

(2022) 03 BOM CK 0056

In the Bombay High Court

Case No : Writ Petition No.6290, 6571 Of 2021, Interim Application No.3265, 3266 Of 2021

Vishwanath Digambar Wadje And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 16-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 16, 16(4), 16(6), 309, 302, 320(3)

Citation : (2022) 03 BOM CK 0056

Hon'ble Judges : Prasanna B. Varale, J;S. M. Modak, J

Bench : Division Bench

Advocate : A.Y. Sakhare, Prema M. Agavekar, Anjali Kolapkar, Bhavana R. Khichi, A.S. Gaikwad, Dr. Milind Sathe, Manisha Jagtap, Shekhar, P.P. Kakade, Vaibhav Sugdare, R.S. Pawar

Final Decision : Dismissed

Judgement

S.M. Modak, J

1. The Petitioners are amongst 413 persons who were selected and recommended by the Maharashtra Public Service Commission (MPSC) to the Government for different post. When they appear for the examination (as per advertisement dated 10th February 2018 issued by MPSC) there was reservation in force for Socially and Educationally Backward Classes (SEBC). It was as per the Socially and Educationally Backward Classes (SEBC) Act, 2018 passed by the State Legislatures. However, these successful recommondees could not get appointment Order.

2 It was due to several reasons. When their recommendation was pending with the Government, there was ban on fresh recruitment due to Covid-19 pandemic. Another reason is filing of Special Leave Petition in the Hon'ble Supreme Court by Dr. Jishri Laxmnarao Patil & there were certain orders passed therein. Ultimately Hon'ble Supreme Court struck down the SEBC Act.

3 The Government issued Resolutions as per observations by Hon'ble Supreme Court and consequently, MPSC called for fresh preferences and declared revised results. The Petitioners could not pass out these revised norms. That is why these Petitioners have filed these two Petitions.

4 Petitioner Vishwanath and Petitioner Arati belongs to SEBC and NT (B) female category, respectively. And they claim that their names were initially recommended by MPSC for the post of Deputy Superintendent of Police. There is change in cut off for these posts. The Petitioners could not overcome that cut off and hence they were unsuccessful in the examination. WP 6290/2021 was filed initially and WP 6570/21 was filed lateron. Whereas Interveners are some of the successful recommendees and they have opposed the petitions for the reason that if the Petitions are allowed it will affect atleast 400 candidates (who are selected by proper procedure and who are waiting for their appointments. Respondent No.1 is State of Maharashtra and Respondent No.2 is MPSC through its Secretary.

5 They are challenging most of the actions/decisions taken by Government of Maharashtra and implemented by MPSC after the Orders passed by Hon'ble Supreme Court during pendency of the Petition and after its final disposal. They have also sought for writ of mandamus thereby giving appointments to 413 candidates. They have sought for various reliefs. They have focused on :-

- 1) decision to covert 55 posts from SEBC category to Open category (& not converting into EWS category);
- 2) decision to call preferences again;
- 3) changing rules from Scheme of Examination in the midst of process.

6 There are notifications, declarations and results published by the Respondents. They are challenged in both these Petitions. In nutshell, they are as follows :-

Group 'A' :

- (a) challenged the G.R. dated 15 July 2021;
- (b) challenged the Notification/Declarations dated 5 August 2021, 6 August 2021, 12 August 2021 and 8 September 2021;
- (c) challenged the results dated 6 August 2021 and 28 September 2021;
- (d) challenged the changes brought in the recruitment process vide declaration dated 30 September 2021.

Group 'B' :

- (a) sought a writ of mandamus thereby declaring the result dated 19 June 2020;
- (b) asked for directions thereby giving appointments as per the recommendations dated 14 August 2020 to 413 candidates

7 On this background, we have heard Mr. Sakhare, learned Senior Counsel assisted by Mr. A.S. Gaikwad for the Petitioners, Dr. Milind Sathe, learned Senior Counsel appearing for MPSC, Mr. Pawar, learned AGP for the State and Ms. Neeta Karnik, learned Counsel appearing for the Interveners. Also perused their written notes of arguments and gone through their citations.

8 We are supposed to decide these Petitions on following issues :-

(a) Whether the Petitioners being successful recomondess (as per first result) have vested right of appointment ?

