

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL  
MUMBAI**

**ORIGINAL APPLICATION NO.1064 OF 2022  
WITH  
ORIGINAL APPLICATION NO.1306 OF 2022  
AND  
ORIGINAL APPLICATION NO.317 OF 2023**

**DISTRICT : MUMBAI**  
**Sub.:- Promotion**

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**ORIGINAL APPLICATION NO.1064 OF 2022**

1. Smt. Manisha Suhas Jamdade. )  
Age : 46 Yrs, Working as Assistant Desk )  
Officer, Public Works Department, )  
Mantralaya, Mumbai and residing at )  
B—40/7, Government Colony, Bandra (E), )  
Mumbai. )
2. Shri Sunil Balkrishna Tambe. )  
Age : 52 Yrs, Working as Assistant Desk )  
Officer, Irrigation Department, )  
Mantralaya, Mumbai and residing at )  
2/1001, Shell Colony, Chembur, )  
Mumbai – 400 071. )
3. Smt. Deepali Narendra Sonavane. )  
Age : 48 Yrs, Working as Assistant Desk )  
Officer, Public Works Department, )  
Mantralaya, Mumbai and residing at )  
C-404, Chavneswar CHS, B-79, )  
Sector-23, Seawood, Navi Mumbai. )
4. Smt. Chandrashekhar K. Vade. )  
Age : 49 Yrs, Working as Assistant Section )  
Officer, Food, Civil Supply & Consumer )  
Protection Department, Mumbai and )  
residing at 402, Roop Solanki Heights, )  
Saibaba Nagar, Boisar, )  
Taluka & District : Palghar – 401 501. )...**Applicants**

**V/s.**

1. The State of Maharashtra. )  
Through Chief Secretary, )  
Mantralaya, Madam Cama Road, )  
Mumbai – 400 032. )
2. The Additional Chief Secretary )  
(Services), General Administration )  
Department, Desk 16-B, Mantralaya,) )  
Madam Cama Road, Mumbai – 32. )
3. Maharashtra Public Service )  
Commission, Through Chairman, )  
Cooperage Telephone Exchange )  
Building, Maharshi Karve Marg, )  
Cooperage, Mumbai – 400 032. )
4. Additional Chief Secretary (Finance), )  
Finance Department, Mantralaya, )  
Madam Cama Road, Mumbai – 32. )
5. Additional Chief Secretary (Services), )  
Desk 14-B, G.A.D, Mantralaya, )  
Mumbai – 400 032. ) **)...Respondents**
6. Shri Satish Baburao Range. )  
Assistant Section Officer, )  
Planning Department, Mantralaya, )  
Mumbai – 400 032 and residing at )  
Nerul, Navi Mumbai. )
7. Shri Sunil Eknath Nimgaunkar. )  
Assistant Section Officer, Mantralaya,) )  
Mumbai and residing at Panvel, )  
Navi Mumbai. )
8. Shri Sunil Narayan Kumbhar. )  
Assistant Section Officer, )  
Revenue & Forest Department, )  
Mantralaya, Mumbai – 32. )
9. Shri Vinayak B. Ingale. )  
Assistant Section Officer, )  
Tribal Development Department, )  
Mantralaya, Mumbai – 400 032. )
10. Shri Hemant T. Mahale. )  
Age : 35 Yrs, Assistant Section )  
Officer, Finance Department )  
(Lottery), Maharashtra State Lottery,)

- Maharashtra State Lottery, )  
 8<sup>th</sup> Floor, New Administrative )  
 Building, Opp. Mantralaya, )  
 Mumbai – 400 032 and residing at )  
 4A/804, Destiny Pride CHS, )  
 PMGP Colony, Near Fire Brigade )  
 Station, Gavanpada, Mulund (E). )
11. Shri Shivaji Chandrabhan Ghuge. )  
 Age : 40 Yrs, Assistant Section )  
 Officer, Agriculture Department, )  
 5<sup>th</sup> Floor, Mantralaya, Mumbai – 32, )  
 and residing at 1205, Siddheshwar )  
 Heights, Plot No.220, Sector – 21, )  
 Navi Mumbai. )
12. Shri Vishal Dattatray Teke. )  
 Age : 34 Yrs, Assistant Section )  
 Officer, Agriculture & ADF Dept., )  
 Mantralaya, Mumbai – 32 and )  
 residing at C-106, Mangeshi Dream )  
 City, Building No.3, Adharwadi Jail )  
 Road, Kalyan (West) – 421 301. )
13. Shri Mohsin Rajmahmad Shaikh. )  
 Age : 37 Yrs, Assistant Section )  
 Officer, Revenue & Forest Dept., )  
 Mantralaya, Mumbai – 32 and )  
 residing at 704-B, Progressive )  
 Grande Society, Plot No.3, Sector-8, )  
 Ulwe, Navi Mumbai – 410 206. )
14. Shri Sanket Sudhir Gaikwad. )  
 Age : 32 Yrs, Assistant Section )  
 Officer, Social Justice Department, )  
 1<sup>st</sup> Floor, Annex Building, )  
 Mumbai – 32 and residing at )  
 1<sup>st</sup> Floor, Bhagwant Krupa, )  
 NSS Road, Vishnu Nagar, )  
 Dombivli (W) – 421 202. )
- Respondent Nos.6 to 14 have filed Caveat, )  
 and therefore, they are added as )  
 Interveners in this O.A. )...Interveners

**WITH**

**ORIGINAL APPLICATION NO.1306 OF 2022**

1. Smt. Sushma Amol More. )  
Assistant Section Officer, )  
Revenue & Forest Department, )  
Mantralaya, Mumbai – 400 032. )
2. Shri Yogesh Wasnik. )  
Assistant Section Officer, )  
Cooperation, Marketing & Textile )  
Department, Mantralaya, )  
Mumbai – 400 032. )**...Applicants**

**V/s.**

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

**AND****ORIGINAL APPLICATION NO.317 OF 2023**

1. Shri Navnath Balu Pokale. )  
Age : 31 Yrs, Occu.: Assistant Section )  
Officer and residing at Flat No.2205, )  
4-B Building, New Hind Mill, )  
Near Rambhau Bhosale Marg, )  
Cotton Green, Mumbai – 400 033. )
2. Shri Atul Vasant Ithape. )  
Age : 34 Yrs, Occu.: Assistant Section )  
Officer and residing at Flat No.C-405, )  
Silver Star CHS, Sector -18, )  
Kamothe, Panvel – 410 206. )
3. Shri Mallinath A. Ghongade. )  
Age : 34 Yrs, Occu. : Service and )  
B-407, Susheel –Harmony CHS, )  
Plot No.92/93, Sector 22, Kamothe, )  
Navi Mumbai – 410 209. )
4. Shri Kiran Sadashiv Kale. )  
Age : 33 Yrs, Occu.: Service and )  
residing at 606/B, Susheel )  
Harmony, Plot No.92/93, Sector-22, )  
Kamothe, Panvel – 410 209. )

