

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI  
BENCH AT AURANGABAD**

**ORIGINAL APPLICATION NO.696/2023  
WITH  
ORIGINAL APPLICATION NO.697/2023**

**DISTRICT:- AHMEDNAGAR**

-----  
**O.A.NO.696/2023**

Yuvraj s/o. Shivaji Pawar,  
Age : 32 years, Occ. Nil,  
R/o. At post: Nimgaonjali,  
Near Balaji Temple, Ahmednagar.

**...APPLICANT**

**V E R S U S**

1. The State of Maharashtra,  
Through its Additional Chief Secretary,  
General Administration Department,  
M.S., Mantralaya, Mumbai-32.
2. The Commissioner,  
Health Services-cum-Campaign  
Director (National Health Campaign),  
“Arogya Bhawan”, St. George’s Hospital  
Campus, P.D’Mellow Road, Mumbai-01.
3. The Deputy Director,  
Health Services (Nursing),  
Health Services Commissionerate,  
“Arogya Bhawan”, St. George’s Hospital  
Campus, P.D’Mellow Road, Mumbai-01.
4. The Medical Superintendent,  
District Women’s Hospital,  
Shastri Nagar, Parbhani.

**... RESPONDENTS**

-----  
**O.A.NO.697/2023**

Amit s/o. Raju Gaikwad,  
Age : 32 years, Occ. Nil,  
R/o. At Malegaon Haveli,  
Post Wadgaon Pan, Ahmednagar.

**...APPLICANT**

**V E R S U S**

1. The State of Maharashtra,  
Through its Additional Chief Secretary,  
General Administration Department,  
M.S., Mantralaya, Mumbai-32.
2. The Commissioner,  
Health Services-cum-Campaign  
Director (National Health Campaign),  
“Arogya Bhawan”, St. George’s Hospital  
Campus, P.D’Mellow Road, Mumbai-01.
3. The Deputy Director,  
Health Services (Nursing),  
Health Services Commissionerate,  
“Arogya Bhawan”, St. George’s Hospital  
Campus, P.D’Mellow Road, Mumbai-01.
4. The District Civil Surgeon,  
District Hospital,  
Nandurbar.

**... RESPONDENTS**

APPEARANCE : Shri Avinash S. Deshmukh, Advocate for  
Applicants in both cases.  
: Shri V.R.Bhumkar, Presenting Officer for  
respondents in both cases.

**CORAM : JUSTICE SHRI P.R.BORA, VICE CHAIRMAN  
AND  
: SHRI VINAY KARGAONKAR, MEMBER (A)**

**Reserved on : 30-07-2024  
Pronounced on : 10-09-2024**

**C O M M O N O R D E R  
(PER: JUSTICE SHRI P. R. BORA, V.C.)**

1. Heard Shri Avinash S. Deshmukh, learned Counsel  
for the applicants and Shri V.R.Bhumkar, learned Presenting  
Officer (P.O.) for the respondents in both cases.

2. Since the facts in both the Original Applications (O.As.) are identical and the similar prayers are made in both these O.As., we have heard common arguments in both these O.As. and deem it appropriate to decide the same by common reasoning.

3. This is the second round of litigation for these applicants. The applicants had earlier filed the O.As. bearing O.A.No.793/2021 and O.A.No.794/2021. A common order was passed in said O.As. thereby setting aside the order dated 06-12-2021 whereby the respondents have cancelled the appointments of the applicants and the respondents were directed to reconsider their decision having regard to the observations made in the body of the order. Respondents challenged the aforesaid order passed by this Tribunal by filing Writ Petition Nos.11613/2022 & 11763/2022 before the Bombay High Court Bench at Aurangabad. Hon'ble Division Bench disposed of the aforesaid Writ Petitions by giving liberty to the present applicants (respondents in the Writ Petitions) to tender their individual written representations to the Commissioner, Health Services Commissionerate on or before 31-03-2023 and the learned Commissioner was directed to consider the said representations by taking into account the

available vacancies and assess as to whether it was on account of any reservation that the appointees were considered for appointment. Accordingly, the applicants submitted their representations before the stipulated date and after having considered the said representations, respondent no.2 vide his order dated 09-06-2023 rejected the said representations. Copy of the said order was forwarded to the applicants by respondent no.3 on 21-06-2023. Aggrieved by the decision so taken, applicants have filed the present O.As.