(b) Whether their grievance about "change of preferences by MPSC pending their recommendations with Government" is justified?

(c) Whether their grievance about "changing Rules of examination on 30th September 2021 and giving retrospective effect" is justified?

(d) Whether their grievance about "SEBC posts ought to have been converted into EWS category (after decision of Hon'ble Supreme Court dated 5th May 2021) and not in unreserved category" is justified?

10 We will deal with these issues. Prior to that it will be material to consider the background of this litigation. There is reference of two kinds of reservation in these Petitions. One is "Reservation under SEBC Act 2018" and another is "Reservation for Economically weaker Section of the Society". For better understanding certain events/dates need to be considered.

Reservation under SEBC Act 2018 :-

11 The Legislatures of Maharashtra have enacted Socially and Educationally Backward Classes (SEBC) Act, 2018, thereby giving reservation to members of Maratha community. There is reservation of 16 per cent initially provided in Government job as well as educational institutions. Prior to enactment of this Act, the Governor of Maharashtra on the recommendation of Government, has promulgated Ordinance No.13 of 2014 on the same subject. However, that Ordinance failed to satisfy the constitutional validity and it was struck down by this Court as per judgment dated 14 November 2014/07 April 2015.

12 The per centage of reservation of 16 per cent was reduced to 13 per cent in public employment and to 12 per centage in educational institutions. This was as per judgment dated 27 June 2019 delivered by this Court. There in again the constitutional validity of 2018 Act was challenged. On this occasion, the validity upheld.

13 In order to meet out the observations of this Court, the Legislatures of Maharashtra have enacted Act No.7 of 2019, thereby reducing per centage of reservation. So uptill the constitutional validity was struck down by the Hon'ble Supreme Court on 5 May 2021 the provisions for reservation in public employment to the extent of 13 per cent was very much there. It will be material to consider the events that took place in between the period starting from 10

December 2018 (the date of advertisement in question) and judgment of the Hon'ble Supreme Court dated 5 May 2021).

Reservation for Economically Weaker Section (EWS)

14 The Central Government by amending Article 16 by way of incorporation clause-6 have made provision for 10 per cent reservation in favour of economically weaker section of citizens. This reservation is not available to backward class of citizens (for whom reservation provided in Article 16(4)). Clause-6 empowers the State to provide such reservation. Clause-6 was inserted on 31 January 2019. Whereas the State of Maharashtra have adopted it with effect from 1 February 2019.

15 There is much emphasis on behalf of the Petitioners that while giving implementation to the observations of the Hon'ble Supreme Court, the State of Maharashtra ought to have converted the seats for SEBC into EWS. That is disputed on behalf of the Respondents for the reason that on the date of advertisement in question, there was no provision for reservation for EWS (for the simple reason that EWS reservation was not there until that time).

16 In the written notes of arguments, the Petitioners have emphasized on certain events and dates. Whereas, in the written note of arguments filed by MPSC, those events/dates were narrated chronologically.

17 The recommendations averred by the Petitioners were made on 14 August 2020. A copy of recommendations was filed on record. Uptill that stage, the Petitioners were not having having any type of grievances. The important dates up to 14 August 2020 are as follows :-

Date

Events

10 December 2018

Notification issued by MPSC for filling up 342 posts

17 February 2019

Preliminary examination was held

23 May 2019

Results of preliminary examination

13, 14 and 15 July 2019

Main examination

04 January 2020

Declaration by MPSC that recruitment will be conducted for 420 posts under 17 categories (this was due to requests by Departments of Government and to give

effect to the Order dated 27 June 2019 passed by this Court)

17 January 2020

Declaration by MPSC for interview and calling preferences from the candidates

14 August 2020

Recommendation letters by MPSC to Government for two candidates (other than the Petitioners) filed on record.

18 When the constitutional validity of the said Act was upheld by this Court, the Petitioner therein approached Hon'ble Supreme Court. It will also be material to consider the Order dated 9 September 2020 passed by the Hon'ble Supreme Court thereby referring the matter to a larger Bench for interpretation of 103rd Amendment to the Constitution. The Hon'ble Supreme Court observed as follows :-

"(c) appointments to public services and posts under the government shall be made without implementing the reservation as provided in the Act."

