

(2018) 01 BOM CK 0069
In the Bombay High Court
Case No : 749 of 2014

Dilip Ramji Kamble

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-01-2018

Acts Referred:

Citation : (2018) 01 BOM CK 0069

Hon'ble Judges : S.C. Dharmadhikari, Bharati H.Dangre

Bench : Single Bench

Advocate : Dr. Suresh T. Mane, Anil Shastri, A.Y. Sakhare, J.J. Xavier

Final Decision : Dismissed

Judgement

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith and the petition is taken up for hearing and final disposal.

2. The factual position which emerged in this case, during the course of hearing and as per the memo of writ petition is as under :-

The petitioners, employees of Respondent No.2/Municipal Corporation Greater Mumbai (hereinafter referred to as MCGM) working in lower cadre posts i.e. Class IV posts, have filed the present petition challenging inaction on the part of Respondent No.2 MCGB in not issuing appointment orders in favour of the petitioners on clerical posts. The petitioners have prayed for issuance of a writ of mandamus, order or direction for issuing appointment orders in their favour on clerical posts, pursuant to the selection process initiated by respondent No.2 by holding a

written Examination on 30/1/2011 and result of which was declared on 6/8/2011. The petitioners have claimed that they have passed the examination held for the promotion to the post of clerks. The petitioners have contended that the General Administration Department under the control of Respondent No.2 and 3 issued a Circular on 17/7/2010 being No. MPR 2205 indicating eligibility criteria for the posts of clerks on the establishment of respondent No.2 and 3. According to the petitioners, Circular dated 17/7/2010 provided two modes for selection for the post of clerk i.e. direct recruitment to the extent of 67% of the posts and remaining 33% posts were to be filled in by selection from eligible lower cadre employees i.e. the petitioners who have succeeded in the Departmental Examination.

3. The Circular dated 17/7/2010 lays down the following eligibility criteria for lower grade employees for appearing for the Department Examination for selection to the posts of clerks.

a) One should have passed SSC or equivalent examination and (a) worked on monthly salary for not less than four years or on daily basis in fair season for not less than five years (b) who has worked for at least four hours daily or for not less than continuous eight years as part- time employees of the Municipal Corporation.

b) One should have passed SSC or equivalent examination or higher examination with Marathi and English subjects for 100 marks.

c) One should possess a Marathi or English typing certificate issued by the State for 30 words per minute.

d) One should have knowledge of computer fundamental, Operating system, word processing, electronic spread sheet and on database management as well as possess a Certificate of MS-CIT as per provisions of Circular No. MPM/2/6381 dated 19/11/2005. (If one does not possess the MS-CIT Certificate then the same would be required to be produced within a period of two years from appointment as clerk).

4. According to the petitioners, the Circular dated 17/7/2010 was modified on 6/1/2011 by issuing a Corrigendum No.MPR/4433 by which the existing condition mentioned in clause 1(B), requiring the

employees to be considered from the lower grade employees for appointment whose daily working hours are not less than 4 hours and whose continuous period of service is not less than 8 years and such part time employees in the service of the Municipal Corporation for Greater Mumbai, being eligible for consideration, was modified by requiring the employees whose working hours per day are not less than 4 hours and whose continuous period of service is not less than 8 years, to be considered to be eligible. The respondents issued Notice on 28/4/2011 inviting applications for 334 posts of Lower Grade Clerks from eligible candidates amongst the lower grade employees in MCGB, Mumbai. The petitioners applied for the post of clerk as they were eligible and complied with the Circular of the MCGB for the examination for the post of clerk. According to the petitioners, respondent No.2 scrutinized the applications of the petitioners and during scrutiny they were found eligible. The petitioners attended the examination on 30/7/2011 and result was declared on 6/8/2011 and the petitioners secured 40% marks and they became eligible for the post of clerk. The petitioners have contended that though the petitioners have passed the examination, no appointment orders have been issued to them. According to the petitioners, at present 1116 posts of clerks are vacant and out of which 368 posts are available for promotion.

5. The petitioners are aggrieved by the non-issuance of appointment orders in their favour, in spite of passing of the requisite examination and being qualified for the post of clerk. The petitioners also allege that the respondents have again issued advertisement declaring total 1247 posts of clerk to be vacant and according to the petitioners said advertisement was issued on 15/10/2011. The petitioners have therefore prayed for issuance of appointment order in their favour to the post of clerk. They have also prayed for their absorption in 33% quota meant for promotional cadre and they also prayed for reckoning their seniority in an

appropriate manner.