5. Shri Chetan Ramrao Chavan. )  
 Age : 36 Yrs, Occu. : Service, )  
 Residing at 204, Greenland CHS, )  
 Plot No.40, Sector – 40, Seawoods, )  
 Nerul, Navi Mumbai. )...**Applicants**

**V/s.**

1. The State of Maharashtra. )  
 Through Additional Chief Secretary, )  
 (14-B), General Administration )  
 Department, Mantralaya, )  
 Mumbai – 400 032. )
2. The Additional Chief Secretary )  
 (16-B), General Administration )  
 Department, Mantralaya, )  
 Mumbai – 400 032. )...**Respondents**

**Smt. Punam Mahajan, Advocate for Applicants in O.A.1064/2022.**

**Shri M.D. Lonkar, Advocate for Interveners Nos.6 to 14 in O.A.1064/2022.**

**Shri A.A. Desai, Advocate for Applicants in O.A.1306/2022.**

**Shri S.S. Dere, Advocate for Applicants in O.A.317/2023.**

**Smt. S.P. Manchekar, Chief Presenting Officer for Respondents.**

**CORAM : A.P. KURHEKAR, MEMBER-J**

**DEBASHISH CHAKRABARTY, MEMBER-A**

**DATE : 17.07.2023**

**PER : A.P. KURHEKAR, MEMBER-J**

**JUDGMENT**

1. Heard Smt. Punam Mahajan, Advocate for Applicants in O.A.1064/2022, Shri M.D. Lonkar, Advocate for Interveners Nos.6 to 14, Shri A.A. Desai, Advocate for Applicants in O.A.1306/2022; Shri S.S. Dere, Advocate for Applicants in O.A.317/2023 and Smt. S.P. Manchekar, Chief Presenting Officer for Respondents.

2. First issue posed for consideration in these O.As is whether selection through Limited Competitive Examination (LCE in short) conducted in terms of Rule 3(b) of Departments of Mantralaya (Recruitment) Rules, 1995 (hereinafter referred to as 'Recruitment Rules of 1995' for brevity) is by way of promotion or can be treated as direct recruitment and secondly, whether Applicants' claim in O.A.1064/2022 and 1306/2022 for promotion to the post of Desk Officer is acceptable in the light of Judgment of Hon'ble Bombay High Court delivered in **Writ Petition No.2797/2015 [State of Maharashtra Vs. Vijay Ghugare] on 04.08.2017** (hereinafter referred to as '**Vijay Ghogare's case**' for brevity) whereby G.R. dated 25.05.2004 is struck down to the extent it makes provision for reservation in the matter of promotion being ultra-virus to Article 16(4-A) of the Constitution and contrary to law laid down in **Writ Petition (Civil) No.61 of 2002 [M. Nagaraj & Ors. Vs. Union of India & Ors.]**.

3. Before advertng to the contentions raised by the parties, the factual narration giving rise to these O.As is necessary.

4. All the Applicants in these three O.As are presently serving as Assistant Section Officers in various Departments in Mantralaya, State of Maharashtra. Initially, they were appointed as Clerk-cum-Typists, but later cleared LCE held by Commission and consequent to it, their names were taken in common seniority list. Following Chart would show the dates of their joining, dates of passing LCE, category to which they belong, etc.

**In O.A.1064 of 2022**

App No.	Names of Applicants	Date of Joining as Clerk-cum-Typist	LCE Merit No.	Date of passing LCE	Category
1.	Manisha Jamdade	10/08/1998	81/2007	12/11/2008	NT-C
2.	Sunil B. Tambe	07/01/1995	45/2012	21/02/2013	SC
3.	Deepali N. Sonavane	23/12/1996	84/2007	12/11/2008	NT-D

4.	Chandrashekhar K. Vade	01/08/1996	78/2009	29/11/2010	NT-D
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**In O.A.1306 of 2022**

App No.	Names of Applicants	Date of Joining as Clerk-cum-Typist	LCE Merit No.	Date of passing LCE	Category
1.	Sushma A. More	18/06/1997	70/2000	29/11/2010	SC
2.	Yogesh C. Wasnik	08/02/2000	35/2011	17/11/2011	SC

**In O.A.317 of 2023**

App No.	Names of Applicants	Department	Date of Birth	Date of Joining as ASO (Direct Recruitment by MPSC)	Category
1	Navnath B. Pokale	Rural Development Dept.	05/06/1991	03/06/2014	Open
2	Atul V. Ithape	General Admn. Dept.	15/05/1989	02/06/2014	Open
3	Mallinath A. Ghongade	Industry, Energy & Labour Dept.	01/06/1988	02/06/2014	Open
4	Kiran S. Kale	Home Dept.	22/07/1989	22/05/2014	Open
5	Chetan R. Chavan	School Education & Sports Dept.	29/07/1986	15/05/2014	Open

5. Admittedly, the Applicants in O.A.No.1064/2022 and 1306/2022 belong to reserved category as mentioned in the Chart. Whereas Applicants in O.A.No.317/2023 are from Open Category. Insofar as Respondent Nos.6 to 14 in O.A.No.1064/2022 is concerned, during the pendency of this O.A, Respondents Nos.6 to 9 are already promoted to the post of Section Officer. Therefore, reply is filed on behalf of Respondent Nos.10 to 14 only in O.A.No.1064/2022.

6. The Applicants in O.A.No.1064/2022 and 1306/2022 have raised grievance of non-consideration to them for promotion to the post of Desk

Officer and sought direction to the Respondent – Government to grant promotion to the post of Desk Officer from the year 2017 with consequential service benefits. Whereas Applicants in O.A.No.317/2023 also aspire for promotion to the post of Desk Officer and raised grievance that the Government kept 46 posts vacant in DPC Minutes dated 24.11.2022 thereby depriving them of promotional avenues to the post of Desk Officer and sought declaration that the decision taken in DPC keeping 46 posts vacant is illegal and unconstitutional and also sought direction to consider them for promotion to the post of Desk Officer by holding fresh DPC.

