the applicant from pillar to post in quest of a relief which we find him entitled on the basis of the admitted factual matrix.

11. We see no reason to interfere with the judgment impugned.

12. We direct that the judgment impugned be implemented, with every consequential relief, except arrears of salary, within the next eight weeks. The notional date of appointment shall be the date on which the other successful candidates are appointed and the petitioner shall be entitled to seniority for the purpose of fixation of pay scale although as observed supra, he shall not be entitled to the salary or difference in salary for the concerned period.

13. The petition is dismissed.

(Mrs. Vrushali V. Joshi, J.)

(Rohit B. Deo, J.)

adgokar