Appointments to Public Service

19 There is emphasis on behalf of the Petitioners that though the Hon'ble Supreme Court has given liberty to the Government to make appointments (without implementing the reservations in the SEBC Act), the recommendations made by Government were not canceled by the Hon'ble Supreme Court.

20 State of Maharashtra was justified in not making appointments as per the recommendations dated 14 August 2020 in view of the above observations of the Hon'ble Supreme Court. Finally, as per judgment dated 5 May 2021, the Hon'ble Supreme Court has struck down the constitutional validity of SEBC Act 2018. In nutshell, the reservations as per 2018 Act, were no more in existence. The Petitioners claimed that being recommendees, they have got right of appointments. That is disputed by the Respondents for the reason that no vested rights can be claimed on behalf of the Petitioners. It will be material to consider the events that took place after the decision of 5 May 2021.

Events after final decision of Hon'ble Supreme Court

There were two Government Resolutions :

firstly dated 5 July 2021; and

secondly dated 15 July 2021.

21 According to MPSC, the resolution dated 5 July 2021 was issued in the light of observations by this Court when SEBC Ordinance was struck down on 14 November 2014/ 7 April 2015 and it is not relevant for deciding the present controversy. As per the G.R. dated 5 July 2021 :-

(a) The appointments made as per SEBC reservations upto 14 November 2014

were confirmed;

(b) So also in view of three Orders passed by the Hon'ble Supreme Court, G.R. dated 11 July 2019 was canceled;

(c) It is very well true that said G.R. does not deal with the advertisement in question.

22 On this background, it will be material to consider the provisions of G.R. dated 15 July 2021. It has dealt with two contingencies. They are :-

(a) appointments made from 27 June 2019 (this Court's decision) till 9 September 2020 (stay granted by Hon'ble Supreme Court) are confirmed;

(b) recommendations made before 9 September 2020, but appointments could not be given after 9 September 2020, different line of action is proposed.

23 So far as the second contingency is concerned, it further contemplates two sub-contingencies. They are :-

(a) WHEN THERE IS NO RESERVATION OF EWS –

then the posts for SEBC be converted into unreserved posts;

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(b) WHEN THERE IS RESERVATION OF EWS –

then candidates belonging to SEBC be given option and then revised selected list be prepared.

24 The Respondents claim that as there was no reservation for EWS in the advertisement in question, best option is to convert SEBC posts into unreserved posts. Whereas, the Petitioners contend that while issuing this G.R., the Government has not considered earlier G.R., by which, the candidates belonging to SEBC were given option to opt for EWS. For deciding this controversy, it would be material to consider these vents that took place and G.RS issued on this topic, which are referred by the Petitioners :-

25 The following are the events :-

Date

Events

5 August 2021

Declaration by MPSC thereby converting SEBC posts into unreserved posts. Our attention is brought to one category of recruitment. That is to say Deputy Collector. Out of 40 posts, 27 posts were earmarked for Open category as per the said declaration. Whereas, in the advertisement in question, that is 10 December 2018, for the same category, the posts were as follows :-

Total posts - 40,

SEBC – 4

Open – 23.

It is pointed out by learned Senior Advocate Shri Sathe that four posts were converted into Open category

Chart dated 6 August 2021

Showing the details of 117 candidates, who were qualified for interviews in view of 55 additional posts of open category were made available.

10 August 2021

Revised results after these 117 candidates are made available – also calling preferences

12 August 21

Declaration by MPSC informing that web-link for preferences will be opened till 19 August 2021 and calling for preferences.

17 August 2021

Publication by MPSC thereby extending the period for giving preferences for certain categories

8 September 2021

Declaration by MPSC thereby informing that certain candidates have not given revised preferences and hence, their preferences for the posts as mentioned in para-6.5.3 from the scheme of examination will be considered

30 September 2021

Publication by MPSC thereby informing new procedure to be followed for selection of candidates and that is made applicable even for the advertisement published in the year 2020

The arguments of the Petitioners are as follows :

(a) it was wrong on the part of MPSC to call for fresh preferences, which was done on 10 August 2021, 12 August 2021 and on 8 September 2021;

(b) prior to this, marks and names of the candidates were already known to the public and calling for fresh preferences amounts to breach the Rules of secrecy and transparency.