7. As per Rule 3 of 'Recruitment Rules of 1995', the appointment to the post of Assistant in the Department is by promotion, by selection and by nomination in the ratio of 30:30:40. Here, it would be apposite to reproduce Rule No.3 of 'Recruitment Rules of 1995', which is as under :-

**“6.13.** The Rule 3 of the Department of Mantralaya (Recruitment) Rules 1995 is as follows:-

**“3.** *Appointment to the post of Assistant in the department shall be made either,*

*a) by promotion of a suitable person on the basis of seniority subject to Class from among the members of lower division having not less than 3 years continuous regular service in the lower division and who have passed or have been exempted from passing the Post Recruitment Training Examination prescribe for them; or*

*b) by selection on the basis of a common merit list prepared by the commission on the basis of the result of the Limited Competitive Examination held by the Commission in accordance with the orders issued by Government in consultation with the Commission in that behalf from time to time, which Examination shall be common to the members of the lower division, in all Departments; or*

*c) by nomination on the basis of result of a Competitive Examination held by the Commission for admission to, which a candidate must-*

*(i) have complete the age of 18 years, but not have completed the age of 30 years, on the first day of the month immediately following the month in which the period of three months from the date of first publication in the Maharashtra Government Gazette or in any newspaper, whichever is*



*earlier, by the Commission of notification, of an advertisement inviting applications for the posts, expires and*

*(ii) possess a degree of a statutory university or any other qualification declared by Government to be equivalent thereto.*

Rule 4 of the Department of Mantralaya (Recruitment) Rules,1995 states as follow:

*“Appointment to be made to the post in a calendar year by promotion, selection on the basis of Limited Competitive Examination and nomination shall be made in the ratio of 30:30:40.”*

8. For appearing in LCE, the candidate is required to complete 7 years' service on the post of Clerk-cum-Typist. In addition to it, the candidate must have passed Post Recruitment Training Examination. Admittedly, the Applicants have cleared LCE Examinations as shown in the Chart and accordingly, they were placed in common seniority list, which is maintained in terms of select list for promotion to the post of Section Officer in 'Mantralaya Departments Rules of 1991' (hereinafter referred to as 'Rules of 1991' for brevity). As per Rule 1(d) of "common seniority list" means seniority list of the Assistants in Mantralaya Departments who have passed departmental examinations and are eligible for promotion to the post of Section Officer prepared by General Administration Department of Government. There is no denying that the names of Applicants are accordingly placed in common seniority list in view of passing of LCE.

9. The principle contention of learned Advocates for the Applicants in O.A.Nos.1064/2022 and 1306/2022 is that they are deprived of promotion to the post of Section Officer on the ground of taking benefit of reservation while passing LCE. According to them, the selection through LCE is not by way of promotion, but it has to be construed as direct recruitment, and therefore, the question of reservation does not survive.

10. To appreciate the contentions raised by the parties, it is necessary to see the background of the matter from which these issues have arisen.

11. The State of Maharashtra has passed Maharashtra State Public Service (Reservation for SC, ST, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Class) Act, 2001 (hereinafter referred to as 'Reservation Act of 2001' for brevity) which came into force on 20.01.2004. Section 4 of the said Act provides for the reservation of vacancies or seats at the stage of direct recruitment in public service for persons belonging to the caste mentioned in the Act. Sub-Section 2 of Section 4 of the Act provides for 52% reservation at the stage of direct recruitment in public services. Whereas Section 5(1) of the Act made provision for reservation in promotion at all stages of promotion. The Government accordingly issued G.R. dated 25.05.2004 thereby superseding earlier G.Rs. dated 23.05.1974, 28.01.1975 and 23.01.1991 which were providing reservation in promotion before 'Reservation Act of 2001' came into force. Accordingly, by G.R. dated 25.05.2004, reservation in promotion is made to the extent of 33%. The legality of G.R. dated 25.05.2004 was challenged by Vijay Ghogare in Writ Petition No.8452/2004. Writ Petition was transferred to this Tribunal at Mumbai Bench for decision on merits. MAT declared 'Reservation Act of 2004' and G.R. dated 23.05.1974 ultra-virus to Article 16(4) of the Constitution of India and law laid down by Hon'ble Supreme Court in **M. Nagaraj's** case.

12. The Judgment passed by the Tribunal was challenged by the Government by filing Writ Petition No.2797/2015. Hon'ble High Court delivered the Judgement on 04.08.2017. The order of Hon'ble High Court is as under :-

**“ORDER**

- (i) *The impugned judgment and order dated 28 November 2014 of Maharashtra Administrative Tribunal to the extent it strikes down the Reservation Act is set aside and the issue of constitutional*

*validity of the Reservation Act is kept open for determination in appropriate case and on an appropriate occasion.*

(ii) *The Government Resolution dated 25th May, 2004 is struck down to the extent it makes provisions for reservation in matters of promotions in favour of Scheduled Caste, Scheduled Tribes, De-Notified Tribes (A), Nomadic Tribes (B), Nomadic Tribes (C), Nomadic Tribes (D), and Special Backward Classes, being Ultra Vires Article 16(4A) of the Constitution and contrary to the law laid down in M. Nagraj case.*

2. *The Petitions are disposed of in the above terms by virtue of the majority view (A.A. Sayed, J. and M.S. Sonak, J.). Rule to stand disposed of accordingly.*

3. *It is clarified that since GR dated 25 May 2004 is struck down, consequential direction is issued to the State Government to take necessary corrective steps/measures in respect of promotions already granted, within 12 weeks from today, which direction is necessitated in view of the order dated 28 March 2008 of the Supreme Court modifying the interim order of this Court dated 9 March 2007, by which the promotions were made subject to the final decision in the old Writ Petition No.8452 of 2004.*

4. *Upon the pronouncement of the order, the learned Government Pleader appearing for the State requested for stay to the effect and operation of this order to the extent stated in paragraph 1(ii) and paragraph 3 above. He pointed out that by order dated 21 December 2016, this Court had continued the stay granted to the impugned judgment and order of MAT until the final decision on Reference by the third learned Judge. Learned Counsel for the Respondents/original Petitioners oppose the prayer for stay.*

5. *In the facts and circumstances of the case, we accede to the request of the learned Government Pleader and stay the effect and operation of this order to the extent as prayed by the learned Government Pleader for a period of 12 weeks from today. It is clarified that the order dated 28 March 2008 passed by the Supreme Court modifying the interim order dated 9 March 2007 of this Court shall continue to operate for the said period.”*

13. The Government has filed Special Leave Petition No.28306 of 2017 before Hon’ble Supreme Court challenging the aforesaid decision and it is subjudice. However, admittedly, Hon’ble Supreme Court has not granted stay. Thus in effect, the Judgment of Hon’ble High Court dated 04.08.2017 is in force and holds the field. In other words, as of now, since G.R. dated 25.05.2004 is struck down in its entirety, it cannot be operated for any purpose whatsoever.

14. The Government by G.R. dated 25.05.2004 reserved 33% posts to be filled-in from reserved candidates for promotion, invoking Section 5(1) of 'Reservation Act of 2004'. It will be apposite to reproduce relevant portion from G.R. dated 25.05.2004, which is as under :-

“३. सध्या प्रचलित असलेल्या दिनांक २३ मे १९७४, २८ जानेवारी १९७५ व २३ जानेवारी १९९१ चे शासन निर्णय अधिकृत करून आता नव्याने लागू केलेल्या वरील अधिनियमाच्या कलम ५ पोटकलम (१) व (२) च्या अनुषंगाने खालीलप्रमाणे सुधारीत आदेश निर्गमित करण्यात येत आहेत.

