

(2018) 07 BOM CK 0005

In the Bombay High Court

Case No : WRIT PETITION NO. 5621 OF 2015, 4555 OF 2016

MAHARASHTRA PUBLIC SERVICE COMMISSION

APPELLANT

Vs

SHRI. PANKAJKUMAR C. DABHIRE AND ORS.

RESPONDENT

Date of Decision : 03-07-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 320

Maharashtra Public Service Commission Rules of Procedure 2005 — Rule 10(7), 11(1)

Citation : (2018) 07 BOM CK 0005

Hon'ble Judges : V. K. TAHILRAMANI, J;M. S. SONAK, J

Bench : Division Bench

Advocate : Ashutosh Kulkarni, S. S. Diwan, Avinash Kango, Shrihari G. Aney, Pradeep Patil, Pravin Gole, Atul Damle, A. S. Pandire, A. I. Patel

Final Decision : Allowed

Judgement

1] Heard the learned counsel for the parties.

2] The learned counsel for the parties agree that both these petitions need to be disposed of by a common judgment and order, since, the main issue

involved, is virtually identical. The learned counsel also agree that writ petition no. 5621 of 2015 be taken as the lead petition and the fate of this

petition will determine the fate of the connected writ petition no. 4555 of 2016.

3] Accordingly, Rule in both these petitions. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

4] The challenge in these petitions is to the impugned judgments and orders dated 24th November 2014 and 27th February 2015 in Original Application

Nos. 907 of 2013 and 1008 of 2013 made by the MAT directing the petitioners to recommend Maharashtra Public Service Commission (MPSC) to recommend

the names of the original applicants (respondents herein) for appointment to the post of Assistant Executive Engineers and Assistant Engineers respectively.

5] Mr. Ashutosh Kulkarni and Mr. Avinash Kango, the learned counsel for the petitioners submit that Rule 10(7) of the Maharashtra Public Service

Commission Rules of Procedure 2005 (2005 MPSC Rules) nowhere obligates the MPSC to maintain a wait list in case of every selection process.

They submit that the use of the expression 'may' in Rule 10(7), makes it clear that the provision is only enabling or discretionary. They submit that

factually the MPSC had not maintained any wait list for the present selection and therefore, the MAT was not right in directing the MPSC to make

recommendations on the basis of a non-existing wait list.

6] The learned counsel for the petitioners further submit that even if some wait lists were to be maintained, the same, would lapse on 24th November

2011 since, on the said date, advertisements for similar examinations were already declared by the said date. They point out that Rule 10(7) upon

which the respondents had placed reliance, itself provides that the wait list shall lapse on the declaration of the date of subsequent examination in the

same category or after a period of two years from the date of preparation of the wait list whichever is earlier. They submit that the direction of the

MAT is therefore, in breach of Rule 10(7) of the 2005 MPSC Rules.

7] The learned counsel for the petitioners submit that the reasoning in paragraph 7 of the judgment and order dated 24th November 2014 is quite

flawed at least for two reasons. In the first place, in the absence of any ambiguity in Rule 10(7), the MAT, under the garb of interpretation, has

virtually rewritten the Rule, which is impermissible. Secondly, the instances referred to by the MAT in the said paragraph were not at all comparable

to the present situation. They submit that the view taken by the MAT runs counter to the settled legal position that wait list can never be made to

operate beyond the period of its validity prescribed in the Rule and in any case wait lists do not furnish any source for recruitment. They point out that

candidates on the wait list can claim no indefeasible right to appointment. In support of these propositions, they rely on Gujarat State Dy. Executive

Engineer's Association vs. State of Gujarat & Ors. 1994 Supp (2) SCC 591, State of Orissa & Anr. vs. Rajkishore Nanda & Ors. (2010) 6 SCC 777,

Vijoy Kumar Pandey vs. Arvind Kumar Rai & Ors. (2013) 11 SCC 611, Raj Rishi Mehra & Ors. vs. State of Punjab & Anr. (2013) 12 SCC 243,

Secretary, A. P. Public Service Commission vs. B. Swapna & Ors. (2005) 4 SCC 154 and Secretary, Kerala Public Service Commission vs. Sheeja

P.R. & Anr. (2013) 2 SCC 56.

