

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL  
MUMBAI**

**ORIGINAL APPLICATION NO.21 OF 2021**

**DISTRICT : SANGLI**

1. Sandeep Suresh Mali, )  
R/at : Deorashtre, Tal-Kadegaon, )  
Dist-Sangli 415 303. )
2. Pundalijk Maroti Vyahadkar, )  
R/at : Pipari Deshpande, )  
Post Govardhan, Tal-Pombhurna, )  
Dist-Chandrapur. )
3. Swapnil Machhindra Hinge, )  
Dist-Pune. )
4. Sukhdeo Gopinath Rathod, )  
R/at : Loni Tanda, Post-Babhalgaon )  
Tal-Pathari, Dist-Parbhani. )
5. Sayed Habib Rashidmiya, )  
R/at:Plot No. 8, Opp Abrar Function) )  
Hall, Waghi Road, Barkatkpura, )  
Nanded 431 601. )
6. Saipan Maula Nadaf, )  
R/at: Aherwadi, Tal-South Solapur. )  
Dist-Solapur 413 215. )

**...Applicant**

Versus

1. Maharashtra Public Service )  
Commission, Through its Secretary, )  
Having office at 5 ½, 7 & 8<sup>th</sup> floor, )  
Cooperage Telephone Exchange Bldg,)  
Maharshi Karve Road, Mumbai. )
2. The Director General and Inspector )  
General of Police, M.S, Mumbai. )  
Having office at Old Council Hall, )  
S.B.S Marg, Mumbai 400 039. )

3. The State of Maharashtra, )  
Through Principal Secretary, )  
Home Department, Mantralaya, )  
Mumbai 400 032. )
4. The State of Maharashtra, )  
Through Principal Secretary, )  
General Administration Department,)  
Mantralaya, Mumbai 400032. )
5. The Maharashtra Police Academy )  
Through its Additional Director )  
General of Police, [Training], )  
Nasik 422007. )
6. Maharashtra Police Academy, )  
Through its Additional Director )  
General of Police, [Training], )  
Having office at Trimbak Road, )  
Nasik 422007. )
7. Balu Popat Shirsat, )
8. Ravindra Vishwasrao Kakde )
9. Rajesh Keshavrao Dongre )
10. Vishnu Govinda Wagh. )
11. Jitendra Murlidhar Patil )
12. Ajmodeein Pashamiya Shaikh )
13. Kishor Bapu Bacchav )
14. Reshim Bhanudas Kolekar )
15. Sunil Parashram Bidkar )
16. Shedge Aniket Vitthal )
17. Pavan Shahurao Nimbalkar )
18. Prasad Dileep Kolape )
19. Sandip Nanaso Sonwalkar )  
[All the Respondents having address )  
at C/o: Through the Director, )  
Maharashtra Police Academy, )  
Trimbak Road, Nasik 422 007. )...**Respondents**

Mr. A.A. Desai & Mr. S.D. Patil, learned Advocates for Applicants.

Ms. S.P. Manchekar, learned Chief Presenting Officer for Respondents No.1 to 6.

Mr. S.S. Ghumare, learned Advocate for the Respondents No.7, 8, 10, 12, 14 to 19.

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

**RESERVED ON** : **04.08.2022**

**PRONOUNCED ON** : **19.09.2022**

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

### **J U D G M E N T**

1. The Hon'ble High Court by order dated 22.12.2021, in W.P 8319/2021, wherein the interim order dated 6.7.2021 passed by this Tribunal was challenged, remanded the O.A. for fresh consideration.

