

(2023) 01 BOM CK 0026
In the Bombay High Court
Case No : Writ Petition No. 10510 Of 2022

Priti Subhashrao Sawake

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 09-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 16
Bombay High Court Appellate Side Service Rules, 2000 — Rule 52, 53, 53(a), 53(b), 53(c)

Citation : (2023) 01 BOM CK 0026

Hon'ble Judges : Dhiraj Singh Thakur, J; Valmiki Sa Menezes, J

Bench : Division Bench

Advocate : S. B. Talekar, Madhavi Ayyapam, S. D. Vyas B, B. V. Samant, Dr. Milind Sathe, Rahul Nerlekar

Final Decision : Dismissed

Judgement

Dhiraj Singh Thakur, J

1. In the present petition, the Petitioners challenge the Rule 53(c) of the Bombay High Court Appellate Side Service Rules, 2000 ("the Rules") as ultra-virus Article 14 and 16 of the Constitution of India, 1950. A further mandamus is sought for quashing the decision as communicated vide Communications dated 30th October, 2021 and 15th November, 2021 issued by the Registrar (Administration), High Court of Judicature at Bombay, Nagpur Bench, whereby the remaining waiting list for the posts of clerk was cancelled.

2. With a view to understand the controversy in its correct perspective, it is deemed appropriate to briefly state the material facts.

An advertisement dated 01st August, 2019 was issued by the High Court of Judicature at Bombay, Nagpur Bench, inviting applications from eligible candidates for the post of clerks in the pay scale of S-6 : Rs. 19900 - 63200/-. According to the advertisement, a select list of 64 candidates had to be prepared.

In addition to this, there would also be a wait list of another 64 candidates. Out of the above 64 advertised posts, three posts were to be reserved for persons with disability in the light of directions issued by the Court in the pending petitions before the High Court.

For purposes of clarity, the relevant portion of the advertisement is being reproduced hereunder:

" The High Court of Bombay Bench at Nagpur has been granted permission to prepare Select List of 64 candidates and Wait List of 64 candidates, total 128 candidates, for the post of Clerk, [by keeping 4%, i.e. 3 posts reserved for persons with disabilities in the light of directions issued in Writ Petition (L) No. 1137/2018 with P.I.L. No. 72 of 2018 (P.I.L. No. 46 of 2018 Aurangabad Bench) and these posts will be filled in near future as per the Notification of the High Court]. By this advertisement, online applications are invited from eligible candidates, who fulfill eligibility criteria on the date of publication of this advertisement, in the pay scale of S-6 : Rs. 19900-63200/- plus allowances as per the Rules.

Eligibility Criteria:-"

Clause 22 of the said advertisement further prescribed as under:

" The Selection and Wait List so approved shall be valid for a period of two years from the date of publication. The lists shall stand lapsed thereafter, unless period is extended by the Hon'ble the Chief Justice."

3. Based upon the selection process, the Registrar (Administration), Nagpur Bench, published a select list consisting of 64 candidates as also a wait list consisting of another 64 candidates for the post of clerk on 29th November, 2019. It is stated that High Court appointed 64 candidates from the select list and 34 candidates from the waiting list as clerks till the end of July, 2021 and that the remaining wait list was not operated, despite the fact that several posts of clerks were lying vacant in the High Court since July, 2021. It is stated that even when the select list and the wait list published on 29th November, 2019 was valid for two years from the date of its publication i.e. till 28th November, 2021, the same was declared as cancelled as was communicated vide Notification dated 15th November, 2021.

It is further stated that even when there was no provision under the Bombay High Court Appellate Side Service Rules, 2000 to prepare a separate wait list, the High Court proceeded to prepare a separate wait list in addition to the select list. It is stated that the Rules 52 and 53 of the Rules were amended vide Notification dated 27th November, 2021, which would only operate prospectively without any retrospective effect and that the recruitment rules as they existed at the time of the publication of the select list on 29th November, 2019, would be the only relevant rules. It was contended that as per Rule 53(a) as it stood then the requirement was to prepare a select list in the order of merit, which would

consist of twice the number of expected vacancies in the next two years and that the lists so prepared would be valid ordinarily for a period of two years from the date of its notification with the discretion of the Chief Justice to direct the appointment from such a list even after the expiry of two years and until a new list was prepared in accordance with the Rules.

4. The argument that was advanced by Mr. S. B. Talekar, learned Counsel for the Petitioners was that the select list of 64 candidates as also the wait list of 64 candidates totaling 128, in fact represented not only the actual vacancies but also the anticipated vacancies, which were likely to fall vacant in the next two years. It was urged that it was only in that background that Rule 53(c) envisaged that the list prepared would remain ordinarily valid for a period of two years from the date of its notification.

At this stage it becomes relevant to reproduce a comparative Chart of the relevant provisions of Rules 52 and 53 before and After amendment as hereunder:

Sr.