6. In support of the contentions raised in the petition, we have heard Dr. Suresh T. Mane, Advocate for the Petitioners, Mr. Anil Shastri, AGP for Respondent No.1, Mr. A.Y. Sakhare, Senior Advocate a/with Mr. J.J. Xavier for Respondent No. 2 to 6.

7. The learned Counsel for the petitioners would vehemently argue that the petitioners have been deprived of their right to appointment in spite of the fact that they have been selected for the post of clerk and they have undergone the entire procedure for its selection. The learned Counsel for the petitioners relied upon a chart presented during the course of hearing to advance his submission that amongst the petitioners one Pramod Gangaram Warang has secured 49 marks and still he has not been issued with an order of appointment. He relied upon the judgment of the Hon"ble Apex Court in case of East Coast Railway and Another Vs. Mahadev Appa Rao and others (2010) 7 Supreme Court Cases 678 to canvass his submission that it is always permissible to have a judicial review of the recruitment process at the instance of this Court when such process suffers from arbitrariness. He, by relying upon the said judgment would argue that though a candidate who has passed in examination or whose name appears in the select list does not have an indefeasible right to be appointed, yet appointment cannot be denied arbitrarily nor can his selection be cancelled without giving proper justification. He also relies upon the judgment of the Hon"ble Apex Court in Civil Appeal No. 6707 of 2013 (Manoj Manu and Anr Vs. Union of India and Ors) decided on 12 th August, 2013.

8. Respondent No.2 MCGM is represented by learned Senior Counsel Shri Sakhare, who advanced his exhaustive submissions. He also relied on the affidavit-in-reply filed by the MCGM on 29/4/2015 and also an additional affidavit. The learned Senior Counsel invited our attention to the Rules permitting the post of clerk to be filled in and according to

him the posts of clerk on the establishment of the MCGM are to be filled in through two sources, in different proportions. According to the learned Senior Counsel, 67% of the post of clerk are to be filled in by direct recruitment i.e. by inviting applications from open market and even the candidates who are on the establishment of MCGM can also apply as an outsider, whereas 33% of the post of clerks are to be filled in by in service candidates i.e. those already on the establishment of MCGM and occupying the post in lower cadre. According to Shri Sakhare, as on 24/4/2011 there were 4691 vacant posts in the clerical cadre and the total vacancies for in service candidates in the 33% quota were 334 which included 171 posts to be filled in from open category and 163 posts from the reserved category candidates. According to the learned counsel, an advertisement was issued initiating process for filling up 1247 posts from open candidates (67% quota). He further submitted that an advertisement was issued on 28/4/2011 for selection of lower grade clerical cadre for 334 in service candidates. He would submit that the respondent MCGM received 626 applications for the said posts and the written examination was conducted in which 581 candidates appeared including the present petitioners and 475 in service candidates were declared to have passed the examination. Out of 475 candidates, the MCGM issued appointment orders in favour of 329 in service candidates, including the open as well as reserved category candidates. Mr. Sakhare, learned Senior Counsel, would submit that a writ petition No. 10016/2011 was filed before this Court where a grievance was made that marks which were taken into consideration for appointment in the open category and on which the list of this category was closed is much less than the marks upon which it closed down in the reserved category. In the said writ petition, it was contended that the candidates in the open category who have received 49 marks were appointed whereas the candidates under reserved category were required to secure 56 or more marks on being selected. In the said writ petition, according to the

learned counsel, MCGM filed an affidavit submitting an undertaking before the Court that the MCGM will absorb all such candidates in the reserved category who have secured 49 marks and in the light of the said affidavit, the Court was pleased to dispose of the said writ petition. According to the learned Senior Counsel, 49 marks was accepted as cut-off by MCGM in the light of the said statement which was also approved by this Court.

Accordingly, the MCGM appointed 98 candidates from the reserved category who had secured marks 49 or more. Balance 48 candidates were left out which included the candidate from reserved and open category who secured marks between 40 to 49 but could not be appointed as the posts were filled in by appointing 98 persons belonging to reserved category. Thus, in the year 2011 though 334 posts were available to be filled in, in 33% quota, but the actual posts filled in were 427. However, the petitioners did not fall within 98 candidates who were additionally appointed in view of the decision in writ petition and rather they belong to those 48 candidates who fell within the range of 40 to 49 marks.

