

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

**WRIT PETITION NO. 1685/2023**

Nitish s/o Anil Sharma,  
Aged about 28 years Occ: Advocate A/p  
R/o Flat no.A402, Harshwardhan Sankul,  
Hazaripahad Road, Nagpur, Dist. Nagpur - 440007.

**PETITIONER**

**.....VERSUS.....**

1. State of Maharashtra, through Secretary,  
Department of Home, Mantralaya, Mumbai – 32.
2. Maharashtra Public Service Commission,  
Through its Secretary, Office Kuprez Telephone  
Nigam Building, at floor 7<sup>th</sup> and 8<sup>th</sup>, Maharshi  
Karve's Road, Kuprez, Mumbai – 400 021.

**RESPONDENTS**

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Shri A.S. Dhore, counsel for the petitioner.  
Shri A.S. Fulzele, Additional Government Pleader for the respondents.

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**CORAM : A. S. CHANDURKAR AND MRS. VRUSHALI V. JOSHI, JJ.**

**DATE : JUNE 12, 2023.**

**ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)**

**RULE.** Rule made returnable forthwith and heard the learned counsel for the parties.

2. By this writ petition filed under Article 226 of the Constitution of India the petitioner seeks a direction to be issued to the Maharashtra Public Service Commission (for short, 'the MPSC') to re-examine and re-evaluate his answer sheet of Paper (I) and especially Question Nos.4(a), (c) and 5(a), (c) of the examination that was held for the post of Civil Judge (Junior Division) and Judicial Magistrate First Class – 2021.

3. The petitioner who has obtained a Post Graduate Degree in Law claims to be a meritorious student having secured first position in the LL.B. examination 2016-17 conducted by Sant Gadge Baba Amravati University, Amravati. In response to an advertisement dated 23.12.2021 published by the MPSC the petitioner submitted his application so as to appear for said examination. In the preliminary examination conducted on 12.03.2022 the petitioner secured 89.75 marks out of 100. On 27.05.2022 the MPSC published an advertisement inviting applications from successful candidates who had appeared in the preliminary examination to enable them to appear in the main examination. The said main examination was conducted in two papers. Paper (I) was based on Civil subjects while Paper (II) was based on Criminal subjects. Each paper was for 100 marks each. The result of the main examination in which the petitioner had appeared came to be published on 01.11.2022 and the petitioner was placed at Serial Number 36 in the said list. The petitioner was issued a letter by the MPSC on 28.12.2022 requiring him to remain present for his interview on 11.01.2023. The petitioner appeared for the said interview after which the provisional results came to be declared on 17.01.2023. The petitioner was placed at Serial Number 71 in the said list wherein the marks secured in the written examination as well as the interview were mentioned. The petitioner secured 52 marks in Paper (I), 63 marks in Paper (II) and 27 marks in the interview.

4. The petitioner was of the view that he was entitled to more marks than 52 in Paper (I) since he had answered all the questions correctly. On 30.01.2023 the petitioner applied for a copy of the answer sheet under the provisions of the Right to Information Act, 2005. The petitioner received copy of his answer paper on 01.03.2023 and found that he was awarded 3 marks each for the answers given to the Question Nos.4(a), (c) and 5(a), (c). From the information received by the petitioner, the last candidate selected at Serial Number 62 had secured 144 marks while the petitioner was placed at Serial Number 70 having secured 142 marks. Insofar as Paper (II) is concerned the petitioner was awarded 59.5/60 marks by the examiner which was increased to 63 by the moderator. The petitioner in the meanwhile had sought re-totalling of the marks awarded to him on 08.02.2023 but there was no change in his marks. It is in the light of these facts that the petitioner has preferred the present writ petition urging that if his answer sheet for Paper (I) is re-evaluated by the moderator his total marks could increase which could then result in he being placed in the merit list.

5. Shri A.S. Dhore, learned counsel for the petitioner at the outset submitted that notwithstanding the limited scope for interference available in writ jurisdiction since there was no provision for re-evaluation or re-examination of the answer sheets, perusal of the answers