**शासन निर्णय :-**

(अ) महाराष्ट्र अधिनियम क्रमांक ८ मधील (आरक्षण कायदा) च्या कलम ५ मधील पोटकलम (१) नुसार जेथे पदे पदोन्नतीने भरली जातात तेथे आरक्षणाचे तत्व लागू होईल. त्यानुसार दिनांक २३/११/१९९१ च्या शासन निर्णयातील तरतूद रद्द करून सरळ सेवेचे प्रमाण ७५ % पेक्षा अधिक असले तरीही उर्वरित पदोन्नतीच्या पदांना आरक्षण लागू राहील.

(ब) पदोन्नतीमधील आरक्षण हे खालीलप्रमाणे असेल.

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|----|---------------------|------|
| १) | अनुसूचित जाती       | १३%  |
| २) | अनुसूचित जमाती      | ७%   |
| ३) | विमुक्त जाती (अ)    | ३%   |
| ४) | भटक्या जमाती (ब)    | २.५% |
| ५) | भटक्या जमाती (क)    | ३.५% |
| ६) | भटक्या जमाती (ड)    | २%   |
| ७) | विशेष मागास प्रवर्ग | २%   |

(क) जेथे पदोन्नतीकरता सेवा प्रवेश नियमात तरतूद आहे तेथे पदोन्नती करीता अदयापर्यंत ज्या टप्प्यांना वा संवर्गांना आरक्षण लागू नव्हते, आता त्या पदोन्नतीच्या सर्व टप्प्यांना/संवर्गांना आरक्षणाचे तत्व दिनांक २९/१/२००४ पासून लागू होईल.”

15. Admittedly, it is on the basis of 33% reservation in promotion, the Applicants in O.A.No.1064/2022 and 1306/2022 participated in LCE and cleared the examination. In other words, while getting selected on the post of Assistant Section Officer through LCE, they got the benefit of reservation in terms of G.R. dated 25.05.2004 which was ultimately struck down by Hon'ble High Court. Not only that, Hon'ble High Court in its Judgment dated 04.08.2017 issued direction to the Government to take necessary corrective steps/measures in respect of promotions already granted within 12 weeks from the date of order. Thus, strictly speaking, the Government was to take some remedial measures for taking away the benefit of selection to the post of Assistant Section Officer given to the Applicant from reserved category, but Government in its wisdom and rightly so continued them on the post of Assistant

Section Officers in view of ongoing litigation and pendency of SLP before Hon'ble Supreme Court.

16. Notably, the Government through GAD issued letter dated 02.11.2017 taking note of the decision of Hon'ble High Court in **Vijay Ghogare's** matter and made it clear that there will be no reservation in promotion as earlier given by G.R. dated 25.05.2004. The contents of letter dated 02.11.2017 are material, which are as under :-

“विषयांकित प्रकरणी मा.उच्च न्यायालय, मुंबई यांनी याचिका क्र.२७९७/२०१५ या प्रकरणी दिनांक ४.८.२०१७ रोजी दिलेल्या निर्णयान्वये, दिनांक २५.५.२००४ चा शासन निर्णय रद्द करून पदोन्नतीमधील आरक्षण अवैध ठरविले आहे. तथापि, मा.उच्च न्यायालयाने आपल्या दिनांक ४.८.२०१७ च्या निर्णयास १२ आठवड्यांची स्थगिती दिली होती. संदर्भाधिन क्र.२ येथील दिनांक १८.१०.२०१७ च्या पत्रान्वये सदर स्थगिती कालावधीत पदोन्नतीमध्ये आरक्षण देऊन पदोन्नतीचे आदेश निर्गमित करण्याबाबत आदेश निर्गमित करण्यात आले होते. हा स्थगिती कालावधी दिनांक २७.१०.२०१७ रोजी संपुष्टात आला आहे. या प्रकरणी मा.उच्च न्यायालयाच्या उक्त निर्णयास स्थगिती देण्याच्या अनुषंगाने मा.सर्वोच्च न्यायालयात दाखल केलेल्या विशेष अनुज्ञा याचिका क्रमांक २८३०६/२०१७ संदर्भात दिनांक ३०.१०.२०१७ रोजी झालेल्या सुनावणीच्या वेळी मा.सर्वोच्च न्यायालयाने मा.उच्च न्यायालयाच्या दिनांक ४.८.२०१७ च्या निर्णयास कोणतीही स्थगिती दिलेली नाही अथवा परिस्थिती “जेसे थे” ठेवण्याबाबत देखिल कोणतेही आदेश दिलेले नाहीत. त्यामुळे शासन निर्णय दि.२५.५.२००४ मधील तरतुदीनुसार मागासवर्गीयांना पदोन्नतीमध्ये आरक्षण देता येणार नाही. यास्तव मा.सर्वोच्च न्यायालयात दिनांक १३.११.२०१७ रोजी होणा-या सुनावणीपर्यंत सर्व स्तरावरील पदोन्नती प्रक्रिया स्थगित ठेवण्यात यावी तसेच पदोन्नतीसंदर्भातील कोणतेही आदेश निर्गमित होणार नाहीत, याबाबत सर्व प्रशासकीय विभागांनी व त्यांच्या अधिनस्त सर्व क्षेत्रिय कार्यालयांनी, आस्थापना अधिका-यांनी, नियुक्ती प्राधिका-यांनी दक्षता घ्यावी.”

17. Consequent to it, the Government through GAD by letter dated 10.09.2018 informed to Smt. Manisha S. Jamdade (Applicant No.1 in O.A.No.1064/2022) that her request for promotion to the post of Section Officer is not acceptable. She has not challenged this communication dated 10.09.2018 in her O.A.No.1064/2022. All that, she claims for promotion to the post of Section Officer from 2017. Be that as it may, there is no escape from the situation that Applicants in O.A.No.1064/2022 and 1306/2022 have taken the benefit of policy of reservation in promotion formulated by the then existing G.R. dated 25.05.2004 which was eventually struck down in its entirety.

18. This takes us to switch over to the contentions raised by Smt. Mahajan and Shri Desai, learned Advocate for the Applicants in O.A.Nos.1064/2022 and 1306/2022 respectively. Smt. Mahajan and Shri Desai, learned Advocate for the Applicants vehemently urged that the selection through LCE is not promotion, but it has to be construed as

a direct appointment, since Applicants cracked the examinations on merit. Thus, according to them, it was merit based examination in which Applicants succeeded and it cannot be given colour or characteristic of promotion. They further made fervent plea that Applicants denied the promotion to the post of Section Officer though they have rendered 10 to 12 years' service on the post of Assistant Section Officer and have legitimate expectation of promotion to the post of Section Officer. Thus in short, according to them, 33% reservation given by G.R. dated 25.05.2004 at that point of time should not come in their way for further promotion and Government ought to have operated common seniority list as per their placements therein.