2. The applicants have approached the Tribunal with a peculiar prayer that the Respondent No. 1, M.P.S.C, be directed to migrate the candidates appointed on the posts reserved for Other Backward Class category (OBC) or De-notified Tribe (DT-A) reserved categories, to Open Category since they have secured more marks than the cut-off marks of the Open General Category. Further prayed that such shifting will lead to vacancies of the posts of P.S.I in the category of OBC and (DT-A) category so that the present applicants from the said reserved category can be accommodated in those reserved categories. If this Original Application is allowed then consequently the candidates who are appointed in Open General Category standing at the bottom will be removed and therefore these 13 persons are added as Party Respondents no 7 to 19. The applicants further pray that the merit list declared by Respondent no. 1 in Notification bearing ref no. NOT-3617/CR-22/2017/3 and advertisement No. 66 of 2017 dated 3.10.2017 for recruitment to the

posts of P.S.I be quashed and set aside and a fresh merit list in the process of recruitment of the post of P.S.I be prepared. The applicants further challenge the legality of Rule 8(ii)(b) &(c) to be declared as unconstitutional and ultra virus of Articles 14, 16 and 335 of the Constitution of India.

3. Learned counsel for the applicants Mr Desai has submitted that the applicants are wrongly not considered by the M.P.S.C due to its inaction to shift the 13 candidates from the reserved categories, i.e. OBC and (DT-A) in the Open General Category. Learned counsel for the applicants submitted that applicants have secured more than the cut-off marks of the Open Category. Learned counsel for the applicants submitted that his submissions are squarely within the corners of the ratio laid down in the judgment of the Hon'ble Bombay High Court in the case of VINOD D. DHORE & ANR Vs. THE SECRETARY, M.P.S.C & ORS, W.P 11970/2017, judgment of this Tribunal dated 27.3.2019 in SACHIN R. CHOUDHARY & ORS Vs. THE STATE OF MAHARASHTRA & ORS and judgment of the Hon'ble Supreme Court in JITENDRA KUMAR SINGH & ANR Vs. STATE OF UTTAR PRADESH & ORS (2010) 3 SCC 119. Learned counsel has submitted that the case of Niravkumar D. Makawana, which is relied by the Tribunal at the time of deciding the issue of interim relief is not applicable. However, the ratio laid down in the case of JITENDRA KUMAR SINGH, is squarely covered as the Recruitment Rules for the post of P.S.I in Gujarat and Maharashtra are the same. However, the State of Gujarat has issued one Government Resolution, specifically restricting the migration of the reserved categories if they have availed of concessions in fees and age. Learned counsel has submitted that M.P.S.C on similar lines has issued Notification "पुनः घोषणा". However, it was struck down by this Tribunal by order dated 27.3.2019 in the case of Sachin R. Choudhary & Ors, O.A 934/2018. Learned counsel has further

submitted that in the case of VINOD DHORE (supra), the Hon'ble Bombay High Court has held that though candidates applying from the reserved category has availed of concessions in fees and age can compete in the Open General Category if he/she has secured more marks than the cut-off marks fixed in Open General Category. Learned counsel for the applicants has submitted that as per the decision of the Hon'ble Supreme Court in the case of INDIRA SAWHNEY & ORS Vs. UNION OF INDIA & ORS, AIR 1993 S.C 477, there is no embargo in availing of concession and claiming benefits of reservation and such concessions are just supplemental to reservation.

4. Learned counsel produced the chart of the cut-off marks fixed for Open General Category, O.B.C and (DT-A) category for the candidates appearing for the examination of P.S.I, pursuant to the advertisement dated 26.4.2017. Learned counsel has submitted that the cut-off marks for Open General Category was 237, for OBC it was 232 marks and for (DT-A) it was 240 marks and the marks obtained by each of the applicants is just below the cut-off marks fixed for OBC and (DT-A) category. The M.P.S.C has failed to consider these meritorious candidates from the reserved categories though they compete with the candidates from the Open General Category and this had caused injustice to the present applicants. Learned counsel for the applicants submitted that this issue was taken up by the Home Department who had sought opinion from the Law & Judiciary Department and the said opinion of the Under Secretary, Law & Judiciary Department dated 15.1.2018 is in favour of the applicants. Learned counsel for the applicants submitted that as now the age relaxation clause is removed by M.P.S.C, it speaks in volume.

