

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH
ORIGINAL APPLICATION NOS 814, 280 & 281 OF 2022**

DISTRICT :

1) ORIGINAL APPLICATION NO 814 OF 2022

- 1) Gajanan Santosh Chavan)
Age. 38 years, Occu: Student)
Residing at: Post Shembaipimpri)
Tq Pusad, Shambal Pimpri,)
Yavatmal, Shembal Pimpri)
Maharashtra- 445 209.)
- 2) Sikandar Inamdar)
Age. 31 years, Occu: Student)
R/o: C/o. Dastgir Husen Inamdar)
Plot No. 26, Shambhu Mahadec Nagar,)
Karve Naka Goleshwar. Near Ashtvinayak)
Mangal Karyalay, Karad (rural), Karad,)
Maharashtra- 415 110.)
- 3) Sohel Ekramtulla Shaikh)
Age. 30 years, Occu: Student)
Residing at: Near Jama Masjid,)
Khadakpura Gali, Vairag, Solapur,)
Maharashtra- 413 402.)
- 4) Satish Sukumar Patil)
Age. 30 years, Occu: Student)
Residing at: Beghar Wasahat,)
Taluka Palus, VTC: Wasgade,)
PO: Vavgade Dist. Sangli,)
Maharashtra- 416 416.)
- 5) Ashish Vikram Singh Thakur)
Age. 30 years, Occu: Student)

Residing at: Janta Bank Mage 24/2,)
 Vidya Nagar, Shelagi Solapur South,)
 Solapur, Maharashtra- 413 006.)

6) Nilesh Ashokrao Shete)
 Age- 31, Occupation-Student)

Residing at: Omkar Building)
 Venkateshwra Nagar Opp. Ambika)
 Mangal Karyala Near Kabra Nagar)
 Bhargav Academy, Tal-Nanded,)
 Dist- Nanded, Maharashtra- 431605.)

7) Sarika Mahadev Balkunde)
 Age- 29, Occupation-Student)

Residing at: Gandhi chowk At-post.)
 Murum, Tal. Umarga Dist-Dharashiv)

)....APPLICANTS

-Versus-

1) State of Maharashtra)
 Through the secretary of Revenue &)
 Forest Department,)
 Government of Maharashtra)
 office at 451 (M), Mantralaya,)
 M Caves Road, Mumbai-400032.)

2) M.P.S.C)
 Office at: 51/2, 7 and 8th Floor,)
 Cooperage, Telephone Exchange Bldg)
 Maharshi Karve Marg, Cooperage,)
 Mumbai – 400021.)

3) Principal Chief Conservator of Forest)
 & Head of the Forest Force)
 Office at: IIIrd Floor, Van Bhanvan,)
 Ramgiri Road, Civil Lines,)
 Near Police Gym, Khana, CBI Colony)
 Nagpur, Maharashtra- 440001.)

- 4) General Administrative Department)
Office at 553, 5th Floor,)
Vistara Building,)
Madam Cama Road,)
Hutatmat Rajguru Chowk,)
Nariman Point, Mumbai- 400 032.)
- 5) Mahavir Balasaheb Zendage)
Adult, Occu: Service.)
Residing at: Hingani, Post Ghatne,)
Nilkant Niwas, Mohal Road,)
Zendage Vasti, Solapur.)
Maharashtra- 413213)
- 6) Kiran Purushottam Rao Chavan)
Adult, Occu: Service.)
Residing at: Bruhampuri,)
Post Solapur,)
Taluka-Parbani,)
Maharashtra – 431505)
- 7) Mane Rupali Ganpat)
Adult, Occu: Service.)
Residing at: Ambaiwadi Kurd,)
House-1634, Parli- Satara Marg,)
Post- Jakantavadi,)
Dist- Satara- 415002.)
- 8) Patil Rahul Shivajirao)
Adult, Occu: Student.)
Residing at: Datta Enclave CHS,)
Flat No. 102, C- Wing,)
N.L. Paralkar Marg, Parel,)
Mumbai- 400012.)
- 9) Gaikwad Rohini Bhujang)
Adult, Occu: Student.)

- Residing at: Post Chimbhule,)
 Taluka-Shrigonda,)
 Dist. Ahmednagar- 414301.)
- 10) Awad Tejaswini Rajaram)
 Adult, Occu: Student.)
 Residing at: Old Sarati Road,)
 Raut Nagar, Aktuj, Tal. Malshiras,)
 Dist. Solapur,)
 Maharashtra- 413101.)
- 11) Pawar Gajanan Govindrao)
 Adult, Occu: Student.)
 Residing at: Post Khatgaon,)
 Taluka- biloli,)
 Dist. Nanded, Maharashtra- 431736.)
- 12) Indrajeet Arjun Pawar)
 Adult, Occu: Student.)
 Residing at: Near Mahadev Temple,)
 Yallama Chowk, Islampur,)
 Maharashtra-415409.)
- 13) Nichal Rameshwar Subhas)
 Adult, Occu: Student.)
 Residing at: Post Raleras,)
 Dist. Solapur,)
 Maharashtra- 413402.)
- 14) Dnyanraj Sudam Age)
 Adult, Occu: Student.)
 Residing at: 387, Shivajinagar,)
 Tal. Majalgaon, Dist. Beed,)
 Maharashtra- 431131.)...RESPONDENTS

2) ORIGINAL APPLICATION NO.280 OF 2022

1. Rajat Manohar Agrawal)
 R/o. Nityanand Nagar,)

- Near Natraj Cinema, Dhule.)
2. Devarshi Rohan Shashikant,)
R/o. At post Nanibai Chikhali,)
Tq. Kagal, Dist. Kolhapur)
3. Bhushan Rajendra Joshi,)
R/o. Vivekanand Nagar,)
Gondur Road, Near Walwadi)
Devpur, Dhule)
4. Gaurav Ganesh Das Daga,)
R/o. At Post- Saur,)
Tq. Bhatkuli, Dist. Amravati.)
5. Joglekar Piyush Vivek,)
R/o. Plot No.25, Dttatray)
Nagar Behind Shivaji Hall)
Tq and Dist. Nagpur)
6. Khandelwal Saurabh Sunil,)
R/o. At Post:Chikhli,)
Dist. Buldhana)
7. Lohiya Shailesh Balaprasad,)
R/o. NeraRajashthani School,)
Vipra Nagar, Beed.)
8. Shailesh Manmath Holdandge)
R/o. At Post Chakur,)
Tq. Chakur, Dist. Latur)
9. Gholkar Omkar Shankar)
Add : Nikam Park, Devkar)
Panand, Kolhapur.)
10. Hulkunde Manoj Sharnappa)
R/at. At Post : Ausa, Tq. Ausa)
Dist. Latur)
11. Kulkarni Sayali Ravindranath,)
R/o. At post Herle,)
Tq. Hathkanangle,)
Dist. Kolhapur)

12. Nilesh Rajendra Patil,)
R/o. Swami Samarth Colony)
PatilGalli, Warleswadi Miraj)
Tq. Miraj, Dist. Sangali)
13. Naveed Ahmed Sajid Ahmed)
R/o. Near Sonapur Masjid,)
Kranti Nagar, Malegaon Camp)
Dist. Nashik.)
14. Pooja Suresh Sabarad,)
R/o. At Post – Jath, Tq.Jath)
Dist. Sangli.)
15. Sarthak Tilokchand Zambad,)
R/o. At Post – Arni, Tq. Arni)
Dist. Yavatmal.)
16. Patil Abhilash Shantappa,)
R/o. At Post – Ambad,)
Tq. Ambad, Dist. Jalna.)
17. Wadikar Saurabh Shivaji,)
R/o. At Somangaon,)
Post Chikurda, Tq. and Dist.)
Latur.)
18. Shaikh Salim Shaikh Rasul,)
R/o. At Post : Wadgaon)
Dadahari, Tq. Parli, Dist Beed)
19. Saurabh Laxmikant Joshi,)
R/o. Samata Colony, Indira)
Nagar Road, Near Ganesh)
Temple, Majalgaon,)
Tq. Majalgaon, Dist. Beed)
20. Mandlik Anuja Raviraj)
R/o.At post – Siddharth Nagar)
Airport Road, Nanded)

21. Amarnath Madhukar Havshette)
R/o. Badade Nagar,)
Near Tawarja Colony,)
Opposite Z.P. School No.03,)
Latur, Tq. & Dist. Latur)
22. Akash Chandrakant Bangiwar)
R/o. Maturchhaya Niwas,)
At Post : Kansari,)
Tq. Chamarshi,)
Dist. Gadchiroli 442 707)
23. Mohasin Hasan Mulla)
R/o. 61-A, Al Hasan Manzil,)
Kurdhunda,)
Tq. Sangameshwar,)
Dist. Ratnagiri 415 611)
24. Azeem Khan Aleem Khan)
Pathan)
R/o. At Post : Wakad,)
Tq. Risod,)
Dist. Washim 444 506)
25. Toshniwal Vijay Shivnarayan)
R/o. Shree Raj Nivas,)
Plot No.07, Gudduraja Nagar,)
Pimprala Road,)
Jalgaon 425 001)
26. Karan Manoj Panchariya)
R/o. A/4606, Kotharwadi,)
Makhmalabad, Naka Road,)
Panchavati, Nashik 422 003)
27. Shaikh Mohseen Saleem)
R/o. Waknathapur, Tq. Beed,)
Dist. Beed 431 122)
28. Parmeshwar Khushal Rao)
Hawanna.)
R/o. Hawana Niwas, Near)

Maruti temple, Dongargaon)
Dist. Latur)**.APPLICANTS.**

VERSUS

1. Maharashtra Public Service)
Commission (M.P.S.C.))
Through its Chairman, MTNL)
5th, 7th & 8th floor, Cooprej,)
Maharshi Karve Road,)
Mumbai 400 021)
2. State of Maharashtra,)
Through its Secretary,)
General Administration Dept)
Govt. of Maharashtra)**...RESPONDENTS**

3) ORIGINAL APPLICATION NO 281 OF 2022

1. Yojana Shriniwas Kulkarni,)
R/o: Flat No. 202, Sahajeevan)
Parisar, Sai Siddhi Apartment,)
Tal-Tarveer, Dist-Kolhapur 416 003)
2. Shivpuje Nitisha Ganpati,)
R/o: At Post Deulwadi,)
Tal-Udgir, Dist-Latur.)
3. Dhulshette Ganesh Baburao,)
R/o: Jalkot, Latur 413 532.)
4. Sheikh Monis Sheikh Maksud,)
R/o: Janta Market,)
Near New Modha, Basmath,)
Hingoli 413 512.)
5. Pathan Karim Khan Bismilla Khan)
R/o: Dongraj, Post-Shelgaon,)
Tal-Chakur, Duist-Latur 413 518.)
6. Shaikh Nifaz Imamuddin,)
R/o: At Post – E.Ward, Line Bazar,)
Tal-Karvir, Dist-Kolhapur 416 006.)
7. Aigale Mahesh Shivappa,)
R/o: At Post-Shahapur, Ichalkaranji)
Hatkangale, Kolhapur 416 121.)**...Applicants**

Vs.