4. The facts in detail were recorded by us in the previous order passed by us in O.A.No.799/2021 and O.A.No.794/2021. We deem it appropriate to reproduce the facts as were recorded in the said order, which were thus:

*“3. On 21-02-2019, an advertisement was issued by respondent no.2 for filling in various posts including the posts of Pediatric Nurse. In response to the said advertisement, the applicants submitted their applications and participated in the selection process. The names of both the applicants were included in the merit list as well as in the select list. Both the applicants belong to the backward class. Applicant Amit Gaikwad comes from Scheduled Caste (SC) whereas applicant Yuvraj Pawar belongs to Vimukt Jati (A) [VJ(A)] category. Both the applicants possess qualifications of B.Sc. Nursing as well as M.Sc. Nursing. Names of both the applicants are registered with the Maharashtra Nursing Council. After the names of the applicants were included in the select list, the respondent no.2 on 27-10-2021 issued the order of appointments in favour of both the applicants*

*on the post of Pediatric Nurse. Subsequently, posting orders were drawn and accordingly both the applicants resumed duties at their respective places of posting.*

*4. Prior to that, applicant Amit Gaikwad was working at the Sub Centre of Primary Health Centre, Ahiwantwadi, Pandne, Tq. Dindori, Dist. Nashik whereas applicant Yuvraj Pawar was working at Primary Health Centre at Anjneri/Amboli, Torangan, Tq. Tryambakeshwar, Dist. Nashik in Zilla Parishad Nashik. After they were given appointment on the post of Pediatric Nurse, both the applicants resigned their previous job to join the post of Pediatric Nurse in pursuance of the appointment order dated 27-10-2021.*

*5. On 06-12-2021, respondent no.2 cancelled the appointments of both the applicants on the ground that the applicants were not fulfilling the criteria prescribed in the advertisement of securing minimum 45% marks in the examination. Aggrieved by the said order, the applicants have approached this Tribunal praying for quashment of the said order dated 06-12-2021 and the consequential relief of reinstatement with other benefits.”*

5. It is undisputed that both the applicants received less than 45% marks. Applicant Amit Gaikwad has received 84 marks whereas another applicant Yuvraj Pawar has received 86 marks. It is not in dispute that, despite having received less than the minimum marks prescribed, names of both these applicants were included in the list of selected candidates and both were given appointment orders in their favour. It is further not in dispute that, both the applicants worked on the said post for the period more than a month and thereafter the said appointment orders came to be cancelled on 06-12-2021.

6. In the earlier O.As., it was the objection raised on behalf of the applicants amongst others that, before cancellation of their appointments they were not given any opportunity of hearing. After the first round of litigation in view of the order passed by the Hon'ble High Court, respondents gave opportunity of hearing to both the applicants and thereafter the order has been passed whereby the competent authority has confirmed its earlier order that of cancellation of the appointment orders issued in favour of the applicants. Excluding the aforesaid ground of passing of the order by respondents without giving opportunity of hearing to the applicants, all other grounds raised in the earlier O.As. are also raised in the present O.As.

7. It is the contention of the applicants that, despite having knowledge of the fact that the applicants have not earned the cut-off marks, their names were included in the list of selected candidates. The applicant Yuvraj Pawar was shown to have been selected from VJ(A) category and applicant Amit Gaikwad was shown to be selected from SC category. It is the contention of the applicants that the steps which were taken by the respondents after the result of the examination was declared, lead to the only inference that the respondents have

consciously taken the decision to consider the applicants for their appointment by relaxing the condition of the cut-off marks. It is the further contention of the applicants that, respondent no.2 without considering the submissions made on behalf of the respondents and ignoring the import of the judicial decisions cited by the applicants in order to buttress their contention, has rejected the representations submitted by the applicants and has re-affirmed the earlier order. The applicants have, therefore, prayed for quashment of the decision dated 09-06-2023 whereby the respondents have rejected the representations of the applicants dated 31-03-2023. The applicants have further prayed for their reinstatement in service and to extend them notional continuity of service with 50% backwages as directed by the Hon'ble High Court in the order passed in Writ Petition Nos.11613/2022 & 11763/2022 on 17-03-2023.

8. Respondent nos.1 to 4 have filed the common affidavit in reply. The Chief Administrative Officer in the office of Deputy Director, Health Services Chhatrapati Sambhajinagar has sworn the affidavit in reply for and on behalf of the respondents. The sum and substance of the contentions taken in the affidavit in reply is that, in the advertisement itself a

condition was imposed that, only such candidates who will score more than 45% marks in the written examination will be considered for further selection process and the applicants were fully aware of the said condition. It is further contended that, the applicants failed in scoring the minimum marks as prescribed and as such according to the respondents they have rightly cancelled the appointments of the applicants.