given to Question Nos.4(a), (c) and 5(a), (c) would clearly indicate that the said answers given by the petitioner were correct and the petitioner was entitled to higher marks than what had been awarded to him. He submitted that while Question No.(1) of Paper No.(I) carried 20 marks, all other questions carried 16 marks each. Insofar as Question Nos.4 and 5 were concerned the candidate was required to answer two sub-questions which meant that each sub-question carried 8 marks. It appeared that the answers given by the petitioner had been evaluated on the basis that each sub-question carried 4 marks and hence the petitioner was awarded 3 marks each for each sub-question. He took the Court through the answer paper of the petitioner of Paper (I) and submitted that the answers given to the said questions ought to have been evaluated for 8 marks each. The award of 3 marks each for each sub-question was hardly justifiable and the same had resulted in causing injustice to the petitioner. Placing reliance on the decision in *High Court of Tripura through the Registrar General Versus Tirtha Sarathi Mukherjee & Others* [(2019) 16 SCC 663], it was submitted that the present was indeed an exceptional case that required interference at the hands of this Court under Article 226 of the Constitution of India. It was thus submitted that considering the previous performance of the petitioner in various examinations, a case was made out to issue directions to the MPSC to re-evaluate and re-examine Question Nos.4(a), (c) and 5(a), (c).

6. Shri A.S. Fulzele, learned Additional Government Pleader for the respondents opposed the aforesaid submissions and relied upon the affidavit-in-reply. He submitted that the answer sheet of the petitioner had been properly evaluated by the experts and marks had been awarded to him on the basis of his performance. The petitioner's request for re-totaling had been considered and by the communication dated 06.03.2023 he had been informed that there was no change in his marks despite re-totaling. Since there was no provision for re-evaluation of the answers as held by the Hon'ble Supreme Court in *Tirtha Sarathi Mukherjee & Others* (supra), the prayers made in the writ petition could not be granted. The answers given by the petitioner in his answer sheet had been evaluated in accordance with law and no fault could be found with such exercise. Since there was no right in the petitioner to demand re-evaluation of his marks the writ petition was liable to be dismissed.

7. We have heard the learned counsel for the parties at length and with their assistance we have perused the material placed on record. It is an admitted position that for the present examination there is no provision for re-evaluation of the answer sheets of a candidate. There is thus no legal right existing in favour of the petitioner and hence there is absence of a corresponding duty with the MPSC to re-evaluate the petitioner's answer sheet. In this regard therefore it would be necessary

to keep in mind the law as laid down in paragraphs 19 and 20 of the decision in *Tirtha Sarathi Mukherjee & Others* (supra). The said paragraphs read as under :-

“19           The question however arises whether even if there is no legal right to demand revaluation as of right could there arise circumstances which leaves the Court in any doubt at all. A grave injustice may be occasioned to a writ applicant in certain circumstances. The case may arise where even though there is no provision for revaluation it turns out that despite giving the correct answer no marks are awarded. No doubt this must be confined to a case where there is no dispute about the correctness of the answer. Further, if there is any doubt, the doubt should be resolved in favour of the examining body rather than in favour of the candidate. The wide power under Article 226 may continue to be available even though there is no provisions for re-evaluation in a situation where a candidate despite having giving correct answer and about which there cannot be even slightest manner of doubt, he is treated as having given the wrong answer and consequently the candidate is found disentitled to any marks.

20.           Should the second circumstance be demonstrated to be present before the writ court, can the writ court become helpless despite the vast reservoir of power which it possesses? It is one thing to say that the absence of provision for revaluation will enable the candidate to claim the right evaluation as a matter of right and another to say that in no circumstances whatsoever where there is no provision for revaluation will the writ court exercise its undoubted constitutional powers? We reiterate that the situation can only be rare and exceptional.”

From the aforesaid observations it can be seen that it is only in a rare and exceptional case where the Court finds that grave injustice is likely to occur that a direction for re-evaluation can be given even if there is no provision for the same. It has been further observed that it could not be said that in no circumstances whatsoever can such direction be issued when there is absence of a provision for re-evaluation. It would thus be necessary to examine whether the petitioner has made out such case herein.

8. The petitioner has confined his request for re-evaluation insofar as Question Nos.4(a), (c) and 5(a), (c) are concerned. It is his contention and belief that though Question Nos.4 and 5 carried 16 marks each and two sub questions from Question Nos.4 and 5 were required to be answered thus meaning that each sub question carried 8 marks, his answers to the said sub-questions had perhaps been evaluated for maximum of 4 marks each. To consider this stand of the petitioner it would be necessary to refer to the aforesaid questions and the answers given by the petitioner.