1. Maharashtra Public Service)
Commission, through its Chairman)
MTNL, 5th 7th & 8th floor,)
Cooperage, M.K Road,)
Mumbai 400 021.)
 2. State of Maharashtra,)
Through its Secretary,)
General Administration Department,))
Mantralaya, Mumbai 400021.)
 3. Mohan Ashok Patil,)
R/o: Hivtad, Tal-Atpadi, Dist-Sangli)
 4. Sunil Shivaji Mungal,)
R/o : At Post Ijali, Tal-Mudkhed,)
Dist-Nanded.)
 5. Bhavesh Bhiku Shinde,)
R/o: Siddhi Vinayak Apt,)
Near JBS High School Nalasopara,)
Mumbai.)
 6. Akshay Suresh Vekhande,)
R/o: Plot no. 32, Varkhade Nagar,)
Shahapur, Thane.)
 7. Swati Shivaji Thokal,)
R/o: CPM Estate, Adgaon Shivar,)
Nasik.)
 8. Dhumal Yogesh Bhagwan,)
R/o: At post Dhumalwadi,)
Tal & Dist-Nanded.)
 9. Rajrattan Prabhu Manwar,)
R/o: Shantanu Apartment,)
Badlapur – West, Tal-Ambarnath)
Dist-Thane.)
-)...Respondents**

Ms Sabiha Ansari, learned advocate for the Applicants in O.A 814/2022.

Shri S.T Yaseen, learned counsel for the applicants in O.A 280 & 281/2022.

Shri Mihir Desai, learned Special Counsel with Ms Swati Manchekar, learned C.P.O for Respondents no 1 & 2.

Shri S.S Dere, learned counsel for the Respondent nos 12.

Shri M.D Lonkar, learned counsel for Respondents nos 9, 10, 11 & 13 in O.A 814/2022.

Shri Waghmare, learned counsel for Respondents no 3 to 8 in O.A 280/2022.

Shri S.B Talekar, learned counsel for Respondents no 3 to 8 in O.A 281/2022.

Dr Gunratan Sadavarte, learned counsel for Respondents no 23, 24 & 25.

CORAM : **Justice Mridula Bhatkar (Chairperson)**
Mrs Medha Gadgil (Member) (A)

RESERVED ON : **19.01.2023**
PRONOUNCED ON: **02.02.2023**

PER : **Justice Mridula Bhatkar (Chairperson)**

JUDGMENT

1. The issue pertains to the challenge to G.Rs dated 31.5.2021 and 23.12.2020 allowing Socially and Educationally Backward Class candidates [S.E.B.C] to apply in Economically Weaker Section category [E.W.S] in the midway of the selection process of the recruitment of various posts which are to be filled up pursuant to the advertisement of the year 2019. All the matters involve the same issue hence are heard together and decided by this common order. The facts and the dates are different to certain extent so discussed accordingly.

2. The applications are glaring example of how an illegal and erroneous policy framed by the State Government generates a chain of litigation in the legal system. The State of Maharashtra

considered persons from Maratha Caste as Socially and Educationally Backward Class (S.E.B.C) and declared that such S.E.B.C reservation is applicable to only Maratha Caste by enactment 1/2018 dated 30.11.2018. In between Union of India declared 10% reservation in public employment to Economically Weaker Section (E.W.S). The Union of India introduced by way of 103rd Constitutional Amendment, 10% reservation for Economically Weaker Section under Articles 15(6) & 16(6) of the Constitution. The legality of that Act was challenged before the Hon'ble Supreme Court. Thereafter, Hon'ble Supreme Court passed the landmark judgment in the case of **Dr Jaishri Laxmanrao Patil Vs. The Chief Minister & Ors in Civil Appeal No. 3123/2020**, throwing light on the various provisions of the reservation, giving clarity to the meaning of persons falling under O.B.C caste and struck down the M.S.E.B.C Act.

3. At the outset, we clarify that reservation under economically weaker section must be open for the eligible candidates from Maratha community in view of Articles 14, 16(4) & 16(6) of the Constitution. The issue before us is whether the candidates who have already applied in SEBC reservation and were not allowed to apply under EWS category earlier on account of prohibition under Articles 16(4) and 16(6) of the Constitution can be allowed to apply in EWS category in the midway of the Selection Process due to striking down of M.S.E.B.C Act by the Hon'ble Supreme Court on 05.05.2021. The another issue is whether the ratio laid down by the Hon'ble High Court in the case of M.S.E.B.C Act in **Vikas Balwant Alase & Ors Vs Union of India & Ors, W.P 2663/2021 & Ors** is applicable to the present set of facts.

We reproduce the prayers made in each O.A.

O.A 814/2022:-

10. (I) Quash and set aside the GRs dated 23.12.2020 and 5.7.2021 at Annexure-A and Annexure-B issued by Respondent no. 1 as being unconstitutional, illegal, arbitrary, self-contradictory, violative and moreover being issued without any authority of law.

(II) Quash and set aside the public notice dt. 12.7.2021 issued by Respondent no. 2 at Annexure H as being unconstitutional, illegal, arbitrary, self-contradictory and violative.

O.A 280/2022:-

B. The Government Resolution dt 31.5.2021 issued by General Administration Department, Government of Maharashtra at Exhibit-J may kindly be quashed and set aside as being unconstitutional, illegal and arbitrary.

O.A 281/2022

B. The Government Resolution dt 31.5.2021 and 15.7.2021 issued by General Administration Department, Government of Maharashtra at Exhibit-J and Exhibit-K respectively may kindly be quashed and set aside as being unconstitutional, illegal and arbitrary.

Besides the challenge to the Government Resolutions and Public Notice mentioned above, the applicants have challenged their respective final select lists and seek appointments

4. Admittedly the Selection Process has commenced in the all the three matters, i.e., in O.As.280, 281 & 814/2022. However, when the Government allowed the SEBC category candidates to apply in EWS category, Selection Process of these three recruitments were at different stages. It is necessary to give gist of the relevant G.Rs and the chart of the stage of the Selection Process in O.A 814/2022, O.As.280 & 281/2022.

G.Rs and CIRCULARS:-

Sr No	G.Rs/Circulars	Subject wise relevance	Contents in brief
1.	30.11.2018	MSEBC Act for 13%	Under Socially and Educationally Backward category as per definition 2(j) of MSEBC Act only Maratha Caste is included in SEBC.
2.	12.2.2019	Introducing 10% E.W.S reservation in the State.	SEBC candidates were not permitted to apply under EWS category
3.	28.7.2020	State of Maharashtra confirmed the policy dated 12.2.2019.	Treating SEBC & EWS candidates under different eligibility
4.	23.12.2020	Allowing SEBC to opt for EWS if eligible. This G.R is challenged.	Option was given to SEBC candidates to apply for EWS. The State of Maharashtra allowed the candidates who have applied under SEBC reservation to opt for EWS and the Government directed the authority to issue EWS Certificate to such SEBC candidates if found eligible. The policy decision was taken that subject to the outcome of the decision in the case of Dr Jaishri Patil's case for public employment under EWS category, the G.R is made applicable for 2020-21 recruitment.
5.	31.5.2021	Confirming the policy decision dated 23.12.2020 allowing SEBC to opt for EWS retrospectively from 9.9.2020.	The G.R is made applicable retrospectively from 9.9.2020 to 5.5.2021 for the candidates though the final select list is declared. However, where the appointments are not made for them it will be applicable retrospectively based on G.R dated 23.12.2020.
6.	5.7.2021	Retrospectively allowing SEBC to opt in EWS category	Pursuant to the order of the Hon'ble Supreme Court dated 5.5.2021 the implementation of the recruitment process.
7.	15.7.2021	Giving clarity to the retrospective application of SEBC to EWS in public appointments in all Government establishments.	The implementation of the order of the Hon'ble Supreme Court dated 5.5.2021 in respect of SEBC candidates.

The State of Maharashtra through M.P.S.C gave advertisement on various dates in 2019, for filling up of total 134 posts in the three departments.

(i)	Forest Department -	- 10 posts
(ii)	P.W.D – Engineering Services	- 111 posts
(iii)	State Tax	- <u>13 posts</u>
		<u>134 posts</u>

CHART

Status of stages of each Examination

Particulars	Name of the post	No of posts	Advertisement	Main Examination	Interview	Final select list
O.A 814/2022	Forest Service	10	8.3.2019	15.9.2019	4.8.2020 to 21.8.2020 For SEBC EWS candidates 17.8.2021	
O.A 280/2022	P.W.D Engineering Services	114	8.3.2019	28.8.2020	NA	23.7.2021
O.A 281/2020	State Tax & Clerk	13	8.3.20219	28.8.2020	NA	14.7.2020

5. Pursuant to the 103rd Constitution Amendment Act, 2019 dated 12.1.2019, Articles 15(6) & 16(6) were accordingly added in the Constitution.

Articles 16(4) & 16(6) of the Constitution is reproduced below:-

“16 Equality of opportunity in matters of public employment.....

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointment

or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.”

O.A 814/2022.

6. The advertisement No. 4/2019 dated 8.3.2019 was published by Respondent no. 2, M.P.S.C for the post of Assistant Conservator of Forest and Range Forest Officer in the Revenue and Forest Department. In all there are 10 total posts reserved for the candidates applying through EWS, out of which 3 posts are for Assistant Conservator of Forest and 7 for Range Forest Officer. All the 7 applicants pursuant to the advertisement applied for the said posts. The main examination was conducted on 15.9.2019 and the interviews were conducted on 21.8.2020. All the applicants have cleared both the examination and interview conducted by Respondent no. 2. However, it is contended that due to the implementation of the G.Rs dated 23.12.2020 and 5.7.2021, the applicants could not secure the position in the merit list. All the applicants have applied originally in the E.W.S category. By G.R dated 30.11.2018, the State of Maharashtra has created 16 % reservation for persons from the Maratha caste under the Socially and Educationally Backward Class (S.E.B.C) category and while implementing the 103rd Constitutional Amendment by G.R dated 12.2.2019 has provided 10% reservation for Economically Weaker Section. By the said G.R dated 12.2.2019 the candidates belonging to S.E.B.C were not allowed to take benefits of E.W.S reservation as per sub clause 6 Article 15 and sub clause 6 of Article 16 of the Constitution (103rd Amendment) Act, 2019 dated 12.1.2019.

7. Learned counsel Ms Sabiha Ansari has argued that on 9.9.2020 the Hon'ble Supreme Court passed interim order that the

appointments in public service shall be made without implementing the reservation as provided under the S.E.B.C Act. The Respondent-State took a policy decision to extend the benefits of E.W.S reservation to the persons who have applied under the S.E.B.C category. Accordingly, G.R dated 23.12.2020 was issued. However, the Hon'ble Supreme Court by judgment dated 5.5.2021 in **Dr Jaishri Laxmanrao Patil Vs. The Chief Minister & Ors in Civil Appeal No. 3123/2020** held that the said Act granting reservation to Maratha Caste under the category of S.E.B.C Act of 2018 is ultra vires and it was struck down. Pursuant to the said decision, the State of Maharashtra issued another G.R dated 31.5.2021 & 5.7.2021 that the posts reserved for S.E.B.C category were converted into unreserved open posts & E.W.S so the candidates from S.E.B.C category were given option that they can apply either in the open or E.W.S category. The interviews of the newly added qualified candidates were held on 17.8.2021. On the basis of the said interview, a fresh merit list was prepared on 20.6.2022. The names of the applicants were replaced by the candidates from the S.E.B.C category so applicants names did not appear in the merit list dated 20.6.2022. Thus, it is averred that the career prospects of E.W.S candidates like the applicants and their right to be considered for appointment on account of the G.R dated 23.12.2020 and 5.7.2021 have seriously prejudiced. Hence, the applicants have challenged both the G.Rs dated 23.12.2020 and 5.7.2021 as unconstitutional, illegal and self-contradictory without authority and law. The public notice dated 12.7.2021 and the merit list dated 20.6.2022 is also challenged. It is further prayed that the applicants be declared selected and be given the appointment.

