

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD**

ORIGINAL APPLICATION NO. 722 OF 2019

DISTRICT : - AURANGABAD

- 1. Gajanan Babulal Bansode,**
Age : 27 years, Occ.: Service as
Police Constable,
R/o Warud-Kaji, Varud,
Tq. & Dist. Aurangabad.
- 2. Wasim Hamid Shaikh,**
Age : 33 years, Occ.: Service as
Police Constable,
R/o Sohel Garden, Plot No. 54,
Ganesh Colony, Near Icon Hospital,
Aurangabad.
- 3. Yogesh Bhagwantrao Dungahu,**
Age : 29 years, Occ.: Service as
Police Constable, R/o. Police Colony,
Mill Corner, Aurangabad.
- 4. Smt. Sarita Shridhar Sakhare,**
Age : 34 years, Occ.: Service as
Police Constable, R/o. 32/10,
Police Colony, N-10,
CIDCO, Aurangabad.
- 5. Ishwar Rangnath Nagare,**
Age : 31 years, Occ.: Service as
Police Constable, R/o. Plot No. 39,
Shree Nagar, Ulka Nagari,
Garkheda Area, Aurangabad. .. APPLICANTS

V E R S U S

- 1. The State of Maharashtra**
Through the Additional Chief Secretary,
Home Department,
Mantralaya, Mumbai 400 032.

2. **The Additional Chief Secretary,**
General Administration Department,
Mantralaya, Mumbai 400 032.
3. **The Director General of Police,**
Shahid Bhagat Singh Road,
Colaba, Mumbai 400 005.
4. **Maharashtra Public Service Commission**
Cooprej Telephone Exchange Building,
Maharshi Karve Road,
Cooprej, Mumbai 400 021.
5. **Shyam Rambhau Gaikwad**
Age : 33 years, Occ: Service
(as Police Constable)
R/o. Plot No. 6, Survey No. 65/8,
Rajiv Gandhi Nagar, N-2,
Aurangabad.
6. **Deepak Dadarao Dikale,**
Age : 33 years, Occ: Service
(as Head Police)
R/o. Home No. 1124,
Sudhakar Nagar, Police Housing
Society, Satara Parisar,
Aurangabad.
7. **Amran Aslam Khan,**
Age : Major, Occ: Service
R/o. Plot No. 4, Aman Paradise,
Madina Colony, JMCT College,
Vadala Road, Nashik,
Dist. Nashik – 422 006.
8. **Anil S/o Balu Nimbalkar,**
Age : Major, Occ: Service
R/o. Khardi, Tq. Pandharpur,
Dist. Solapur
9. **Dnyaneshwar S/o. Jagannath Ghadage,**
Age : Major, Occ: Service
R/o. Arvind Dham, Police Colony,
Building No. 1, Room No. 37,
Avanti Nagar, Solapur, Dist. Solapur

- 10. Vinod S/o Bhaskar Pawar,**
Age : Major, Occ: Service
R/o. Bharat Apartment,
Room No. 15, Building No. 8,
Sector – 10, Vashi,
New Mumbai.
- 11. Navnath S/o. Balaso Pavale,**
Age : Major, Occ: Service
R/o. Room No. 230, Building No. 29
Giolibar Maidan, Godawali Police Line,
Satara, Tq. & Dist. Satara.
- 12. Ramzan S/o Madarso Shaikh,**
Age : Major, Occ: Service
R/o. New Police Line,
Building No. 1, Room No. 25,
Near Head Post Office,
Thane (West).
- 13. Niteeraj S/o. Dinkarrao Thorat,**
Age : Major, Occ: Service
R/o. Village Panda,
Tq. Wai, Dist. Satara.
- 14. Vikas S/o. Vilas Chavan,**
Age : Major, Occ: Service
R/o. Flat No. 103, New Police Line,
Chirag Nagar, Ghatkopar,
Mumbai – 86
- 15. Rahul S/o. Chandrakant Khandekar,**
Age : Major, Occ: Service
R/o. Behind Saraswati School,
Saint Para Road, Avadhoot Colony,
Akot, Dist. Akola.
- 16. Premnath S/o. Namdeo Mahajan,**
Age : Major, Occ: Service
R/o. B-2/02, Prabodhan Co-op.
Housing Society, Sector -11,
Khana Colony, New Panvel,
Dist. Raigad.

- 17. Sandeep S/o. Uttamrao Chavan,**
Age : Major, Occ: Service
R/o. Devgaon Tanda,
Post Ektuni, Tq. Paithan,
Dist. Aurangabad.
- 18. Abhijit S/o. Gorakh Kanse,**
Age : Major, Occ: Service
R/o. At Post Kumbhargaon,
Tq. Karmala, Dist. Solapur.
- 19. Satish S/o. Vinayak Bavne,**
Age : Major, Occ: Service
R/o. Room No. 504, Quarter No. 38,
SRPF Camp, Vijapur Road,
Solapur, Dist. Solapur.
- 20. Totya S/o. Anna Bhosale,**
Age : Major, Occ: Service
R/o. 197 Quarter, Saraswati Building,
Room No. 5, SRPF Camp,
Vijapur Road, Solapur,
Dist. Solapur.
- 21. Satyabhama Yeshwant Kharat,**
Age : Major, Occ: Service
At Pisewadi, Post. Velapur,
Tamalshiras, Dist. Solapur.
- 22. Dipak S/o. Dnyandeo Pawar,**
Age : Major, Occ: Service
R/o. Pipalwadi, Tq. Karmala,
Dist. Solapur.
- 23. Anna Madhukar Darade,**
Age : Major, Occ: Service
R/o. At Post. Bhalgaon, Tq. Barshi,
Dist. Solapur.
- 24. Sachin S/o Dashrath Jiri,**
Age : 31 years, Occ: Service
R/o. Police Colony, N-10,
CIDCO, Aurangabad.

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...RESPONDENTS

APPEARANCE :

Shri Ajay S. Deshpande, learned Advocate for the applicants.

Shri M.S.Mahajan, learned Chief Presenting Officer for respondent Nos.1 to 3.

Shri M.B. Kolpe, learned Advocate for respondent No.4.

Shri A.S. Deshmukh, learned Advocate for Respondent Nos. 5, 6, 71, 87, 150, 198, 211, 229, 369, 489, 511, 528, 625, 628 & 629.

Shri G.K. Kshirsagar, learned Advocate for the Respondent Nos. 221, 222, 249, 252, 296, 327, 353, 573, 581, 593, 606 & 627.

Shri S.G. Chapalgaonkar, learned Advocate for the Respondent Nos.15, 193, 194, 278, 288, 291, 331, 344, 510, 515 & 554, and,

Shri Ashish Rajkar, learned Advocate for respondent nos.105, 317, 443, 458,

Shri Sandeep Dere, learned Advocate for Respondent Nos. 20, 22, 23, 30, 33, 36, 58, 60, 75, 78, 79, 84, 90, 92, 94, 109, 111, 115, 117, 121, 123, 126, 130, 132, 133, 142 158, 162, 171, 173, 177, 178, 180, 189, 196, 200, 205, 209, 210, 213, 216, 218, 226, 240, 248, 255, 258, 260, 267, 271, 272, 594, 277, 279, 298, 303, 309, 315, 320, 325, 326, 339, 343, 349, 351, 356, 359, 372, 377, 382, 390, 391, 400, 402, 407, 411, 412, 415, 417, 422, 426, 428, 436, 442, 450, 451, 453, 458, 467, 475, 477, 478, 479, 488, 491, 500, 502, 512, 514, 517, 533, 535, 536, 541, 545, 550, 367, 560, 563, 565, 568, 569, 596, 603, 618, 619, 624, 626, 630, 634, 636 & 638.

