

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD**

ORIGINAL APPLICATION NO.90/2018

DISTRICT: - DHULE

Jayant Ramesh Chavan,
Age : 34 years, Occu. : Service,
ARTO, Dhule, Mohadi Upnagar,
Dhule, Maharashtra-424 006.

...APPLICANT

V E R S U S

1) State of Maharashtra,
Through its Cabinet/Chief Secretary,
State Secretariat, Mantralaya,
Mumbai-32.

2) State of Maharashtra,
Through its Secretary,
General Administration Department,
Maharashtra State Secretariat,
Mantralaya, Mumbai-32.

...RESPONDENTS

APPEARANCE :Shri Nitin Meshram Advocate holding for
Shri Shankar Borkute Advocate for the
Applicant.

:Shri M.S.Mahajan, Chief Presenting
Officer for the respondents.

CORAM : JUSTICE M.T.JOSHI, VICE-CHAIRMAN
AND
ATUL RAJ CHADHA, MEMBER (A)

DATE : 4th May, 2018

O R D E R

[Delivered on 4th day of May, 2018]

1. Present applicant is challenging legality and validity of
respondent no.1's order no.BCC-2017/C.N.312 A-16-B

(General Administration Dept.) date 29th December, 2017. Vide the said order, respondents subject to the decision of Hon'ble the Supreme Court of India in Special Leave Petition (C) No.28306/2017 has directed that presently promotion in the different cadres of the State shall be made only in the Open category on temporary basis and subject to the rules and seniority .

2. History leading to the passing of the order can be briefly summarized as under:

(i) Division Bench of this Tribunal in Transfer Application No.01/2014 from the Hon'ble High Court from Writ Petition No.8452/2004 vide decision dated 28th November, 2014 had held Maharashtra State Public Services, Reservation for Schedule Caste, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and other Backward Classes Act, 2001 (hereinafter referred to as "Act" for short) as ultra vires the Constitution and the laws laid down by Hon'ble the Supreme Court. Consequently, Government Resolution dated 25th May, 2004 as fully described in paragraph 135 of the judgment was also held ultra vires.

(ii) Said decision was challenged before the Hon'ble High Court vide Writ Petition No.2797/2015. Several similar Writ Petitions were also taken for decision. The Division Bench consisting of Hon'ble Shri Justices Anoop V. Mohta and A.A.Sayed decided Writ Petition on 26th July 2016. It was held that it was not necessary for the Maharashtra Administrative Tribunal to decide the issue as to whether the Act is valid or not. It was declared that in fact, the Act is valid. However, Hon'ble Shri Justice A.A.Sayed could not agree with some of the views and findings in the said judgment. Therefore, a separate judgment was delivered by Hon'ble Shri Justice A.A.Sayed. Vide said judgment His Lordship Shri Justice A.A.Sayed has held that though the Act is valid, Government Resolution dated 25th May, 2004 is bad in law, and therefore, struck down it being contrary to Article 16(4A) of the Constitution of India.

(iii) In view of the dissenting judgment, Hon'ble Chief Justice had referred the issue to the Hon'ble third judge Hon'ble Shri Justice M.S.Sonak. Vide decision dated 25th July, 2017 His Lordship Shri

Justice M.S.Sonak agreed with the view of His Lordship Hon'ble Shri Justice A.A.Sayed that though Act is valid, the impugned Government Resolution is ultra vires the Constitution of India.

(iv) This decision is challenged by the respondent State vide above-referred Special Leave Petition (C) and no interim relief against the decision of the Hon'ble High Court is granted by Hon'ble the Supreme Court. In this scenario, the impugned Government order came to be issued as detailed supra.

3. Shri Nitin Meshram Advocate holding for Shri Shankar Borkute Advocate for the Applicant made following submissions –

(A) Not only the Constitution mandates for providing reservation for the backward castes etc. but also Section 5 of the Act specifically provides for reservation in promotion as well. Hon'ble High Court had clearly upheld the constitutionality of the said Act.

(B) Article 309 of the Constitution of India provides that nothing contrary to the Constitution of India can be done by the State while providing for rules for recruitment etc. Further, in the case of **Secretary, State of Karnataka &**

Others V/s. Umadevi (3) & Others reported in [(2006) 4 Supreme Court Cases 1] had underlined the relation of Article 309 with Articles 14 and 16 of the Constitution of India as under:

11. *In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and Public Service Commissions for the States. Article 320 deals with the functions of Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part*

of the affirmative action recognized by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the scheduled castes and scheduled tribes for employment. The States have made Acts, Rules or Regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, Rules and Regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

In the circumstances, he submits that the impugned order be set aside.

4. Learned CPO on the other hand submits that it is not the case of State of Maharashtra that it would not apply the provisions of reservation in promotion. However, as the modalities for the same provided by the G.R. dated 25th May, 2004 has been struck down by Hon'ble the High Court presently it is not possible for the Government to implement the provisions of S.5 of the Act. Therefore, the State of Maharashtra has filed a special leave petition challenging the said decision. Hon'ble the Supreme Court, however, has not granted any stay to the order of the Hon'ble High

Court. Numerous promotional posts are vacant causing hardship in the administration awaiting decision of Hon'ble the Supreme Court of India. Therefore the State has made an interim arrangement vide the said order. It, therefore, cannot be called as bad in law.

5. Having considered the rival submissions, in our considered view, the application deserves to be dismissed without any order as to costs for the reasons to follow:

Reasons

6. Entire thrust of arguments of Shri Meshram is that since the Act is held valid, the State is under obligation to comply with the Constitutional mandates. The State though agrees with the above submissions, contends that the modalities for implementation of the mandate as provided by the above-referred G.R. have been struck down by Hon'ble the High Court, and therefore it is not possible for it to implement the said mandate for the time being. In the circumstances, awaiting decision of Hon'ble the Supreme Court, vacancies in the promotional posts from Open category only, are being filled in and that too on temporary basis so as to make suitable amends upon final decision of the issue by the apex court. It was further

submitted that as a precautionary measure, it is directed that seniority should not be disturbed.

7. In these facts and circumstances of the case, we do not find any illegality in the impugned order. The State is required to undertake various functions including welfare measures. Insufficient staff is a matter of concern. The modalities provided for reservation in promotion vide the G.R. is struck down by Hon'ble the High Court. The State has challenged the said decision in Hon'ble the Supreme Court of India. Decision may take its own time. Therefore, the interim measure adopted by the State vide the impugned order cannot be called as either unreasonable or ultra vires of any of the provisions of the Constitution of India. Hence, following order.

ORDER

O.A. is hereby dismissed without any order as to costs.

MEMBER (A)

VICE-CHAIRMAN

**Place : Aurangabad
Date : 04-05-2018.**