8. Learned counsel Ms Sabiha Ansari, has further submitted that the Respondents have changed the rules in the middle of the

process of selection which is not permissible and is illegal. Learned counsel has submitted that the change in the reservation policy, i.e., allowing the candidates from S.E.B.C to opt for E.W.S reservation in the midway is found detrimental for the applicants who are originally E.W.S candidates. Learned counsel has further submitted that the E.W.S candidates were suddenly thrown in a larger competition than a smaller one and it did cause prejudice to the originally E.W.S candidates. She has argued that in the present case the interviews were also conducted on 20.9.2020, that is before the G.R dated 23.12.2020 was issued. Thus, the entire process of conducting the examination was completed and the Respondents should not have conducted the interviews of the private Respondents. The Government cannot provide reservation in E.W.S category to the persons from the S.E.B.C category in the on-going process. This has adversely affected the opportunity of the services of the applicants. Learned counsel for the applicant in support of her submissions relied on the judgment of the Hon'ble Bombay High Court dated 29th July, 2022 in group of **Writ Petitions No. 2663/2021 & Ors, Vikas Balwant Alase & Ors Vs. Union of India & Ors**. Learned counsel for the applicants has submitted that though the appointments were made in the Maharashtra State Electricity Distribution Company Ltd, (M.S.E.D.C.L), the applicants in the said case and the present applicants stand on an identical footing. Learned counsel for the applicants relied on clause 4.1 & 4.19 of the advertisement dated 8.3.2019. Learned counsel for the applicants also relied on the general guidelines 1.3.4 issued by the M.P.S.C.

O.A Nos 280 & 281/2022

9. Shri S.T Yaseen, learned counsel for the applicants in O.A 280/2022 & 281/2022 has submitted that the applicants who have appeared for the examination in Engineering in P.W.D, pursuant to the advertisement dated 8.3.2019 have challenged the

Government Resolutions dated 23.12.2020, 31.5.2021 and 15.7.2021 issued by Government of Maharashtra, allowing S.E.B.C candidates to change their category to E.W.S category and giving directions to M.P.S.C to publish the revised select list. Learned counsel for the applicants has adopted the submissions of Ms Sabiha Ansari, learned counsel for the applicants in O.A 814/2022. In O.A 280/2022 the candidates who have applied for Engineering Services in P.W.D in E.W.S category pursuant to the advertisement dated 3.4.2019 and the applicants in O.A 281/2022 have applied for the post of States Tax & Clerk all over Maharashtra. Learned counsel has submitted that after clearing the Preliminary Examination, they appeared for the Main Examination on 24.11.2019. The results of the Main Examination were declared on 27/28.8.2020. Thereafter, the Respondent-State invited the preference from those candidates who are going to be considered for which the link was to be opened from 31.7.2020 till 7.8.2020. All the applicants are qualified candidates who gave the preference and were waiting for the appointments. However, on 23.12.2020 Government issued the G.R allowing S.E.B.C candidates to convert their reservation in E.W.S category. Learned counsel has submitted that the G.R dated 23.12.2020 is contrary to the policy of the Government dated 28.7.2020 and G.R dated 12.2.2019. He further pointed out by order dated 18.12.2020, passed by the Hon'ble Bombay High Court, Aurangabad Bench in **W.P 8072/2020 in the case of Sheetal Zirpe Vs. State of Maharashtra**, whereby the applicants belonging to S.E.B.C category were allowed to apply in E.W.S category. Pursuant to the said order, the State Government has issued this G.R on 23.12.2020. Learned counsel has submitted that the Respondent-State deliberately did not show their earlier G.R dated 28.7.2020 and 12.2.2019, and therefore, it is not mentioned in the said order. He further pointed out that in the G.R of 23.12.2020 the G.Rs

dated 28.2.2019 & 28.7.2020 were not deleted or withdrawn and the Government by G.R dated 23.12.2020 has given retrospective effect to clause (viii).

10 Shri S.T Yaseen, learned counsel for the applicants relied on the following judgments:-

- (i) **Dr. Jaishri Laxmanrao Patil Vs. The Chief Minister & Anr, S.L.P (C) Nos 15737/2019.**
- (ii) **Tej Prakash Pathak & Ors Vs. Rajasthan High Court & Ors, Civil Appeal No. 2634/2013 (arising out of S.L.P (C) No. 12406/2011).**
- (iii) **The Assam Public Service Commission Vs. Pranjal Kumar Sarma & Ors, Civil Appeal No. 9100/2019 (arising out of S.L.P (C) No. 23677 of 2019).**
- (iv) **Nalgonda Srinivasa Rao & Ors Vs. Dr. B Kishore & Ors, Conmt. Pet © No. 1700/2017 in Civil Appeal No. 5099/2006.**
- (v) **Gurdeep Singh Vs. State of J & K and Ors, 1995 Supp (1) SCC 188.**
- (vi) **Sadhana Singh Dangi & Ors Vs. Pinki Asati & Ors, Civil Appeal No. 7781/2021 (arising out of SLP (C) No. 7811/2020).**

11. Learned Senior Counsel Mihir Desai with Learned C.P.O in support of the provisions in the G.R making it applicable retrospectively has submitted that the Government after the judgment dated 5.5.2021 of the Hon'ble Supreme Court in **Dr Jaishri L. Patil's case (surpa)**. The earlier reservation of 13% posts for S.E.B.C candidates was made open for candidates in the open category. Therefore, earlier Maratha community was not allowed to take the benefits of reservation of E.W.S in view of Article 16(4) and 16(6) of the Constitution are now entitled and eligible to be considered under the E.W.S category.

12. Learned counsel & Learned C.P.O have pointed out that consistent with the Constitutional scheme of Article 16, the Respondent-State has earlier issued the G.R dated 12.2.2019 where persons from S.E.B.C category were specifically not allowed to take the benefits in E.W.S reservation. Now the Government is required to streamline the reservation policy of the State, in view of the judgment of the Hon'ble Supreme Court in the case of Dr Jaishri L. Patil. Therefore, the Respondent-State after the interim order dated 9.9.2020 of the Hon'ble Supreme Court granting stay to fill up the posts in S.E.B.C category issued G.R on 23.12.2020 that the candidates from S.E.B.C may opt for either open or E.W.S category. Learned counsel & Ld. C.P.O have further submitted that the policy of allowing the S.E.B.C candidates to apply under E.W.S category is correct as in reality some of the S.E.B.C candidates do fall in E.W.S category. Therefore, there was no change in the criterion but it is a change in the selection scheme, which is permissible under the law. Learned counsel & Ld. C.P.O have relied on the affidavit in reply dated 4.10.2022, filed by Sampat D. Suryawanshi, Joint Secretary, G.A.D, Mantralay, Mumbai and affidavit in reply dated 1.12.2022, filed by Shri B.P Mali, Under Secretary in the office of Secretary, M.P.S.C. In the present case the interviews were conducted from 4.8.2020 till 22.8.2020 and thereafter, the interim order in the case of Dr. Jaishri Patil was passed by the Hon'ble Supreme Court on 9.9.2020, granting stay to the S.E.B.C reservation in the State of Maharashtra. However, in this matter no final select list was published. Only the main examination and interviews were over. The Government did not publish the final select list till the decision in the case of Dr Jaishri Patil was declared. Due to merger of 13% posts of the total posts of S.E.B.C in the open category, cut-off marks of the open category automatically came down with a view to maintain the ratio of 1 : 3. Similarly, some of the candidates

from S.E.B.C have secured more marks than the candidates from E.W.S and therefore, the cut-off marks of E.W.S went higher. Therefore, the candidates from, E.W.S category are aggrieved. Learned counsel & Ld. C.P.O have pointed out that the E.W.S candidates have already participated in the selection process when the Government has readvertised on 12.7.2020 that the S.E.B.C candidates are given option to apply in open or E.W.S category. They did not challenge the said G.R and they appeared for the interview. The applicants have approached the Tribunal only after they were not selected in the E.W.S category. Learned C.P.O relied on guidelines 5.5.1 & 5.5.2, under which change in the criteria of posts, reservation is possible with retrospective effect.

13. Learned Senior Counsel and learned C.P.O have relied on the judgment of the Hon'ble Supreme Court in the case of **The State of Uttar Pradesh Vs. Karunesh Kumar & Ors, Civil Appeal Nos 8822-8823/2022 (arising out SLP (C) Nos 10386-10387/2020**. They have further relied on the judgment of the Hon'ble Supreme Court in the case of **Tej Prakash Pathak Vs. Rajasthan High Court & Ors, (2013) 4 SCC 540**, by which the Three Judges Bench of the Hon'ble Supreme Court have referred the issue for more clarification of the term change of rules in the midst of the selection process which was decided earlier in the case of **K. Manjushree Vs. State of A.P & Anr, (2005) 3 SCC 512**, to a larger Bench.

14. Learned Special Senior Counsel Shri Mihir Desai specially appointed by the State has submitted that there are two-fold issues:-

- (i) Is there any change of rules in the game?
- (ii) How much is the High Court order in Alase's case is binding on this Tribunal in view of the facts and law of each case?

Learned Senior Counsel has submitted that the rules of the games are not changed when the State allowed S.E.B.C candidates to apply under E.W.S category. The criteria of getting the E.W.S Certificate to the candidates coming from S.E.B.C & E.W.S group is one and the same. The criterion of selection so far as the experience, educational qualifications are concerned is not changed. Had there been change in the educational qualifications, it would have been a change in the rules of game. Secondly, there is no as such subsequent change because economically weaker class in the Maratha community already exists, however, they were earlier put in S.E.B.C category wrongly. Thus, when there is an exclusion from one class of reservation and the inclusion of that class in other group is now allowed. On 17.6.2021, M.P.S.C issued the Circular based on G.R dated 31.5.2021 thereby allowing S.E.B.C candidates to give option either in open or in E.W.S category. The interim order dated 9.9.2020 is as good as granting stay to the M.S.E.B.C reservation Act. Therefore, the Government is justified in issuing G.R dated 23.12.2020 giving option of S.E.B.C candidates to E.W.S. All these candidates of S.E.B.C were required to submit their validity Certificate of E.W.S of the same period, i.e., for the Financial Year 2018-19 like other E.W.S candidates. Thus, all the interviews or publication of the select list, all happened after 31.5.2020, when S.E.B.C Act was struck down by the Hon'ble Supreme Court on 5.5.2021. Learned Senior Counsel has submitted that arguing on second issue, the judgment of the Hon'ble Bombay High Court in Alase's case (supra) view of the facts in four circumstances, is not made applicable. The precedence is not made applicable under following circumstances.

- (i) If the order is overruled by the Hon'ble Supreme Court.

- (ii) The principle on which the Hon'ble High Court has decided the matter is already overruled by the Hon'ble Supreme Court.
- (iii) If the judgment is per-incuriam and earlier judgment of High Court was not pointed to the High Court.
- (iv) If the facts of the case are distinguishable.

The present case falls within Condition No. (iv). Hence, the following facts distinguishable are pointed out.

15. Learned Senior Counsel has submitted that in the present case, M.P.S.C and State are involved and in Alase's case the public sector, i.e., M.S.E.D.C.L were involved. The Public Sector has no powers to issue orders retrospectively. However, the State has powers to apply the G.R or the Policy retrospectively. Therefore, the G.R dated 31.5.2021 and subsequent directions of M.P.S.C dated 17.6.2021 are legal and cannot be challenged on the ground of applying retrospectively. Learned Senior Counsel has submitted that meaning of change of rules of the game is really hazy, crowdy concept and it needs to be clarified. In the case of **Tej Prakash Pathak & Ors Vs. Rajasthan High Court & Ors, Civil Appeal No. 2634/2013 (arising out of S.L.P (C) No. 12406/2011)**, while referring the case of **K. Manjusree Vs. State of A.P & Anr, (2008) 3 SCC 512**, the bench of Hon'ble Three Judges of the Hon'ble Supreme Court, observed that every change cannot be stamped as change of rules of the game and the reference is still pending. Learned Senior Counsel has submitted that the Hon'ble High Court in the case of **Alase (supra)** had no opportunity to deal with the ratio neither in the case of **Lavanya (supra)** or in the case of **Karunesh Kumar (supra)**. Learned Senior Counsel has submitted that the rules of the game are changed only after the interim order or final order of the Supreme Court was delivered in the case of **Dr. Jaishri Patil (supra)**. Learned Senior Counsel in respect of

appointment of the applicants in O.A 281/2022 has submitted that the Government has enacted the Act for the supernumerary posts on 8.9.2022 in order to take care of the candidates who will not be selected and will not be appointed considering the merit among the E.W.S candidates. He submitted when a particular component, i.e., S.E.B.C of the total number of E.W.S candidates was earlier excluded out and now included, and therefore, the State found it correct not to give appointment to anybody in the process of selection.