According to the learned Senior Counsel, the MCGM has appointed candidates who have successfully passed the written examination and secured minimum cut-off marks of 49 and in fact in the year 2011, 427 in service candidates were appointed even though the posts available for the said category were 334. According to the learned Senior Counsel, out of those 427 appointments, 21 persons did not join and those 406 candidates were inducted in the cadre of clerk from the lower cadres. In the year 2012-13 there was no recruitment process and on 1/3/2014 an advertisement was issued for recruitment of 295 candidates from 33% quota i.e. service quota and examination was conducted in pursuance of the said advertisement on 2/3/2014. According to the learned Senior Counsel, seven petitioners appeared in the written examination conducted on 2/3/2014 and two candidates were successful and in fact they were appointed.

The emphasis of learned Senior Counsel is on the fact that the petitioners cannot claim an indefeasible right of appointment even though their names are included in the select list and the learned Senior Counsel placed heavy reliance on a Circular issued by the MCGM on 28/4/2011 which has been placed on record by the petitioners. According to the learned Senior Counsel for the Respondent-MCGM, as per the said Circular, validity of the said select list is for one year in the process of filling up of the post to the direct recruitment. However, as far as departmental employees are concerned, the life of the select list has been fixed as two years. According to the learned Senior Counsel, the petitioners who have approached this Court in the year 2014, when the select list was prepared pursuant to the examination in furtherance of an advertisement issued on 28/4/2011 did not subsist and the said select list has worked itself out. The learned Senior Counsel therefore prays for dismissal of the writ petition by relying upon the judgment of the Hon''ble Apex Court in the case of State of Orissa vs. Rajkishor Nanda and Ors reported in (2010) 6 SCC 776 and in case of Vijaykumar Pandey Vs. Arvind Kumar Roy & Ors (2013) 11 SCC 661.

9. We have carefully perused the writ petition along with all its annexures and the affidavit filed by the Respondent-Corporation and we have also considered the submissions advanced on behalf of both parties through their respective counsels. It is an undisputed fact that the petitioners applied in pursuance of an advertisement issued by the MCGM for filling up the posts of clerk by which the applications were invited for 334 posts of lower grade clerical cadre. The said advertisement provided for social reservation and other reservation on the basis of gender and physical disability and the sports quota. It is not in dispute that the petitioners appeared for the written examination conducted for selection of the candidates and secured passing marks of 40. The petitioners awaiting their order of appointments, preferred applications seeking information

under the Right to Information Act to know the vacancy position and the operation of the select list in pursuance of the advertisement to which they had applied to MCGM. The petitioners continued to make repeated representations requesting for their appointment orders to be issued to the post of clerk and they at times also asserted through Association and Union of MCGM. On perusal of the writ petition, we have come across a noting on the file of the General Administration Department (GAD) of the MCGM dated 21/5/2013 which is obtained by the petitioners under the Right to Information Act . Perusal of the said noting reveals that an application in the form of request was addressed to the Hon"ble Commissioner and the recommendations were made by the Mayor for merging the employees from all categories from lower cadre employees securing marks from 40 to 49 on the post of clerk. Pursuant to this reference, a decision was taken in the backdrop of peculiar fact that the candidates from the reserved category had secured more marks than the candidates from the open category and such candidates had approached the Court by filing the writ petition and in order to remove the disparity, a statement was made before the Court that those candidates from reserved category who have secured marks between 49 to 56 would also be accommodated. In pursuance of such a decision being taken 98 candidates belonging to reserved category who secured marks up to 49, also came to be appointed resulting into 475 candidates being appointed. The said noting also sets out the bifurcation of the category of the candidates who had appeared for the written examination conducted on 30/1/2011 and had secured marks in the range of 40 to 49 who were not issued orders of appointment.

10. Perusal of the said noting reveals that a representation was also made by the candidates who had cleared the examination but did not reach up to the benchmark of 49 marks. The office note of the respondent sets out that the issue has already been set right and the waiting list would be valid only as against 334 posts and would be operated only if any

candidates from 334 candidates did not join and this list will not be operated for any future vacancies to be created and if at future point of time the vacancies are created, examination would be further conducted.

11. When we have perused the affidavit filed on behalf of the Respondent Corporation dated 27/4/2015 and we could find that the said decision taken and reflected in the said noting is reproduced with the detail figures in the affidavit-in-reply. The affidavit-in-reply has categorically stated that the petitioners belong to the balance 48 candidates who have secured marks ranging between 40 to 49 and therefore could not reach the cut-off marks which was accepted by the MCGM and though they have cleared the examination by securing minimum 40 marks, they could not reach the cut-off level of 49 marks and were not found eligible to be appointed in pursuance of an advertisement issued in the year 2011. A fresh recruitment process was conducted in the year 2014 and it was open for the petitioners to apply again and participate in the selection process. In fact, seven petitioners participated in the examination conducted in pursuance of a subsequent development and two of the petitioners namely petitioner No. 3 and 10 qualified themselves and were issued with appointment orders on 3/10/2016 and 4/10/2016. Remaining petitioners did not choose to participate in the subsequent round of recruitment and did not avail of the opportunity of entering into higher cadre.