5. Learned C.P.O. relied on the short affidavit-in-reply dated 30.11.2021, on behalf of Respondent No.1 through Mr. Bhalchandra Pandurang Mali, working as Under Secretary, in the office of Secretary, M.P.S.C., Mumbai (page 205 to 211). She pointed out Clause 4.17, (page 40-41) of the advertisement for Preliminary Examination dated 16.07.2017 and also Clause 3.11, (page 44) of the advertisement for the Main Examination dated 03.10.2017. She explained that in both the Clauses the M.P.S.C. has declared that the candidates from the reserved category who have taken benefits of concession of age and fees etc. will not be allowed to migrate in the Open Category. She submitted that thus the M.P.S.C. followed the Rule of no migration consistently from 2014 to 2017 till the judgment of the Hon'ble Bombay High Court in *Vinod D. Dhore & Anr. Versus The Secretary, M.P.S.C. & Ors. in Writ Petition No.11970/2017 dated 20.12.2017*, which has dealt with more on the concession of fees and not on concession of age. She admitted that on the decision in the case of *Sachin Raghunath Choudhary Versus The State of Maharashtra, O.A.No.934/2018 dated 27.03.2019* (page 416) the said pronouncements dated 19.09.2014 and 25.09.2014 was withdrawn by the M.P.S.C. She submitted that in the present case the process was completed on 08.03.2019. The demand of the applicant of applying decision of *Choudhary (supra)* retrospectively is not correct, in which pronouncement of 25.09.2014 was cancelled. She submitted fresh additional affidavit-in-reply dated 04.08.2022 on behalf of Respondent No.1, through Mr. Dilip Arjun Waghe, working as Under Secretary, in the office of Secretary, M.P.S.C., Mumbai wherein she presented the chart of the marks obtained by the Applicants, Respondents and the candidates who are selected and appointed in reserved category but who have secured more than cut-off marks in the Open Category. She tallied the marks demonstrated on the basis of the chart as to how the decision of the M.P.S.C. was correct. She further argued that Rule 8.2.B and 8.2.C

are very much applicable in this case. She therefore prays that O.A. is to be dismissed.

6. Learned Chief Presenting Officer has argued that the State has relied on the judgment of Hon'ble Supreme Court in the case of *Niravkumar D. Makwana Versus Gujarat Public Service Commission, Civil Appeal No.5182/2019 arising out of SLP (C) No.3938/2018* which on the facts is similar to the present case. Though admittedly no Government Resolution (G.R.) is issued by the State of Maharashtra restricting the migration of the meritorious reserved candidates in the Open Category unlike the G.R. issued by the State of Gujarat and which was dealt in the case of *Makwana (supra)*. However, she submitted that the facts of the judgment of Hon'ble Supreme Court in the case of *Jitendra Kumar Singh & Anr Versus State of Uttar Pradesh & Ors. (2010) 3 SCC 199* are different as at the relevant time the Rules were framed in the State of Uttar Pradesh regarding migration. Learned C.P.O. submitted that the M.P.S.C. declared the policy in the both the advertisements of Preliminary and Main Examinations, about no migration of the candidates of the reserved category in Open Category will be allowed once they opt to submit their candidature in the reserved category.

7. Learned Advocate Mr. Desai by way of reply has again relied on the judgment of *Vinod Dhore's case (supra)* that though the benefit of concession of age and fees relaxation is availed of by the candidates they should have been allowed to migrate from the Open General Category as they have secured more marks than the cut-off marks of the General Category. He further submitted that the Government cannot say that the participation in the selection process will bar the candidates from raising the point of selection. On this point he relied on the judgment of Hon'ble Supreme Court in the case of *Dr. (Major) Meeta Sahai Versus State of Bihar and Other,*