9. Shri Avinash S. Deshmukh, learned Counsel appearing for the applicants vehemently argued that, respondent no.2 has mechanically rejected the representations of the applicants without application of mind. The learned Counsel submitted that, it is not in dispute that the applicants have received less than the cut-off marks and as such in ordinary course they were not liable to be selected. Learned Counsel further submitted that, however, it were respondents who included the names of both the applicants in the list of selected candidates. Learned Counsel submitted that, it is not the contention of the respondents that, in the selection of the applicants any foul role was played by them or that, the applicants misrepresented their case or played any fraud in securing the appointment. Learned Counsel submitted that, even the Hon'ble High Court in paragraph 3 of its order has



observed that, “the applicants and the similarly situated other candidates were not selectively picked and chosen, akin to the phrase “cherry picking” while issuing them with the appointment orders”. Learned Counsel further argued that if the conduct of the respondents at every stage is observed, it demonstrates that, the respondents have relaxed the condition of the cut-off marks. Learned Counsel submitted that, rejection of representations submitted by the applicants by respondent no.2 runs contrary to the spirit of the judgment and order dated 17-03-2023 passed by the Hon’ble High Court in Writ Petition Nos.11613/2022 & 11763/2022. Learned Counsel submitted that the respondents could not have lost sight of the observations made by the Hon’ble High Court in its judgment dated 17-03-2023.

10. Learned Counsel further submitted that the respondents were under an obligation to consider the cases of the applicants with humane approach having regard to the fact that, the applicants belong to the reserved category and further that for joining the present post they had sacrificed their earlier job. Learned Counsel further submitted that the respondents have completely lost sight of the provisions under The Maharashtra State Public Services (Reservation for Scheduled

Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001. Learned Counsel further argued that the respondents have utterly failed in understanding the facts involved in the present matter. Learned Counsel further submitted that the respondents have failed in appreciating the view taken by this Tribunal while passing the order in earlier O.As. bearing O.A.No.793/2021 and 794/2021. Learned Counsel submitted that, various past decisions cited by the applicants in support of their claim have not been correctly appreciated by the respondents. It is further argued that, the decisions on which the respondents have placed their reliance may not be applicable in the present matters having regard to the facts involved in the present matter. Learned Counsel has referred to and relied upon the judgments referred to and relied upon by this Tribunal in its order passed on 06-05-2022 i.e. in the first round of litigation.

11. Learned P.O. reiterated the averments taken by the respondents in their affidavit in reply. Learned P.O. submitted that, to consider the names of the applicants though they had not received the cut-off marks was an inadvertent mistake on their part. It is further contended that, the selection criteria

cannot be changed midway. Learned P.O. further submitted that after the matter was remanded by the Hon'ble High Court due opportunity of hearing was given to the applicants to put forth their case and only thereafter the order rejecting the representations has been passed. Learned P.O. relied upon the judgment of the Hon'ble Supreme Court in case of **K. Manjushree V/s. State of A.P. & Anr. [2008 (3) SCC 512]** as well as in the case of **State of Orissa & Ors. V/s. Gopinath Dash & Ors. [2005 (13) SCC 495]**. Respondents have also relied upon the judgment of the Hon'ble Supreme Court in the case of **Rakesh Kumar Sharma V/s. Govt. of NTC of Delhi & Ors.** [Civil Appeal No.6116/2023 decided on 29-07-2023].

12. We have given due consideration to the submissions made on behalf of the applicants as well as the State authorities (respondents). It is undisputed that in clause 8(2) of the advertisement issued by respondent no.3 on 21-02-2019, it is specifically stated that, candidate will have to score minimum 45% marks and only such candidates securing 45% marks and above will be held eligible while preparing the select list. It is further not in dispute that, in the written examination held, neither applicant Yuvraj Pawar nor applicant Amit Gaikwad could gain 45% marks. Applicant Amit Gaikwad has received

84 marks whereas another applicant Yuvraj Pawar has received 86 marks. It is, however, significant to note that respondents included names of the applicants in the list of selected candidates for the post of Pediatric Nurse. The result of the written examination was published on Mahapariksha Portal and also on the website of the Health Department. In the result so published, the marks as were received by the applicants were duly reflected. Thus, it was well within the knowledge of the respondents that both the applicants had received less marks than 45%. However, inspite of that the applicants were called upon to remain present for counseling and were directed to bring along with them the relevant original documents for the purpose of verification. Both the applicants had remained present for counseling and their documents were verified. Such counseling and verification was done on 27-10-2021. Only after the counseling was held and the documents verification was done that the select list was prepared containing the names of the applicants. Subsequently, appointment orders were issued in favour of the applicants in pursuance of which the applicants joined the services.