16. Learned Senior Counsel has relied on the following case laws in support of his submissions on this point.

- (1) **V. Lavanya & Ors Vs. State of Tamil Nadu represented by its Principal Secretary & Ors, (2017) 1 SCC 322.**
- (2) **State of Uttar Pradesh Vs. Karunesh Kumar & Ors, 2022 SCC Online SC 1706.**
- (3) **Hyder Consulting (UK) Ltd Vs. Governor, State of Orissa, through Chief Engineer, (2015) 2 SCC 189.**

17. Learned Advocate Mr. Waghmare has filed the appearance for the Respondents No.3 to 22 has submitted that the applicants No.3 to 8 have also engaged Senior Advocate Mr. Lonkar so he will argue for Respondents No.9 to 22. Learned Advocate Mr. Waghmare has submitted that the judgment of **Vikas Balwant Alase (supra)** of the Bombay High Court is distinguishable mainly on two points from the present set of facts in O.A 280/2022. Firstly, in the said judgment in paragraph 49 it is stated:-

“that SEBC candidates took a chance and applied against the seats reserved for SEBC category. It is not as if on the date of the advertisement / on the date of the application the eligible candidates of SEBC category could not have availed of reservation provided for EWS category. The Rules set out on the date of advertisement (page 225 of O.A.814/2022 were clear that the eligible candidates had to either apply against EWS vacancies or SEBC vacancies”.

Learned Advocate has submitted that the Hon'ble High Court unfortunately has not considered the G.R. of 12.07.2021 and also Article 16(6) of the Constitution. He submitted that for SEBC candidates the option of EWS category was not available and therefore this observation is incorrect". Secondly, he submitted that the retrospective applications of the impugned G.R. is permissible in view of the conditions laid down in the advertisement for Preliminary Examination which is at Clause 4.1 and also advertisement for Main Examination at Clause 3.1 wherein the power of M.P.S.C. to change the reservation and the post at any stage is specifically mentioned and applicants were aware of these conditions.

18. Learned counsel Shri Waghmare has submitted written notes of arguments. Learned counsel Mr Waghmare relied on clause 5.5.1 and 5.5.2 of the guidelines and has submitted that they were not party in the case of MSEDCL recruitment and therefore the facts in the case of MSEDCL and MPSC recruitment are distinguishable. He relied on the judgment dated 22.7.2022 in the case of **Arjun R. Tarke Vs. MPSC, O.A 693/2022**, on the point that change in the rule is possible and legal. He has raised a preliminary objection on the point of limitation that the Original Application is not filed within the limitation, i.e., period of one year. No application for condonation of delay is filed challenging the G.R dated 23.12.2020 by filing the Original Application on 11.8.2022. After the declaration of the judgment of the Hon'ble Bombay High Court in **Alase's case (supra)** dated 29.7.2022, the applicants with a view to take the benefits of the said judgment have rushed to the Tribunal. In fact, they are aware that they do not have vested right in the appointment. Learned counsel argued that the M.P.S.C has specifically mentioned in the advertisement its power to change the reservation policy and the applicants were

fully aware of it. Learned counsel has submitted that the rules of the games were not defined and they could have been defined at any point of time. Thus, the Government had issued the revised advertisement dated 12.7.2021 and G.R dated 23.12.2020 and further G.R dated 21.5.2021 has set and defined the Rules. Learned counsel argued that the judgment of the Hon'ble Bombay High Court dated 29.7.2022 in the case of **Alase (supra)** is not applicable to the present case, especially in view of the paragraphs 24 and 25 of the order dated 4.3.2022 in the case of **Gaurav Ganesh Das Daga & Ors, W.P 2270.2021**.

19. Learned counsel Shri Dere, for private Respondent no. 12 has argued that in the judgment dated 29.7.2022 in **Alase's matter (supra)** the Hon'ble Bombay High Court had no opportunity to consider certain issues in the judgment in the case of **Janhit Abhiyan Vs. Union of India, Writ Petition (Civil) No. 55/2019** (addressed as E.W.S case), which was subsequently decided on 7.11.2022. The legality of 103rd Constitution Amendment was upheld by the Hon'ble Supreme Court in the case of **Janhit Abhiyan (supra)**. He relied on the said judgment authored by Hon'ble Justice Dinesh Maheshwari & Justice Pardiwala and also on the concluding paragraph of the said judgments. Learned counsel has submitted that Hon'ble Justice Pardiwala has observed that the reservation provided under Articles 16(4) & 16(6) is not a fundamental right, but it is an enabling provision, so the Government may grant reservation or may not. Learned counsel further argued that in the present case the retrospective effect of the scheme namely the migration of SEBC candidate to E.W.S is not an issue. These words are wrongly used by the applicants. The fact is the entire case revolves around the issue of identification and inclusion of the candidates of S.E.B.C category in E.W.S. Learned counsel has submitted that

the private Respondents were wrongly identified in S.E.B.C category. However, by judgment of the Hon'ble Supreme Court in the case of **Dr Jaishri Laxmanrao Patil (supra)**, the private Respondents as a effect are taken out of the S.E.B.C reservation and therefore, they are required to be included in E.W.S category. The State Government has committed mistake in identifying the private Respondent in S.E.B.C category and therefore, by issuing the G.Rs of 31.5.2021 and further G.R dated 5.7.2021 has corrected its mistake which is prescribed under the scheme of the Constitution. All the candidates covered under S.E.B.C category are automatically included in the open category and once they are in the open category they are entitled to E.W.S reservation in view of Articles 16(4) & 16(6) of the Constitution of India. The eligibility of the S.E.B.C candidates in the E.W.S category is not tested after considering the relevant paragraphs in the case Janhit Abhiyan (supra). Learned counsel for the private Respondent referred to Articles 388B and 348A which were introduced by way of 102nd amendment wherein the National Commission was established to take a survey and to identify the class of persons for reservation under S.E.B.C category. In the same line, he pointed out Section 2(j) and 4(1)(b) of M.S.E.B.C Act about identification. The exclusion of S.E.B.C candidates in Maharashtra shall necessarily allow them to apply in E.W.S category. The exclusion of S.E.B.C from E.W.S reservation is unconstitutional since the Hon'ble Supreme Court has made applicable its judgment in Dr Jaishri Laxmanrao Patil's case (supra) retrospectively since September, 2020. Learned counsel has further submitted that the benefits of E.W.S were not given to the private Respondents, due to exclusion of their caste from E.W.S category. Learned counsel has further relied on the judgment of the Hon'ble Bombay High Court dated 30.8.2022 in the case of **Amruta Suresh Yadav Vs. State of Maharashtra, W.P 12356/2019** along with other group matters.

20. Shri M.D Lonkar, learned counsel for private Respondents 6, 9, 10, 11 & 13 has submitted that the judgment in the case of Alase (supra) is not applicable to the present case, but the judgment of Amruta Yadav (supra) is applicable. Learned counsel has submitted that in the present case no final select list was prepared which was prepared in the case of Alase (supra). Learned counsel has submitted that there is a vast difference between the examination conducted by a Constitutional body like MPSC and non-Constitutional body like MSEDCL. Learned counsel much argued on what is meant by ratio decidendi and the ratio is made applicable in view of the facts and circumstances of each case. Even a small fact creates a vast difference while applying the ratio. Shri Lonkar, laboured on this one point alone while buttressing his submissions that the judgment in the case of Alase (supra) is not applicable to the present set of facts as the final stage of selection process was not over and in view of decision in the case of Amruta Yadav (supra), the change made in the reservation policy is permissible and not unconstitutional. In support of his submissions, learned counsel Shri Lonkar, relied on the following judgments:-

- (i) **Ashwani Kumar Singh Vs. U.P Public Service Commission & Ors, (2003) 11 SCC 584.**
- (ii) **Regional Manager and Anr Vs. Pawan Kumar Dubey, (1976) 3 SCC 334.**
- (iii) **Roger Shashoua and Ors Vs. Mukesh Sharma & Ors, (2017) 14 SCC 722.**
- (iv) **Ispat Industries Ltd Vs. Commissioner of Customs, Mumbai, (2006) 12 SCC 583.**
- (v) **Anurag Sharma & Ors Vs. State of Himachal Pradesh & Ors, 2022 SCC Online SC 680.**
- (vi) **State of Uttar Pradesh Vs. Karunesh Kumar & Ors, 2022 SCC Online SC 1706.**

(vii) **A.P Public Service Commission, Hyderabad & Anr Vs. B. Sarat Chandra & Ors, (1990) 13 ATC 708.**

21. Learned Advocate Mr. Sadavarte, appearing for Respondents No.23 & 25 in O.A.No.280/2022 has submitted that these Respondents have originally applied from EWS category and they are supporting the case of the applicants. He has submitted that the inclusion of SEBC candidates in EWS reservation in the midway of process is completely political decision taken for the appeasement of the people of Maratha caste in the present selection process. Once the judgment of **Dr Jaishri L. Patil (surpa)** was declared by the Hon'ble Supreme Court on 05.05.2021 and SEBC reservation granted for Maratha community was struck down by the Hon'ble Supreme Court, the Government allowed the backdoor entry to the candidates of Maratha community by opening the gate of EWS reservation. Allowing the SEBC candidates to opt for EWS reservation at this stage is illegal and unconstitutional and it is not to be allowed. The framers of the Constitution have not created the provisions of reservation for dirty politics. Article 16 of the Constitution has not provided any interchangeability in vertical reservation especially between the reserved castes. The reservation to Maratha community in selection process is provided out of ill will of the pressure groups. Learned Advocate Mr. Sadavarte, relied on the interim order dated 12.07.2019 passed in the case of **Dr. Jaishri L. Patil (surpa)** which is also referred by the learned Advocate Mr. Yaseen wherein the Hon'ble Supreme Court has specifically stated that no retrospective effect is to be given to SEBC reservation. Under Article 16 no persons from the reserved class of SC/ST/NT/SEBC are allowed in EWS reservation. The M.S.E.B.C Act though was in existence the Respondent-State has provided EWS reservation to the candidates who have applied in SEBC category. Learned Advocate has pointed out that the said judgment passed by the

Bombay High Court, Aurangabad Bench in **the case of Sheetal Zirpe Vs. State of Maharashtra, W.P 8072/2020**, wherein it was directed to allow the SEBC candidates to apply under EWS reservation and therefore the State by issuing G.R. dated 23.12.2020 has opened the reservation for SEBC to EWS Category. In the said judgment the earlier G.R. dated 28.07.2020 wherein the Government has specifically disallowed the SEBC to opt reservation under EWS was not pointed out. He has submitted that by suppressing its own G.R. the Government surreptitiously has obtained the order from the Hon'ble High Court. The G.R. dated 23.12.2020 is illegal and to be struck down as prayed by the applicant. No retrospective effect is to be given to the reservation policy in midway is a mandate. However, due to favoritism the State has not remained an independent body. Providing reservations to SEBC candidates after the results are out is unlawful and arbitrary. He has further submitted that the cut-off marks for EWS is very low on account of their poverty and non-availability of basic requirements of survival, however, it is not the case of SEBC candidates though they are brought in EWS category. Hence, giving them services in EWS category is doubtful process. Thus, by bringing a large number of SEBC candidates under EWS reservation, the original EWS candidates have to suffer.