reported in (2019) 20 SCC 17, wherein the rights of the Appellant are crystalized after participating in the selection process. He further relied on the judgment of Hon'ble Supreme Court in the case of *Inder Parkash Gupta Versus State of Jammu and Kashmir, Appeal (civil) No.3734 of 2002, dated 20.04.2004*. He argued that the policy decision of M.P.S.C. should be in consonance with the relaxation and M.P.S.C. cannot take unilateral decision of disallowing migration. He further argued that all the applicants have secured above 46 marks in preliminary examination. He submitted that individual marks of each examination are to be taken into account but the total cumulative marks are to be considered and thus the pattern adopted by M.P.S.C. is wrong. If the meritorious persons from the reserved category would have migrated in Open Category then the cut-off marks for OBC from 232 would have gone down to 230 or 231 so that the applicants could have entered the mark list and would have been selected for the post. Under such circumstances it is to be allowed.

8. Learned counsel for the applicants pointed out that in the advertisement dated 26.4.2017 clause no 8(ii) is mentioned and it is to be declared ultra-virus. Rule 3(c) of the Maharashtra Public Service Commission Rules of Procedure (Amendment) Rules, 2017, is reproduced below:-

“3. In Rule 8, sub-clause (ii) shall be substituted as under:-  
“(ii)(a) While shortlisting candidates for the Main Examination from the Preliminary Examination, the cut-off marks shall be fixed in such a manner that the number of candidates available for the Main Examination shall be 12 times of the number of posts available for recruitment.

(b) After fixing the cut-off line of marks as at (a) above, it should be ensured that the available candidates for each category are 12 times the number of posts advertised in the respective categories. If the number of candidates is short of 12 times of the posts advertised, the cut-off line of marks so fixed shall be brought down so as to have 12 times candidates in each respective category.



(c) The additional candidates so qualified for the Main Examination by relaxing the cut-off line, as per clause (b) above shall be eligible only for the posts of their respective category.”

Learned counsel has relied on the R.T.I information received by the applicants (page 103 & 104) wherein it is mentioned that the applicants were not considered in view of Rule 3 (c) of the Maharashtra Public Service Commission Rules of Procedure (Amendment) Rules, 2017. We have gone through the entire Rule 3(a), (b) & (c). We are of the view that considering the marks obtained by the candidates and 12 times category rule followed by the M.P.S.C, the applicants do not fall under Rule 3(b) and 3(c) and therefore, their cases are not covered under these rules. Hence, the information received under R.T.I is incorrect and irrelevant. Therefore, the prayer to declare clause 8(ii) as ultra- virus and illegal does not stand and is without merit.

9. As pointed out by learned Advocate for the Applicant in the case of *Makwana (supra)*, the Government of Gujarat had issued a special G.R. stating that the candidates who have availed of relaxation/ concession in age and fees are not entitled for migration. While the State of Maharashtra has not issued such G.R, so we accept that the facts of the present case are distinguishable on this point. While deciding interim relief we have lost the sight of that particular G.R. as it was not placed before us.

10. In the 'पुनः घोषणा' dated 25.9.2014, M.P.S.C has declared that if the concession in age and fees and other eligibility criterion is availed of by any candidates of reserved category, then they are not entitled to migration to open general category. In the case of **Sachin Raghunath Choudhary Versus The State of Maharashtra, O.A.No.934/2018 dated 27.03.2019**, the 'pronouncement' i.e. 'पुनः घोषणा' dated 25.9.2014 was quashed and set aside by the Tribunal.

11. It is true that in the judgment of VINOD DHORE(supra), the Hon'ble High Court dealt with mainly the relaxation of fees and not of age. However, there is a passing relevance of relaxation of age also. In the case of **SAURAV YADAV & ORS Vs. STATE OF UTTAR PRADESH & ORS, AIR 2021 S.C 233**, wherein the Hon'ble Supreme Court held that:-

“35. We must also clarify at this stage that it is not disputed that the Appellant No. 1 and other similarly situated candidates are otherwise entitled and eligible to be appointed in ‘Open/General Category’ and that they have not taken or availed of any special benefit which may disentitle them from being considered against ‘Open/General Category’ seat.”

