IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI

ORIGINAL APPLICATION NO.445 OF 2019

Shri Madan T. Metake & Ors.)**...Applicants**

Versus

1. The State of Maharashtra & Ors.)**…Respondents**

Mr. S.B. Talekar, Advocate for Applicants.

Ms. S.P. Manchekar, Chief Presenting Officer for Respondents 1 to 3.

Mr. K.R. Jagdale with Mangal Bhandari with R. Adsure with M.M. Deshmukh, Advocate for Respondent Nos.25, 75, 82 & 97.

Dr. Gunaratan Sadavarte, Advocate for other Respondents.

Mr. A.A. Desai, Advocate for Respondent No.4.

Mr. C.T. Chandratre, Advocate for Respondent No.15.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 01.08.2019

O R D E R

1. This Original Application is taken up for hearing to consider the interim relief in view of Office Order dated 11.01.2018 which *inter-alia* provides for listing of the matter before Single Bench for interim relief, if Division Bench is not available.

2. The Applicants are serving as Police Constables at various places in Police Department in State of Maharashtra. The basic challenge is to G.R. dated 22.04.2019 whereby the Government has decided to appoint / absorb 636 candidates [who have secured more than 230 marks] over and above 828 candidates already selected and appointed on the post of Police Sub Inspector (PSI) through limited departmental examination. They also prayed for interim relief restraining the Government (Respondent No.1) from sending 636 candidates for training as a part of process of their appointment / absorption on the post of PSI.

3. The background and the events leading to the filing of this O.A. needs to be borne in mind which are as follows :-

(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).

(i) 11.06.19 Director General of Police issued direction for conducting medical tests and other formalities, so as to send these 636 candidates for training to Maharashtra Police Academy, Nashik as a part of process of their appointment / absorption in service on the post of PSI.

4. On the above background, the preset O.A. filed by the candidates who have admittedly got less than 230 marks challenging the Government Resolution dated 22.04.2019 for appointing 636 candidates over and above 828 candidates and prayed for interim relief.

5. Heard Shri S.B. Talekar, learned Advocate for the Applicants at length. He sought to assail the impugned action and prayed for interim relief raising following grounds :-

(i) The advertisement was restricted for the selection of 828 candidates (642 from Open category and 186 from Reserved category), and therefore, the appointment of 636 candidates for being an excess of number of candidates advertised, is *ex-facie* illegal and violative of Articles 14 and 16 of the Constitution of India.

(ii) Admittedly, there is no approval of MPSC as mandated by Article 320(3) of Constitution in respect of selection of these 636 candidates and on that count also, the impugned action is unsustainable in law.

(iii) In view of selection of these 636 candidates, over and above 828 candidates, the promotional avenues of the Applicants are seriously affected and this amount to denial of right of consideration for further departmental promotion or through limited departmental examination.

(iv) As per Recruitment Rules for the post of Police Inspector (Recruitment) Rules, 1995, the appointment to the post of Police Sub Inspector by promotion, the selection on the basis of limited departmental examination and nomination shall be in the ratio of 25:25:50, which is trampled upon while selecting

636 candidates as it exceeds quota in terms of Recruitment Rules.

Shri Talekar, therefore, strenuously urged that *ex-facie* the impugned action of the Government is in blatant violation of law and deserves to be stayed.

6. Heard Shri Gunaratan Sadavarte, learned Advocate for supporting Respondents who adopted the submission advanced by Shri Talekar for grant of interim relief.

7. Heard Ms. S.P. Manchekar, learned C.P.O. for Respondents 1 to 3, Shri Mangal Bhandari, learned Advocate for Respondents 25, 75, 82 & 97, Shri C.T. Chandratre, learned Advocate for Respondent No.15. They vehemently opposed the grant of interim relief and their submission was focussed on the following grounds :-

(I) Government's decision to appoint / absorb 636 candidates out of qualified candidates is rational one and it being policy decision of the Government should not be interfered with by the Tribunal under the powers of judicial review.

(II) The selection of 636 candidates from the list of qualified candidates is not direct appointment in one go but those will be appointed / absorbed in future, and therefore, no propriety to stall the process initiated in terms of G.R. dated 22.04.2019 and consequently, the O.A. at this stage itself is premature.