Three judgments of Hon'ble Supreme Court :

- (i) **Arup Das on disobedience 2021 (5) SCC 559**
- (ii) **Board of Control for Cricket in India Versus Cricket Association of Bihar and Ors. reported in (2016) 10 SCC 231** on the point of ratio, paragraph 18
- (iii) **Himangni Enterprises Versus Kamaljeet Singh Ahluwalia reported in (2017) 10 SCC 706** and holding field on the point of retrospective effect paragraph 25.

Learned Advocate Mr. Sadavarte has further referred to the Maharashtra Creation of Supernumerary Posts and Appointment of Selected Candidates Act, 2022. He has further submitted that the applicants who are originally from EWS category should be given regular appointment and cannot compete with the other candidates.

22. Learned Advocate Ms. Amruta Kharade holding for learned Advocate Mr. Talekar has stated that the Respondents have submitted that all the Private Respondents who are originally from SEBC category and now applied in EWS category are given appointments and they are working.

Assessment.

23. Firstly, we address the issue whether the change of rules during the selection processes can be made applicable retrospectively, i.e., allowing SEBC to apply under E.W.S is unjust, arbitrary and not permissible in law. The 103rd Constitution Amendment was challenged before the Hon'ble Supreme Court in **Janhit Abhiyan case (supra)** and it is upheld by the Hon'ble Supreme Court and thus in view of clause 6 and clause 4 of Article 16 of the Constitution it is understood that the persons who are eligible to get reservation on the basis of castes in S.C/S.T/O.B.C (also included S.E.B.C at the relevant time) are not entitled to get the reservation under the E.W.S category. Thus, persons who are excluded under these reserved categories but fall in the open general category can only apply under E.W.S category, if found eligible.

24. Some Clauses in the advertisement and also in general guidelines stating power of the M.P.S.C to make change in the procedure are relied.

Clause 4.1 of the advertisement reads as under:-

“४.१ वर नमूद केलेल्या संवर्गातील पदसंख्या व आरक्षणामध्ये शासनाच्या संबंधित विभागांच्या सूचनेनुसार बदल होण्याची शक्यता आहे. पदसंख्या व आरक्षणात बदल झाल्यास त्याचा समावेश मुख्य परीक्षेच्या अधिसूचनेमध्ये करण्यात येईल.”

It pertains to the number of posts and the reservation. Clause 4.1 states that the number of the posts and reservation can be changed as per the directions given by the concerned departments of the Government. If there is a change in the post and reservation, then such change is to be included in the notification or advertisement of the Main Examination.

Clause 3.1 of the advertisement of the Main Examination reads as under:-

३. पदसंख्या व आरक्षणासंदर्भात सर्वसाधारण तरतुदी

“३.१ वर नमूद केलेल्या संवर्गातील पदसंख्या व आरक्षणामध्ये शासनाच्या संबंधित विभागांच्या सूचनेनुसार बदल होण्याची शक्यता आहे.”

A change in the number of posts and reservation is possible as per the policy of the Government. The general guide lines 5.5.1 dated 29.10.2016 read as under:-

५.५ उमेदवारी संदर्भातील बदल :-

“५.५.१ उमेदवारी संदर्भातील कोणत्याही तरतुदी शासन अथावा आयोगाद्वारे कोणात्याही क्षणी पूर्वलक्षी प्रभावाने बदलण्याची शक्यता आहे. सदर बदल अवश्यकतेनुसार निदर्शनास आणायत येतील व ते संबंधितांवर बंधनकारक असतील. असे बदल, प्रसिद्धी पत्रक इत्यादी सर्वसाधारणपणे आयोगाच्या संकेतस्थळावर वेळोवेळी प्रसिद्ध करण्यात येतील. त्याकरिता उमेदवाराने वेळोवेळी आयोगाच्या संकेतस्थळाचे अवलोकन करणे त्यांच्या हिताचे राहिल.”

Clause 17 of the general instructions issued to the candidates is reproduced below:-

“१७. प्रस्तुत जाहिरातीमध्ये परीक्षेसंदर्भातील संक्षिप्त तपशील दिलेला आहे. अर्ज स्वीकारण्याची पध्दत, आवश्यक अर्हता, आरक्षण, क्योमर्यादा, शुल्क, निवडीची सर्वसाधारण प्रक्रिया, परीक्षा योजना. अभ्यासक्रम इत्यादीबाबतच्या सविस्तर तपशिलासाठी आयोगाच्या www.mpsc.gov.in या संकेतस्थळावरील स्पर्धा परीक्षेअंतर्गत ‘उमेदवारांना सर्वसाधारण सूचना’ तसेच ‘परीक्षेची योजना’ विभागातील ‘महाराष्ट्र वन सेवा परीक्षा’ मध्ये उपलब्ध करून देण्यात आलेल्या माहितीचे कृपया अवलोकन करावे. आयोगाच्या संकेतस्थळावर प्रसिद्ध करण्यात आलेली माहिती व अधिसूचना अधिकृत समजण्यात येईल.”

Thus, these all instructions in the advertisement and general conditions made clear that the M.P.S.C and State have power to change the procedure, method of selection. All the candidates are bound by that. One more important instruction was misread and misunderstood, i.e., as follows:-

Clause 4.19 reads as under:-

“४.१९ मा उच्च न्यायालय, मुंबई येथे दाखल झालेल्या रिट पिटीशन क्रमांक २०५३/२०१४ तसेच, जनहित याचिका क्रमांक १७५/२०१८ प्रकरणी होणा-या अंतिम निर्णयाच्या अधीन राहून पदभरतीची कार्यवाही करण्यात येईल.”

The appointments in the process would be subject to the outcome of the decision of the Supreme Court in W.P 2053/2014 and PIL 175/2018. We understand that said conditional appointments were applicable to S.E.B.C/Marathas reservation and not for E.W.S reservation. The Hon'ble High Court in **Alase's case (supra)** has taken the same view.

25. The Hon'ble Supreme Court time to time has explained the concept of “retrospective application of changed rules in midway of selection process”. Let us advert to the relevant case laws relied by the learned counsel of both sides. In **Raj Kumar & Ors (supra)**, the Hon'ble Supreme Court in this case dealt with issue of applicability of the earlier rules and the amended rules in the process of selection. In the earlier case of **Y.V Rangaiah Vs. J. Sreenivasa Rao, (1983) 3 SCC 284**, the rules existing when the posts fall vacant were made applicable. The Hon'ble Supreme Court has considered the case of Rangaiah and held that:-

“70.....

2. It is now settled position of law that a candidate has a right to be considered in the light of the existed rules, which implies the "rules in force" as on the date consideration takes place. The right to be considered for promotion occurs on the date of consideration of the eligible candidates.”

3. The Government is entitled to take a conscious policy decision not to fill up the vacancies arising prior to the

amendment of the rules. The employee does not acquire any vested right to being considered for promotion in accordance with the repealed rules in view of the policy decision taken by the Government. There is no obligation for the Government to make appointment as per the old rules in the event of restructuring of the cadre is intended for efficient working of the unit. The only requirement is that the policy decisions of the Government must be fair and reasonable and must be justified on the touchstone of Article 14.”

26. In **Tej Prakash Pathak’s** case (supra), the Hon’ble Supreme Court while referring the case of **K. Manjushree (supra)** made two categories in respect of change of rules; (i) about eligibility criterion and (ii) procedure/process of selection. The reference is pending before the larger bench and the ratio laid down in the case of **K. Manjushree** that no change can be made during the process of selection as on today holds the field. Though **K. Manjusree** holds the field as on today, it is useful to refer to the relevant portion in the judgment of **Tej Prakash Pathak & Ors (supra)**, which is relied by the learned counsel for the Respondents to counter the ratio laid down in **K. Manjusree**.

11. In the context of the employment covered by the regime of [Article 309](#), the ‘law’ – the recruitment rules in theory could be either prospective or retrospective subject of course to the rule of non- arbitrariness. However, in the context of employment under the instrumentalities of the State which is normally regulated by subordinate legislation, such rules cannot be made retrospectively unless specifically authorised by some constitutionally valid statute.”

13. Those various cases deal with situations where the State sought to alter 1) the eligibility criteria of the candidates seeking employment or 2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut off marks to be secured by the candidates either in the written examination or viva-voce as was done in the case of Manjusree (supra) or the present case or calling upon the candidates to undergo some test relevant to the nature of the employment [such as driving test as was the case in Maharashtra State Road Transport Corporation (supra)].

14. If the principle of Manjusree's case (supra) is applied strictly to the present case, the respondent High Court is bound to recruit 13 of the "best" candidates out of the 21 who applied irrespective of their performance in the examination held."

27. The Hon'ble Supreme Court on the point of retrospective applicability of the change in rules in the case of **The Assam Public Service Commission & Ors (supra)**, held as under:-

"A candidate has a limited right of being considered for selection in accordance with the Rules as they existed on the date of advertisement and he cannot be deprived of that limited right by amendment of the Rules during the pendency of the selection, unless the Rules are to be applied retrospectively."

In the present cases, the G.R dated 31.5.2021 is made applicable retrospectively. However, whether such retrospective application can be made in view of the provisions of Article 16(6) of the Constitution and moreover in view of the ratio laid down by the Hon'ble Bombay High Court while deciding the similar issue in Alase's case (supra).

28. Thus, the State in its executive fiat has taken policy decision to allow all the candidates from the Maratha Caste who have applied in S.E.B.C category to opt either in open category or under E.W.S category. To issue the G.R and make it applicable retrospectively is well within the power of the State. However, the issue agitated before us in all these matters at late stage of the process of selection the retrospective application of the G.R is justified and is it a fair policy on the part of the Government?

29. The Hon'ble Supreme Court in **Nalgonda Srinivasa Rao's case (supra)**, has referred the basic issue that arose in the case of **M. Surender Reddy Vs. State of A.P & Ors, reported in (2015) 8 SCC 410** for consideration about the applicability of Government

Office Memorandums (G.O.Ms) dated 7.3.2022. The Hon'ble Judges in Nalgonda's case have stated as under:-

“These paragraphs, in our view, are quite clear that everything that was initiated pursuant to the advertisement issued before or prior to 2002 GO, must be taken to the logical conclusion, in consonance with the then prevailing rules or regime when the advertisement was issued. This logic would apply even with respect to filling up of vacant or remaining posts from that selection. In other words, the principles emanating from said 2002 GO are not to be applied to such selection.”

In **M. Surender Reddy's case** (supra), the Hon'ble Supreme Court observed as under:-

“28. In any case, the State Government cannot pass any order amending a procedural law regarding reservation in the matter of selection to posts, with retrospective effect, once the procedure of selection starts.”

In **Gurdeep Singh's case (supra)**, the Hon'ble Supreme Court held that attribution of eligibility long after the selection process was over, in our opinion is misuse of power.