CORAM : Hon'ble Shri Justice P.R.Bora, Member (J)

AND

Hon'ble Shri Bijay Kumar, Member (A)

Decided on : 04-03-2022

ORDER
(Per : Justice P.R. Bora, Member (J))

1. The legality of the Government Resolution dated 22.04.2019, whereby the Home Department of the State has resolved to absorb 636 candidates over and above 828 candidates already selected, who have secured 230 and above marks for their appointments on the post of Police Sub Inspector on the vacancies, which may arise in future in phase-wise manner in the quota meant for the candidates passing the Limited Departmental Competitive Examination (L.D.C.E.), is questioned in the present O.A. and the quashment is sought of the said G.R.

Facts in brief:-

2. On 27-06-2016 an advertisement was published by the Home Department of the State of Maharashtra for filling in the 828 posts of Police Sub Inspector by selection on the basis of the LDCE. Out of total 828 posts advertised, 642 posts were the Open seats and 186 posts were reserved for the candidates belonging to the respective reserved categories. As per the advertisement so published, the LDCE was held on 21-08-2016. Result of the said examination was declared on 05-05-2017. In view of some

orders passed by the Hon'ble Bombay High Court and the Hon'ble Supreme Court in regard to the age criteria, the result published on 05-05-2017, was modified by the MPSC and the modified result was published on 12-12-2017. Respondent no.1 then forwarded the recommendation list of 828 candidates received from the MPSC to respondent no.3 i.e. Director General of Police, Maharashtra State for further necessary action vide letter dated 15-12-2017. Said list was containing the names of 186 candidates belonging to various reserved categories selected on the basis of criteria set for the reserved candidates as per the requisition sent to the MPSC. Respondent no.3 then issued letter dated 26-12-2017 to the various concerned Police Units to relieve total 781 candidates out of 828 on 04-01-2018 for the Police Sub Inspectors Training at Nashik scheduled from 08-01-2018. Remaining 47 out of 828 candidates were not sent for training in view of the pending departmental enquiry proceedings against them.

3. In the meanwhile, the Hon'ble Bombay High Court delivered the judgment on 04-08-2017 and thereby struck down the G.R. dated 25-05-2004, providing reservation in promotion in favour of the candidates belonging to SC, ST, etc. In view of the said decision, respondent nos.1 to 3

were expected to fill up the 828 posts so advertised, by selecting the candidates purely on merits without any reservation. As such, the respondents could not have sent 186 candidates from the reserved category who got the said benefit because of the policy of reservation contained in G.R. dated 25-05-2004. Since the candidates belonging to reserved class were already sent for training, it appears that the State Government did not find it appropriate to call them back or to undo promotions given to the said candidates. The State Government, in the circumstances, took a decision to accommodate 186 additional candidates from the unexhausted merit list. At that time, it was revealed that 32 candidates though were belonging to reserved category, have secured the meritorious position so as to get appointment in the Open category. In the circumstances, decision was taken to call the list of next 154 candidates in order of merit and to send them also for training.

4. In view of the fact that G.R. dated 25-05-2004, providing reservation to the reserved class candidates was set aside, first the decision was taken to additionally take equal number of candidates from the Open category i.e. 154 candidates since the representations were received from

such candidates and in support of the representations so made by the said candidates some of the Peoples' Representatives have also pursued the said matter with the Government. In the circumstances, the decision was taken to also issue them the appointments, however subject to the outcome of the Special Leave Petition pending before the Hon'ble Supreme Court. After the 154 candidates were sent for training, various other candidates submitted representations claiming that inspite of having more than 230 marks in the examination, they are not sent for training. The representations in this regard were also received from the Peoples' Representatives, and in the circumstances, the State Cabinet in its meeting dated 20-02-2019 took a decision to accommodate 636 candidates who have secured 230 and above marks in the merit list published by MPSC on the vacancies which will occur in future in the quota for LDCE (25%) and resultantly, G.R. dated 22-04-2019 came to be issued which is under challenge in the present O.A.

Submissions by respondents:-

5. The contentions raised in the O.A. and the prayers made therein are opposed by the respondents. Initially a short affidavit in reply sworn by Shri Nandkishor Eknath

Phondke, Under Secretary in the office of Home Department was filed. In the said short reply the State Government has raised a plea that in the peculiar circumstances the Government has taken a policy decision to accommodate 636 candidates, who have secured 230 and above marks from the merit list published by the M.P.S.C. on the post of P.S.I. on the vacancies, which may arise in future in the quota meant for LDCE. It has been further contended in para 13 of the said reply that proposal is sent by the Director General and Inspector General of Police, Maharashtra State, Mumbai regarding strengthening the police force and creation of additional posts, in which 6659 posts of P.S.I. are included, and the said proposal is under consideration of the Government and therefore the prospects of applicants would remain unaffected since the applicants would have opportunity to compete for the substantive vacancies in their quota.

6. Private respondents have filed their replies opposing the contentions raised in the application and prayers made therein. We need not to reiterate the contentions raised in each of the said reply. The sum and substance of the contentions raised in all these replies is that no illegality has been committed by the respondent nos. 1 to 3 in

issuing the G.R. dated 22.4.2019, thereby absorbing 636 candidates on the posts of PSI as and when the vacancies would arise in future from the 25% quota of the candidates passing the LDCE. Locus of the applicants has also been seriously disputed by these respondents.

7. Subsequently, Shri Vyankatesh Madhav Bhat, Joint Secretary in the office of Home Department filed affidavit in reply on behalf of the respondent nos. 1 to 3. In the said reply the respondents have explained in what circumstances the Government was required to take a policy decision to absorb 636 candidates, who have received more than 230 marks, which has culminated in issuance of G.R. dated 22.4.2019. Along with said reply the respondent nos. 1 to 3 have annexed two opinions received from the Law & Judiciary Department; first dated 15.01.2018 and other dated 31.01.2019. The order passed by the Hon'ble Supreme Court in Civil Appeal No. 104/2021 has also been annexed along with the said reply as Exhibit R-2.

8. On behalf of respondent no. 4 the Under Secretary of the Commission Shri Dilip Arjun Waghe has filed the affidavit in reply. The main contention in the said affidavit

in reply is that the Government Resolution dated 22.4.2019 violates the provisions under Article 320(3) of the Constitution of India as there is no consultation by the State with the Commission prior to issuance of the said G.R. It is the further contention of respondent No. 4 that the said G.R. also violates the provisions under Rule 4 and 5 of the Recruitment Rules of 1995. It is also contended that the candidates sought to be appointed vide G.R. dated 22.4.2019 were never recommended by the Commission. It is however, admitted that 636 candidates in whose respect the impugned G.R. has been issued were from the merit list published on Commission's website on 6.1.2018. Along with the affidavit in reply the MPSC has filed on record the letter dated 3.12.2019 sent by the MPSC to the respondent No. 1. The copy of the letter written by the learned Chairman of the MPSC to the learned Chief Secretary of the State on 25.6.2020 is also placed on record.