12. We are unable to accept the contentions advanced on behalf of the Counsel for the petitioners that in pursuance of the petitioners clearing written examination and qualifying themselves by securing minimum marks, they have right of being appointed. It is settled position in law that mere placement in the select list or panel does not by itself entitle a candidate whose name figures in such select list or panel to seek appointment and to claim that it is his indefeasible right to be appointed. We would gainfully refer to the observations of the Hon''ble Apex Court in

case of Shankarsan Dash v. Union of India reported in (1991) 3 SCC 47 where a Constitutional Bench was examining the identical issue as to whether candidates declared successful in the selection process acquired an indefeasible right to get appointed against the available vacancies. The Hon"ble Apex Court in paragraph 7 repelled the said contention and observed as below :-

7. "It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. and if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted".

(emphasis supplied)

13. The said decision was followed in a catena of decisions rendered subsequently and by now it has become settled proposition of law that a person whose name features in the select list does not acquire an indefeasible right to seek an appointment and his empanelment at the most is out of eligibility for the purpose of his appointment but does not confer a right of appointment in him. Though the petitioners in the present case would argue that the petitioners were declared successful in the written examination conducted on 31/7/2011 by securing more than 40 marks, we have noted that for 334 posts which were advertised to be filled in from in service candidates, 581 candidates had appeared in the examination and 475 candidates cleared the said examination. The number of candidates who cleared the examination was more than the number of vacancies to be filled in and initially 329 candidates came to be appointed which included the candidates from open as well as reserved

category. In a writ petition being filed before this Court, to which we had made reference in the above paragraph, the MCGM undertook before the Court to absorb candidates from the reserved category who have secured marks between 49 to 56 and thus appointed 98 candidates from reserved category who were able to make it to the cut-off marks of 49 marks. The petitioners are the candidates who secured the marks below 49 barring petitioner no.5 Pramod Warang who had secured 49 marks. It is not the case of the petitioners that the candidates who have secured less marks than them have been inducted on the post of clerk. The respondents have applied a benchmark of 49 marks to both open and reserved category and while operating the list of open category, the last candidate to be absorbed was with 49 marks whereas in case of reserved candidate, last candidate to be admitted was at 56 marks and in order to remove the disparity and anomaly, the MCGM itself had committed to this Court that it would appoint candidates from reserved category who had secured 49 or more marks and the Municipal Corporation has abided by the said statement made before this Court.

14. The petitioners before us are claiming an appointment on the basis of a select list prepared on 6/8/2011 based on the marks secured by the candidates in the written examination conducted on 30/7/2011. The Respondent Municipal Corporation on 20/6/2001 by issuing Circular has already fixed the life of a select list/wait list and has laid down a policy determining the life of the select list/wait list to be two years in case of selection from the category of departmental employees. Going by the norms applicable for the employment in MCGM, quota of the 33% is to be filled in by any service candidates, the life of a panel/select list would be of two years. The petitioners have approached this Court by filing the present writ petition in February, 2014, at a point of time when the select list in which the names of the petitioners appeared was already exhausted. The petitioners are reckoning their claim as the select list prepared in

furtherance of an advertisement issued on 28/4/2011 is still subsisting and one look at the prayers made by the petitioners in the writ petition would reveal that the petitioners want this Court to issue a writ to issue appointment orders to the petitioners in pursuance of the selection process which was initiated in the year 2011. We are mindful of the fact that the select list is no longer alive in the light of the policy of the respondent/Corporation. Shri Sakhare, learned Senior Counsel, has rightly relied upon the judgment of the Hon''ble Supreme Court in the case of State of Orissa Vs. Rajkishore Nanda (supra), wherein the Apex Court has held that a select list cannot be treated as a reservoir for the purpose of appointments and that the vacancies can be filled up by taking the names from the select list as and when required. The Apex Court made the following observations in paragraphs 13, 14 and 15 as under:-

13. " In Mukul Saikia and Ors. v. State of Assam and Ors . AIR 2009 SC 747, this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law.

14. "A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.