Thus, the horizontal migration is allowed with the following rider. The case in hand is not pertaining to horizontal reservation but a vertical migration of the OBC candidates to General Open Category which is required to be followed in view of Indra Sawhney's case, (1992) Supp (3) SCC 217 & R.K Sabharwal's case AIR 1995 S.c 1371, as the candidates have secured more marks than the cut-off marks of the general category candidates. The applicants' case is supported by the ratio in the case of **Bharat Sanchar Nigam Limited & Anr.**

12. We rely on the judgment of Hon'ble Supreme Court in the case of **Bharat Sanchar Nigam Limited & Anr. Versus Sandeep Choudhary 7 Ors. reported in 2022 Live Law (SC) 419** which is the case where similar situation arose wherein the reserved category candidates, the Original Appellants had approached the Central Administrative Tribunal at Jodhpur Bench who allowed the O.A. The Original Appellants were from the reserved category, however they have secured higher marks than cut-off marks of the General/ Open Category candidates. However, the Appellants, Bharat Sanchar Nigam allow the migration of the meritorious Reserved Category candidates to Open Category. Therefore, the Appeal was filed by the

Bharat Sanchar Nigam before the Hon'ble Supreme Court. The Hon'ble Supreme Court held that the migration of the deserving meritorious reserved category candidates should take place during the selection process and while applying the selection process merit must be given precedence and the reserved category candidates must be considered against the seat meant for unreserved candidates. It further held that:-

*“11. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. The High Court has rightly observed and held that two reserved category candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar having more marks than the general category candidates appointed, were entitled to the appointment in the general category and the seats reserved for OBC category were required to be filled in from and amongst the remaining candidates belonging to the OBC category. Consequently, respondent No.1 – original applicant was entitled to the appointment on such post. However, at the same time in exercise of the powers under Article 142 of the Constitution of India, it is observed and directed that on reshuffling, the two candidates belonging to general category shall not be removed from service as they are working since long. However, at the same time, the respondent No.1 shall be entitled to the seniority from the date, the general category candidates having lesser marks than the aforesaid two reserved category candidates were appointed.”*

13. The submissions made by the learned C.P.O that the applicants once participated in the selection process, will not be allowed to question the same process of selection is not sustainable in view of the ratio laid down in the case of Dr. (Major) Meeta Sahai Versus State of Bihar and Other, (2019) 20 SCC 17. The basic law that once you participated in the process of selection, then normally the candidate cannot challenge the same process is a general principle. However, in Meeta Sahai's case (supra) the law is taken further, wherein the Hon'ble Supreme Court has differentiated the said principle in so far as when the candidate agrees to participate the selection process at that time, he accepts only the prescribed

procedure and not the illegality in it. So the candidate is not estopped from challenging the alleged misconstruction of statutory rules or discriminatory consequences arising therefrom. The Hon'ble Supreme Court has further held that a candidate cannot have locus to assail the incurable illegality or derogation from the provisions of the Constitution unless the candidate participates in the selection process. Thus, in the present case, the derogation from the rule of law allowing the migration from reserved category to general open category was revealed only when the select list was declared. Thus, the challenge to locus of the applicants is not maintainable.

14. We reproduce a tabular Chart of the marks obtained by the applicants and the cut-off marks of OBC candidates and Open General category candidates.