Argument on behalf of the applicants:-

9. The learned Counsel for the applicants has assailed the decision taken by the Government vide G.R. dated 22.4.2019 to absorb 636 candidates to be arbitrary exercise of powers in violation of articles 14 & 16 of the Constitution of India. The learned Counsel submitted that the said

decision has serious ramifications as the appointments of 636 candidates in excess of 828 already selected would certainly have the effect of distortion of the quota of 25% prescribed by Recruitment Rules of 1995 and would curtail future promotional opportunities of the candidates like the applicants. The learned Counsel rejected the objection as of locus of the applicants stating that every member of the Police constabulary of the State can be aggrieved person on account of accommodation of 636 candidates on the promotional post of PSIs.

10. Relying on the judgment of the Hon'ble Supreme Court in the case of **Arup Das & Ors. Vs. State of Assam and Ors. (2012) 5 SCC 559**, the learned Counsel argued that the question that deserves advertence is as to whether a civil post under the State can be permitted to be filled in, in violation of the equality principle enshrined under articles 14 & 16 of the Constitution of India. The learned Counsel further submitted that the reasons as are assigned in the G.R. dated 22.4.2019 that the representations were received from the candidates concerned as well as from peoples' representatives can by no stretch of imagination be construed as sufficient reason to fill in disproportionately large number of vacancies than the notified vacancies. The

learned Counsel further submitted that the opportunities for the candidates like the applicants will be absolutely blocked if G.R. dated 22.4.2019 is implemented. The learned Counsel submitted that no future vacancies can be permitted to be filled in by the State authorities in the manner they are sought to be filled in.

Arguments by Respondents :-

11. Shri Avinash Deshmukh, the learned counsel for the respondents has raised some preliminary objections, which according to the learned counsel disentitle the applicants from seeking any relief from this Tribunal. It was the contention of the learned counsel that having considered the conduct of the applicants no relief deserves to be granted in their favour. It is the further contention of the learned counsel that O.A. filed challenging the G.R. dated 22.4.2019 and praying for its quashment without adding even a single candidate from out of 636 candidates, who are beneficiaries of the said G.R. is liable to be dismissed for non-joining of necessary parties. Learned counsel has further submitted that in the additional affidavit filed on 30.11.2019 though it was contended that the applicants wish to add all 636 candidates as party respondents in the O.A., no such compliance was ever made. It is the further

contention of the learned counsel that the applicants have not approached the Tribunal with clean hands inasmuch as they have suppressed material facts at the time of filing of O.A. It is submitted that the applicants had not stated that the applicant Nos. 1, 3 & 5 had not participated in the L.D.C.E. 2016 and that other remaining 2 applicants i.e. applicant Nos. 2 & 4 though had appeared in the said L.D.C.E. had not qualified therein. Learned counsel further submitted that the applicants do not have locus standi to challenge G.R. dated 22.4.2019.

12. It is further argued that all the averments raised in the application are based on mere apprehension and on presumption, assumption and hypothesis that their promotional prospects to the cadre of PSI would be hampered. According to the learned counsel the apprehension is misplaced in view of the fact that during pendency of the present application an advertisement was issued for LDCE 2017 and on the basis of the said advertisement total 322 candidates have been selected and sent for PSI training. It is further contended that applicant No. 2 in the present application namely, Wasim Hamid Shaikh, is one of those 322 candidates. It is further submitted that recently on 21.2.2022 the State Government

had issued a circular/advertisement for LDCE 2021 for filling in total 250 posts. According to the learned counsel, during pendency of this application itself total 572 posts have been created which has nullified the allegation of the applicants that their chances of promotion have been prejudicially affected.

13. Learned counsel has further argued that it is well within the rights of the State to fill in more posts than advertised, if the contingency so arises. It has been further contended that if a policy decision is taken by the State in that regard there may be very little scope for scrutiny of the said decision on judicial side. Learned counsel submitted that in the preamble of the G.R. dated 22.4.2019 itself the State has sufficiently explained the extraordinary situation created due to various judicial proceedings arisen out of the issue of reservation in promotion. In the circumstances, according to the learned counsel, the G.R. dated 22.4.2019 perfectly falls within the rights vested in State. Learned counsel has further argued that in the matters of policy decision taken by the Government there exists a very little scope and unless it is noticed that the decision taken is in violation of any of the constitutional provisions or was contrary to the public interest, the same cannot be

interfered with. It was the further contention of the learned counsel that before issuance of the G.R. dated 22.4.2019 the consultation with M.P.S.C. was not at all required. It is contended that since there is no change in the mode or manner of selection or promotion, consultation with M.P.S.C was not required. Learned counsel in the circumstances, prayed for rejecting the application.

14. Shri Sachin Dere, learned counsel appearing for some of the private respondents while adopting the arguments advanced by learned Advocate Shri A.S. Deshmukh, additionally submitted that the applicants, who have not raised any objection as about the selection of 154 candidates, who have also been selected in excess to the 828 candidates for which the selection process was carried out are estopped from raising any objection as about the selection of 636 candidates by the State Government vide the G.R. dated 22.4.2019. Learned counsel further submitted that had the Government not taken a decision to accommodate 636 candidates in fact, the injustice would have caused to the said candidates in view of the fact that the Government has already selected the candidates having less marks than these candidates. According to the learned counsel, the Government has, therefore, taken a right

policy decision. Learned counsel relying upon the judgment in the case of **Direcotrate of Film Festival and Others VS. Gaurav Ashwin Jain and Others (2007) 4 SCC 737**, has submitted that the Tribunal has limited power to interfere in the policy decision so taken by the Government. Relying on the judgment in the case of **Anmol Kumar Tiwari and Others Vs. State of Jharkhand and Others**, learned counsel further submitted that in any case merit cannot be compromised and, as such, the rights accrued in favour of 636 candidates cannot be denied.

15. Shri Santosh G. Chapalgaonkar, learned counsel appearing for few other respondents also adopted the arguments advanced by learned Advocate Shri Avinash Deshmukh and made certain additional submissions. Learned counsel relying upon the judgment in the case of **Amlan Jyoti Borooh VS. State of Assam and Others (2009) 3 SCC 227**, submitted that it is well within the power of the State to fill the posts in excess than advertised. Learned counsel further submitted that the policy decision taken by the State authorities in larger public interest cannot be subjected for judicial scrutiny.