(III) Consultation with MPSC is not mandatory and at the most, it is an irregularity which can be taken care of by prospective consultation process.

(IV) The present Applicants have got less than 230 marks (benchmark adopted for selection of 636 candidates), and therefore, they have no *locus* to challenge the decision.

(V) The Applicants have already participated in the process by appearing in examinations and some of them have already made representation to the Government to include their names in the list of selection, and therefore, Applicants cannot be allowed to challenge the decision being hit by the principle of 'approbate and reprobate'.

(VI) The very challenge to G.R. dated 22.04.2019 is also subjudice before the Hon'ble High Court, Bench at Nagpur in ***Writ Petition No.3555/2019 (Nivrutti V. Gite Vs. State of Maharashtra)*** wherein order "issue notice for final disposal. The process of selection shall go on which shall be subject to result of this petition" is passed. Therefore, this Tribunal should not entertain the application for interim relief.

8. Whereas, Shri A.A. Desai, learned Advocate for Respondent No.4 - M.P.S.C. has pointed out that the MPSC had recommended only 828 candidates but no consultation was made in respect of these 636 candidates selected by the Government under impugned G.R. dated 22.04.2019. He has also placed on record a letter dated 11th July, 2019 issued by MPSC to the Government expressing serious displeasure for taking the decision of selection of 636 candidates unilaterally. In the said letter, the MPSC has categorically stated that this action of Government amounts to encroachment on their powers and called for clarification from the Government. Shri Desai has also pointed out that till date, the MPSC has not received any communication from the Government in this behalf. He has further pointed out that Article 320(3) of the Constitution of India mandates the consultation with MPSC for the appointments and in the present case, admittedly, there being no consultation, the impugned action of the Government is unsustainable in law.

9. Now, let us see the contents of G.R. dated 22.04.2019 (Page No.222 of Paper Book) which is as follows :-

प्रस्तावना :-

पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षा सन २०१६ च्या अंतिम निकालाच्या आधारे महाराष्ट्र लोकसेवा आयोगाने केलेल्या ८२८ उमेदवारांच्या शिफारस यादी व्यतिरिक्त अधिक उमेदवारांना पोलीस उपनिरीक्षक पदावर सामावून घेण्याबाबतची मागणी शासनाकडे प्राप्त झाली होती. सदरहू उमेदवारांनी अशी मागणी केली होती की, पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षा सन २०१६ च्या परीक्षेमध्ये ८२८ उमेदवारांची शिफारस महाराष्ट्र लोकसेवा आयोगाने शासनाकडे केली होती. सदरहू शिफारस यादीनुसार संबंधित ८२८ उमेदवारांना पोलीस उपनिरीक्षक पदाच्या प्रशिक्षणासाठी पाठविताना, मा.उच्च न्यायालय, मुंबई यांनी शासन सेवेतील पदोन्नतीतील आरक्षणासंदर्भात दि.०४/०८/२०१७ रोजी दिलेला निर्णय विचारात घेऊन, मागासवर्ग प्रवर्गासाठी आरक्षित जागा या प्रवर्गनिहाय न भरता गुणवत्ताक्रमानुसार भरणे आवश्यक होते. तथापि, या ८२८ उमेदवारांना पोलीस उपनिरीक्षक पदाच्या प्रशिक्षणासाठी पाठविताना पोलीस महासंचालक कार्यालयाने या ८२८ उमेदवारांमधील १८६ मागासवर्ग प्रवर्गातील उमेदवारांनाही पोलीस उपनिरीक्षक पदाच्या प्रशिक्षणासाठी पाठविल्याने मा.उच्च न्यायालय, मुंबई यांच्या आदेशांचा अवमान झाला. या संदर्भात मा.महाराष्ट्र प्रशासकीय न्यायाधिकरण, मुंबई येथे दाखल झालेल्या मूळ अर्ज क्र.१३/२०१८ (श्री.राजेंद्र चव्हाण) बाबत विधि विषयक सल्ला घेऊन, ८२८ उमेदवारांव्यतिरिक्त (ज्या मध्ये ६४२ खुल्या प्रवर्गाच्या जागेवरील व १८६ मागासवर्ग प्रवर्गातील जागांवरील उमेदवारांचा समावेश होता) १८६ मागासप्रवर्गासाठी राखीव जागांवर गुणवत्ता क्रमानुसार शिफारस यादीतील अनु.क्र.६४३ पासून पुढील आणखी १८६ उमेदवारांना पोलीस उपनिरीक्षक पदाच्या प्रशिक्षणासाठी पाठविण्याचा