13. It is also not in dispute that the applicants were previously working in Zilla Parishad, Nashik and for joining

their new posting both of them relinquished their earlier job. It is nowhere the case of the respondents that, at any point of time or at any stage of selection process, the applicants had misrepresented the respondents on the issue of marks scored by them in the written examination. It is also not the case of the respondents that any such request was made by the applicants to relax the condition of cut-off marks and to consider them for appointment. From the documents on record, it is quite evident that, the decision was taken by the respondents themselves to include the names of the applicants in the list of selected candidates.

14. Having considered the facts as aforesaid there appears force in the submissions made on behalf of the applicants that, the above referred steps taken from the stage of inclusion of names of the applicants in the final select list, the directions issued to them to appear for counseling and the ultimate and final action of issuance of appointment order in their favour clearly mean and establish that the condition of securing minimum of 45% marks in the examination was relaxed in favour of the applicants and only thereupon they were given appointments as Pediatric Nurse on 27-10-2021. The respondents, however, have taken a stand that in the

advertisement, there is no provision for relaxation of the cut-off marks as prescribed. It is further contended that in the G.R. dated 13-06-2018 issued by the General Administration Department to prescribe the cut-off marks is mandatory and there is no further provision of giving any relaxation for the candidates coming from backward class.

15. It is further contended that, though in some of the States in the country the provision exists of giving relaxation in respect of minimum marks to be scored by backward class candidates, there is no such provision made by the State of Maharashtra. On the aforesaid grounds respondents have justified the orders whereby they have cancelled the appointments of the applicants. Respondents have also contended that, selection criteria cannot be changed midway as it would amount to changing the rules of the game after the game was played and that it is clearly impermissible under the law.

16. Now, the question is, the provisions which are now pressed in service on the basis of which the appointments of the applicants are cancelled whether were not within the knowledge of the officers who were part of the selection process, that is to say, who conducted the counseling, who verified the documents,

who published the provisional merit list and who published the final selection list. If it is the contention of the respondents that the candidates scoring less than 45% marks were not liable to be considered then why for such candidates were considered.

17. The stand taken by the respondents that there are no instructions from the State Government as about giving relaxation to the backward class candidates in the criteria of cut-off marks is based on incomplete information. Resolution of the erstwhile Bombay Government dated 05-03-1955 is in fact a policy statement. A point was raised way back in the year 1975, whether appointing authority should recommend backward class candidates who possess minimum qualification without consideration as to their suitability to appointment to their posts and the Government was pleased to direct that the minimum qualifications required for the post should be considered to be enough in the case of backward class candidates provided they satisfy the minimum requirements regarding suitability for appointment. By the Government Circular dated 29-04-1971 issued by General Administration Department of the State, it is directed that the minimum qualification required for a post should be recorded as enough for backward class candidates and that such candidates should

be appointed in reserved vacancies even if non-backward class candidates with higher qualification are available. The aforesaid orders were reiterated in Government Circular subsequently issued on 27-03-1972. In the year 1992, General Administration Department of the State has issued compendium about reservation to the backward class candidates in the Government service and the other facilities to them. In chapter 7 of the said compendium, it has been prescribed that in the event of non-availability of the backward class candidates in enough number, it may be permissible to relax the eligibility conditions and the relaxation can be given even in the criteria of scoring of marks in the examination. It has always been an endeavour of the State that, candidates coming from the backward class get adequate representation.

18. We deem it appropriate to reproduce the observations/discussion made by us and the conclusions recorded in paragraphs 15 to 28 of the earlier order passed in O.A.No.793/2021 & 794/2021, which are thus:

*“15. Dr. Sunita Vijay Golhait, Deputy Director of Health Services (Nursing), Mumbai has filed affidavit in reply in the present matters on behalf of respondent nos.1 and 2. In paragraph 5 of the said affidavit in reply it is stated thus (p.b.p.77-78 of O.A.No.793/21):*



“5. ....