16. Shri M.B. Kolpe, learned counsel for respondent No. 5 i.e. the M.P.S.C. argued that in the present matter before taking decision to give appointments to the candidates in excess of the number of posts advertised, the respondent Nos. 1 to 3 were bound to consult the M.P.S.C. The learned counsel submitted that under Article 320 of the Constitution of India and more particularly sub-clause 3 thereof in all matters relating to methods of recruitment to Civil Services and for civil posts the State is under obligation to have consultation with the M.P.S.C. The learned counsel inviting our attention to the rules of 1995 argued that as per rule 5 of the rules of 1995, if the Government desires to make appointments to the post of PSI in deviation of the ratio prescribed for appointment by promotion or selection on the basis of LDCE or nomination, prior consultation with the M.P.S.C. is must. The learned counsel further pointed out that the M.P.S.C. has at the relevant time raised an objection with the respondent No. 2 for not consulting the M.P.S.C. The learned counsel has further argued that in the civil services a person is either appointed or promoted but there is no provision of absorption of the candidates as has been resolved by the respondent No.1 vide G.R. dated 22.4.2019.

Chronology:-

17. Before advertng to the rival submissions advanced on behalf of the learned Counsel appearing for the parties, the facts require to be noted chronologically. Order passed in O.A.No.445/2019 on 01-08-2019 by the learned Member (J) of MAT at Mumbai is filed on record. In the said matter, facts are recorded in that manner. We deem it appropriate to borrow the said portion from the said judgment and reproduce the same hereinbelow:

- (a) 02.06.16 *State Government had sent requisition to MPSC for selection of 828 candidates for the post of PSI through limited departmental examination 2016.*
- (b) 27.06.16 *Home Department, State of Maharashtra issued Advertisement for selection of 828 candidates inclusive of 186 from reserved category.*
- (c) 05.05.17 *After conducting examinations, the MPSC declared final list of 2903 qualified candidates.*
- (d) 12.12.17 *MPSC recommended 828 candidates for the appointment on the post of PSI (642 from Open Category having scored 253 marks and above and 186 from Reserved*

Category having secured 230 and above marks).

- (e) 04.08.19 *The Hon'ble High Court in **Writ Petition No.2797/2015 (State of Maharashtra Vs. Vijay Ghogare)** decided on **04.08.2017** had struck down by G.R. dated 25.05.2004 providing reservation in the matter of promotions in favour of candidates belonging to reserved categories being ultra-virus of Article 16(4-A) of the Constitution of India.*
- (f) 09.01.19 *Having apprehensive of contempt of the order passed by Hon'ble High Court, the Government took remedial measure and created 154 more posts for open merit candidates over and above 828 subject to decision of Hon'ble Supreme Court in SLP No.28306/2017 filed by State Government against the Judgment in **Vijay Ghogare's** case.*
- (g) 06.11.18 ***O.A.394/18 (Santosh B. Rathod Vs. State of Maharashtra)** challenging the Government decision to appoint 154 candidates was dismissed by this Tribunal with liberty to the Applicants therein to make suitable representations to the Government, if they are so advised and in case, such representation is made, the direction was given to the Government that*

it may be considered in due course and on its own merit.

(h) 22.04.19 Government has taken policy decision to accommodate 636 additional candidates from the list of 2903 qualified candidates prepared by MPSC who got more than 230 marks in the examination (bench-mark of 230 marks was considered in view of the fact that the last candidate from the Batch of 154 candidates had secured 230 marks).

Preliminary objections:-

18. Respondents have raised serious objection as about the locus of the present applicants as well as the conduct of these applicants as has been revealed in prosecuting the present O.A. As has been argued none of the present applicants is having the locus to question the appointments to be issued in favour of the 636 candidates. It is the further contention that applicant no.1 Gajanan Babulal Bansode and applicant no.2 Wasim Hamid Shaikh had participated in the selection process and could not pass the said examination. Having participated in the said process without raising any objection, according to the respondents, the applicants were estopped from raising any objection in relation to the said recruitment process. In so far as the other applicants are concerned, it is contended

that they were not even eligible at the relevant time to participate in the said selection process. It was also argued that nothing has been explained by the present applicants as to what prejudice is likely to be caused to them because of the decision taken by the Government to accommodate the 636 candidates. Non-joinder of necessary parties as respondents is another objection which is seriously pressed. It is argued that despite an undertaking given, the applicants did not make 636 candidates as respondent. According to the respondents on this count alone O.A. deserves to be dismissed. As against it, it has been contended by the learned Counsel for applicants that every person of the Police Constabulary who is aspiring for the promotion to the post of PSI in future has locus to raise the objection in regard to the selection of 636 candidates. It is further submitted that it was never the intention of the applicants not to add 636 candidates as respondents.

19. In so far as the issue of locus as has been raised by the respondents is concerned, it would be useful to see the observations made by the Hon'ble Apex Court in paragraph 12 of its judgment in case of **Prem Singh & Ors. V/s. Haryana State Electricity Board & Ors.** reported in [1996

4 SCC 319]. We deem it appropriate to reproduce the entire said paragraph which reads thus:

“12. In our opinion, there is no substance in the objection raised with respect to locus standi of the original writ petitioners. The candidates could not have anticipated when they appeared for the interview that the Selection Committee would recommend the candidates and the Board would make appointments far in excess of the advertised posts. The petitioner who was not eligible had a just grievance that due to appointments of candidates in excess of the posts advertised he was deprived of the right of consideration for appointment against the posts which would have become vacant after he acquired eligibility.”

In view of the observations as above, according to us the action as has been initiated by the applicants would sustain.

20. In so far as the other objection that 636 candidates were not made party is concerned, the said objection has now lost significance in view of the fact that all said 636 candidates are now made respondents in the present matter, may be because of the orders passed by the Hon'ble the Apex Court. However, it is observed that the applicants

must have added all these persons as respondents since they were the necessary parties in the present O.A. The applicants failed in discharging the said obligation.

21. From the arguments advanced by the learned Counsel appearing for the parties, it can be gathered that when according to the applicants respondent nos.1 to 3 were not having any right or authority to select the candidates in excess of the posts advertised since it is in violation of the Articles 14 and 16 of the Constitution of India, it is the contention of the respondents that it is well within the power of the State authorities to fill more posts than advertised if the situation so arises by taking a conscious policy decision.

Judgments relied upon :-

22. The learned Counsel for the applicants has heavily relied upon the judgment in the case of **Arup Das** cited supra. In the said matter advertisement was published by the Director of Land Records and Survey, Assam inviting applications for selection for admission in Assam Survey and Settlement Training Institute in respect of the 160 seats. About 12000 candidates applied for the said seats and a written test was conducted which was followed by

Viva Examination. The Viva test was limited to only 560 candidates. The restriction of the Viva test to only 560 candidates was challenged before the Gauhati High Court, which was dismissed by the learned Single Judge of the said High Court. Writ Appeal preferred against the judgment of the learned Single Judge was also dismissed and the matter was thus taken to the Hon'ble Apex Court. The Hon'ble Apex Court did not cause interference in the order passed by the learned Single Judge of the Gauhati High Court, which was also not disturbed in the Writ Appeal. In the said matter, it was held by the learned Single Judge that if any appointment was to be made beyond the number of seats advertised, the Director is required to publish a fresh advertisement for selecting the next batch of the candidates in accordance with Rule 20 of the Rules in that regard.