19. In alternative submission, Shri Desai and Smt. Mahajan, learned Advocates for the Applicants sought to contend that even before issuance of G.R. dated 25.05.2004, there was reservation in promotion policy as reflected by G.Rs. dated 23.05.1974, 28.01.1975 and 23.01.1991. In this behalf, they referred Section 5(2) of the 'Reservation Act of 2004' to urge that even assuming that it was by way of promotion, the selection of the Applicants is protected under Section 5(2) of 'Reservation Act of 2004'. Section 5 of 'Reservation Act of 2004' is as under :-

“5. (1) The reservation in promotion shall be at all stages of promotions.

(2) On the date of coming into force of this Act, if any Government orders providing for reservation for any posts to be filled by promotion, are in force, the same shall continue to be in force unless modified or revoked, by Government.”

20. Per contra, Smt. S.P. Manchekar, learned Chief Presenting Officer urged that selection through LCE is not from open market and it is restricted to the candidates who are in service and in terms of Rule 3(b) of 'Recruitment Rules of 1995', it is accelerated promotion and at the same time, it is not purely merit based but on the basis of benefit of reservation, since 33% posts were reserved to fill-in the posts of Assistant Section Officers from reserved categories. She has further pointed out

that Law and Judiciary Department of State of Maharashtra has also given opinion that the appointment through LCE is accelerated promotion. The perusal of opinion of Law and Judiciary Department reveals that the opinion was given based on the decision of Hon'ble High Court of Delhi given in **Writ Petition No.2887/2012 [Man Singh Vs. Union of India & Ors.] decided on 21.12.2012**. Para Nos.6, 7 and 8 of the opinion given by Law and Judiciary Department is relevant, which is as under :-

**6.** The question now posed by the General Administration Department is whether such appointment of the Assistant Desk Officer through the limited departmental competitive examination be made after following the reservation policy or otherwise.

**7.** Once, it is held that the appointment of the Assistant Desk Officer through the limited departmental competitive examination falls within the category of promotion, than, naturally the set of rules applicable for appointment through promotion will be applicable to such appointments. The Hon'ble High Court, Bombay in the matter of reservation in promotion has delivered a judgment on 4<sup>th</sup> August, 2017. The legal position and the consequent actions required to be taken pursuant to the orders of Hon'ble High Court dated 4<sup>th</sup> August, 2017 is clarified in this Department's earlier UORs dated 24.11.2017 and dated 04.04.2018 and the opinion of Ld. Advocate General dated 15.12.2017 in the matter. Further, while considering the matter of appointment of PSI through the limited departmental examination, this Department vide UOR No.53-2018/E, dated 15<sup>th</sup> January, 2018, after referring to the opinion of Ld. Advocate General dated 15<sup>th</sup> December, 2017 has opined that a reservation in promotion cannot be granted. It is further opined that, all the promotional posts are required to be filled in without any reservation. It is further opined in that case, that the orders of promotion of the Police Sub-Inspector selected through the departmental examination have to be issued as per merit list, without any reservation. It is also opined that the action of providing reservation in promotion and sending the candidates from the reserve category (who got promotion because of policy of reservation contained in the Government Resolution dated 25<sup>th</sup> May, 2004 and the attendant concessions and relaxations, and not otherwise on merit) for training does not appear to be in consonance with the decision of Hon'ble High Court dated 4<sup>th</sup> August, 2017 in Writ Petition No.2797/2015.

**8.** In view of the above legal position, the appointment to the post of Assistant Section Officer through limited departmental examination is required to be made on merit and without following the reservation. The fact that the process was completed and recommendations were made by the MPSC before the pronouncement of judgment in Writ Petition No.2797/2015 will not be of no consequence."

21. The learned CPO thus sum-up that since Applicants in O.A.Nos.1064/2022 and 1306/2022 have already taken the benefit of reservation on the basis of G.R. dated 25.05.2004, which is struck down by Hon'ble High Court, now they cannot ask for promotion to the post of Section Officer at least until the final decision of Hon'ble Supreme Court in **Vijay Ghogare's** case.

22. Shri Desai and Smt. Mahajan, learned Advocates for the Applicants in second limb of submission in alternative without prejudice to the contentions raised by them submits that their clients are ready to give Undertaking for *ad-hoc* promotions to the post of Section Officers, subject to final order by Hon'ble Supreme Court in **Vijay Ghogare's** matter and Government be directed to promote them on *ad-hoc* basis.

23. Shri M.D. Lonkar, learned Advocate for Respondent Nos.6 to 14 adopted the submission advanced by learned CPO and reiterated that the Applicants in O.A.No.1064/2022 having availed the benefit of reservation, they are not eligible for next promotion to the post of Section Officer in the teeth of the Judgment of Hon'ble Bombay High Court dated 4<sup>th</sup> August, 2017 in Writ Petition No.2797/2015.

24. Insofar as O.A.317/2023 is concerned, it is for declaration that action of Government keeping 46 posts vacant is illegal and sought directions to the Government to consider them for promotion to the post of Desk Officer as per gradation list. The Applicants in this O.A. were directly appointed as Assistant Section Officer by Direct Recruitment in terms of Rule 3 (c) of Recruitment Rules, 1995. Their grievance is that because of decision of the Government to keep 46 posts of Section Officer vacant, they are deprived of promotion. These Applicants are in conflicted with the Applicants in O.A.No.1064/2022 and 1036/2022.

25. Shri S.S. Dere, learned Advocate for Applicants in O.A.No.317/2023 in reference to the decision of the Hon'ble Bombay



High Court declaring G.R. dated 25.05.2004 ultra-virus to the Constitution has pointed out that since the Applicants in O.A.1064/2022 and 1306/2022 have taken benefit of reservation which was available on the basis of G.R. dated 25.05.2004, now G.R. being struck down, they are not entitled for promotion to the post of Section Officer. Therefore, the decision of Government to keep 46 posts vacant for reserved category is totally erroneous. He has further pointed out that initially after the decision of the Hon'ble High Court in **Vijay Ghogare's** matter, the Government through G.A.D. by letter dated 29.12.2017 informed to all Departments to fill-in the promotional posts from Open Category for time being subject to decision of the Hon'ble Supreme Court. It is in pursuance of the said letter, the posts kept for reserved categories were kept intact. However, later Government issued G.R. dated 07.05.2021 to fill in all promotional posts on seniority basis including posts which are kept vacant for reserved category. This being so, the policy decision taken by G.R. dated 07.05.2021 ought to have been continued. However, the Government again changed its stand and kept 46 posts vacant for reserved categories which is prejudicial and detrimental to his client. According to him had Government not kept those 46 posts vacant, his client would have got promotion to the post of Section Officer.