15. A Constitution Bench of this Court in Shankarsan Dash Vs. Union of India, AIR 1991 SC 1612, held that appearance of the name of a candidate in the select list does not give him a right of appointment. Mere inclusion of candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remain unfilled. The candidate concerned cannot claim that he has been given a hostile discrimination. (see also Asha Kaul & Anr. Vs. State of J & K & Ors., (1993) 2 SCC 573; Union of India Vs. S.S.Uppal, AIR 1996 SC 2340; Bihar Public Service Commission Vs. State of Bihar AIR 1997 SC 2280;

Simanchal Panda Vs. State of Orissa & Ors., (2002) 2 SCC 669; Punjab State Electricity Board & Ors. Vs. Malkiat Singh (2005) 9 SCC 22; Union of India & Ors. Vs. Kali Dass Batish & Anr. AIR 2006 SC 9 789; Divisional Forests Officers & Ors. Vs. M. Ramalinga Reddy AIR 2007 SC 2226; Subha B. Nair & Ors. Vs. State of Kerala & Ors., (2008) 7 SCC 210; Mukul Saikia & Ors. Vs. State of Assam & Ors., (2009) 1 SCC 386; and S.S. Balu & Anr. Vs. State of Kerala & Ors., (2009) 2 SCC 479).

The Apex Court has clearly held that it is the settled legal proposition that no relief can be granted to the candidate if he approaches the Court after the expiry of the select list and if the selection process is over, select list has expired and appointments have been made, no relief can be granted by the Court at a belated stage. In the said decision, the Apex Court has also categorically held that mere empanelment does not give a vested right in favour of an empanelled candidate. Applying the said principle of law laid down by the Hon"ble Apex Court, we can safely conclude that the select list or the so called empanelment which the petitioners claim, is no longer in existence as the life of the select list has expired and the list prepared on the basis of the marks obtained by the candidates in the written examination, has worked itself out, 427 appointment orders were issued in favour of candidates to fill in 33% in service quota as against 334 posts available on the establishment of MCGM in the cadre of clerk. There is an intention and object in affixing a life to any select list. When a public body undertakes a process of selection for any particular post and issues an advertisement and carries out the selection process by conducting written examination and in some cases by holding or conducting personal interviews and thereafter issues an order of appointment in favour of the candidates as against the number of vacancies mentioned in the advertisement the procedure for selection consumes the considerable time ranging in between six months to one year or sometime even more. During the said period there might be some candidates who may be eligible to compete and participate in the process of selection either they become eligible on account of their age or they become eligible by

acquiring necessary qualifications prescribed for the said post. The time gap between the advertisement and the process of selection till its completion breeds new eligible candidates and if the select list which is prepared on the basis of the advertisement issued is continued or operated till all the vacancies are filled in, it would cause injustice to such candidates who have become eligible during the interregnum period. The public bodies are expected to adopt a transparent procedure and is expected to await new talent and instead of operating the select list and selecting the persons lower in rank of merit, it would be more gainful for the public bodies to secure candidates with fresh blood and vigour and more merit by initiating a fresh selection procedure. If the public bodies are permitted to operate the select list for years together, it would get too long to operate the select list and it may result into nepotism which would be detrimental to the public interest. In such circumstances, we feel that fixing a life span for select list has its own advantages and as the Apex Court has observed in case of Orissa Vs. Rajkishore Nanda (supra), it is not a reservoir for the purpose of appointments to fetch the candidates as and when it wants.

The petitioners in the present case have approached this Court after the life of the select list in which their name feature has expired and they cannot claim the relief of being appointed to the post of clerk on the basis of examination which was conducted on 30/1/2011 and stake their claim against the vacancies in the cadre of clerk which exists even today. The respondent had issued an advertisement subsequent to the advertisement in pursuance of which the petitioners had participated and one such advertisement was issued in the year 2014 in which seven petitioners participated and even two were successfully appointed. It was open to the petitioners to participate in the subsequent selection procedure to fill up the remaining vacancies and it is even now open for them, if it is permissible as per the service rules to respond to any advertisement to

be issued for filling up the 33% quota of in service candidates, if they so desire. However, in our view, it is not permissible for the petitioners to stake their claims on the basis of selection process initiated in the year 2011 and it is not within our jurisdiction to command the respondents to operate the select list prepared by them in pursuance of examination held on 30/7/2011 and issue appointment order to the petitioners.

15. In the result, we are disinclined to grant any relief as prayed by the petitioners in this writ petition and we dismiss the writ petition being without any merit and substance and the writ petition is dismissed. Rule stands discharged. No order as to costs.