23. It has been vehemently argued by the learned Counsel appearing for the respondents that it is well within the powers of the State to make excess appointments than advertised. Reliance was placed by the learned Counsel on the judgment of Hon'ble Apex Court in the case of **Prem Singh & Ors. V/s. Haryana State Electricity Board & Ors.** reported in [1996 4 SCC 319].

Reliance was also placed on the judgment of the Hon'ble Apex Court in the cases of **Amlan Jyoti Boroah V/s. State of Assam & Ors.** [(2009) 3 SCC 227]. The judgment in the case of **Anmol Kumar Tiwari & Ors. V/s. The State of Jharkhand & Ors.**, recently delivered by the Hon'ble Apex Court on 18-02-2021 has also been relied upon. While arguing that the power of the State to make excess appointments than the posts advertised cannot be objected, it is asserted by the learned Counsel for the respondents that any policy decision taken by the State in this regard ordinarily cannot be subjected to judicial scrutiny. It has also been argued that the Tribunals cannot sit in appeal over the policy decision taken by the State authorities. It has also been argued that the Tribunals are not supposed to decide the merits in the policy decision but may look into the aspect of the process adopted by the State while taking such policy decision.

24. In so far as the facts involved in the present case are concerned, it has been argued on behalf of the respondents that at the relevant time, the circumstances were as such that the State took a conscious policy decision to treat 636 candidates, who have secured more marks than 230, eligible for their absorption in view of the fact that the last

selected candidate had 230 marks. According to the respondents had such decision not taken by the State it would have caused serious prejudice to the 636 candidates, who all have secured more than 230 marks and that would be in fact in violation of the constitutional mandate of Article 14 r/w. Article 16 of the Constitution.

25. Thrust of the learned Counsel for the respondents was also on the issue that no prejudice is likely to be caused to the applicants if the decision taken by G.R. dated 22-04-2019 is implemented. It has also been argued that the Government has not taken the decision to absorb all 636 candidates at one stroke but has consciously decided to give such appointments in phases and that too in the quota prescribed for the candidates passing the LDCE within the limit prescribed therefor.

Analysis:-

26. The right of the State to make appointments in excess of the posts advertised cannot be disputed. In the case of **Prem Singh & Ors. V/s. Haryana State Electricity Board & Ors.** reported in [1996 4 SCC 319], two questions were there for Hon'ble Apex Court for their consideration; first that, “whether it was open to the Board to prepare a list of

as many as 212 candidates and appoint as many as 137 of that list when the number of posts advertised was only 62 ? and the other that “whether the High Court was justified for quashing the selection of all 212 candidates and appointment of 137 candidates. In the said matter, it was the case of the Board that after the posts were advertised and published but before the appointments could be made, 13 more posts became vacant because of retirement and 12 because of the deaths. It was further contention of the Board that meanwhile, the Board also created 60 new posts of Junior Engineers. It was the stand taken by the Board before the Hon’ble High Court that by April, 1993, 85 more posts had become vacant and there was a backlog of 62 posts of Junior Engineers and that was not through oversight taken into consideration. It was also submitted that there was backlog of 24 posts belonging to reserved category. It was for the aforesaid reasons that the Secretary of the Board had written to the Chief Engineer who was appointing authority that as the list of 212 candidates selected by the selection committee was received and as 147 posts were vacant as on 11-02-1993, all those vacant posts may be permitted to be filled in and out of the said list the Board was able to appoint 132 candidates.

27. Hon'ble High Court was not convinced with the submission made on behalf of the Board and set aside entire selection process and also canceled the appointments already made. The Hon'ble Apex Court permitted the Board to make appointments in excess of the posts advertised but only on the posts which had become vacant during the period in which selection process was being carried out, as stated earlier 13 posts had become vacant because of retirement and 12 because of deaths. The Hon'ble Apex Court in addition to the 62 posts advertised, permitted the Board to fill and make appointments on the aforesaid 25 posts, in total 87 posts only and held other appointments beyond 87 invalid.

28. In the case of **Amlan Jyoti Borooah V/s. State of Assam & Ors.** State had issued an advertisement on 16-09-1997 for filling up 112 vacancies of Sub-Inspectors by direct recruitment. Accordingly, the recruitment process was carried out and ultimately, the State made appointments of 169 candidates sometime around 04-07-2000. The legality and validity of the excess appointments were challenged. The learned Single Bench of the Hon'ble

Gauhati High Court set aside the appointment of 54 candidates.

Judicial Scrutiny of Policy Decisions :-

29. It was vehemently argued by the learned Counsel appearing for the respondents that the power of judicial review is not intended to assume the supervisory role. It was further contended that the power of judicial review is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to the other organs of the State. It was also argued that a mere wrong decision without anything more is not enough to attract the power of judicial review.

30. Learned Counsel Shri Deshmukh heavily relied upon the judgment of the Hon'ble Apex Court in the case of **State of U.P. V/s. Johri Mal**. In his arguments, learned Advocate Shri Sachin Dere also pressed the aforesaid aspect. The learned Counsel relied upon the judgment in the case of **Directorate of Film Festivals and Ors. V/s. Gaurav Ashwin Jain & Ors.** [(2007) 4 SCC 737] submitted that the courts do not and cannot act as appellate authority examining the correctness, suitability and appropriateness

of a policy, nor are courts advisors to the executives on matters of policy which executives are entitled to formulate. It was the common contention of the learned Counsel appearing for the respondents that for the sake of arguments, even if it is accepted that the decision taken by the State to accommodate all 636 candidates on the post of Sub Inspector is not a right decision, in view of the fact that it is a policy decision taken by the Government taking into account the contingency arisen at the relevant time, cannot be a matter of judicial scrutiny and it may not be within the powers of this Tribunal to set aside the said Government Resolution on the said ground.

31. There may not be a dispute that while exercising powers of judicial review, the courts do not sit in appeal over the decision of the administrative bodies. We deem it appropriate to reproduce hereinbelow the observations made by the Hon'ble Supreme Court in paragraph 20 of the judgment in case of **State of U.P. V/s. Johri Mal** as about the scope of judicial review. As noted in the said judgment, limited scope of judicial review put forth is thus:

“(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies;

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See Ira Munn Vs. State of Ellinois, 1876 (94) US (Supreme Reports) 113”

32. To rightly understand the scope of judicial review, one has to read the judgment of the Hon’ble Apex Court in the case of **State of U.P. V/s. Johri Mal** (cited supra) in its entirety. Learned Counsel for the respondents had invited

our attention to the observations made by the Hon'ble Apex Court in paragraph 20 of the said judgment. In the immediate next paragraph the Hon'ble Apex Court has said thus:

“It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision

of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.”

33. As analyzed by the Hon’ble Apex Court while examining and scrutinizing the decision making process, it is inevitable to also appreciate the facts of the given case as otherwise the decision cannot be tested on the grounds of illegality, irrationality or the procedural impropriety.

34. Even in the case of **Directorate of Film Festivals and Ors.** cited supra, the Hon’ble Supreme Court has held that if any policy violates the fundamental rights of the citizens or is opposed to the provisions of the constitution or opposed to the public interest, the said aspects can certainly be looked into. Keeping in mind the aforesaid aspects the legality of G.R. dated 22-04-2019 has to be examined.