Rule

Original Rule – 2021

Rule Post – 2021 amendment

1

52(a)

The Registrar shall issue a Notice inviting applications from eligible candidates for being included in the Select List.

The Registrar shall issue a Notice inviting applications from eligible candidates for being included in the Select List.

* The Notice shall indicate the number of existing vacancies sought to be filled up. It may also indicate the number of vacancies that are expected to arise in the next two years. In case the expected vacancies are indicated, the Selection Process shall be conducted for filling up both existing and expected vacancies.

2

53(b)

The Select List shall consist of twice, the number of expected vacancies in the next two years and candidates shall be included in the Select List in the order of merit.

* The Select List shall consist of names of candidates, equal to the number of vacancies notified as per Rule 52(a), arranged in order of merit.

If considered necessary, a Wait

List of candidates arranged in order of merit may be prepared not exceeding 25% of the total number of vacancies notified.

3

53(c)

The Select List so prepared

* The aforesaid list(s) so
shall ordinarily be valid for
prepared shall ordinarily be
a period of two years from
valid for a period of two years
the date of its Notification
from the date of its notification
as above. Provided that the
as above. Provided that the
Chief Justice may in his
Chief Justice may, in his
discretion direct the
discretion direct the
appointment from that list
appointment from those list(s)
even after the expiry of
even after the expiry of the
period of two years until a
period of two years until a new
new list is prepared in
list is prepared in accordance
accordance with the Rules.
with the Rules.

5. In the response fled by the High Court it is admitted that applications were

invited for 64 vacancies and another wait list for 64 candidates was prepared and which was notified on

29 th November, 2019. It is stated that out of 64 candidates on the select list, only one candidate did not join service and hence one candidate from the wait list was duly called.

Further stand taken, as is reflected in the reply affidavit, is that with the filling up of 64 posts, the select list and the wait list got exhausted and that the remaining candidates on the wait list do not have any right to claim appointment. It is however stated that in view of special exigencies, call letters were issued to candidates on the wait list till serial No. 37. However it is stated that the candidate at Serial No. 37 of the wait list declined to join the service on account of having secured a job in the Department of Posts and, therefore, his name was deleted from the wait list. It is admitted that pursuant to the directions of the Chief Justice, the proposal for extension of the wait list was rejected. The decision taken as was communicated vide Communication dated 30th October, 2021 by the Registrar (Personnel) High Court of Bombay, Appellate Side, was as under:

"No further appointment from the 'Wait List' be made. Fresh process be commenced for filling up all vacant posts."

Besides this, it is stated that merely because the name of the Petitioners figured in the wait list, no right accrues to them for seeking appointment as such.

6. We have heard learned Counsel for the parties.

Admittedly as per the advertisement only 64 candidates had to be selected for appointment against the post of clerks while an equal number was to be reflected in the wait list. 4% posts were to be kept reserved for persons with disabilities in accordance with the directions issued in pending petitions. Admittedly, as against 64 vacancies, 63 candidates had joined and the wait list had to be operated in regard to one candidate. It has been admitted in the reply affidavit filed by the High Court that the wait list was operated to fill up not 64 but 92 posts. It was stated that out of 64 candidates whose names figured in the select list, 63 candidates joined and besides filling up one post from the candidate figuring in the wait list additional 28 candidates were appointed.

From a reading of the advertisement notice dated 01st August, 2019, it is quite clear that the advertised vacancies were only 64 while the rest of the 64 candidates were to figure in the wait list. A wait list operates only when the candidates whose names figure in the select list do not join.

7. We are not at all convinced with the argument as was propounded by learned Counsel for the Petitioners that the advertised vacancies were 128 representing not only the actual but anticipated vacancies as well. This proposition runs in the face of the advertisement notice dated 01st August, 2019, which clearly envisaged preparation of the select list for 64 candidates only and nothing more.

However, with a view to ascertain the position as regards the available clear vacancies and the anticipated vacancies, records were called, based upon which the registry has prepared a chart which is being reproduced herein below:

Calculation as provided by Nagpur Bench vide submission

dated 16th January, 2019

Permission granted by Personnel Department vide letter dated 11th

June, 2019

Sr.

Particulars

Total

Posts

Sr.

Particulars

Total

Posts

1.

Clear vacant posts on the date of the Advt. i.e. 01.08.2019

45

1.

No. of vacancies

75

2.

Anticipated promotions to the post of Assistant Registrars

4

2.

Reserved to fill up 10% posts from class IV employees and Staff-Car- Drivers, by promotion

(-) 8

3.

Anticipated promotions to the post of Section Officers

9

3.

Reserved 4% posts for persons with disabilities in the light of directions issued in WP(L) No.1137/2018 with PIL No.72 of 2018.

(-) 3

4.

Anticipated promotions to the post of Assistants

8

4.

Posts for which the permission is granted to commence Selection Process, 2019.

(=) 64

5.