8] Mr. Shrihari Aney and Mr. Atul Damle, learned Senior Advocates for the respondents who had instituted the Original Applications before the MAT

refute the aforesaid contentions and submit that there is no case made out to warrant interference with the view taken by the MAT. They submit that

the MPSC, had in fact placed reliance upon the MPSC Rules of Procedure (Amendment) 2011 and its decision dated 5th August 2011, which may

obviate the necessity of maintaining a wait list in case of recruitment by competitive examinations. However, they point out that this amendment

entered into force only on 5th August 2011, by which time, the selection process which had commenced with the advertisement dated 23rd December

2009 had also concluded with the declaration of results on 30th July 2011.

They submit that the MAT has quite correctly held that the Amendments of 2011 had no retrospective effect and on the basis of the same, the MPSC

was not at all justified in refusing to maintain any wait list.

9] The learned Senior Advocates for the respondents further submitted that factually, a wait list was in fact maintained by the MPSC, though, the

MPSC, did not choose to call such list as a wait list. They submit that the MAT, called for records, examined the files and has correctly held the merit

list containing the names of the recommended candidates and the non-recommended candidates, is in fact, nothing but a merit list cum wait list

prepared by the MPSC. Since the names of the respondents on the basis of their merit in the respective categories were indicated just below the

names of the recommended candidates, the MAT, was quite justified in directing the MPSC to recommend the names of the respondents for

appointments since admittedly, the recommended candidates, had failed to join the posts within the prescribed period or even otherwise.

10] The learned counsel for the respondents defend the reasoning of the MAT in paragraph 7 of the impugned judgment and order dated 24th

November 2014. They submit that Rule 10(7) has to be interpreted reasonably and the MPSC cannot be permitted to adopt unequal standards in

dealing with the situations which are more or less similar. They point out that the MPSC in the two instances referred to by the MAT have in fact

maintained and operated wait list beyond the period expressed in Rule 10(7) of the 2005 MPSC Rules. They submit that the MAT has quite rightly

taken into consideration these instances for issuing the impugned directions now being assailed by the MPSC.

11] Finally, Mr. Aney whilst admitting that such a contention was never raised before the MAT, submits that the functions of a public service

commission as set out in Article 320 of the Constitution of India do not extend to the determination of validity period of a wait list. He submits that the

functions of a public service commission are only recommendatory and thereafter, it is for the concerned State to decide upon the further course of

action. On these basis, Mr. Aney contends that Rule 10(7) of the 2005 MPSC Rules, to the extent, it purports to prescribe the period during which a

wait list is to operate, is in fact, ultra vires the powers of MPSC. Mr. Aney submits that on this additional ground as well, this Court, may not interfere

with the impugned judgments and orders made by the MAT.

12] Rival contentions now fall for our determination.

13] In order to appreciate the rival contentions, a brief reference to certain salient and mostly undisputed facts is necessary.

14] By advertisement dated 23rd December 2009 (MES â?" 2009), the MPSC invited applications to fill up two posts of Assistant Executive

Engineers by competitive examinations (one of the post was reserved for members of the OBC category). The respondent nos. 1 and 2 applied along

with several others and took part in the competitive examination and other selection procedures. The results were declared on 30th July 2011, in form

of the merit list containing the names of the two topper candidates who were styled as 'recommended candidates'. The list continued further and the

names of the respondent nos. 1 and 2 find mention in the respective merit list, soon after the names of the recommended candidates under the caption

of 'non recommended candidates'. Mr. Aney and Mr. Damle, on the basis of this list, submit that a wait list was in fact maintained by the MPSC

though, the MPSC chose not to use the nomenclature of wait list or reserve list. On 24th November 2011, the MPSC published a fresh advertisement

for filling up posts of Assistant Executive Engineers by competitive examinations

(MES-2011). There is no dispute that such advertisement amounts to the declaration of date of subsequent examination in the same category.

15] On 13th February 2002, the State, acting on basis of the recommendations made on 30th July 2011 issued appointment orders to the recommended candidates. However, since by 21st July 2012, the two recommended candidates in respective categories failed to join the appointed posts, the State, cancelled their appointments. Thereafter, the State Government vide requisition dated 30th July 2012, which was received by the MPSC on 6th September 2012 sought for recommendations from the MPSC to fill in the vacancies which arose on 21st July 2012 on account of non-joining of the recommended candidates.

16] The MPSC, on 18th July 2013, resolved not to make any recommendations in pursuance of the requisition dated 30th July 2012 mainly on the ground that the MPSC had already proceeded with selections in terms of MES-2011. The results of MES-2011 had been declared on 11th September 2012 and even the interviews of the successful candidates were concluded on 26th /27th September 2012.