35. We revert back to the submissions made on behalf of the respondents that the G.R. dated 22-04-2019 is a policy decision taken by the Government under the circumstances explained in the said resolution itself. The issue which is

involved in the present matter is whether the excess appointments can be made than the posts advertised. As we have mentioned hereinbefore, the general rule is that, vacancies cannot be filled up over and above the number of vacancies advertised.

36. In the order passed by this Tribunal at Mumbai in O.A.No.445/2019, paragraph 7 in the judgment of the Hon'ble Supreme Court in the case of **Rakhi Ray V/s. High Court of Delhi [(2010) 2 SCC 637]** is reproduced. We deem it appropriate to reproduce the same hereinbelow which reads thus:

“7. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as “the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution”, of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to “improper exercise of power and only in a rare and exceptional circumstances and in emergent situation, such a rule can be deviated from and

such a deviation is permissible only after adopting policy decision based on some rationale”, otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, is not permissible in law. (Vide Union of India v. Ishwar Singh Khatri, Gujarat State Dy. Executive Engineers’ Assn. v. State of Gujarat, State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986, Prem Singh v. Haryana SEB and Ashok Kumar v. Banking Service Recruitment Board).”

37. In the order passed in O.A.No.445/2019, the reference has also been given of judgment of Hon’ble Apex Court in the case of **Surinder Singh V/s. State of Punjab [(1997) 8 SSC 488]**. In paragraph 16 of the said judgment, the Hon’ble Supreme Court has held as under:

“16. It is in no uncertain words that this Court has held that it would be an improper exercise of power to make appointments over and above those advertised. It is only in rare and exceptional circumstances and in emergent situation that this rule can be deviated from. It should be clearly spelled out as to under what policy such a decision has been taken. Exercise of such power has to be tested on the touchstone of reasonableness. Before any advertisement is issued, it would, therefore, be incumbent upon

the authorities to take into account the existing vacancies and anticipated vacancies. It is not as a matter of course that the authority can fill up more posts than advertised.”

38. As per the law laid down in the aforesaid judgments, the right of the State to take a policy decision though is undisputed, the further burden lies on the State to explain the extraordinary circumstance, which necessitated such policy decision. In the case of **Delhi Development Authority, N.D. and Anr. V/s. Joint Action Committee, Allottee of SFS Flats & Ors. [2008 2 SCC 672]**, in paragraph 64 thereof the Hon'ble Apex Court has noted grounds for the judicial review of the policy decision. The grounds are thus:

“64. Broadly, a policy decision is subject to judicial review on the following grounds :

(a) if it is unconstitutional;

(b) if it is de hors the provisions of the Act and the regulations;

(c) if the delegate has acted beyond its power of delegation;

(d) if the executive policy is contrary to the statutory or a larger policy.”

39. In light of the principles so laid down, we have examined the impugned Government Resolution dated 22-

04-2019. We are afraid any ground mentioned therein can be said to be extraordinary circumstance. Receiving of the representations from the candidates concerned or from the Representatives of People cannot be treated as extraordinary circumstance. In normal course, the Government is approached by the aggrieved persons by filing representations. Sometimes, the number of people aggrieved may be more than as in the present case. Further there is nothing uncommon in receiving the representations even from the Representatives of People. Ultimately, it has to be seen whether the cause which is being pursued and the prayer accordingly made is worth accepting and whether will fall within the parameters for any decisions of the Government, as are laid down by the Hon'ble Supreme Court reproduced hereinabove.

40. There cannot be a dispute that the Government can in the given circumstance and in an emergent situation deviate from the settled principle of law and may in such circumstance give appointment over and above the number of vacancies advertised. However, the contention that the power of State in giving appointments is unfettered, is not wholly correct. Even in the case of **Prem Singh**, the Hon'ble Apex Court did not permit the Haryana State

Electricity Board to fill 137 posts. In the said case, we reiterate that only 62 posts were advertised and the Board prepared list of 212 candidates and appointed as many as 137 out of the said list. The Hon'ble Apex Court after having considered the overall circumstances in the said matter permitted Haryana State Electricity Board to fill only 25 posts over and above the 62 posts advertised on the ground that when the selection process was started for 62 clear vacancies, the anticipated vacancies were not taken into account. After the selection process had started, 13 posts had become vacant because of retirement and 12 posts because of deaths. The Hon'ble Apex Court permitted to fill up only those vacancies in addition to the 62 clear vacancies. In paragraph 25 of the said judgment, the Hon'ble Apex Court has in unequivocal terms held that "the selection process can be started for clear vacancies and also for anticipated vacancies but not for "future vacancies"."

41. In case of **Arup Das and others V/s. State of Assam and others, [(2012) 5 SCC 559]** relied upon by the applicants, the Hon'ble Supreme Court has held that the authority cannot make any selection, appointment beyond the number of posts advertised even if there were large

number of posts available than those advertised. In paragraph 17 of the said judgment, the following observations are made:

“17. It is well-established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up.”

42. In case of **Amlan Jyoti Borooah V/s. State of Assam & Ors.**, the extraordinary circumstances were duly and correctly brought on record. In paragraph 8 of the said judgment, there is reference of the letter written by the Director General of Police to the Home Department with following contents:

“I am writing to inform you that presently, there are 2154 number of vacancies in the rank of constables (Battalion 1136, District AB 504, District UB 514) and 77 Nos. of vacancies in the

rank of S.Is in the Assam Police. These are all functional posts. In the context of insurgency situation obtained in the state and that there will be Assembly Election within the next four months, we will need to mobilize all the manpower. In view of this, it is requested that permission of the State Level Empowered Committee may be conveyed to us to fill up these vacancies by direct recruitment from the results of the records of the previous recruitment rallies already available with us. Government orders on the same may kindly be issued immediately.”

The Hon'ble Apex Court has observed that deteriorating law and order situation in the State as also sudden spurt of the extremists related violence were the emergent and compelling reasons in which the said vacancies were required to be filled.

43. In backdrop of the judicial pronouncements discussed by us hereinabove, it has to be examined whether circumstances which necessitated the issuance of the G.R. dated 22-04-2019 as explained in preamble thereof can be held “extraordinary”.

44. It has come on record that in the present matter, opinion of the learned Advocate General of the State was sought by the State. Opinion was also sought from the Law

and Judiciary Department. A copy of the opinion given by the Law and Judiciary Department has been placed on record. We have carefully gone through the opinion given by the Law and Judiciary Department. In the opinion so given, the Law and Judiciary Department has referred to the opinion given by the learned Advocate General of the State. We deem it appropriate to reproduce the same hereinbelow. The relevant portion of the said opinion reads thus:

“6. The ld. Advocate General on 15th December, 2017 has tendered his opinion in the matter. The ld. Advocate General has considered all the pros and cons of the matter and in para 16 of his opinion has discussed the cumulative effective of the entire legal proceedings through which the Reservation Act and the G.R. dated 25th May, 2004 had to undergo. In para 16, the ld. Advocate General has stated as under:-

“The cumulative effect of the entire aforesaid legal proceedings through which the said Act and the said GR had to undergo, is as under :

(i) The said Act as on this date is valid. The issue of Constitutional validity of the said Act is kept open for determination in an appropriate case and will be examined on an appropriate occasion.