26 As against this, it is submitted on behalf of the Respondents that preferences were called upon in order to give effect to the observations of the Hon'ble Supreme Court in the final Order dated 5 May 2021. When the amendment in the procedure mentioned in the publication dated 30 September 2021 is perused, we

may find that MPSC has prescribed the following procedure for calling preferences. It is as follows :-

(a) When there is recruitment for multiple posts, बहुसंख्य then preferences will be called from the candidates as per the General Merit List and then final Recommendations List will be prepared;

(b) when there is recruitment other than for multiple posts, the final recommendations list will be prepared only on the basis of General Merit List.

27 It will be material to note that the advertisement in question was issued on 10 February 2018. That is earlier to 2020, the said advertisement was for multiple posts.

OBJECTIONS ON ACCOUNT OF NOT CONSIDERING EARLIER G.R.

Our attention is invited to following G.Rs. :-

G.R. dated 28 July 2020 :

On reading it, it reveals that it was issued in order to clarify the reservations for members of Maratha community in Central Services as well in State employment. It reads as follows :-

(a) Maratha community is not included in backward classes by Central Government and hence members of Maratha community can take benefits of SEBC reservations for those services ;

(b) Maratha community is included in SEBC and hence such members cannot take benefits of EWS.

28 It will be material to note that as per the provisions of Article 16(6) of the Constitution of India, 10 per cent reservation for EWS is available only to such classes, who are not backward classes. It is pertinent to note that when this G.R. was issued, already EWS reservation had come into force.

G.R. dated 23 December 2020 :

29 After the Hon'ble Supreme Court has granted interim stay on 09 September 2020 to the appointments as per SEBC reservations, this G.R. was issued. The effect of interim Order was that members of Maratha community will not get reservations as per SEBC category. Hence, G.R. shows that the members of SEBC community can take benefits of EWS. The Government in its wisdom and discretion thought it fit to extend such benefits.

G.R. dated 31 May 2021 :

This G.R. was issued on the background that the Hon'ble Supreme Court has disposed of the matter finally on 5 May 2021. By this G.R. amendment was made in G.R. dated 12 February 2019. (By that G.R., the reservation for 10 per cent is provided to EWS category). It was clarified that the castes which are mentioned

in Maharashtra State Public Services Act 2001, they will be entitled to 10 per cent reservation as per EWS. Our attention is invited to Para No.8 of the said G.R. There is clarification in that paragraph about entitlement of the benefits to SEBC candidates, because the SEBC candidates were given benefits of EWS as per G.R. dated 23 December 2020 as mentioned above. The clarification says as follows :-

(a) EWS benefit for SEBC candidates will be available from 9 September 2020 upto 5 May 2021;

(b) the recommendations, which are pending as per the process completed prior to 9 September 2020, they will be appointed from retrospective effect;

(c) the candidates whose process is completed, but appointments are not given to SEBC candidates, for them, this clarification will not be applicable; and

(d) the candidates, who had appeared and whose SEBC certificate declared illegal, for them this clarification will not be applicable.

30 To counter these submissions, it is pointed on behalf of the Respondents that the Government has made changes in the reservations depending upon the situation and which was permissible at that time. Whenever it was possible to give benefit to SEBC, they have given them benefit of EWS, but when it is not possible to give benefit of EWS, to SEBC candidates, the Government is unable to give such benefits. Our attention is invited to relevant dates, on which, the EWS was incorporated by way of Article 16(6) and adopted by the State of Maharashtra.

31 It is true that EWS came into force in Maharashtra from 1 February 2019 as notified by G.R. dated 12 February 2019. Admittedly, the advertisement in question was issued earlier. That is 10 December 2018. There was no EWS reservation on that date.

32 The Petitioners have challenged :-

(a) the final results dated 28 September 2021; and

(b) Notifications dated 5 August 2021, 6 August 2021, 12 August 2021 and 8 September 2021; and

(c) challenged the G.R. dated 15 July 2021.

Instead they have asked for directions

(a) to confirm the results dated 19 June 2021; and

(b) recommendations given on 14 August 2020. After considering this factual aspects and prior to making any observation, it will be material to consider ratio laid down in the judgments relied upon by both sides.