शासनाने निर्णय घेतला व त्यानुसार गुणवत्ता क्रमानुसार १८६ उमेदवारांपैकी, मागासवर्ग प्रवर्ग आणि गुणवत्ता या दोन्ही आधारे समावेश होऊ शकणाऱ्या आणि प्रत्यक्षात मागासवर्ग प्रवर्गाच्या जागेवर अगोदरच प्रशिक्षणासाठी पाठविण्यात आलेल्या ३२ उमेदवारांना वगळून उर्वरित १५४ उमेदवारांना पोलीस उपनिरीक्षक पदाच्या प्रशिक्षणासाठी पाठविण्याच्या सूचना पोलीस महासंचालक यांना शासनाने दिल्या. सदर उमेदवारांचा समावेश हा मा.सर्वोच्च न्यायालय, नवी दिल्ली येथे दाखल असलेल्या विशेष अनुमति याचिका क्र.२८३०६/२०१७ च्या अंतिम निर्णयाच्या अधिन असेल असेही याबाबतच्या शासन पत्रात स्पष्ट करण्यात आले आहे.

वरीलप्रमाणे सन २०१६ च्या पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षेमध्ये ८२८ + १५४ = ९८२ उमेदवारांना प्रशिक्षणासाठी पाठविण्यात आले. या कार्यवाहीस आक्षेप घेऊन ही सर्व ९८२ पदे गुणवत्ता क्रमानुसार भरण्याबाबत तसेच मागासवर्ग प्रवर्गातील २३० गुण प्राप्त झालेला उमेदवार पोलीस उपनिरीक्षक पदाचे प्रशिक्षण घेत असल्याने २३० व त्यापेक्षा जास्त गुण असलेल्या सर्व उमेदवारांना पोलीस उपनिरीरक्षक पदाच्या प्रशिक्षणास पाठविण्याबाबत शासनाकडे विनंत्या प्राप्त झाल्या होत्या. तसेच या संदर्भात मा.महाराष्ट्र प्रशासकीय न्यायाधिकरण, मुंबई येथे मूळ अर्ज क्र.३९४/२०१८ (एस.बी.राठोड व इतर) दाखल झाला होता. सदरहू मूळ अर्जावर

दि.०४/१०/२०१८ रोजी मा.न्यायाधिकरणाने दिलेले अंतरिम आदेश विचारात घेऊन मागासवर्ग प्रवर्गासाठी राखीव जागेवर निवड होऊन ९ महिन्याचे प्रशिक्षण पूर्ण झालेल्या १५४ मागासवर्ग प्रवर्गातील उमेदवारांना पोलीस महासंचालक यांनी पोलीस उपनिरीरक्षक पदाच्या पुढील मुलभूत प्रशिक्षणासाठी न पाठविता त्यांना त्यांच्या मूळ पदावर, मूळ घटकात हजर होण्याचे आदेश दिले. सदरहू कार्यवाहीमुळे विविध लोकप्रतिनिधी, उमेदवार यांच्याकडून प्राप्त झालेली निवेदने आणि मा.महाराष्ट्र

प्रशासकीय न्यायाधिकरण, मुंबई यांचे मूळ अर्ज क्र.३९४/२०१८ वरील दि.०६/११/२०१८ चे अंतिम आदेश विचारात घेऊन, सदरहू १५४ मागासप्रवर्गातील उमेदवारांना पोलीस उपनिरीक्षक पदाच्या पुढील मुलभूत प्रशिक्षणासाठी पाठविण्याचा शासनाने निर्णय घेतला व त्याप्रमाणे सदर निर्णयानुसार या उमेदवारांना पुढील प्रशिक्षणासाठी पाठविण्याची कार्यवाही पोलीस महासंचालक यांनी केली.