26. Learned C.P.O. all that submits that the decision to keep 46 posts vacant is taken by the Government in DPC minutes dated 24.11.2022 in view of filing of O.A.No.1064/2022 and 1306/2022 and it being subjudice before the Tribunal. Thus, it appears that the Government has kept the issue of promotion of the Applicants in O.A. 317/2023 in abeyance waiting for the decision of the Tribunal in O.A.No.1064/2022 and 1306/2022 since the decision would impact the claim raised by the Applicant in O.A.No.317/2023 for promotion to the post of Section Officer.

27. It is on the above background, we proceed to consider the issue as to whether selection through LCE is by way of promotion or can it be construed as direct recruitment purely based on merits and secondly

what is impact on the decision of the Bombay High Court in **Vijay Ghogare's** case over the claim raised by the Applicants in O.A.No.1064/2022 and 1306/2022 for promotion to the post of Section Officers in Mantralaya.

28. To buttress the submissions that selection through LCE is merit based direct recruit, reliance is placed on the decision of Hon'ble Supreme Court in **Writ Petition (Civil) No. 936/2018 [Dinesh Kumar Gupta & Ors. Vs. The Hon'ble High Court for Judicature of Rajasthan and Ors.] decided with connected Writ Petitions on 29.04.2020** and in **Writ Petition No.1069/2019 [Prem Narayan Vs. Hon'ble High Court of Madhya Pradesh] decided on 12.08.2021**. In these cases, the issue was whether *inter se* placement of candidates selected to the cadre of District Judge in the State through Limited Competitive Examinations in the seniority list must be based on their merit in the said examination or should it be based on their initial seniority in their erstwhile cadre. Hon'ble Supreme Court observed that 25% posts in the cadre of District Judge was to be filled through LCE as an incentive amongst relatively junior and other Officers to improve and to compete with each other, so as to excel and get accelerated promotion. Hon'ble Supreme Court ultimately held that *inter se* placement of the candidates selected through LCE must be based on merit and not on the basis of seniority in erstwhile cadre. Thus, it was a case relating to issue of *inter se* placement selected through LCE. Indeed, these decisions do not laid down on such ratio or proposition that LCE has to be treated as direct recruit. On the contrary, it is observed that the reason for introduction of promotion through LCE is to improve the caliber of the members of Higher Judicial Service. Thus, it is treated as accelerated promotion. That apart, in the present case, the pivotal issue is of securing position of Assistant Section Officers and consequent placement in common seniority list by virtue of reservation benefit which was available as per the then existing G.R. dated 25.05.2004. Therefore,

these decisions cited above in our considered opinion are of little assistance to the Applicants.

29. True, in **Vijay Ghogare's** case, there was no issue of selection through LCE and the Judgment of Hon'ble Bombay High Court relate to non-permissibility of reservation in promotion. As such, one need to see as to whether selection through LCE as provided under Rule 3(b) of "Recruitment Rules of 1995" is by way of promotion or can be construed as a direct recruit as strenuously canvassed by learned Advocate for the Applicants Smt. Mahajan and Shri Desai. As per Rule 3, for selection to the post of Section Officer, three modes are provided. As per Clause 3(a), it is by way of promotion of a suitable person on the basis of seniority from feeder cadre and as per Rule 3(b), it is by way of selection on the basis of LCE held by Commission. Whereas as per Rule 3(c), it is by way of nomination on the basis of result of competitive examination held by the Commission from open market. It is in ratio of 30:30:40. As such, the selection through LCE is from the in-service candidates on clearance of LCE. Thus, the selection through LCE is device to encourage meritorious candidates and to strike balance so that meritorious candidates should also get opportunity to work on promotional post on clearance of LCE and they need not wait for promotion on the basis of seniority. This being so, the selection through LCE will have to be held as accelerated promotion and it cannot be construed as direct recruitment. As stated above, the direct recruit is only by nomination on the basis of result of competitive examination held by Commission from open market. We are, therefore, unable to accept the submissions that selection through LCE is direct recruitment on merit based.

30. Reliance placed on the decision rendered by this Tribunal in **O.A.No.626/2014 [Milind Meshram Vs. State of Maharashtra] decided on 21.03.2016** is misplaced. In that case, the issue was pertaining to the disparity in pay scale selected through LCE and those who are selected by nomination or promotion on other hand. The

Tribunal observed that the candidates selected through and deserves to be treated as direct recruits. Accordingly, directions were issued to the Government to consider their claim for fixation of pay and allowances in terms of Rule 8 of Maharashtra Civil Services (Revised Pay) Rules, 2009 within a period of three months. As such, this decision pertains to fixation of pay and allowances and there is no such specific finding that selection through LCE has to be treated as direct recruit for the purpose of further promotion. There was no such issue availing the benefit of reservation while getting selected through LCE in that case. Suffice to say, the said decision is totally distinguishable.

31. At this juncture, it would be apposite to refer the decision of Hon'ble Supreme Court in Civil Appeal No.17974/2017 [Maharashtra Forest Guards Union Vs. State of Maharashtra] decided on 03.11.2017. In that case, the issue was whether the restriction introduced on the basis of educational qualification for participating in Limited Departmental Competitive Examination (LDCE) in terms of Forest Guards Recruitment Rules, 1987 is legal and valid. Hon'ble Supreme Court held that, introducing further restriction on the basis of educational qualification to participate in LDCE is discriminatory since once the Forest Guard irrespective of educational qualification having formed one class for the purpose of participation in LDCE, further classification between graduates and non-graduates for participating in LDCE is unreasonable. In the said Judgment, Hon'ble Supreme Court observed that LDCE is meant for selection for promotion from the entire lot of Forest Guards irrespective of seniority, but subject to minimum five years of service. Thus, LDCE is considered selection on promotion.

32. Notably, after the decision of Hon'ble Bombay High Court in **Vijay Ghogare's** case, the Government in Home Department had issued G.R. dated 04.04.2018 making it clear that LDCE for Police Sub-Inspector is a promotional examination, and therefore, reservation is not applicable the said examination. Thus, Government has implemented the decision of

Hon'ble Bombay High Court making it clear that there shall be no reservation in promotion henceforth.

33. This view is fortified by two decisions of Hon'ble Delhi High Court. The said issue was firstly decided by Hon'ble Delhi High Court in **Man Singh's** matter. In that case, the issue was whether appointment to the rank of Assistant Commandant in Central Industry Security Force by Limited Departmental Competitive Examination is tantamount to appointment by promotion or is direct recruitment appointment. Hon'ble Delhi High Court held that the appointment to LDCE is merely an appointment on promotion, albeit, fast tracked. The same issue was again considered by Hon'ble Delhi High Court in **Writ Petition No.1938/2011 [Ajay Pande Vs. Union of India] decided on 28.07.2014** in which Hon'ble Delhi High Court referred its earlier decision in **Man Singh's** case and reiterated that LDCE is a mode of promotion, and therefore, Recruitment Rules or guidelines which would apply to appointment through LDCE would have to be those which are applicable to appointment by promotion and not those which are applicable to appointment of direct recruit candidates. In that case, the Department itself had taken stand that LDCE is a mode of promotion and it was accepted by Hon'ble High Court. In the present case also, the Government has taken stand that selection through LCE is accelerated promotion and not direct recruitment. In absence of any other contrary decision, the decision of Hon'ble Delhi High Court has persuasive value. Only because Applicants cleared LCE, that itself cannot be tantamount to direct recruitment. There is basic difference between selection through LCE and selection from open market which is called appointment by nomination.