Judgments relied upon by the Petitioners

33 In the case of M. Surender Reddy Vs. State of Andhra Pradesh (2015) 8 Supreme Court Cases 410. Andhra Pradesh Government has given reservations to local candidates in civil services. The issue involved was when recruitment process has already started, whether Government can issue office memorandum thereby amending procedure regarding reservation. It was held that office memorandum dated 7 March 2002 is prospective in operation and cannot be made applicable to the process of selection started as per Advertisement No.10 of 1999. By the said Memorandum, the earlier Memorandum dated 15 July 1975 was amended and the merit list as per the advertisement of 1991 was bifurcated into two parts. One reserved for local candidates and another dual. Whereas in case of Sonia Vs. Oriental Insurance Co. Ltd. (2007) 10 Supreme Court Cases 627 there was an issue whether policy can be changed midway through recruitment process. There was option available for interchanging of SC and ST vacancies. The office memorandum dated 6 November 2003 was issued and thereby stopping the practice of interchangeability (para-5). This was done by Government on its own and not on the basis of any directions issued by any constitutional Court. Whereas process for promotion in the post of Assistant Administrative Officer was started on 30 October 2003. It was held that the office memorandum cannot be given retrospective effect unless and until there is an intention, which can be seen expressly or by impliedly (para-11). Whereas in case of P.D. Aggarwal Vs. State of U.P. (1987) 3 Supreme Court Cases 622 , there was an issue about binding effect of executive instructions contained in office memorandum on one hand and statutory Rules made under Article 309 of the Constitution of India. The Rules were United Provinces Service of Engineers Rules 1969. It was held that the rights, which are already vested cannot be taken away by amendment, which has given retrospective effect. The temporary Assistant Engineer, who have become members of services after selection by Public Service Commission are entitled to seniority from their membership and it cannot be taken away by giving retrospective effect to the Rules of 1969-71 (para-20). There was no issue involved about candidate, who has been selected and not given appointment and what is the nature of his right.

34 As against, Mr. Sathe, learned Senior Counsel for Respondent No.2-MPSC relied upon the following judgments :-

- (i) State of Maharashtra Vs. Deepak Namdev Jagtap 2018(4) Mh.L.J.
- (ii) Jatinder Kumar Vs. State of Punjab (1985) 1 Supreme Court Cases 122
- (iii) Dinesh Kumar Kashyap Vs. South East Central Railway (2019) 12 Supreme Court Cases 798

35 As against this, Mr. Kakade, learned AGP relied upon the following judgment in case of Anupal Singh Vs. State of Uttar Pradesh through Principal Secretary, Personal Department (2020) 2 Supreme Court Cases 173

36 It is true that in all judgments relied upon by the Petitioners, the principle has been laid down that once the process of recruitment has been started, the

procedure should not be changed and the retrospective operation cannot be given to such change.

37 Whereas in the judgments relied upon by the Respondents, the issue involved and decided was whether a candidate from select list is having indivisible right of appointment. The role of Public Service Commission in making recommendations and to what extent those recommendations are binding on the Government is explained. It is also interpreted that a Notification calling applications is nothing but an invitation to the candidates and it does not give any promise that the selection would be made. The scope of Public Service Commission and its duties under Article 320 of the Constitution as also been interpreted. Even it has been held that "if the recommendations are held mandatory, then it would amount to making the provisions of Article 320, sub-clause (3) mandatory and in fact it is not so". It has also been interpreted that the candidates, who have not been appointed does not get vested rights. Furthermore, the right of State has been interpreted to the extent of even not appointing the candidates. Ultimately, if the State has to refuse the recommendations, they can do so by giving reason, because they are answerable to the Legislatures.

Facts of the case

38 It is true that in the petitions at hand, the Petitioners were recommended by MPSC and it is pending with the Government for further Orders. Out of these Petitioners, the Petitioner- Vishwanath Digambar Wadje belongs to SEBC category. Whereas the Petitioner-Aarti Rajendra Pawar belongs to NT(B) Female category. She has not been appointed because of change in cut off due to dropping of SEBC reservations. Apparently, two reasons have come on record for not appointing them prior to the final Order dated 5 May 2021. The Government has banned the recruitment due to Covid-19 situation and interim Orders dated 9 September 2020 passed by the Hon'ble Supreme Court. The Petitioners may be right in one way. That is to so there was no direction to cancel the recommendations in that Order. However, certainly, there was ban on appointments. The said ban was in force till 5 May 2021. Finally, the reservation was dropped and the candidates belonging to SEBC were required to compete with the Open category.