उपरोक्तप्रमाणे पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षा २०१६ मध्ये मूळ मागणी पत्राच्या ८२८ पदांऐवजी ९८२ उमेदवारांना पोलीस उपनिरीक्षक पदावर नियुक्ती देण्यात आली असून व या ९८२ उमेदवारामध्ये मागासवर्ग प्रवर्गातील अनु.क्र.१६१५ वरील उमेदवारास २३० गुण असल्याने त्यापेक्षा जास्त गुण असूनही आपणास पोलीस उपनिरीक्षक पदावर नियुक्ती न दिल्याने आपल्यावर अन्याय झाल्याची निवेदने संबंधित उमेदवार तसेच विविध लोकप्रतिनिधींकडून शासनास प्राप्त झाली होती. या अनुषंगाने पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षा सन २०१६ मधील महाराष्ट्र लोकसेवा आयोगाच्या शिफारस यादी व्यतिरिक्त २३० व त्यापेक्षा जास्त गुण प्राप्त झालेल्या ६३६ उमेदवारांना पोलीस उपनिरीक्षक पदावर सामावून घेण्याबाबतचा निर्णय शासनाच्या विचाराधिन होता.

वरील पार्श्वभूमीवर मंत्रिमंडळाने दि.२०/०२/२०१९ रोजीच्या मंत्रिमंडळ बैठकीमध्ये खालीलप्रमाणे निर्णय घेतला :-

"पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षा सन २०१६ मधील मूळ मागणी पदांव्यतिरिक्त महाराष्ट्र लोकसेवा आयोगाने प्रसिध्द केलेल्या गुणवत्ता यादीतील आणखी ६३६ उमेदवारांना, पोलीस उपनिरीक्षक मर्यादित विभागीय परीक्षेद्वारे भरण्यात येणाऱ्या कोटयातील भविष्यात वेळोवेळी रिक्त होणाऱ्या पदावर टप्प्या-टप्प्याने सामावून घेण्यास मान्यता देण्यात यावी. तथापि, सदरहू निर्णय मा.महाराष्ट्र प्रशासकीय न्यायाधिकरण, मुंबई यांच्या निदर्शनास आणण्यात यावा व तद्नंतर पुढील कार्यवाही करण्यात यावी."

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 भरण्यात येणाऱ्या कोटयातील भविष्यात वेळोवेळी रिक्त होणाऱ्या पदावर टप्प्या-टप्प्याने सामावून घेण्यास शासन मान्यता देण्यात येत आहे.

२. पोलीस महासंचालक यांनी त्यानुसार याबाबत पुढील आवश्यक कार्यवाही करावी. सदरहू कार्यवाही करताना या प्रकरणी मा.सर्वोच्च न्यायालय, नवी दिल्ली, मा.उच्च न्यायालय, मुंबई / औरंगाबाद खंडपीठ / नागपूर खंडपीठ अथवा महाराष्ट्र प्रशासकीय न्यायाधिकरणाने कोणतेही आदेश दिले असल्यास त्या आदेशाचा अवमान होणार नाही याची दक्षता घेण्यात यावी.

10. In view of submissions advanced at the Bar, the foremost issue posed for consideration is whether the decision of Government to select / absorb 636 candidates over and above 828 candidates is rational decision, so as to term it as ‘administrative exigency’ and whether such deviation is permissible without consultation of MPSC, particularly when the number of candidates exceeds the posts advertised by the Government.

11. The perusal of G.R. dated 22.04.2019 reveals that the Government had already selected in all 982 candidates (828 + 154) and they were sent for training. The last candidate in the list of 982 candidates was belonging to Reserved Category at Serial No.1615 had secured 230 marks. It appears that, as the candidate who secured 230 marks were selected and sent for training, the other candidates who got more than 230 marks but not find place in the list of 982 candidates, felt aggrieved and affected, and therefore, some of the

candidates as well as their local representatives made some representations to the Government voicing their grievance and injustice caused to them. It is on this background, the Government seems to have taken decision to select and absorb additional 636 candidates (as per Annexure attached to G.R.) having scored 230 marks or above and it was decided that they be sent for training so as to absorb and appoint them on the post of PSI as and when vacancy would arise.

12. In so far as the scope of judicial review in the policy decision is concerned, needless to mention that the challenge to administrative action is permissible where it is established that the executive decision is contrary to mandatory provisions of law or violative fundamental rights including being in violation of guarantee of fairness. In other words, the judicial review of administrative action is permissible when action suffers from voice of arbitrariness, unreasonableness or unfairness and has effect of serious prejudice or violation of fundamental rights of the Applicants. The Applicants' contention therefore needs to be examined on the touch-stone of these principles of law.