34. That apart, even assuming for a moment that selection through LCE is the appointment by direct recruitment, there is no denying that the Applicants in O.A.Nos.1064/2022 and 1306/2022 have taken the benefit of 33% reservation and it is on the basis of that reservation, they

got selected and placed in common seniority list. Had it been the case that they cracked LCE without crutches or shelter of reservation, the situation should have been different, but it is not so. Admittedly, they have availed the benefit of 33% reservation on the basis of G.R. dated 25.05.2004 which was ultimately struck down by Hon'ble High Court.

35. The matter also needs to be examined from one more important another angle. During the course of hearing, the learned CPO has tendered Chart showing the marks obtained by the Applicants in O.A.Nos.1064/2022 and 1306/2022 as well as marks obtained by last candidate from Open Category which clearly shows that they obtained less marks than marks obtained by last open candidate. It is only in case of one Applicant viz. Sushma R. Jadhav (Applicant No.1 in O.A.1306/2022) she secured 87 marks and last open candidate also secured 87 marks. However, last open candidate Smt. Yogita Chavan got Rank No.69 and Sushma R. Jadhav got Rank No.70 by applying some other permissible parameters. The learned CPO has made categorical statement that where candidates from reserved category secured marks higher than open category candidate, in that situation, those reserved candidates who secured higher marks were considered and migrated as open candidates and they were also promoted to the post of Section Officer. As such, it is apparent that the candidates from reserved category candidates, they were declared 'pass' in LCE so as to fulfil 33% reserved quota. In such scenario, it cannot be said that the candidates belonging to reserved category cleared LCE purely on merit. Suffice to say, in fact situation, it cannot be said that reserved candidates cracked LCE purely on merit basis. Apparently, they have taken the benefit of 33% reservation for their placement in common seniority list maintained for further promotion to the post of Section Officer.

36. In fact, once G.R. dated 25.05.2004 which was the foundation for the selection of reserved candidates itself is struck down as unconstitutional, all subsequent actions taken on the basis of G.R. dated

25.05.2004 got affected and eclipsed. Thus, the Judgment of Hon'ble Bombay High Court holds the field. In Para No.3 of the Order dated 04.08.2017, the directions were given to the State Government to take necessary corrective steps in respect of promotions already granted and such steps were required to be taken within the stipulated period of 12 weeks given in the order. Therefore, any kind of direction to the Government to promote the Applicants to the post of Section Officer though they have already taken the benefit of reservation of 33% will be in contravention of the Judgment of Hon'ble High Court. No such course of action is permissible, since the Tribunal is bound by the Judgment of Hon'ble High Court.

37. It is in pursuance of Judgment of Hon'ble Bombay High Court, the Government later in subsequent LCE (LCE of 2022) has not kept any seat reserved for the backward class. Thus, the Government has implemented the decision for providing no reservation in promotion in recent period.

38. The submission advanced by Smt. Mahajan and Shri Desai, learned Advocates for the Applicants that in absence of any mention that it was temporary promotion, the selection order of the Applicants their selection through LCE will have to be treated selection on merit is totally unpalatable. What we need to see the effect of striking down of G.R. dated 25.05.2004 and the effect is loud and clear that there could be no reservation in promotion. Whatever promotions given on the basis of reservation were also required to be rectified by taking corrective measures, as directed by Hon'ble High Court in Clause No.3 of order dated 04.08.2017. Only because State Government in its wisdom taking sympathetic view of the matter has not yet taken any such corrective steps in view of pendency of matter before Hon'ble Supreme Court, that does not permit us to perpetuate the illegality. The selection of reserved category candidates through LCE is not only in cloud, but the action of Government giving reservation in promotion itself is declared

unconstitutional and ultra-virus to Article 16(4-A) of Constitution of India and contrary to law laid down in **M. Nagraj's** case.

39. Insofar as applicability of doctrine of legitimate expectation is concerned, only because Applicant worked on the post of Assistant Section Officer for longer period and they aspire for promotion, that itself would not attract doctrine of legitimate expectation. The law is bound to take its own course. There is no such assurance or representation by the Government to promote the Applicants to the post of Section Officer. Therefore, the question of doctrine of legitimate expectation does not survive. In this behalf, reliance placed on the decision of Hon'ble Supreme Court in **AIR 1979 SC 621 [M/s. Motilal Padampat Sugar Mills Limited Vs. State of Uttar Pradesh]** is totally misplaced. In that case, Government gave assurance that Appellant (Manufacturer) would be entitled to exemption from sales tax for three years from the date of commencement of production and it is on that basis of assurance, Manufacturer started Plant for production of Vanaspati. However, later Government charged sales tax. Therefore, in fact situation, Hon'ble Supreme Court held that Government is bound by doctrine of promissory estoppel and manufactures were exempted from sales tax for three years. In the present case, there is no such issue of any such assurance of promotion by the Government. This being so, the doctrine of promissory estoppel has no application to the present case.

40. The submission advanced by learned Advocates for the Applicants in O.A.Nos.1064/2022 and 1306/2022 that the Rules of the game cannot be changed after it has begun have no application in the present case. In the present set of facts as narrated above, there is no question of change of Rules of game so as to attract the proposition that Rules of game cannot be changed after it has begun. Therefore, reliance placed in this behalf on the Judgment of Hon'ble Supreme Court in **SLP No.4302/2021 [Suresh Kumar Patel Vs. State of Gujarat] decided on 20.02.2023** is totally misplaced. This authority is for the proposition



that there could not be change of criteria of selection during the course of selection, since Rules of the game cannot be changed after it has begun. In the present case, there is no issue of change of Rules of game, but it is the issue of effect of striking down of G.R. dated 25.05.2004 and implementation of the Judgment of Hon'ble High Court in **Vijay Ghogare's** case.