“Question 4(a) reads as under:-

*Right of mortgagor to redeem. Explain.*

The answer given by the petitioner reads as under :-

Answer : 4(a)      *Section 58 to Section 99 of the transfer of property Act deals with the provisions relating to Mortgage of immovable property.*

*Section 60 of the Transfer of Property Act, 1882 provides the Right of Redemption to the Mortgagor.*

*Right to redeem [Section 60]*

*Right to redeem the mortgaged property is one of the most important right of mortgagor.*

*When exercised ?*

*Right of redemption may be exercised by the Mortgagor only after the Mortgage money becomes due but before the decree of foreclosure is passed by the court.*

*When not exercised ?*

*Right of mortgagor to redeem the Mortgaged property shall not be exercised after the decree for foreclosure is passed by the civil court.*

*Any time after the mortgage money becomes due the mortgagor may pay the mortgaged debt and get the mortgaged property redeemed.*

*Clog on redemption to be void :-*

*Any clog which takes away the right of mortgagor to redeem the mortgaged property shall be void. The principle of once the mortgage always a mortgage is incorporated under Section 60 of the Transfer of Property Act.*

*Section 60-A : The mortgagor shall have right on redemption to direct the mortgagee to deliver or transfer the mortgaged property to any other person named by mortgagor.*

Question 4(c) reads as under:-

*What are the mutual rights and liabilities of partners?*

The answer given by the petitioner reads as under :-

Answer : 4(c) *Section 9 to 30 of the Partnership Act, 1932 deals with the provisions relating to Rights & liabilities of partners.*

*Section 9 to Section 17 of the Partnership Act, 1932 deals with the mutual rights and liabilities of the partners.*

*Partnership [Section 4]*

*Partnership is the relation between the persons who agreed to share the profits of the business carried on by all or any of them acting for all persons individually called as partners. Collectively called firm, name under which they carries business called firm name.*

*Rights & liabilities of partners.**A] Rights of partners.*

*1] Right to conduct business of the firm. Every partner shall have the right to conduct the business of the firm.*

*2] Right to share profits :- Every partner shall have the right to share the profits of the firm as per their agreed ratio and in absence of agreement equally.*

*3] Right to interest on capital if provided under the agreement.*

*4] Right to remuneration to working partners as per the agreement of partnership.*

*5] Right to use the property of the firm for the purpose of the business of the firm.*

*6] Right to access and inspect books of account of the firm.*

*7] Right to express their view and opinions as to the business.*

*B] Liabilities of the partners :-*

*1] All partners shall work with due diligence for the benefit of the firm.*

*2] Partners shall not make any personal profit or secret profit.*

*3] Partners shall give accounts to all the other partners.*

*4] Partner shall not use the property of the firm for personal use.*

*5] Partner shall indemnify the firm for the losses caused due to their misconduct or negligence.*

*6] Partner shall not do any act which will be against the terms and conditions of partnership agreement.*

*7] Partner must do all the acts necessary to protect the business as a man of ordinary prudence in case of emergency.*

Question 5(a) reads as under:-

*When injunction can not be granted under Specific Relief Act?*

The answer given by the petitioner reads as under :-

Answer : 5[a]            *Section 36 to Section 42 of the Specific relief Act, 1963 deals with the provisions relating to injunctions.*

*'Injunction' is not defined under the Specific Relief Act nor in the Code of civil procedure, 1908. However, injunction is the order of civil court directing a person to do or not to do some specific act in order to prevent breach of legal right of other person.*

*Section 36 of the Act.*

*As per Section 36 preventive relief may be granted in the form of injunction temporary or perpetual.*

*Kinds of Injunctions.*

- 1)            *Temporary Injunction.*
- 2)            *Perpetual Injunction.*
- 3)            *Mandatory Injunction.*

*Section 41 of the Specific Relief Act, 1963 states the grounds when injunction cannot be granted :-*

- 1)            *Injunction cannot be granted to restrain a person from instituting or prosecuting any proceeding.*
- 2)            *Injunction cannot be granted to restrain a person from apply to legislative bodies.*
- 3)            *Injunction cannot be granted to restrain any person from filing criminal proceedings.*
- 4)            *Injunction cannot be granted to restrain any person from prosecuting or institution of proceeding before superior Court.*
- 5)            *Injunction cannot be granted when plaintiff is at own fault.*
- 6)            *Injunction cannot be granted if plaintiff has no interest in subject matter.*
- 7)            *When plaintiff has acquiesced the act.*
- 8)            *Injunction cannot be granted to restrain any act on the ground of nuisance, which is not nuisance.*
- 9)            *Injunction shall be granted to prevent breach of contract which is not specifically enforceable.*

10) As per amendment in Section 41 new clause i.e. Section (ha) is inserted in 2018, as per the said clause injunction shall not be granted if granting such injunction will cause delay or obstruction in progress or completion of infrastructure project.

*In all above situation court shall not grant injunction.*

Question 5(c) reads as under:-

*Define – unpaid seller” and what are its right ?*

The answer given by the petitioner reads as under :-

Answer : 5[c] Section 45 to Section 61 of the Sale of Goods Act, 1930 deals with the provisions relating to rights of unpaid seller.