13. The learned C.P.O. and learned Advocates for contesting the Respondents were much harping upon the rationality of the impugned decision. The perusal of G.R. dated 12.04.2019 reveals that because of act of Respondents to appoint additional 154 candidates as well as 186 candidates of Reserved Category though not entitled in view of Judgment of Hon'ble High Court in ***Vijay Ghogare's*** case, there was simmering unrest and feeling of injustice amongst the Police Constables, who were in the list of 2903 qualified candidates. They seems to have approached the Government through local representatives and thereon the decision of appointing / absorbing additional 636 candidates were taken (who have obtained marks 230 or above) as the last candidate appointed was having 230 marks. Admittedly, the post

advertised were limited to 828 candidates. This being the position, the decision taken by the Government, if tested on the touch-stone of legality can hardly be termed 'rational and legal'. The decision seems to have been taken on the basis of representations received by the Government unmindful of the requirement of law holding the field. The rationality alone is not the criteria for administrative decisions, but it must be ensured that it does not violate fundamental principles of law and the rights of individual who are likely to be affected by such decision.

14. Shri Talekar, learned Advocate for the Applicants rightly referred to the decisions of Hon'ble Supreme Court to emphasize that the appointment of candidates over and above notified vacancies is violative of Article 14 of the Constitution. He referred to ***(1997) 8 SCC 488 (Surinder Singh Vs. State of Punjab)*** where the Hon'ble Supreme Court held that it would be improper exercise of power to make appointments over and above those advertised. In Para No.16, the position was summarized as follows :-

> "**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."*

The same view was reiterated by Hon'ble Supreme Court in ***(2010) 2 SCC 637 (Rakhi Ray Vs. High Court of Delhi)***. In Para No.7, it has been held as follows:-

> "**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 Examines Union 1986, Prem Singh v. Haryana SEB and Ashok Kumar v. Banking Service Recruitment Board)."

15. On this point, Shri Talekar also referred to recent Judgment of Hon'ble Supreme Court in ***(2019) SCC Online SC 594 (Nand Kumar Manjhi Vs. State of Bihar)*** wherein the Hon'ble Supreme Court relying on the decision in ***Rakhi Ray's*** case (cited supra) held that the appointments which are made beyond vacancies advertised is in contravention of well settled principles of law. Suffice to say, it is no more in *res-integra* that the appointments beyond the number of post advertised are illegal.

16. True, the appointment of candidates over and above those advertised is permissible in rare and exceptional circumstance and in emergent situation as held by Hon'ble Supreme Court in ***Surendra Singh's*** case (cited supra). The learned C.P.O. and learned Advocates for contesting Respondents sought to contend that the present situation has to be termed as 'rare and exceptional circumstance', and therefore, it is saved from the rigor of law. In my considered opinion, no such exceptional circumstance or emergent situation is made out to deviate from the settled principles of law. Indeed, it is Government's own case that these 636 candidates will be absorbed in due course of time whenever the vacancies arise and this itself goes to show that there was no such extreme emergent situation to appoint these 636 candidates immediately. These 636 candidates are not being appointed immediately so as to address or take care of some law and order problem or

some emergent situation. On the contrary, they are being appointed in future without having any fixed time for their appointment. It being so, the million dollar question is where comes the question of emergent situation to deviate from law of the land. This necessarily demonstrates that no such emergent situation exists, so as to employ these 636 candidates immediately for public service. This aspect itself run counter to the Government's stand of any necessity for such appointment of 636 candidates without advertising the post afresh. Not a single reason is forthcoming for the appointment of these 636 candidates except the alleged representations of the candidates or people's representative which can hardly be termed as a ground for such decision. The Government ought to have published the Advertisement afresh, as these exist no such emergent situation to warrant the deviation from law.