*I further submit that after the issuing appointment order department once again started verification of the documents of the applicant and scrutinized the same. I submit that during the scrutiny it was observed that applicant has scored below the cutoff mark i.e. applicant scored 84 (42% marks) instead of 90 marks (45%). Therefore the movement department came to know the fact that applicants scored less than cutoff, department immediately informed the applicant vide letter dated 06.12.2021 along with the specific reason mentioned there in.*

*The respondent humbly submit that the action of the respondent is neither intentional nor deliberate or with view to harass the applicant. It was just an oversight which was further rectified immediately. Therefore, considering the procedure and conditions laid down in advertisement, the office of respondents has decided to rectify the mistake and taken corrective steps by issuing impugned order dated 06.12.2021 which is legal and proper according to the provision of law.”*

*[Reproduced ad-verbatim from p.b.p.77-78 of O.A.No.793/21]*

*16. In the affidavit in reply the respondents have not mentioned as to verification of which documents was conducted by them. Had it been the case that the documents in regard to the caste certificate of the applicants, caste validity certificate and documents in regard to age and educational qualifications would have been re-verified and had it been found that at the time of verification of the documents prior to issuance of the appointments, the applicants had produced some different documents than were found in the re-verification and on that count the appointments of the applicants had cancelled, perhaps, there may not be any case for applicants.*

17. Further averments in the affidavit in reply lead to an inference as if at the time of securing appointments the applicants have produced some bogus record showing that they have secured more than 45% marks, and subsequently, the said manipulation was noticed by the respondents. However, no such case has been pleaded by the respondents nor any such document is on record on the basis of which such inference could have been drawn. The mark list was available with the respondents duly showing the marks received by both the applicants which were admittedly less than 45%. There was specific term incorporated in the advertisement that the names of such candidates only will be included in the list of merit who would secure 45% marks or more in the written examination. In spite of that names of applicants were included in the merit list. In preparation of merit list, there was no role of the applicants. The fact which was within the knowledge of the respondents since beginning cannot be accepted to have been surfaced in the re-verification. Further, in no case it can be accepted that such a mistake would have occurred through oversight.

18. We are constrained to observe that the respondents have not come out with a true defence. Having regard to documents on record there is reason to believe that it was not the oversight but a conscious decision taken by the respondent authorities to consider even the candidates securing less marks than 45%, for giving them appointment for certain reasons. In the peculiar circumstances prevailing at that time, the decision seems to have been taken to consider the candidates who have secured marginally less marks than the cut-off marks since at the relevant time, more particularly, in Covid situation, the respondents were in need of staff nurses and there were orders from the Tribunal also for prompt recruitment of the staff in medical colleges and hospitals.

19. In paragraph 5 of the affidavit in reply filed by the respondents, it has been contended that in O.A.No.1133/2018, the Principal Bench of this

*Tribunal had passed the order on 22-10-2021 directing respondents to fill up the vacant posts urgently. It is further contended that in view of the aforesaid order and having regard to the outbreak of Covid-19 pandemic, the process for filling the vacant posts was speedily completed.*

*20. In the O.A., the applicants have specifically pleaded that there are more 4 candidates other than the applicants who had received less marks than 45% and their names are also included in the select list. This fact has not been denied or disputed by the respondents. We have also perused the select list. There is substance in the contention raised in the O.A. as above. On the contrary, we have noticed that including the applicants, there are 8 candidates included in the list of selected candidates who have received less than 45% marks. Thus, in the select list of 18 candidates, about 50% of them had not received minimum qualifying marks. It is further significant to note that all these 8 candidates are coming from backward class.*

*21. The question arises, to rectify the mistakes occurred, whether cancellation of the appointments of the applicants who have no role in commission of the said mistake was the only solution or was there any other way out ? The learned Counsel for the applicants has cited the judgment of the Hon'ble Apex Court in case of **Rajesh Kumar Verma V/s. State of M.P. [(1995) 2 SCC 129]**. In the aforesaid case, the question for consideration before the Hon'ble Apex Court was whether the minimum qualifying marks can be relaxed by the Government in cases of SC & ST candidates specifically when eligible candidates to the extent of reservation are not available for admissions in the medical colleges. In the said matter, the facts were that out of 87 seats available for SC candidates only 40 students qualified for admission whereas for the ST category out of 87 seats available only 30 qualified for admission under the then existing rules. The result was that out of 174 seats reserved for SC, ST candidates only 70 could be utilized leaving 94 unutilized. Ordinarily, these unutilized seats would*