30. The relevant Clauses 4.1 and 3.1 in the advertisement similarly, general guidelines such as Clauses 1.3.4, 5.5.1 or 17, as mentioned in the beginning empowers the State or M.P.S.C., to make necessary changes in the rules and procedure in the Selection Process. The method of selection of a candidate and the procedure adopted can be changed to certain extent. However, the eligibility criteria of the candidate seeking employment cannot be changed in the midway. In **Karunesh Kumar & Ors (supra)**, the case of **K. Manjuree** was referred and it was held by the Hon'ble Supreme Court that the rules of the game can be changed, except qualification and eligibility. The Hon'ble Supreme Court further observed as under:-

“32. The respondents have also placed reliance on the decision of this Court in the case of K. Manjusree (supra). However, in our considered view, the facts of the aforesaid decision are quite different from the present case. A change was introduced for the first time after the entire process was over, based on the decision made by the Full Court qua the cut off. Secondly, it is not as if the private respondents were non- suited from participating in the recruitment process. The principle governing changing the rules of game would not have any application when the change is with respect to selection process but not the qualification or eligibility. In other words, after the advertisement is made followed by an application by a candidate with further progress, a rule cannot be brought in, disqualifying him to participate in the selection process. It is only in such cases, the principle aforesaid will have an application or else it will hamper the power of the employer to recruit a person suitable for a job.”

In ***Tej Prakash Pathak's case***, the Hon'ble Supreme Court has held that the Recruitment Rules can be made retrospectively applicable. However, it cannot be made arbitrarily applicable. The Hon'ble Supreme Court has stated that Rules can be retrospectively applicable when specifically authorized by some Constitutionally valid statute.

31. Under Articles 16(4) and 16(6) of the Constitution the candidates who are not falling under SC/ST category and other classes of reservations are entitled to avail of the benefits under EWS reservation. We address the submissions made by learned Advocate Mr. Dere that earlier Maratha Caste was wrongly identified by the Government for granting SEBC reservation and once it is excluded from the said category it was automatically included in the EWS category during this selection process. The submissions of learned Advocate Mr. Dere are accepted with a rider that S.E.B.C cannot be included in E.W.S category in the recruitment of the year 2019-2020 as it is not permissible to make a change in the criterion of eligibility at such late stage of selection.

32. On the point of retrospective application of the rules or G.R, learned counsel relied on the judgment of this Tribunal dated 22.7.2022 in **Shri Arjun R. Tarke Vs. The State of Maharashtra & Ors, O.A 693/2022**, wherein this Tribunal held that the G.R dated 23.8.2021 providing reservation to the orphans in Maharashtra Civil Engineering Services Main Examination pursuant to the advertisement dated 30.9.2021 was allowed. In the above case of **Tarke** the Tribunal held that the definition of orphans is extended to the children who have lost their parents but brought up and looked after by the relatives and by way of retrospective application of the said G.R, the case of the applicant is covered. In the present case inclusion of S.E.B.C to E.W.S amounts a change of eligibility criterion provided under the Constitution.

33. It is settled position of law that the rules of the game cannot be changed once the selection process has commenced is hereby again confirmed. In **Vikas Balwant Alase & Ors Vs. Union of India & Ors, Writ Petitions No. 2663/2021 & Ors**, the Hon'ble High Court observed as under:-

48. Applying the aforesaid well settled principles enunciated by the Supreme Court to the facts of the present case, we have no hesitation in holding that the benefit extended to SEBC candidates while granting such candidates an opportunity to be considered in the EWS category at such an advanced stage of the recruitment process is arbitrary and impermissible. The advertisement had clearly spelt out the vacancy position for the various categories. As on the date when the advertisement was published, the challenge to the decision of this Court upholding the constitutional validity of the MSEBC Act was pending in the Supreme Court. The State Government by issuance of the impugned G.R., which is in the nature of an executive instruction sought to give a retrospective operation to the selection process qua reservations for the EWS. This is impermissible. It is not as if in the exercise of the rule making power of the State that retrospective effect is given to

its decision. In our opinion, by issuance of such executive instructions, it is not open for the State Government to stultify the vested right created in favour of EWS category candidates for considering them for appointment to the said posts which were reserved for them. The decision in case of I.C.A.R. vs. Satish Kumar and another affirmed the view taken by the Supreme Court in Tushar Ranjan Mohanty and others (supra) supports the view we take. All concerned (SEBC candidates) were informed that the selection process would be subject to the outcome of the orders passed by the Supreme Court. The aspirants with full knowledge of the matter pending before the Supreme Court chose to take the benefit of the reservation provided by the MSEBC Act. The selection process reached the stage of publication of the select list of the candidates selected from the respective reserved categories. The Supreme Court on September 9, 2020 by its interim order directed that appointments to public services and posts under the Government shall be made without implementing the reservation as provided under the MSEBC Act. The State Government at this stage issued the impugned G.R. thereby permitting the candidates belonging to the Maratha community to avail the benefit of open category or EWS category as per their eligibility. In our opinion, the State Government and the MSEDCL was not at all justified in permitting SEBC candidates to avail the benefit of EWS category. The EWS category candidates who are duly selected had accrued a vested right to be considered for appointment. The State Government could not have issued a G.R. to the detriment of the EWS category candidates. The Supreme Court has in no uncertain terms held that the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned midway or after the process of selection has commenced. It was not open for the State or the MSEDCL to issue such circulars having retrospective operation in the midst of the selection process and that too, by an executive fiat. While we have sympathy for the SEBC candidates, but we cannot lose sight of the fact that the situation is the result of their own making. The SEBC candidates were aware about the matter pending before the Supreme Court despite which they took a chance to participate in the recruitment process claiming reservation meant for SEBC.

50. Resultantly, the writ petitions [Writ Petition (St.) No. 7549 of 2021, Writ Petition No. 4059 of 2021, Writ Petition (St.) No. 13088 of 2021, Writ Petition (St.) No. 4060 of 2021, Writ Petition (St.) No. 7891 of 2021, Writ Petition (St.) No. 7575 of 2021, Writ Petition No. 1054 of 2021 and Writ

Petition No. 8099 of 2021] filed by EWS category candidates succeed in the following terms:

(a) We hold and declare that the G.Rs. impugned in such writ petitions are not applicable to the recruitment process initiated for the purpose of appointment of EWS category in furtherance of the Advertisement Nos.04/ 2019, 05/2019 and 6/2019 which are the subject matters of the respective writ petitions and the G.Rs. will not affect the selection process initiated pursuant to the publishing of such advertisements.

(b) It is declared that the action on the part of the respondents in applying the G.Rs. impugned in the writ petitions retrospectively to the selection process which is the subject matter of the writ petitions is illegal and bad in law. Consequently, the impugned directions of MSEDCL are held illegal and bad in law.

(c) MSEDCL to proceed with the selection process in consonance with the Rules prevailing when the advertisement/s were issued.”

34. For the better clarity of the rationale behind the amendment of Articles 16(4) & 16(6) of the Constitution in **Janhit Abhiyan (supra)**, while upholding 103rd Constitution Amendment, by the Hon'ble Supreme Court, the reading of following paragraphs is necessary.

“82.1. According to the petitioners, it is a case of their direct discrimination when they have been excluded from EWS reservation. The problem with this argument is that EWS reservation itself is another form of compensatory discrimination, which is meant for serving the cause of such weaker sections who have hitherto not been given any State support by way of reservation. SEBCs/OBCs/SCs/STs are having the existing compensatory discrimination in their favour wherein the presently supported EWS are also excluded along with all other excluded classes/persons. As a necessary corollary, when EWS is to be given support by way of compensatory discrimination, that could only be given by exclusion of others, and more particularly by exclusion of those who are availing the benefit of the existing compensatory discrimination in exclusion of all others.”

“84.1. The above observations make it absolutely clear that so far as the classes availing the benefit of compensatory discrimination in the form of reservation under Article 16(4) are concerned, no further classification or special treatment is to be given to them. A fortiori, they cannot make a claim to intrude into other compensatory discrimination in favour of another deserving group.”

“89. One of the submissions that the words “other than” in Articles 15(6) and 16(6) of the Constitution of India should be read as “in addition to”, so as to include SCs/STs/OBCs within EWS has also been noted only for rejection for the simple reason that the suggested construction is plainly against the direct meaning of the exclusionary expression “other than” as employed in, and for the purpose of, the said Articles 15(6) and 16(6). If there is any doubt yet, the official Hindi translation of the amendment in question, as published in the Gazette of India, Extraordinary, Part II, Section 1A dated 17.07.2019 would remove any misconception where the exclusionary Hindi expression “भिन्न” (bhinn) has been employed in relation to the expression “other than”. No further comment appears requisite in this regard.”

Thus, the Hon’ble Supreme Court has specifically explained the word ‘other than’ by taking help of its Hindi version “भिन्न” (bhinn). Thus, there is no ambiguity that the persons from any caste cannot fall in the E.W.S category and simultaneously reservation available for S.C/S.T and O.B.C. The candidates can avail of the reservation only in one category. The Constitutional scheme provided under Article 16(4) and 16(6) all the State is expected to be followed by the State while implementing its reservation policy. Naturally, the State of Maharashtra issued the G.R dated 12.2.2019 wherein the candidates from S.E.B.C, i.e., Maratha Caste were not allowed to apply under the E.W.S reservation. As stated above, in Maharashtra, Maratha Caste is not included in Other Backward Class category. But the said Caste is put in a different specific category, i.e., Socially and Educationally Backward Class, which in short is S.E.B.C. In other words, no other caste than Maratha was identified as Socially and

Educationally Backward Class under that reservation. Therefore, the State of Maharashtra rightly excluded the candidates of S.E.B.C category from applying under E.W.S reservation by G.R dated 12.2.2019. The Hon'ble Supreme Court with reference to the earlier judgment in the case of **C.A Rajendran Vs. Union of India, AIR 1968 SC 507**, has stated that Articles 15(4) & 16(4) do not confer any fundamental rights, but it is an enabling provision for the State to consider the creation of the reservation. Thus, once such reservation is created though the candidate has no right to get appointed but if person after passing all the tests is found eligible, then right to be considered for the appointment accrues in his favour in the course of the selection process at late stage. In the case of *Indra Sawhney & Ors Vs. Union of India & Ors*, 1992 Supp (3) 217, the Hon'ble Supreme Court has clarified the concept of vertical or social reservation and horizontal reservation. Vertical reservation or Social reservation is based on a peculiar structure and hierarchy rooted in the Indian Society. Horizontal reservation is acknowledgement and identification of certain class of persons in the Society on the basis of sex, skill, disability conditions etc. As per the judgment of **Indra Sawhney (supra)** interchangeability is permissible from the reserved categories to general open if candidate is found meritorious and thus eligible. However, we have not come across any Supreme Court judgment or a position of law allowing interchangeability between Vertical reservation from S.C to S.T and to O.B.C and vice versa (which includes S.E.B.C & E.W.S). We are aware of the interchangeability only between NT(A), NT(B) and NT(D) in the State of Maharashtra.

35. The application of the ratio laid down by the Hon'ble High Court in the case of **Alase (supra)** is vehemently disputed by all the counsel of the Respondents. Let us consider this issue on the background of various pronouncements of the Hon'ble Supreme

Court and in view of the facts and circumstances of the present cases. On the point of application of ratio, in **Ashwani Kumar Singh's case (supra)**, the issue was about the belated attempt by the appellants to get the appointment. In the said case, the Hon'ble Supreme Court held as under:-

“10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of statute, it may become necessary for Judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments.”

“12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.”

36. In **Regional Manager and Anr (supra)**, it is held as under:-

“Indeed, we do not think that the principles of law declared and applied so far have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.”

37. In **Roger Shashoua & Ors's case (supra)**, the Hon'ble Supreme Court held as under:-

“From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the Court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment de hors from the context and understand the ratio decidendi which has the precedential value. That apart, the Court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process.”

38. In the case of **Ispat Industries Ltd (supra)**, the Hon'ble Supreme Court has relied and referred to the ratio laid down in the case of **Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd** and observed that:-

“It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.”

Keeping the ratio on the background the facts in these three recruitment processes, we found similar to the case of **Alase (supra)**. It is not that facts should be identical but there should be factual resemblance and the same issue to apply the case law as precedence.