17. Here, it would be apposite to see Recruitment Rules governing appointment to the post of PSI. In this behalf, Rules 4 & 5 of "The Police Sub-Inspector (Recruitment) Rules, 1995" (hereinafter referred to as 'Recruitment Rules 1995' for brevity) are material, which are as follows :-

> "**4.** Appointment to the post of Police Sub-Inspector by promotion, selection on the basis of limited departmental examination and nomination shall be made in the ratio of 25 : 25 : 50.
>
> **5.** Notwithstanding anything contained in these rules, if in the opinion of Government, the exigencies of service, so require, Government may with prior consultation with the Commission make appointment to the post of Police Sub-Inspector in relaxation of the ratio prescribed for appointment by promotion, selection on the basis of limited departmental examination or nomination."

18. As such, the quota for selection on the basis of limited departmental examination is limited in the ratio mentioned above. This being the position, the Government was required to see the vacancy position before taking any such decision to appoint / absorb 636 candidates. Significantly, no

explanation or vacancy position in this behalf is forthcoming. This goes to show that the decision was taken without considering vacancy position only on the demand of some of those 636 candidates or their representatives and only to please them, the decision was taken without considering its effect on other candidates who may fall in the zone of consideration, if the posts are advertised afresh.

19. True, Rule 5 of 'Recruitment Rules 1995' quoted above permits to relax the aforesaid ratio but it should be in exigency of service, that too, with prior consultation with MPSC. In the present matter, admittedly, no consultation is made with MPSC and in fact, MPSC frowned upon such practice in view of its letter dated 11th July, 2019 on which the Government remains tight-lipped. In so far as the exigency of service is concerned, as stated above, no such case is made out for appointment of 636 candidates. This being the position, *ex-facie*, there is breach of 'Recruitment Rules 1995'.

20. Shri Bhandari, learned Advocate for contesting Respondents sought to place reliance on the Judgment of Hon'ble Supreme Court in ***(2008) 2 SCC 672 (Delhi Development Authority & Anr. Vs. Joint Action Committee, Allottee of SFS Flats & Ors.)***. He particularly referred Para No.64 of the Judgment, which is as follows :-

> "**64.** Broadly, a policy decision is subject to judicial review on the following grounds :
>
> (a) if it is unconstitutional;
> (b) if it is dehors 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."

In fact, the principles quoted above support the case of the Applicants rather the contesting Respondents, as the impugned action squarely falls within

Clause (a), (b) and (d) of Para No.65 of the Judgment reproduced above. In the present case, the impugned action is violative of fundamental rights of the Applicants for their right of consideration for selection to the post of PSI through limited departmental examination as well as settled principles of law laid down by Hon'ble Supreme Court that the appointment should not exceed over and above the post advertised being breach of Articles 14 and 16 of the Constitution.

21. As regard consultation with MPSC, the learned CPO sought to contend that non-consultation with MPSC can be termed as mere irregularity and such irregularity can be cured by post consultation. To bolster-up her submission, she placed reliance on the Judgment of Hon'ble Supreme Court in ***Civil Appeal No.10829/2014 (Ajay Kumar Singh & Anr. Vs. The State of Uttar Pradesh & Ors.) decided on 09.08.2018***. I have gone through the Judgment which pertained to the dispute relating to seniority list between promotees and direct appointees to the post of Assistant Engineer. There was no consultation with MPSC for the promotion of Junior Engineer to the post of Assistant Engineer and on that ground, the dispute of seniority arose. It is in that context, in Para No.22, the Hon'ble Supreme Court held as follows :-

> "**22.** *Simultaneously, we are also of the view that the learned Senior Counsel for the State Government is right in contending that this is an irregularity and not an illegality, and such irregularity can always be cured through prospective consultation."*

22. However, it would be material to note the observations made by Hon'ble Supreme Court in Para No.20 of the same Judgment, which are as follows :-

> "**20.** *….. Not only that, the interpretation of Article 320(3) of the Constitution as enunciated in State of U.P. v. Manbodhan Lal also makes it clear that while the intention of the makers of the Constitution may not be to provide for consultation with the Commission as mandatory, in view of the*

proviso, it would not amount to saying that it is open to the Executive Government to completely ignore the existence of the Commission, as was sought to be done in the present case by doing away with such consultation across the board."