(ii) *The said GR is struck down in its entirety and therefore, does not operate for any purpose of whatsoever :*

(iii) *The interim stay granted by the Hon'ble High Court to its own aforesaid Judgment and Order dated 4th August, 2017, having already expired and there being no interim order by the Hon'ble Supreme Court, at least as on the date this opinion is being rendered, the aforesaid two positions today hold the field.*

(ix) *The interim arrangement which was operating in terms of the aforesaid interim order of the Hon'ble High Court by its Order dated 28th March, 2008 no longer continues to operate with effect from 27th October, 2017.*

(v) *Since, the steps taken by the State Government in accordance with the aforesaid interim orders were subject to the final decision of the Writ Petition and since the final order passed in the Writ Petition directs to take corrective steps meaning thereby correct the actions taken under the said GR which is now held invalid, the State Government will have to undo whatever has been done in the meantime pending the Writ Petition.*

(vi) *The State Government is required to take necessary corrective steps / measures in respect of promotions already granted in terms*

of the aforesaid two interim orders i.e. (a) Hon'ble High Court dated 9.3.2017 and (b) Hon'ble Supreme Court dated 28th March, 2008. This was required to be done within 12 weeks from 4th August, 2017 i.e. on or before 27th October, 2017 which period was already expired.

Further, in para 17 of the opinion the Ld. Advocate General has clarified as under :-

“17. In the absence of any interim order from the Hon'ble Supreme Court in the pending Special Leave Petition, it is needless to state that the aforesaid judgment and Order of the Hon'ble High Court dated 4th August, 2017 delivered in the aforesaid group of matters i.e. Writ Petition No. 2797 of 2015 and others continues to hold the field and continues to operate, of course, subject to any further orders that may be passed by the Hon'ble Supreme Court in the aforesaid pending Special Leave Petition.”

Also further, in para 19 the Ld. Advocate General has opined as under –

19. In my opinion, such an implementation process would inter-alia involve undertaking of an exercise spelt out hereunder of course, subject to further orders that may be passed in the aforesaid Special Leave Petition, which is

presently pending before the Hon'ble Supreme Court :

(A) Immediate steps will have to be taken by moving appropriate interim application before the Hon'ble Supreme Court seeking an order or maintaining status quo or the stay to the effect, operation and execution of the aforesaid order of the Hon'ble High Court dated 4th August, 2017. If already an application is made accordingly, steps needs to be taken by pressing such an application before the Hon'ble Court, requesting for grant of at least an ad interim order immediately, failing which steps will have to be taken by the State Government to immediately implement the aforesaid order of the Hon'ble High Court dated 4th August, 2017 as spelt out hereunder.

(B) All the promotions granted as and by way of the implementation of the said G.R. and in pursuance of the interim order passed by the Hon'ble High Court dated 9th March, 2007 as modified by the Hon'ble Supreme Court vide its order dated 28th March, 2008 will have to be cancelled and the status quo ante i.e. position prevailing as on the date of the said G.R. will have to be restored. In short, it will have to be assumed as if the said G.R. was never passed and/or issued and whatsoever has been done

towards / for implementation thereof, will have to be undone completely.

(C) After taking the aforesaid step, with the position restored as on the date of issuance of the said G.R., appropriate promotions will have to be granted, of course in accordance with law, by completely ignoring the said G.R.

(D) Since the time to undertake the aforesaid exercise, which the Hon'ble High Court has termed as "corrective steps / measures in respect of promotions already granted", of 12 weeks from 4th August, 2017 has already expired on 27th October, 2017, the State Government will have to move an appropriate application either before the Hon'ble High Court or before the Hon'ble Supreme Court in the aforesaid pending Special Leave Petition for seeking extension of time to complete the aforesaid exercise."

45. It is discernible that the learned Advocate General and Law and Judiciary Department both have endorsed the negative opinion for the accommodation of 186 candidates over and above 828 posts advertised referring to the legal position on the issue based on the judgments of the Hon'ble Supreme Court. It is, however, evident that against the opinions given by the learned Advocate General of the State

and the Law and Judiciary Department, the State Government took decision to send 154 candidates for training in excess to the 828 candidates already selected.

46. It has come on record that the Home Department had submitted a Cabinet note to accommodate 636 additional candidates by availing 322 posts advertised in LDCE 2017 and 149 vacant posts in the year 2019. It was also proposed to accommodate the remaining candidates step by step as per the availability of the posts in quota for LDCE. Before placing the said note before the Cabinet, opinion of the department of Law and Judiciary was called for. The opinion given by the Law and Judiciary Department dated 31-01-2019 is annexed with the affidavit in reply filed on behalf of respondent no.1. The relevant portion of the opinion given by the department of Law and Judiciary is reproduced hereinbelow (p.b.p. 331):

9. By the present proposal, the Home Department proposes to accommodate another 636 candidates in addition to 154 candidates already appointed in excess of the posts advertised in the year 2016. Therefore, the opinion recorded by this Department in its UOR note No. 53-2018 dated 15th January, 2018 applies to the present issue also and therefore, as mentioned in the said note it may

not be advisable to pursue the action proposed by the Home Department. Further, in addition to the aspects mentioned in para 12 of the earlier note dated 15th January, 2018, the Department will have to take into account, following aspects carefully before taking such a policy decision.

(i) Since, for accommodating these 636 candidates in excess of the posts advertised, it is proposed to avail 322 posts advertised in the advertisement for the Limited Departmental Competitive Examination for the year 2017 and the examination for the said post appears to have already been conducted, the proposed course of action will affect the chances of promotion of the candidates who have participated in the recruitment process undertaken pursuant to the advertisement issued in the year 2017, which may give birth to further complication including multiple litigation.

*Principal Secretary and R.L.A. (Shri Laddha)
has seen the papers and approved the above view.*

*Sd/xx
(D.S. Patil)
Joint Secretary (Law).”*

47. Looking to the tenor of the opinion given by the department of Law and Judiciary, it can be gathered that the proposal was opposed by the said department. It seems that ignoring the said opinion the Cabinet took a decision

and consequently, the G.R. dated 22-04-2019 came to be issued. It has to be noted that in the said G.R. nothing is stated about the LDCE of 2017; nothing is also mentioned about the vacancies in the year 2019, references of which is there in the note prepared by the Home Department.

48. In the earlier opinion given by it on 15-01-2018 the Law and Judiciary Department has amply clarified the legal position by giving reference of 3 judgments of the Hon'ble Supreme Court. The first judgment referred was in the case of **Hoshiyar Singh V/s. State of Haryana and Others [1993 Supplement 4 SCC 377]**, wherein the requisition was for 8 posts and the Board had recommended for 19 posts. Hon'ble Supreme Court held that since the requisition was for 8 posts of Inspector of Police, the Board was required to send its recommendations for 8 posts only. It was held by the Hon'ble Apex Court that the appointments on the additional posts on the basis of such selection and recommendation would deprive candidates, who were not eligible for appointments to the posts on the last date of submission of applications mentioned in the advertisement and who become eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts, because if the said

additional posts are advertised subsequently those who become eligible for appointment would be entitled to apply for the same. In the case of **State of U.P. V/s. Rajkumar Sharma [2006 3 SCC 330]** it is held that “filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution and further that selectees could not claim appointment as a matter of right.” The judgment in the case of **Prem Singh** was also mentioned, to which, we have already referred to.