*Unpaid Seller [section 45]*

*A seller of goods is said to be unpaid when he has not received the complete amount of price i.e. sale consideration or cheque or bill of Exchange is received for price but it was dishonoured.*

*Rights of Unpaid*

A] *Rights against goods*

1] *Right to lien :-*

*Right to lien is one of the important right of unpaid seller against goods. Seller may exercise his right to lien if goods are sold without any stipulation of Credit or goods sold on credit but term of credit is expired.*

*Right of lien can be exercised also when the buyer becomes insolvent provided seller must have possession.*

*Termination of right to lien :-*

1) *When the seller parted with the possession of goods.*

2) *When the buyer acknowledge delivery of goods.*

2] *Right to stoppage in transit :-*

*Right to stoppage in goods can be exercised by unpaid seller only when buyer becomes insolvent.*

*Goods in transit.*

*Goods are in transit when seller parted with the possession but buyer has not obtained the possession of goods.*

*Termination of right to stoppage in transit :-*

a) *When buyer acknowledged delivery.*

b) *When goods reached at appointed destination.*

c) *When the agent of buyer acknowledged delivery.*

3) *Right to re-sale.*

*The unpaid seller shall have the right to re-sale the goods. This right can be exercised only after giving prior reasonable notice to the buyer.*

B] *Right against the Buyer.*

*The seller have following rights against the buyer :-*

1) *To file suit claimining compensation for breach of contract.*

2) *To file suit for specific performance of contract.*

9. For all the aforesaid answers the petitioner has been awarded 3 marks each. *Prima facie*, when the answers given by the petitioner are examined in the context of the relevant statutory provisions, it can be seen that the petitioner has made a reference to various statutory provisions be it the provisions of the Transfer of Property Act, 1882, the Indian Partnership Act, 1932, the Sale of Goods Act, 1930 and the Specific Relief Act, 1963. On reading the answers given to Question Nos.4(a), (c) and 5(a), (c), it cannot be said that the answers given by the petitioner are wrong. He has referred to the relevant statutory provisions as applicable while answering the questions in that context. It is thus a case of awarding proper marks for the answers given. As held in *Tirtha Sarathi Mukherjee & Others* (supra), there should not be any doubt about the correctness of the answers given by a candidate and in case of any doubt the same should be resolved in favour of the examining body rather than in favour of the candidate.

10. One of the contentions raised by the petitioner is that the last candidate who finds his name in the merit list had secured 144 marks while the petitioner was awarded 142 marks. There is thus a difference of two marks. We find that the present is a case where the petitioner seeks re-evaluation of his answer sheet on the ground that he has not been awarded marks keeping in mind the maximum marks as could be awarded to the answers of such questions. We find in the facts of the present case after perusing the answers given by the petitioner to the aforesaid questions that the answer sheet of the petitioner insofar as answers given to Question Nos.4(a), (c) and 5(a), (c) calls for re-evaluation. The situation can be treated to be exceptional especially in the light of the answers given by the petitioner when compared to the marks awarded to him. We therefore find that such case has been made out by the petitioner for issuance of a direction for re-evaluation. This is after eschewing the aspects of sympathy or compassion as observed in *Ran Vijay Singh Versus State of Uttar Pradesh* [(2018) 2 SCC 357].

11. It is informed that one seat of the total advertised 63 posts has been kept vacant which position continues even today. In the facts of the present case we are satisfied that the award of marks to the petitioner for

Question Nos.4(a), (c) and 5(a), (c) does result in causing injustice to the petitioner in the light of the fact that the last candidate in the merit list has secured 144 marks while the petitioner has secured 142 marks. We therefore find the petitioner entitled for a direction of re-evaluation of his answer sheet insofar as Question Nos.4(a), (c) and 5(a), (c) are concerned.

12. As a sequel to the aforesaid discussion, the following order is passed :-

- (I) It is directed that the respondent no.2 shall re-evaluate the petitioner's answer sheet for Paper (I) as regards Question Nos.4(a), (c) and 5(a), (c) thereof are concerned.
- (II) The needful be done within a period of three weeks from today.
- (III) Till such exercise is conducted the seat already kept vacant shall not be filled in.
- (IV) It is informed that in the meanwhile another advertisement has been published by the MPSC for filling in the posts of Civil Judge (Junior Division) and Judicial Magistrate First Class. The petitioner is permitted to apply pursuant to the subsequent advertisement without prejudice to the directions issued hereinabove.

13. The writ petition is disposed of. Rule is made absolute in aforesaid terms with no order as to costs.

(MRS.VRUSHALI V. JOSHI, J.)

(A.S. CHANDURKAR, J.)

APTE