Assistants who will be retiring

9

TOTAL

75

Based upon the aforementioned facts, it would therefore not be correct to suggest that the posts which were advertised were 128, included actual and anticipated vacancies, which goes not only contrary to the advertisement notice but even the record. A lot of emphasis was placed on Rule 53(b) by learned Counsel for the Petitioners to bring home the point that the list of 128 candidates was in fact the select list as it contained twice the number of advertised vacancies.

8. The names of the Petitioner admittedly figured in the waiting list. Law with regard to rights of the candidates figuring in the waiting list as also the issue whether the appointments in excess of the advertised posts can be made is no longer res integra.

9. In the case of Gujarat State Dy. Executive Engineers' Association V/s. State of Gujrat & Ors. 1994 Supp (2) SCC 591 it was held that a wait list could not be used as a perennial source of recruitment for filling up vacancies not advertised and that it became operative only if any of the selected candidates did not join, which would result in the person from the wait list being pushed up and be appointed from the vacancies so caused. It was held:

"8. Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?; and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A

waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. 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 join for one or the other reason or the next selection or 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 candidate does not join. But once the selected candidates join 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 candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. He has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.

9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. 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."

10. In the case of Prem Singh & Ors. V/s. Haryana State Electricity Board & Ors.

1996 SCC (4) 319 the Apex Court held as under:

"25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the Court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.

26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies - in this case on posts which were newly created - must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs."

11. In the case of Madan Lal & Ors. V/s. State of J & K and Ors. (1995) 3 SCC 486 held that once the advertised posts are filled by candidate from the select list, the list exhausts itself having served its purpose. It was held:

" 23. It is no doubt true that even if requisition is made by the Government for 11 posts the Public Service Commission may send merit list of suitable candidates which may exceed 11. That by itself may not be bad but at the time of giving actual appointments the merit list has to be so operated that only 11 vacancies are filled up, because the requisition being for 11 vacancies, the consequent advertisement and recruitment could also be for 11 vacancies and no more. It is easy to visualise that if requisition is for 11 vacancies and that results in the initiation of recruitment process by way of advertisement, whether the advertisement mentions filling up of 11 vacancies or not, the prospective candidates can easily find out from the Office of the Commission that the requisition for the proposed recruitment is for filling up 11 vacancies. In such a case a given candidate may not like to compete for diverse reasons but if requisition is for larger number of vacancies for which recruitment is initiated he may like to compete. Consequently the actual appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by the Government. In such an eventuality, candidates in excess of 11 who are lower in the merit list of candidates can only be treated as wait listed candidates in order of merit to fill only the 11 vacancies for which recruitment has been made, in the event of any higher candidate not being available to fill the 11 vacancies, for any reason. Once the 11 Vacancies are filled by candidates taken in order of merit from the select list that list will get exhausted, having served its purpose."

12. Considering the ratio of the judgments referred hereinabove, it thus becomes clear that merely because the name of a candidate figures in the wait list by itself creates no indefeasible right to seek appointment and that the candidate's right is limited to consideration for appointment in a case where any of the selected candidates does not join and further that no appointment can be made in excess of the posts advertised, inasmuch as if the wait list were to be used as perennial source of recruitment, it would deprive others from consideration for such an appointment and create a vested interest in favour of those, whose name figured in the wait list.

From the material on record, we have no hesitation in holding firstly that the posts that were advertised by virtue of advertisement notice dated 01st August, 2019 were limited to the extent of 64 candidates, which included the actual vacancies as also anticipated vacancies while the list of 64 candidates in the wait list would get a right of appointment only in the eventuality of any of the candidates had failed to join against the post for which such a candidate was selected.

13. Insofar as Rule 53(b) is concerned, it did envisage the select list to consist of twice the number of expected vacancies in the next two years and the names of the candidates included in the select list to be referred in the order of merit, yet the rule must be deemed to presuppose an equal number of vacancies to be advertised. In the absence whereof, a situation would arise where the number of advertised posts would be far less than the number of candidates whose name

figure in the select list and assuming such a situation did arise in any case, No appointments in excess of the advertised vacancies could be made.

14. We have also noticed that in the present case although the wait list had been operated to make appointments beyond the 64 posts which were advertised but since the said appointments are not under challenge before us, we only hold that the wait list cannot be directed to be operated in the case of the petitioners beyond the advertised 64 posts on the analogy that similarly situated other candidates were so appointed beyond the 64 posts so advertised.

15. We also hold that once the advertised vacancies were filled up, the select list as also the wait list would exhaust itself as was held by the Apex Court in the case of Madan Lal & Ors. V/s. State of J & K and Ors. and, therefore, no right would survive in favour of the Petitioners. Having held so all other issues raised regarding challenge to the discretion vested in the Chief Justice in terms of Rule 53(c) is rendered academic and may be decided in an appropriate case.

16. For the reasons mentioned above, the petition is found to be without merit and is, accordingly, dismissed.