49. After having referred to the abovesaid judgments, the Law and Judiciary Department has recorded that, ordinarily, neither the Public Service Commission can recommend the candidates more than the posts requisitioned to it nor the State Government can accommodate candidates in excess of the posts advertised by the notification. It is further recorded by the Department that only in exceptional circumstances and in emergent situation by taking a policy decision, the State Government may make excess appointments. It is significant to note that immediately thereafter, the Law and Judiciary Department has candidly opined that it may not be advisable to pursue the action proposed by the Home

Department, meaning thereby that, element of extraordinary circumstance was lacking in the said proposal.

50. According to respondent nos.1 to 3 the circumstances elaborated in the preamble of the G.R. dated 22-04-2019 necessitated the State Cabinet to take a decision to absorb 636 candidates on the post of PSI and those were the extraordinary circumstances. We find it difficult to agree with the submissions so made on behalf of respondent nos.1 to 3. It is not the case of the respondents that at the relevant time, the State was in dire need of expanding the Police Force for any particular reasons as were there in the case of **Amlan Jyoti Boroah**. Mere making of demand by some candidates cannot be said to be an extraordinary circumstance. The Peoples' Representatives insist for so many matters and make so many demands. However, if any demand made by the Peoples' Representatives is not within the four corners of law, the State may not accede to such demand. When the learned Advocate General and the Law and Judiciary Department both have candidly opined that acceptance of any such proposal would violate the principles enshrined under Articles 14 and 16 of the

Constitution of India, the State Cabinet must have refrained from taking any such decision.

51. After having considered the facts and circumstances as above, we have no hesitation in recording a conclusion that circumstances as are canvassed to be extraordinary by respondent nos.1 to 3 for issuance of the G.R. dated 22-04-2019 cannot be held to be extraordinary circumstance, neither there was any emergent situation which could have justified the issuance of the said G.R.

52. Further, though it has been argued on behalf of the respondents that the policy decision taken by the Government having regard to the contingencies arisen at the relevant time cannot be a matter of judicial scrutiny, it is difficult to agree with the submissions so made. As has been observed by the Hon'ble Apex Court in the case of **Johri Mal**, it is always open to the courts to review the evaluation of facts by the decision maker. As has been observed by the Hon'ble Apex Court while examining and scrutinizing the decision making process, it becomes inevitable to also appreciate the facts of the given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. In the

present matter as has been elaborately discussed by us the decision so taken is violative of the Constitutional Guarantee provided under Articles 14 and 16. We further see no rationale in taking such decision by the State.

53. Lastly, relying on the judgment in the case of **Prem Singh & Ors.** (cited supra) it was submitted by learned Advocate Shri Deshmukh that this Tribunal may not invalidate the excess appointments and shall mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. Relying on the judgment in the case of **Amlan Jyoti Barooah** (cited supra) learned Advocate Shri Chapalgaonkar submitted that the applicants, who have not questioned the appointments / selection of 154 candidates over and above 828 candidates selected as per the advertisement, were estopped from raising any objection in regard to the decision taken by the Government to absorb 636 candidates from the same merit list. The learned Counsel pointed out that in the said matter the Hon'ble Apex Court has expressly observed that appellant did not question the appointments of 169 candidates made at earlier point of time and as such the appellant must be deemed to have accepted the change in the selection

process *sub-silentio* and hence cannot be permitted to contend that procedure adopted thereafter was illegal.

54. We are unable to accept both the submissions made as above. The observations which are brought to our notice by learned counsel Shri Deshmukh are made in paragraph 25 of the judgment in the case of **Prem Singh** (cited supra). We deem it appropriate to reproduce the entire said paragraph which reads thus:

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

State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.”

55. It is significant to note that it has been firmly ruled by the Hon'ble Apex Court that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. It has to be further noted that the Hon'ble Apex Court ultimately did not unsettle the appointments only on the posts which had fallen vacant because of the retirement of 13 persons and because of deaths of 12 persons; except that other appointments made beyond 87 posts were held invalid by the Hon'ble Apex Court. In paragraph 26 the Hon'ble Apex Court has in clear terms held that the appointments, which were made against the future vacancies must be regarded as invalid.

56. It is true that, the applicants have not challenged the appointments issued in favour of 154 candidates who also have been appointed over and above the seats advertised by the State. As has been submitted by learned Advocate Shri Deshpande appearing for the applicants, the contents of paragraph 12 and 13 of the O.A. explain why applicants

have not objected to the said appointments. After having gone through the contents of the said paragraphs, it appears to us that the applicants have impliedly clarified their stand in not questioning the appointments of the said 154 candidates. We, therefore, see no substance in the objection raised that, the applicants were estopped from raising objection to the appointments of 636 candidates.

57. One more issue has been raised in the present O.A. as to whether before issuance of the G.R. dated 22-04-2019, the State was under an obligation to consult the MPSC. In view of the fact that we have held the impugned decision of the State Government to be unsustainable being violative of Articles 14 and 16 of the Constitution of India, we have not deliberated on this issue and leave it open to be considered if raised in any O.A. in future.

58. For the reasons recorded above, the following order is passed:

ORDER

(1) The decision taken by the respondent No. 1 vide Government Resolution dated 22.4.2019 to absorb 636 candidates having secured 230 and above marks, as are named in the list at Annex. 'A' attached to the

said Resolution, over and above 828 candidates as per the original demand of the year 2016, on the post of Police Sub Inspector in the quota meant for the candidates passing Limited Departmental Competitive Examination, as and when the vacancy would arise therein in future, in phase-wise manner, is quashed and set aside. For the ready reference the relevant portion of the said G.R. is reproduced as it is in vernacular :-

“शासन निर्णय -

पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षा सन २०१६ मधील मूळ मागणी पत्रानुसार ८२८ उमेदवारांव्यतिरिक्त, महाराष्ट्र लोकसेवा आयोगाने प्रसिध्द केलेल्या गुणवत्ता यादीतील २३० व त्यापेक्षा जास्त गुण प्राप्त झालेल्या ६३६ उमेदवारांना (सोबतच्या परिशिष्ट-अ मधील यादीनुसार) पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षेद्वारे भरण्यांत येणा-या कोटयातील भविष्यात वेळोवेळी रिक्त होणा-या पदांवर टप्प्याटप्प्याने सामावून घेण्यास शासन मान्यता देण्यात येत आहे.”

(2) Original Application No. 722/2019 stands allowed in the aforesaid terms without any order as to costs.

(BIJAY KUMAR)
MEMBER (A)

(JUSTICE P.R. BORA)
MEMBER (J)

Place : Aurangabad
Date : 4th March, 2022