39. The Original Application 814/2022 is filed on 11.8.2022 after the select list was published on 20.6.2022. Admittedly, the applicants did not challenge the revised advertisement dated 12.7.2021. They waited for the publication of the select list which was published on 20.6.2022. On the point of limitation & locus the objection was raised that the advertisement dated 12.7.2021 or G.R dated 23.12.2020 by which S.E.B.C candidates were allowed to apply in E.W.S were not challenged within one year, hence the

Application are beyond the period of limitation. The declaration of the results was the actual decisive factor, i.e., the effect of the G.R dated 23.12.2020 and the revised advertisement dated 12.7.2021 as advertised. If the challenge considering the nature of the process of selection whether the cause of action continued after one year is to be considered. We are aware that every aggrieved candidate having failed in their selection cannot challenge the selection process in hope of getting the second chance. On this point, we rely on the judgment of the Hon'ble Supreme Court in the case of **Dr (Major) Meeta Sahai Vs. State of Bihar & Ors, (2019) 20 SCC 17**. In that case the work experience was restricted to the experience gained in the Government hospital. However, in **Meeta Sahai's** case it is held as under:-

“17.we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it.”

Thus, objection on the ground of limitation and locus does not sustain.

40. In the case of **Amruta Suresh Yadav (supra)**, the circular dated 19.12.2018 was questioned. M.P.S.C declared the result of the Main Examination for the post of P.S.I and they were to be called for physical examination and interview. However, in between the Government issued Corrigendum on 19.12.2018 substituting clause (1) of the G.R dated 13.8.2014 thereby permitted migration of the candidates from the reserved category to open general category. In the present cases in hand the migration is from one reservation to another reservation. The Hon'ble High Court held that the case of Amruta Yadav is not a case of any amendment made to the rules during the pendency of the selection

process or there is no change in the criterion laid down for selection. The Division Bench further held that the Circular of December, 2018 was of an explanatory nature and specifically held that the judgment in the case of **Madan Mohan Sharma and Vilas Alase in W.P 2663/2021** has no application in the set of facts in the case of **Amrtua Yadav** (supra).

41. We understand that S.E.B.C & E.W.S are vertical reservations. Therefore, the candidates from S.E.B.C or E.W.S who are above the cut-off marks of the open general category are to be automatically migrated to the open general category from any reserved category so that proper and adequate representation can be given to the reserved category candidates in true sense in their respective category. The migration between the reserved categories, i.e., from SC to OBC or O.B.C to E.W.S is not permissible. Thus, the G.R of 12.2.2019 of the State of Maharashtra is in consonance with the Constitutional scheme. The State of Maharashtra subsequently issued G.R dated 28.7.2020 confirming the policy of keeping E.W.S and S.E.B.C reservation separate and no interchangeability is permissible.

42. It is pertinent to note that G.R dated 23.12.2020 of the Government of Maharashtra is contrary to its own policy dated 12.2.2019 and 28.7.2020. Learned Senior Counsel and learned C.P.O tried to explain the reason for issuance of this G.R that due to the interim order dated 9.9.2020 in the case of **Dr. Jaishri Patil (supra)**, S.E.B.C was stayed and the Hon'ble Bombay High Court, Aurangabad Bench in **Sheetal B. Zirpe Vs. State of Maharashtra & Ors, W.P 8072/2022**, has allowed S.E.B.C candidates to give option for E.W.S category. This explanation is not satisfactory and acceptable after going through the said iorder.

“4. It would have been appropriate if the Government would have taken a decision as to whether the benefit of

EWS ought to be granted to the candidates, who have applied from SEBC category and the said reservation is stayed by the Apex Court. It appears that the decision to that effect has not been taken.....

7. Till then the respondents shall not appoint candidates possessing less marks than the petitioners from EWS category.”

There is no reference of G.R dated 12.2.2019. It is a short interim order. Moreover, it appears that the earlier G.Rs dated 12.2.2019 and 28.7.2020 were not shown and argued before the Hon'ble Bombay High Court, Aurangabad Bench the applicants in the said application were from S.E.B.C reservation prayed that they be allowed to opt for E.W.S reservation pending before the Hon'ble Supreme Court in Dr Jaishri Patil's case (supra). It appears that Government did not oppose. The Hon'ble Supreme Court on 9.9.2020 has passed the interim order in detail directing the State of Maharashtra not to fill up the posts under S.E.B.C reservation. It is not correct to say on account of the said order that S.E.B.C reservation was cancelled. There was stay because the S.E.B.C reservation was in existence. Hence, G.R of 23.12.2020 is not applicable to the present cases. The said Writ Petitions before Aurangabad Bench were withdrawn not after 5.5.2021 but before that.

43. In the case of **Lavanya (supra)**, the Government gave 5% relaxation in the marks. It was considered that by merely allowing more persons to compete, the Petitioners cannot contend that their accrued right has been taken away. On the basis of these findings, learned Advocate Mr. Desai has submitted that in the present case no Appellant was eliminated from the Selection Process. Rather fair opportunity was provided to SEBC candidates who can legitimately compete with the applicants herein. We agree that by allowing originally SEBC candidates to apply in EWS category has

increased the area of competition and the applicants are not eliminated to compete with the Respondents. It is true that from the beginning the candidates who have applied from S.E.B.C category were prohibited from applying in E.W.S. Hence, the candidates from the originally E.W.S category were not aware that they will have to compete with the candidates from the S.E.B.C reservation, after they were found and treated eligible in view of E.W.S reservation. Though the candidates opting for E.W.S from Maratha community are required to fulfill the same criterion, which is for the originally E.W.S, the candidates have minimum expectation that they should know in competitive examination with whom they are competing. One's own performance matters, yet who is playing with you in the playground also matters more. We are more on the point of changing criterion of eligibility at a very late stage, by showing it as extra ordinary situation. Ultimately, the policy decision is tested on the basis of doctrine of natural justice and fair play.

44. In **Karunesh Kumar (supra)** it is held that the new rules made in the year 2016 are to be made applicable to the selection process and not the rules when the posts were advertised.

45. In the case of **Hyder Consulting (UK) Ltd (supra)**, the Hon'ble Supreme Court to elaborate the concept of 'per incuriam' and has stated that 'per incuriam' means 'through inadvertence', when the court of record has acted in ignorance of any previous decision and its own or subordinate court had added in ignorance of the decision of the court of record. It was pointed out that in the case of **Alase (supra)**, the Hon'ble High Court has observed that the SEBC candidates had options to opt for the reservation either to SEBC or EWS. In view of the Constitutional provisions of Articles 16(4) and 16(6) and the G.R. of 12.02.2019 and

28.07.2020 it is true that the SEBC candidates were prohibited from applying under EWS category. Though we accept this factual and legal position, yet this observation of the Hon'ble High Court cannot be considered as decisive factor or main reasoning of holding that the concerned G.Rs allowing SEBC candidates to EWS category and the policy decision taken by the MSEDCL are not applicable in the midway of the selection process.

46. In **A.P Public Service Commission's case (supra)** on the point of changing the rules of procedure, as per Rule 5 of the Public Service Commission the age of the candidate at the time of application should be 21 years on the 1st day of July of the year in which the selection was made. The original applicant was 19 days short of the age on 1st July. After two years, he challenged the Notification stating that he has attained the age of 21 years when the select list was ultimately prepared after two years and therefore, he should be appointed in that service. The Administrative Tribunal accepted his contentions. The Hon'ble Supreme Court reversed the decision and held as under:-

“If the word ‘selection’ is understood in a sense meaning thereby only the final act of selecting candidates with preparation of the list for appointment, then the conclusion of the Tribunal may not be unjustified. But round phrases cannot give square answers. Before accepting that meaning, we must see the consequences, anomalies and uncertainties that it may lead to.”

“When such are the different steps in the process of selection, the minimum or maximum age for suitability of a candidate for appointment cannot be allowed to depend upon any fluctuating or uncertain date. If the final stage of selection is delayed and more often it happens for various reasons, the candidates who are eligible on the date of application may find themselves eliminated at the final stage for no fault of theirs. The date to attain the minimum or maximum age must, therefore, be specific, and determinate as on a particular date for candidates to apply and for

recruiting agency to scrutinize applications. It would be, therefore, unreasonable to construe the word selection only as the factum of preparation of the select list. Nothing so bad would have been intended by the rule making authority.”

47. In all the three cases in hand the recruitment started on March, 2019 and Main Examinations were over. In O.A No. 814/2022 & 281/2022, the interviews were also over till August, 2020. The Government did not take decision till **Dr Jaishri Patil's case (supra)** was finally decided by the Hon'ble Supreme Court on 5.5.2021, though nearly the process of selection was complete. Learned Advocate Mr. Lonkar appearing for Respondents No.3 to 8 in O.A.No.280/2022 has submitted that he is appearing for the candidates who are MES in Engineering and have appeared for Multi cadre posts in different Departments. He has submitted that the Respondents No.3 to 8 are meritorious and therefore they are to be selected as merit is to be upheld. The learned Advocate Mr. Lonkar submitted that the merit of EWS category went high on account of inclusion of SEBC category in EWS category. Thus, so far as the merit is concerned, the State is going to be benefited on account of this merger. Thereafter, from 14.10.2021 to 02.02.2022 interviews were held and on 12.02.2022 General Merit List was published and on 10.06.2022 Final Select List was published wherein 143 candidates were shown. Learned Advocate Mr, Lonkar has submitted that the prayer Clause (b) in O.A.No.280/2022, setting aside G.R of 31.5.2021 is not granted. He demonstrated that the result for the Preliminary Examination was declared on **27.09.2019** and out of 100 marks the cut off was fixed as follows:-

Open Category : 27 marks.
SEBC Category : 27 marks.
EWS Category : 1 mark

The result for the Main Examination was declared on 28.07.2020 and out of 400 marks the cut-off was fixed as follows :

Open Category : 258 marks.
SEBC Category : 210 marks.
EWS Category : 126 marks.

The revised advertisement was published on **14.07.2021**. The SEBC candidates were allowed to apply through EWS category and were brought on the same footing. Thus, after interview they were allowed and finally result was published on **23.07.2021**. As the reserved posts of SEBC were merged into Open and EWS categories the cut-off marks out of 400 marks of these two groups was fixed as follows :

Open Category : 246 marks.
EWS Category : 212 marks.

48. The facts and figures given by Shri Lonkar, learned counsel for the private Respondents about the cut-off marks secured by the candidates from the open category, E.W.S and S.E.B.C and so also compared to the cut-off marks obtained from open and E.W.S category after merger of E.W.S, clearly disclose that the performance of the candidates from the Maratha Caste covered earlier under the S.E.B.C reservation is far better than the candidates who have applied from originally Economically Weaker Section category.

49. Consistent with the submissions of Mr Lonkar, on our query, the Respondent-State has supplied the overall facts and figures disclosing the merit of the candidates in the E.W.S category. The arguments are advanced by Learned Senior Counsel Shri Mihir Desai, learned C.P.O and all the learned counsel for the Respondents in one tune that in any reservation while giving appointments the merit shall prevail. The S.E.B.C candidates who were allowed to opt in E.W.S category are meritorious than the

other candidates from the originally E.W.S category. We, therefore, place the facts and figures as follows:-

(i)	Forest Department -	- 10 posts
(ii)	P.W.D – Engineering Services	- 111 posts
(iii)	State Tax	- <u>13 posts</u>
		<u>134 posts</u>

O.A 814/2022 - Forest Department :

Total No of posts	:	10
Selected SEBC candidate:		10
EWS candidate	:	Nil

O.A 280/2022 - P.W.D Engineering Services.