17] The respondents, aggrieved by the MPSC's decision dated 18th July 2013 in refusing to recommend their names for appointments against vacancies, which arose on 21st July 2012 on account of non joining of the recommended candidates, instituted Original Application No. 907 of 2013 before the MAT. By the impugned judgment and order, the said OA was allowed by the MAT, which directed the MPSC to recommend the names of the respondents to the posts of Assistant Executive Engineer and Assistant Engineer respectively. Hence, the present petitions by the MPSC.

18] From the record, it does appear that the MPSC, had contended before the MAT that it was not required to maintain any wait list by relying upon its decision dated 5th August 2011 and the consequent amendment of 2011 to the MPSC Rules. The MAT has perhaps rightly held that the decision not to maintain any wait list was to apply prospectively and therefore, the contention of the MPSC based upon the decision dated 5th August 2011 and the amendment of 2011 may not be correct. The amendment of 2011 very clearly states that the amended rules shall come into force from the date on which the minutes of the meeting of the MPSC to amend the respective provisions were approved. This means that the amended were to come into

force from 5th August 2011. Such amended rules, therefore, could not apply to the selection process which had commenced with the advertisement

dated 23rd December 2009 and had even concluded with the declaration of results on 30th July 2011. The selection process for MES-2009, therefore, had to be governed by the unamended 2005 MPSC Rules.

19] The most relevant Rule for the purposes of this matter is Rule 10(7) of the 2005 MPSC Rules, which reads as follows:

10. Appointment of Interview Committee and declaration of result.

(1) (a)

(2) (b).

(3) (c).

(4) (d).

(5) (e)...

(6) (f)....

(7) Wait-list.-- Based on the merit of the Candidates in their respective category, the Commission may maintain a reserve list up to the 10% of the

vacancies in each category. Provided further that the candidates from the reserve list may be recommended to the Government only if the candidates

recommended earlier are unable to accept the offer of appointment for any reason. This waiting list shall not be operative for any additional number of

posts, other than those advertised. Further this reserve list and entire merit list shall be maintained confidentially with the Secretary of the Commission

only. This reserve list shall lapse on the declaration of date of subsequent examination for the same category or after a period of two years from the

date of preparation of this reserve list whichever is earlier. [Emphasis supplied]

20] Since Rule 10(7) states that 'the Commission may maintain a reserve list.....', the issue as to whether the MPSC is bound to maintain a wait list

or not, is still arguable. The use of the expression 'may' at least prima facie indicates that this is an enabling provision or that some discretion is vested

in the Commission in the matter of maintenance of wait list. However, in the present case, it is not necessary to rule one way or the other on this

issue. This is because, in the present case, even if we proceed on the basis that there was a mandate upon the MPSC to maintain a wait list and

further, in pursuance of such mandate, the MPSC had in fact maintained a wait list, even then the moot question which arises for consideration is

whether such wait list stands lapsed upon the declaration of the date of subsequent examination for the same category or after a period of two years

from the date of preparation of the wait list, whichever is earlier?

21] Now Rule 10(7) quite clearly and unambiguously provides that the wait list shall lapse on the declaration of date of subsequent examination for the

same category or after a period of two years from the date of preparation of wait list, whichever is earlier. There is no dispute in the present case that

the date for subsequent examination for the same category was declared by MPSC on 24th November 2011. This means that the so-called wait list

prepared by MPSC on 30th July 2011 stood lapsed on 24th November 2011, which is admittedly the date of declaration of subsequent examination for

the same category (MES-2011). The MAT's direction to operate the wait list beyond 24th November 2011 will virtually amount to extending the

period of validity of the wait list much beyond the period prescribed clearly and unambiguously in Rule 10(7). According to us, such a direction, which

runs contrary to the statutory rules cannot be sustained. Such a direction is also contrary to several rulings of the Hon'ble Supreme Court on the

subject of preparation and operation of wait lists in relation to recruitment in public services. Therefore, reference to some such rulings will be

appropriate.

22] In Gujarat State Dy. Executive Engineers' Association (supra), the Hon'ble Supreme Court has held that wait list prepared in service matters by

competent authority is the list of eligible and qualified candidates, who in order of merit, are placed below the selected candidates. How such list

should operate and what is its nature may be governed by the Rules. Such lists are prepared either under the Rules or even otherwise mainly to ensure

that the working in the office does not suffer if the selected candidates do not want for one or the other reasons or the next selection of the

examination is not held soon. A candidate in the waiting list, in the order of merit, has a right to claim that he may be appointed if one or the other

selected candidates do not join. But once the selected candidate joins and no vacancy arises due to resignation etc. or for any other reason within the

period the list is to operate under the Rules or within reasonable period where no

specific period is provided, then the candidate from the wait list has no right to claim appointment to any future vacancy which may arise unless selection is held for it. Such candidate has no vested right, except to the limited extent indicated above. The waiting list prepared in an examination conducted by the commission does not furnish source of recruitment. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service.