39 When we have considered the events that took place after 5 May 2021, we may find that G.R. dated 15 July 2021 was issued in order to give effect to the said Order. MPSC is bound to make changes as directed in the said G.R. As we may notice that the posts for SEBC candidates were converted into the Open category and practically posts for Open category have increased. Mr. Sathe, learned Senior Counsel is right in the sense that no fresh examinations have been taken. MPSC have declared the change in posts. In view of that MPSC was justified in calling the preferences. It is pertinent to note that the preferences from 117 candidates were called.

40. The scheme of examination was published on 15 January 2020. It is true that

paragraph 6.5 mentions about giving of preferences only on one occasion. It is true that the MPSC has called for preferences again on 10 August 2021, 12 August 2021 and 8 September 2021. MPSC has not done this on its own, but so as to give effect to the G.R. dated 15 July 2021. It is also true that these preferences were called after initially the results were declared and marks and names of the Petitioner were also made known. MPSC called preferences from all qualified candidates (and not only from Open Category candidates). It is acceptable. Now these are not the preferences required to be called "When there is reservation for EWS in the advertisement as mentioned in impugned GR dated 15 July 2021. But those preferences from all qualified candidates even from reserved category to compete on the basis of merits. This argument of MPSC is acceptable.

41 Now the issue is whether the objection that privacy maintained by MPSC was breached? In normal circumstances, the grievances could have been accepted. However, the Government and MPSC were required to deal with situation, wherein the validity of SEBC Act was not upheld. So there was absolute need to make necessary changes. So grievance has to be rejected for this background.

42 It is true that when the advertisement in question was published on 10 December 2018, there was reservation for SEBC. In G.R. dated 15 July 2021, the Government has laid down the procedure to be followed when there was no EWS reservations. In that case, we do not think that Government was having any option left to convert SEBC seats into EWS seats as contended by the Petitioners. It is true that earlier the Government has given benefit to SEBC candidates to opt for EWS category. This was prior to 5 May 2021. However, when on 5 May 2021, SEBC Act was declared unconstitutional, the effect is there is no reservation for SEBC and it will be effective from passing of the Act. The candidates belonging to SEBC cannot ask for the benefits of EWS reservations on the basis of advertisement when there was no reservation in the said advertisement.

43 Afterall, it is also important that what right the Petitioners, who have been recommended have got? This issue has been answered by the Hon'ble in case of Jatinder Kumar (supra) and in more specifically paragraph 11 to paragraph 16. The final right is given to the State Government, because the role of MPSC is only recommendary in nature. The State can revise it by giving reasons. What can be better justification than cracking down SEBC Act. So to the misfortune of the Petitioner-Vishwanath Digambar Wadje, he could not get appointment for the reasons stated above. So far as the Petitioner-Aarti Rajendra Pawar is concerned, even though she does not belong to SEBC category, there is change in a cut off & to her misfortune, she cannot overcome that cut off of post preferred by her. Considering peculiar situation, the Court is unable to accept the grievance made by the Petitioners.

44 Though the Rule pertaining to calling preferences was changed on 30 September 2021, that was made applicable to the recruitment from the year

2020. So also the practice of selecting the candidates on the basis of General Merit List (without calling preferences) was made applicable only when there is a recruitment for posts other than multiple categories posts. For the above discussion, we are unable to accept any of the grievances of the Petitioner. The Petitions deserve to be dismissed. Hence, both Petitions are dismissed without any Order as to costs.

45 In view of the above, the Interim Applications, namely, Interim Application Nos.3265 of 2021 and 3266 of 2021, do not survive and are dismissed.

46 There were Interim Application No.4339 of 2021 and 4340 of 2021, filed by both these Petitioners making grievances that the State has made the appointments during the pendency of these Petitions. The Division Bench sitting in Vacation, as per Order 29 December 2021, has taken note of the fact that these Petitions are reserved for Orders, an undertaking was recorded on behalf of the State that the Orders to be passed qua the Petitioners will be binding on the State. As these Petitions are dismissed, there is no question of passing further Orders on these Interim Applications and they are also dismissed.