41. This takes us to consider one more submission advanced by Smt. Mahajan and Shri Desai, learned Advocates for the Applicants about protection to reservation in promotion which was granted to Government servants and continued to be in force in reference to Section 5(2) of 'Reservation Act of 2001'. As per Section 5(2) of 'Reservation Act of 2001' on the date of coming into force of the Act, if any Government orders providing for reservation for any post to be filled by promotion are in force, the same shall continue to be in force unless modified or revoked by Government. Insofar as this aspect is concerned, notably, there is specific mention in G.R. dated 25.05.2004 that G.Rs. dated 23.05.1974, 28.01.1975 and 23.01.1991 were superseded and fresh policy decision was taken to provide 33% reservation in promotion. Pertinently, it is on the basis of G.R. dated 25.05.2004, 33% reservation in promotion was provided in 2004. However, later Hon'ble High Court struck down G.R. dated 25.05.2004 in its entirety. In effect whatever promotions given on the basis of G.R. dated 25.05.2004 were not legal, and therefore, corrective measures were directed to be taken. Suffice to say, the question of protection to promotion does not survive.

42. Shri A.A. Desai and Smt. Punam Mahajan, learned Advocates for the Applicants in reference to minutes dated 24.09.2021 of the Committee headed by Additional Chief Secretary which was constituted for making recommendation to solve this issue sought to contend that the Government was required to seek clarification from Hon'ble Supreme Court in pending SLP No.28306/2017 and in absence of any such clarification, the Applicants in O.A.Nos.1064/2022 and 1306/2022

cannot be denied promotion to the post of Section Officer is totally unpalatable. Here, we need to see the existing legal position holding the field and its effect. Whether to seek clarification from Hon'ble Supreme Court is for the Government and no such direction to seek clarification can be given by the Tribunal. The Tribunal is required to restrict its scope to the permissibility to ask for further promotion after getting the benefit of reservation. The issue that no such reservation is permissible in promotion is already adjudicated by Hon'ble High Court striking down G.R. dated 25.05.2004. Therefore, only because Government has not taken clarification that hardly matters.

43. In view of above, in our considered opinion, there is no escape from the conclusion that the candidates belonging to reserved category are not entitled to reservation in promotion and the Judgment of Hon'ble High Court striking down G.R. dated 25.05.2004 holds the field as on today. Consequently, Applicants in O.A.Nos.1064/2022 and 1306/2022 who have already taken the benefit of reservation while getting selection though albeit in LCE cannot ask for further promotion to the post of Section Officer, as long as the legal position as discussed above holds the field.

44. Alternative submission advanced by learned Advocates for the Applicants in O.A.1064/2022 and 1306/2022 for giving direction to the Government to promote the Applicants to the post of Section Officer on *ad-hoc* basis, subject to decision of Hon'ble Supreme Court in **Vijay Ghogare's** matter is totally unacceptable to us, since it would be amounting to circumventing or bypassing the order of Hon'ble Bombay High Court in **Vijay Ghogare's** case. We are afraid, no such direction would be permissible at the behest of the Tribunal.

45. In this view of the matter, as discussed above, the claim of the Applicants in O.A.Nos.1064/2022 and 1306/2022 for direction to the Government to promote them to the post of Section Officer and also to

grant deemed date of promotion w.e.f. 2017 as per *inter say* seniority from common seniority list is totally untenable. Indeed, the claim of the Applicants to that effect is premature and it could be considered only after the decision of Hon'ble Supreme Court in **Vijay Ghogare's** case. At this juncture, when the Judgment of Hon'ble High Court that the reservation in promotion is unconstitutional and holds the field, no such direction could be given as it would be amounting to bypassing the Judgment of Hon'ble High Court.

46. Now let us see the claim raised by the Applicants in O.A.No.317/2023. The Applicants in this O.A. are from Open Category and selected to the post of Assistant Section Officer by nomination as a direct recruit. In common seniority list, they are below the Applicants in O.A.Nos. 1064/2022 & 1306/2022. However, they claims to be aggrieved by the decision of Government to keep 46 posts of reserved candidate vacant.

47. Indeed, once G.R. dated 25.05.2004 is declared ultra-virus to the Constitution, consequent to it, the Applicants in O.A.Nos. 1064/2022 & 1306/2022 could not be promoted to the post of Section Officer being hit by the Judgment of Hon'ble Bombay High Court, and therefore, the posts of Section Officers were required to be filled-in from amongst other candidates on the basis of common seniority list. Notably, initially Government through GAD by letter dated 29.12.2017 informed to all Departments to fill-in the promotional posts from Open Category for the time being, subject to decision of Hon'ble Supreme Court in **Vijay Ghogare's** case and in pursuance of the said letter, posts of reserved categories were kept in-tact. However, later Government issued G.R. dated 07.05.2021 to fill-in all promotional posts on seniority basis including posts which are kept vacant for reserved category. But again Government made holty face and DPC in its meeting dated 24.11.2022 kept 46 posts for reserved category again vacant because of which the chances of the Applicants in O.A.No.317/2023 for promotion to the post

of Senior Officers are severely affected. We see no logic or rational in keeping those 46 posts vacant and the policy decision taken by G.R. dated 07.05.2021 ought to have been continued and implemented.

48. The submission advanced by Smt. S.P. Manchekar, learned CPO that these 46 posts were kept vacant as abundant precaution and to avoid further complications in the matter in view of filing of O.A.Nos.1064/2022 and 1306/2022 is totally unpalatable. It appears that the Government has taken the said decision.

49. In the first place, the decision to keep 46 posts is totally arbitrary and contrary to Government's own policy decision taken by G.R. dated 07.05.2021 as well as defiance of the Judgment of Hon'ble High Court in **Vijay Ghogare's** case. That apart in view of our conclusion as recorded above that Applicants in O.As.1064/2022 and 1306/2022 are not eligible for further promotion to the post of Section Officer, since their claim is hit by the Judgment of Hon'ble Bombay High Court, consequently, Government is required to fill-in those 46 posts on merit basis and such promotions would be subject to final decision of Hon'ble Supreme Court in **Vijay Ghogare's** case.

50. The up short of aforesaid discussion leads us to conclude that the claim of the Applicants in O.As.1064/2022 and 1306/2022 is untenable and both the O.As are liable to be dismissed. Insofar as claim raised by the Applicants in O.A.317/2023 is concerned, the decision of DPC dated 23.11.2022 and 24.11.2022 keeping 46 posts vacant is totally arbitrary and indefensible and the same is liable to be quashed and set aside. Hence, the order.

### **ORDER**

- (A) Original Application Nos.1064/2022 and 1306/2022 stands dismissed.

- (B) O.A.No.317/2023 is allowed.
- (C) The decision of DPC in meeting dated 23.11.2022 and 24.11.2022 keeping 46 posts vacant is quashed and set aside.
- (D) Respondents are directed to consider the claim of the Applicants in O.A.No.317/2023 for promotion to the post of Desk Officer by holding special DPC within a month and decision be communicated to the Applicants within a week thereafter.
- (E) No order as to costs.

Sd/-  
**(DEBASHISH CHAKRABARTI)**  
**Member-A**

Sd/-  
**(A.P. KURHEKAR)**  
**Member-J**

Mumbai

Date : 17.07.2023

Dictation taken by :

S.K. Wamanse.

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