23] In *Rajkishore Nanda (supra)*, the relevant rules had provided that the list prepared under sub-rule (1) of Rule 11 "wait list shall remain valid for

a period of one year from the date of publication of the same or till drawal of the next year's list, whichever is earlier. In this context, the Hon'ble

Supreme Court has held that the appearance name of the candidate in the select list does not give him a right of appointment. Mere inclusion of the

candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remain unfilled. The selected list cannot be

treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required. 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. In the

present case, the so-called wait list lapsed on 24th November 2011 and the Original Applications were instituted by the respondents in the year 2013.

The grant of relief by MAT, in such circumstances, is contrary to the ruling in *Rajkishore Nanda (supra)*.

24] In *Raj Rishi Mehra (supra)*, the Hon'ble Supreme Court has held that the question whether candidates whose names are included in the waiting list

are entitled to be appointed against the unfilled posts as of right, is no longer *res integra* and must be answered in the negative. In the absence of any

stipulation in the recruitment rules imposing duty on the appointing authority to make appointments from the wait list, the decision of the appointing

authority rejecting the claim of wait listed candidates could not be faulted. In this case, the Hon'ble Supreme Court took cognizance of the fact that fresh recruitment process had already commenced and in such circumstances, there was no question of operating the wait list. In the present case as well, the fresh recruitment process MES-2011 had already reached at an advance stage when requisition for recommendations against unfilled posts was received by the MPSC.

25] In fact, this court, in its judgment and order dated 1st February 2018 in Writ Petition No. 11014 of 2013 (The Chairman, Maharashtra Public Service Commission vs. Mahendra R. Shinde and Anr.) in which, one of us (Smt. V.K. Tahilramani, Acting Chief Justice), was a party has set aside the judgment and order made by the MAT, which had the effect of operating the wait list beyond the period of its validity as prescribed in the standing order of the MPSC. Relying upon the standing order dated 21st November 1989, which was applicable to the selection under consideration, the Division Bench of this court has held that when the standing order is unambiguous that the wait list would be operative till the declaration of the result of the examination to be held in the subsequent year or for a period of two years, if holding of next examination is substantially delayed, the MAT, was not at all right in directing that the MPSC recommends candidatures of the wait listed candidates, even though, the validity of the wait list had long expired.

26] The MAT, in paragraph 7 of the impugned judgment and order dated 24th November 2014, has stated broadly two reasons for grant of relief to the respondents. The first is that in a situation where the MPSC declares the result of the earlier examination very late and declares the dates of the next examination quite early, the wait list which the MPSC is required to maintain, will not operate for much time if Rule 10(7) is to be interpreted literally. Therefore, the MAT commends 'reasonable interpretation' of Rule 10(7) and on the basis of such interpretation, proceeds to extend the validity period of the wait list. The second reason stated by the MAT is that in at least in two instances, the MPSC has itself operated the wait list beyond the period of its validity as prescribed in Rule 10(7). According to us, neither of the reasons are sufficient to ignore the clear and unambiguous provisions of Rule 10(7) as also the rulings of the Hon'ble Supreme Court on the

subject of maintenance and operation of wait lists.

27] Since, wait lists are neither meant to be sources of recruitment nor meant to be perpetrated for the benefit of candidates of one examination at the cost of entire set of fresh candidates, there is absolutely nothing unreasonable in the MPSC, in its Rules providing that the wait list will lapse on the declaration of date of subsequent examination for the same category. Therefore, merely because the results of the first competitive examination may have been delayed and the second competitive examination for the same category is announced early, there is no question of any unreasonability, as such involved in the exercise. Such an exercise neither takes away any vested right of the wait listed candidates nor does it deny such candidates the right or the opportunity to take part in the fresh selection process or to compete at the second competitive examination which may have been announced.