It is thus quite clear that no such inflexible proposition is laid down by the Hon'ble Supreme Court that non-consultation with MPSC can be treated as mere irregularity in every case. On the contrary, the Hon'ble Supreme Court made it clear that it is not open to the Executive Government to completely ignore the existence of the Commission as was sought to be done in that matter by doing away with such consultation across the Board. Suffice to say, in fact situation, the Hon'ble Supreme Court held that it was irregularity and furthermore directed the Government to move MPSC for consultation within a period of two months and finally held that the consultation with MPSC, a quietus must be put to the dispute and no further litigation should be entertained in case UPSC concurs. As such, in my humble opinion, this Judgment is of no assistance to the learned C.P.O. in the present context, as the facts are quite distinguishable and here, the matter pertains to non-consultation to MPSC in the matter of appointment, particularly when it exceeds the post advertised.

23. In this context, it would be apposite to refer the decisions of Hon'ble Supreme Court in ***(1999) 1 SCC 354 (Dinakar A. Patil and Anr. Vs. State of Maharashtra & Ors.)*** and ***(2000) 7 SCC 561 (Suraj Prakash Gupta & Ors. Vs. State of J & K & Ors.)*** as relied by the learned Advocate for the Applicants in support of his contention that the appointments without consultation of MPSC are bad in law. In ***Dinakar Patil's*** case, in Para No.26 while dealing with the similar situation and relaxation of Recruitment Rules viz. "Maharashtra Sales Tax Officers Class-I (Recruitment) Rules, 1982", the Hon'ble Supreme Court in Para No.26 held as follows :-

"**26.** ….. *Rule 4-A opens with a non obstante clause and provides that if in the opinion of the State Government, the exigencies of service so require, the Government may in consultation with MPSC wherever necessary make appointments to the post in relaxation of the percentage prescribed in Rule 4 of the Rules by promotion and nomination. The Tribunal held that the word "may" used in this Rule is directory but in our considered view, to give such a meaning would render the very object of consultation with MPSC wherever necessary nugatory. It would give unbridled power to the Government to dispense with the consultation with MPSC which may result into arbitrary exercise of power by the authority. This could never be the object of Rule 4-A. In our considered view, the word "may" must mean "shall" and this is also obvious from the correspondence between the State Government and MPSC."*

Whereas, in ***Suraj Prakash Gupta's*** case, the Hon'ble Supreme Court held that implied relaxation of Recruitment Rules without following quota Rule and without consulting the Service Commission is bad in law.

24. In so far as the present case is concerned, the Article 320(3) of the Constitution mandates the consultation with MPSC in the matters relating to appointments to civil services and for civil posts, as apparent from the phraseology used in Section 320(3) wherein the word used "shall be consulted" and not "may be consulted". As such, *prima-facie*, the appointments over and above the post advertised, that too, without consultation of MPSC is *prima-facie* unsustainable in law.

25. The learned CPO and learned Counsels for contesting Respondents sought to contend that the Applicants have no *locus* to challenge the impugned action and the apprehension of the Applicants is misplaced. In this behalf, a reference was made to ***(2019) SCC online SC 886 (Vishal A. Thorat & Ors. Vs. Rajesh S. Fate & Ors.)*** and the Judgment of Hon'ble Supreme Court in ***(2017) 9 SCC 478 (D. Sarojakumari Vs. R. Helen Thilakom & Ors.)***. In ***Vishal Thorat's*** matter, a Writ Petition was filed by the candidate who did not participate in the process initiated for appointment to the post of Assistant Inspector of Motor Vehicles. They also challenged the validity of Rule 3(III)(IV)

and Rule 4 of "Assistant Inspector of Motor Vehicles, Group 'C' in Motor Vehicles Department (Recruitment) Rules, 2016". The Hon'ble High Court was pleased to allow Writ Petition and decision was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court observed that the Writ Petition was entertained as PIL although it relates to condition of service which is contrary to settle principles of law. It is in that context, the Judgment was delivered and the ratio is that the PIL should not be entertained in service matter. Whereas, in the present case, the Applicants had participated in the process and their names are figured in qualified list of 2903 candidates. Therefore, the Judgment in ***Ashok Thorat's*** case is of no assistance to the Respondents.