Total No of posts	:	<u>111</u>
Selected SEBC candidate:		94 posts
EWS candidate	:	17

O.A 281/2022 - State Tax -

Total No of posts	:	13
Selected SEBC candidates:		13
EWS candidates	:	Nil

Thus net result is:-

Selected Maratha SEBC		117 posts
Selected Original E.W.S	-	<u>17</u>
Total Posts		<u>134</u>

50. 94 candidates in the P.W.D – Engineering Services, who originally had applied under S.E.B.C Maratha reservation are selected out of 111 candidates. Thus, only 17 candidates succeeded and found meritorious from originally E.W.S category. Thus, 94 candidates from E.W.S are found below and not meritorious and thrown out. Similarly, out of 14 candidates, other 4 posts in Forest Department were reserved for disabled and they all were selected from hearing impairment from Maratha Caste only. 10 candidates who had applied in the Forest Department for the post of Range Forest Officer are selected from S.E.B.C category

and similarly all the 13 candidates from the State Tax were found in the final merit list are also from S.E.B.C category. Thus, these figures reveal that the S.E.B.C candidates who were eligible to apply in E.W.S category are superior in merit than the originally E.W.S category candidate. Indeed, it shows that the findings of the Hon'ble Supreme Court that the persons from Maratha Caste are not socially and educationally backward is really true as mostly all the meritorious candidates are from Maratha community. Thus, it confirms that the policy decision of the Respondent-State giving reservation to Maratha Caste under Socially and Educationally Backward Class was truly illegal and erroneous. Mr Lonkar has submitted that the prayer clause challenging G.R of 23.12.2020 and 31.5.2021 is barred under constructive *res judicata*. He submitted that in the judgment of **Vikas Balwant Alase (supra)** the Bombay High Court has not struck down the G.R. of 31.05.2021 though it was prayed. So, in this matter the applicants cannot pray that the G.R. of 31.05.2021 is to be declared as void and struck down. These submissions are not convincing because there was no challenge to G.R dated 23.12.2020 in Alase's case (supra) and the Hon'ble High Court did not deal with the illegality of that G.R but held that G.R of 31.5.2021 is not applicable in the said selection process. We also hold that it cannot be made applicable to the recruitment in these cases. There is no issue of constructive *res judicata*. He argued that after declaration of results no right was accrued in favour of EWS candidates and so nothing was taken away from them. He further argued that no one should suffer by the orders passed by the Court and thus the order of Hon'ble Supreme Court striking down the M.S.E.B.C Act should not take away the right of present SEBC candidates availing of reservation from EWS category when they are eligible.

51. We find substance in the submissions of Advocate Ms Sabiha Ansari, Mr Yaseen and Mr Sadavarte that all the applicants have cleared the main examinations and only the select list was to be declared. In O.A 814/2022 & O.A 280/2022. In O.A 281/2022 the applicants are aspiring to be appointed in the State Tax Department. Their final merit list was also published on 14.7.2020. Their names are recommended by M.P.S.C. on 18.8.2020 to the State of Maharashtra. Thereafter, the Government allowed SEBC candidates to apply in EWS category and only SEBC candidates are found subsequently meritorious, the list was revised and SEBC candidates are considered for the job and they are given appointment. Learned Advocates have submitted that the Respondent-State should have given the appointment to EWS candidates (applicants). However, the originally EWS candidates (applicants) are completely side tracked. We agree with the submissions that the Government is inclined to give supernumerary posts to E.W.S is illegal & unjust. If, at all, supernumerary posts are to be offered they are to be given to the persons who are allowed to shift from SEBC category to EWS category.

52. The submissions made by the learned counsel for the Respondents are required to be reproduced. However, such relief of supernumerary posts may be considered by the Government for the originally S.E.B.C candidates and not for E.W.S candidates. on the point of retrospective effect to migrate and equitable relief. The reliance is placed on the decision in the case of **Gaurav Pradhan & Ors Vs. State of Rajasthan & Ors, CIVIL APPEAL NO. 8351 OF 2017 [ARISING OUT OF SLP (C) NO. 30603 OF 2014], the**

“The reserved category candidates who were appointed on migration against unreserved vacancies are not at fault in

any manner. Hence, we are of the opinion that SC/ST/BC candidates who have been so migrated in reserved vacancies and appointed should not be displaced and allowed to continue in respective posts. On the other hand, the unreserved candidates who could not be appointed due to the above illegal migration are also entitled for appointment as per their merit. The equities have to be adjusted by this Court.”

53. It is settled position that the candidates who successfully clear the examination have no vested right to be appointed. However, they have reasonable and legitimate expectations to be considered for appointment when vacancies are available. An order of appointment is subject to judicial review on the grounds of illegality, non-application of mind, malafides, etc., and a wrongful denial of appointment is also subject to judicial review. Learned Senior Counsel, Learned C.P.O and learned counsel for the private Respondents while defending the action of the Respondent-State of changing the eligibility in the midway have submitted that it was an extraordinary circumstance and no person should be sufferer because of the orders of the Court. We would like to clarify that the candidates who have appeared for these examinations are not suffering because of the order of the Hon'ble Supreme Court in the case of **Dr. Jaishri Patil (supra)**, but the real cause is a erroneous policy decision taken by the Respondent-State of Maratha reservation. The said mistake was corrected by the Hon'ble Supreme Court in the case of **Dr Jaishri Patili (supra)** and therefore, the arguments of the learned Senior Counsel that the candidates are suffering because of the decision of the Hon'ble Supreme Court are misleading and hence rejected. We also fail to understand what is the extraordinary situation in this case.

54. Every Government decision/policy has to pass the test of fairness and appointments to be examined on the basis of Constitutional provisions, prevailing rules and the steps taken by the Government in the process of selection. The arguments of learned Senior Counsel, learned C.P.O and the learned counsel for the private Respondents that Government issued the G.R of 23.12.2020 on account of the interim stay granted by the Hon'ble Supreme Court directing the Respondent-State not to fill up the posts under Maratha reservation are not convincing. We have already discussed about the orders passed by the Hon'ble High Court, Aurangabad Bench in the case of **Sheetal Zirpe Vs. State of Maharashtra, W.P 8072/2020**. Moreover, the said order was not mandatory in nature, but it was left to the State of Maharashtra to take policy decision regarding S.E.B.C candidates to allow in E.W.S category in view of the order passed in the case of **Dr. Jaishri Patil (supra)**. The Respondent-State without withdrawing their earlier G.Rs, issued fresh G.R dated 23.12.2020. The said G.R is completely against the reservation policy of E.W.S under Article 16(4) & 16(6) of the Constitution, which is further confirmed by the Hon'ble Supreme Court in the case of **Janhit Abhiyan (supra)**.

55. Learned Senior Counsel and learned C.P.O has tried to impress upon us had the Hon'ble Supreme Court not struck down the Maratha reservation the present situation would not have occurred. Under Article 14 when this group is excluded from SEBC they are entitled to apply in EWS category. They cannot be denied both the reservations. This argument prima facie though appealable, after close scrutiny of the law and the facts discussed above, it does not stand to the test of legality and the reason. Exclusion of Maratha candidates from S.E.B.C is not necessarily converse of inclusion of Maratha Caste in E.W.S in this midway at

this late stage of selection. The process of selection of 2019 were already commenced in the year 2019, the candidates from Maratha are otherwise undoubtedly entitled to be compete in open general. It is to be noted that as per G.R of 23.12.2020, option to S.E.B.C to E.W.S was made retrospectively applicable for the recruitment process of the year 2020-2021. The recruitment in all the present Original Applications is of the earlier year 2019-2020. Admittedly, Respondent-M.P.S.C has taken a stand in the present matter that the M.P.S.C did not act on the basis of G.R dated 23.12.2020 allowing originally SEBC candidates to apply under E.W.S category. However, on the basis of G.R dated 23.12.2020, the last G.R dated 31.5.2021 was issued. Moreover, while issuing the G.R dated 23.12.2020 earlier G.R of 12.2.2019 was never withdrawn. The entire tone of all these G.Rs dated 23.12.2020, 31.5.2021 and 5.7.2021 is that they are issued and SEBC is allowed to opt for E.W.S reservation only pursuant to the order by the Hon'ble Supreme Court. Though the SEBC reservation was struck down the candidature of SEBC was never cancelled and they were to be considered from the open category. The EWS reservation is a vertical reservation and creation of the legislature which is a Constitutional provision. Allowing option to EWS to SEBC while the MSEB Act was in force on 23.12.2020 is as good as having two sides of bread buttered.

56. Thus, we hold that as per law of precedence, all the three cases are covered under the ratio laid down in the case of **Alase (supra)**. Applicant No. 3 Mr Sohel Ekramtulla Shaikh in O.A 814/2022, has produced copy of the order of the Hon'ble Supreme Court dated 24.1.2023, in Special Leave to Appeal (C) No (s) 21238-21245/2022, Maharashtra State Electricity Distribution Company Ltd Vs. Vikas Balwant Alase & Ors, challenging the order of the Hon'ble Bombay High Court, thereby dismissing the same.

57. The Government has power and authority to make unilateral amendment in the Rules without consent of the Government employee. However, such an act of the Government is subject to the provisions of the Constitution and the principles of natural justice. If not followed then power of judicial review is invoked. In the case of ***Kumao Mandal Vikas Nigam Ltd Vs. Girja Shankar Pant, AIR 2001 SC 24***, this Court held:-

“The doctrine (natural justice) is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action.”

58. As mentioned above out of 134 posts, on 117 posts the candidates from S.E.B.C caste are selected in EWS category and thus on account of changing eligibility in the midway originally EWS candidates are adversely affected. The procedure adopted in the recruitment of State Tax Officers in O.A.NO.281/2022 is a complete deviation from the settled law and against fairness and equity. The Respondents indeed went overboard in accommodating SEBC candidates under EWS reservation and it cancelled the final select list of the applicants, revised the same wherein all the candidates from Maratha caste who opted for EWS reservation are found meritorious. Hence, on all the 13 posts today the candidates from Maratha Caste are appointed. It appears that the Respondent-State was aware of this deviation and therefore by way of compensation have enacted the supernumerary post by Act dated 24th August, 2020, thereby giving protection to all the original EWS candidates by offering them the supernumerary posts. This action is arbitrary, unjust and shocks the judicial conscience. Learned Counsel Mr. Yaseen has pointed out that the Respondent-Government has not yet issued the orders of appointment of the applicants under the garb of verification of the documents. Under no circumstances the applicants can be treated and appointed on the supernumerary post, when they are eligible

and entitled to be appointed on the regular post, when they are selected.

59. In view of the above, we pass the following order:-

- (a) The Original Applications are partly allowed.
- (b) Being contrary to the provisions of Articles 16(4) & 16(6) of the Constitution of India, the G.R dated 23.12.2020 is illegal and void as it was issued when the S.E.B.C reservation was in existence. Hence, it is quashed and set aside.
- (c) The G.R dated 31.5.2021 is held as not applicable to the present selection process in these applications retrospectively.
- (d) The select list dated 20.6.2022 in O.A 814/2022, select list dated 23.7.2021 in O.A 280/2022 & select list dated 14.7.2022 in O.A 281/2022, qua E.W.S candidates are hereby quashed and set aside. The Respondents are directed to prepare the final select list of the originally E.W.S candidates and recommend within four weeks. Remaining select lists except E.W.S in respective examinations are kept intact.
- (e) The applicants in O.A 281/2022 cannot be appointed on supernumerary posts. The earlier recommendations given by M.P.S.C about the applicants are to be considered by the Respondent-State while filling up the posts. The names of the applicants, if found eligible are to be recommended to the Government, within one month.

Sd/-
(Medha Gadgil)
Member (A)

Sd/-
(Mridula Bhatkar, J.)
Chairperson

Place : Mumbai
Date : 02.02.2023
Dictation taken by : A.K. Nair.