28] Further, if the Rule is clear and unambiguous, then, there is no question of resorting to interpretation or rewriting the Rule in the guise of interpretation. The rule of literal interpretation cannot be departed from, unless such interpretation leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. The golden rule is that the words of the statute must prima facie be given their ordinary meaning unless it can be shown that the legal context requires a different meaning. Again, such meaning cannot be departed from by the Courts in the light of their own views as to policy, although Courts can adopt a purposive interpretation, if reference to policy is necessary on account of some ambiguities in the statute or such other causes of like nature. In *Raghunath Rai Bareja vs. Punjab National Bank* (2007) 2 SCC 230, the Hon'ble Supreme Court has held that the departure from the rule of literal interpretation should be only in very rare cases and ordinarily there should be a judicial restraint in this connection.

29] The second reason stated by the MAT by relying upon the two instances in which MPSC is alleged to have extended the validity of the wait list beyond the period specified in Rule 10(7) is also untenable. Mr. Kulkarni and Mr. Kango, did attempt to demonstrate that the two instances offer no comparison to the present instances. Mr. Aney and Mr. Damle, on the other hand urged that there is nothing wrong in the observation of the MAT

that the instances were similar or comparable instances. According to us, there is no necessity to examine in some details whether the two instances were comparable or not. Because, even if we proceed on the basis that the two instances were indeed comparable, the moot question is whether any plea of right to equality can at all be invoked by the respondents in the facts and circumstances of the present case. The reasoning of the MAT virtually comes to endorsing negative equality or enforcing equality of illegalities. Assuming that in two comparable instances, the MPSC, in breach of its own rules may have operated the wait list beyond the prescribed period of its validity, that by itself, does not entitle others, in the name of equality, to insist upon perpetuation of the illegalities.

30] In *Kulwinder Pal Singh and anr. vs. State of Punjab & Ors.* - (2016) 6 SCC 532 and *State of U.P. and Ors. vs. Rajkumar Sharma and Ors.* -

(2006) 3 SCC 330, the Hon'ble Supreme Court has held that the object of Article 14 of the Constitution is not to perpetuate illegality and the said

Article does not envisage negative equalities. Even if the appointments have been made by mistake or wrongly, that by itself, does not confer any right upon another person who insist upon perpetuation of such illegality.

31] In *Chandigarh Admn. v. Jagjit Singh* [(1995) 1 SCC 745], the Hon'ble Supreme Court has held that the mere fact that the respondent-Authority

had passed a particular order in the case of another person similarly situated, can never be the ground for issuing a writ in favour of the petitioner on

the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it

can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in

the facts and circumstances of his case, it is obvious that such illegal or unwarranted order could not be made the basis of issuing a writ compelling the

respondent-Authority to repeat the illegality to cause another unwarranted order. The extraordinary and discretionary power of the High Court under

Article 226 cannot be exercised for such a purpose.

32] For the aforesaid reasons, we are unable to endorse the reasoning in paragraph 7 of the impugned judgment and order dated 24th November 2014

or to sustain the relief awarded by the MAT to the respondents.

33] The last contention of Mr. Aney dealing with the functions and powers of

MPSC need not detain us in these petitions. In the first place, such contention was never raised by the respondents in their Original Applications before the MAT. Secondly, such a contention finds no reference even in the replies filed by the respondents to these petitions. Thirdly, such a contention, is nothing but a challenge to Rule 10(7) of the 2005 MPSC Rules, when in fact, the respondents had themselves insisted that there was an obligation upon the MPSC to maintain wait list in terms of Rule 10(7) which they now seek to assail.

34] The respondents had challenged the MPSC (Amendment) Rules of 2011 by which the requirement to maintain wait lists was sought to be done away with by the MPSC, inter alia on the ground that such amendments could not have been given any retrospective effect. As noted earlier, the respondents seek to rely and benefit from Rule 10(7), which according to them mandates the maintenance of wait list. However, the respondents, vide this last contention, seek to challenge the validity of this Rule to the extent it provides for the period during which such wait list is to operate. There are as noted earlier, neither any pleadings nor any foundation laid in support of such a belated challenge. In a matter of this nature, the Hon'ble Supreme Court has itself held that wait lists are not sources of recruitment and wait listed candidates cannot claim any indefeasible right to recruitment, particularly where the validity period of the wait list has lapsed in terms of the Rules or where no such validity period is prescribed in the Rules, then, within some reasonable period. For all these reasons, we are unable to entertain the last contention of Mr. Aney, which in effect, seeks to question the validity of Rule 10(7) of the 2005 MPSC Rules.

35] For all the aforesaid reasons, we allow both these petitions, set aside the impugned judgments and orders and make the Rule absolute in terms of prayer clauses (b) in both the petitions. There shall be no order as to costs.