26. As regard ***D. Sarojakumari's*** case (cited supra), the Hon'ble Supreme Court held that, if the candidate participates in selection process, he cannot subsequently turn around and question selection process or constitution of Selection Committee. In that matter, the management of Samuel LMS High School, Parassala, invited application for filling up the post of Music Teacher on direct recruitment basis. The appellant and Respondent 1 both applied for the said post. The appellant was appointed as Music Teacher on 12-7-1999 in Samuel LMS High School, Parassala. Though Respondent 1 had applied for being considered for appointment as Music Teacher in Samuel LMS High School, but after she was not selected in the process of direct recruitment, she raised a plea that since the management of both the schools are same, she was entitled to be promoted as Music Teacher on the basis of her seniority in Light to the Blind School, Varkala. It is in that context, the Hon'ble Supreme Court in Para No.4 held as follows :-

> "**4.** *The main ground urged on behalf of the appellant is that Respondent 1 having taken part in the selection process could not be permitted to challenge the same after she was unsuccessful in getting selected. The law is well settled that once a person takes part in the process of selection and is*

not found fit for appointment, the said person is estopped from challenging the process of selection."

Whereas, the challenge in the present O.A. is on totally different grounds and the Applicants being aggrieved by the decision to appoint / absorb 636 candidates over and above the post advertised have filed the present O.A, and therefore, it cannot be said that they have no *locus standi* to challenge the decision or estop from challenging the impugned action of the Government.

27. As rightly pointed out by the learned Advocate for the Applicants that the decision to appoint / absorb 636 candidates over and above advertised post is certainly going to cause serious prejudice to the Applicants as if these posts are filled in, then there would be no recruitment for at least next five years. In fact, the decision of appointing these 636 candidates is taken without seeing the vacancy position. It is very unlikely that again so many vacancies would be there in near future. This being the position, the contention of the Applicants that the impugned decision has taken away their right of consideration for selection and it violates their fundamental rights cannot be repelled.

28. The submission advanced by Shri Bhandari, learned Advocate for contesting Respondents that some of the Applicants have made representations to the Government to include their names in the list of selection, and therefore, now Applicants are estopped from challenging the impugned action is misplaced. In fact, Shri Talekar, learned Advocate for the Applicants has made a categorical statement that none of the Applicants is signatory to the representation made to the Government purportedly on 22.05.2019. When specific query was made to Shri Bhandari, learned Advocate, he made a statement at least two Applicants are signatory to the

said representation. Even assuming for a moment that some of the Applicants have signed the said representation that *ipso-facto* will not debar the Applicants from challenging the legality of impugned action in accordance to law, if it is shown that it resulted into serious prejudice to them.

29. In so far as the pendency of ***Writ Petition No.3555/2019 (Nivrutti V. Gite Vs. State of Maharashtra)*** filed before Hon'ble High Court, Bench at Nagpur is concerned, therein notices are issued for final disposal and the process of selection allowed to continue subject to result of the Petition. In my humble opinion, merely because Writ Petition is subjudice before the Hon'ble High Court, that will not take away the jurisdiction of this Tribunal. The Hon'ble High Court has not passed order on merit and in fact, what was allowed is the continuation of process of selection. Had there being adjudication on merit refusing the interim relief, the position certainly would have been different. Suffice to say, this Tribunal can exercise it's jurisdiction to consider the relief of interim relief on merit.

30. The contentions sought to be raised by the learned C.P.O. and learned Advocates for contesting Respondents that the impugned decision is of recommendation only and not appointment is misconceived and deserves to be rejected. The tenor of impugned G.R. dated 22.04.2019 as well as the subsequent action follow-up action taken by the Government for medical examination, etc. certainly goes to show that the Government has decided to appoint these 636 candidates in service on the post of PSI, and therefore, it cannot be said that the Applicants have approached this Tribunal only on unfounded apprehension. The Applicants have definitely *locus* to challenge the impugned action and have succeeded to establish *prima-facie* case in their favour for grant of interim relief.

31. The totality of aforesaid discussion leads me to conclude that *prima-facie* impugned action is violative of settled principles of law as discussed above. Resultantly, the impugned action is *prima-facie* not sustainable in law. The Applicants are entitled to the interim relief. If the interim relief is refused, certainly it would cause irreparable loss to the Applicants, as in that event, 636 posts will be filled-in leaving the Applicants in lurch having no opportunity of promotion at least for next five years or even more. Hence, the following order.

O R D E R

The interim relief as prayed in Para 51(D) is granted.

Sd/-

(A.P. KURHEKAR)
Member-J

skw