**MAHARASHTRA PUBLIC SERVICE COMMISSION  
POLICE SUB INSPECTOR EXAMINATION – 2017**

Sr No	Candidate Name	Applied Category	Preliminary Exam		Main Exam			Final Result				Availed Facility in age or Exam Fees
			Standard	Open Cut off	Marks Obtained	Respective Category Cut off	Open Cut off	Total marks obtained	Respective Category Cut off	Open Cutoff	Reco. Category	
1	Mali Sandip Suresh	OBC	HIGH	46	116	109	116	231	232	237	NOT RECOMMENDED	NO
2	Vyhadkar Pundlik Maroti	OBC	HIGH	46	111	109	116	231	232	237	NOT RECOMMENDED	NO
3	Hinge Swapneel Machhindra	OBC	HIGH	46	109	109	116	231	232	237	NOT RECOMMENDED	NO
4	Sukhadev Gopinath Rathod	DT(A)	HIGH	46	117	115	116	237	240	237	NOT RECOMMENDED	NO
5	Syed Habib Rashidmiya	OBC	HIGH	46	109	109	116	231	232	237	NOT RECOMMENDED	NO
6	Saipan Maula Nadaf	OBC	HIGH	46	112	109	116	231	232	237	NOT RECOMMENDED	NO

15. However, we need to point out the time sequence which goes against the applicants. The advertisement was issued on

26.4.29017, the preliminary examination was conducted on 16.7.2017. The Main Examination was conducted on 3.10.2017. The select list was declared and the entire selection process was over and the names of the candidates were recommended on 8.3.2019. The challenge should have been raised by the applicants immediately as the selected candidates, i.e. the Respondents who are from the open category were given appointments and they have also started working from 2019. Learned counsel for the applicants has submitted that the applicants had knowledge of such deviation from the law of alleged migration only after the applicants' sought information under the R.T.I. The R.T.I application was submitted by the applicants on 3.1.2020 and copy of the information was given by Respondent no. 1 on 3.2.2020. This delay cannot be justified for any satisfactory reason. When the names of eligible candidates were recommended on 8.3.2019, the applicants had knowledge that their names are not included in the said list, then they should have immediately moved the application under R.T.I in March or April, 2019. Within a month from the date of the application, the information was furnished by Respondent no. 1 i.e. on 3.2.2020. Had the application been moved earlier, then this Original Application would have been filed earlier well within the time. The Original Application was not filed immediately, i.e. in the month of February, 2020 but filed on 17.3.2020. After 16<sup>th</sup> March, 2020, the lock down was declared due to Covid-19 Pandemic. However, there was regularly filing in the Tribunal after July, 2020. The Original Application was filed on 7.1.2021. In between from 8.3.2019 the Respondents, private applicants have put in their respective service for a minimum of 1 to 2 years. In the case of Bharat Sanchar Nigam Limited (supra), the applicants have immediately taken a legal recourse before the available Forum. Subsequently, the matter travelled upto the Hon'ble Supreme Court and the decision regarding the examination of 2008 was given in favour of the applicants in the

year 2022. Thus, the applicants in the case of Sanchar Nigam Ltd (supra) could get the actual relief. However, in the present case as per the instructions given to us from the Respondent-State all the posts are filled up. The applicants basically approached the Tribunal when all the procedure was over. Thus, no interim order could be passed to keep some posts vacant. Under such circumstances, we feel it is unfair to terminate the services of the Respondents for no fault on their part. The said delay on the part of the applicants has defeated their own cause.

16. Under the circumstances, we pass the following order:-

- (a) The applicants prayer removing the Respondents 7 to 19 belonging to open category, from service is rejected.
- (b) In view of the judgment of the Hon'ble Supreme Court in the case of ***Bharat Sanchar Nigam Limited & Anr, (supra)***, the case of the applicants, be considered, if at all any vacancy for the post of P.S.I of the concerned year is available today. If the vacancies are available, then the applicants may be considered for appointment to the said post.
- (c) The said decision is to be taken by the Respondent-State on or before 11<sup>th</sup> November, 2022.

Sd/-  
**(Medha Gadgil)**  
**Member (A)**

Sd/-  
**(Mridula Bhatkar, J.)**  
**Chairperson**

**Place : Mumbai**  
**Date : 19.09.2022**  
**Dictation taken by : A.K. Nair.**