*have gone to the general category, however, the State Government intervened and reduced the minimum qualifying marks in English subject for SC at 15% and for ST for 10%. On this reduced percentage of qualifying marks in the General English, additional SC & ST candidates were offered admission on the unutilized reserved seats. Relaxation so given by the State Government was questioned in group of Writ Petitions filed before the Division Bench of the Hon'ble M.P. High Court, the Hon'ble High Court came to the conclusion that it was not open to the State Government to reduce the minimum qualifying marks in General English and seats made available to the SC, ST candidates by virtue of the said relaxation would revert to the general category students. The Hon'ble Apex Court while setting aside the said judgment held that the State Government is empowered to relax the requirement of minimum qualifying marks to ensure that the candidates belonging to SC, ST and OBC category secure admission to professional courses.*

*22. We have carefully perused the advertisement in the present matter. The criteria to secure 45% marks in the written examination for to be eligible for the appointment on the subject post has been prescribed for all the candidates and no relaxation is provided for the candidates belonging to backward classes. Ordinarily qualifying marks are differently prescribed for the candidates coming from Open class and the candidates belonging to reserved class.*

*23. In the instant selection process in so far as the requirement of minimum qualifying marks is concerned, no relaxation was provided for the backward class candidates. In the circumstances, candidates like the applicants who have received 42% and 43% marks, respectively, i.e. 2% and 3% less marks than the minimum qualifying marks, are subsequently held ineligible by the respondents. In the matter before the Hon'ble Apex Court cited supra, the requirement of minimum qualifying marks was relaxed by the State Government to ensure that the required number of candidates belonging to SC, ST*

and OBC category get admission to the professional courses.

24. We sincerely feel that for ensuring representation of the backward class candidates in the recruitment on the post advertised vide advertisement dated 21-02-2019, the State may in its power relax the requirement of minimum qualifying marks for the candidates belonging to backward class. When for Open class candidates, the cut-off marks are prescribed as 45%, the cut-off marks for the backward class candidates can be prescribed 5% less than prescribed for the Open class candidates. If the said relaxation is provided, these candidates can be accommodated and may not lose their jobs without any fault on their part.

25. As we have noted hereinabove, for securing the present appointments both the applicants have relinquished their earlier jobs with Zilla Parishad, Nashik. The said fact can be another weighing circumstance for considering the case of the present applicants. Having regard to the fact that the Health Department of the State is in urgent need of the nursing staff in the medical colleges and hospitals and no number of adequate candidates are being selected though the efforts are made for their recruitment, there may not be any impediment for the State to take a conscious decision of relaxing condition of minimum qualifying marks so that the Health Department may get adequate staff and in the said staff adequate representation to the backward class candidates.

26. It has been argued by the learned CPO that illegal appointments are always illegal. In answer to the submissions as aforesaid made by the learned CPO, the learned Counsel for the applicants has cited the judgment of the Hon'ble Supreme Court in the case of **Vikas Pratap Singh & Ors. V/s. State of Chhattisgarh & Ors. [(2013) 14 SCC 494]**. In the said matter appointments made on the posts of Subedars, Platoon Commanders and Sub-Inspectors were cancelled on complaints received in respect of defects/mistakes in several questions of the main examination papers. The candidates whose

*appointments were cancelled had approached the Hon'ble High Court, however, Division Bench rejected their Writ Petition and the matter was thereafter taken to the Hon'ble Apex Court. The Hon'ble Apex Court set aside the order passed by the Division Bench of the Hon'ble High Court of Chhattisgarh observing that "error committed by respondent-board in the matter of evaluation of the answer scripts could not be attributed to the appellants as they have neither been found to have committed any fraud or misrepresentation in being appointed qua the first merit list, nor has the preparation of the erroneous model answer key or the specious result contributed to them." The observations made by the Hon'ble Apex Court in paragraph 20 of the said judgment are quite relevant. We deem it appropriate to reproduce the entire said paragraph hereinbelow, which reads thus:*

*"20. The pristine maxim of *fraus et jus nunquam cohabitant* (fraud and justice never dwell together) has never lost its temper over the centuries and it continues to dwell in spirit and body of service law jurisprudence. It is settled law that no legal right in respect of appointment to a said post vests in a candidate who has obtained the employment by fraud, mischief, misrepresentation or malafide. (See: District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and another v. M. Tripura Sundari Devi, (1990) 3 SCC 655, P. Chengalvaraya Naidu v. Jagannath and others, (1994) 1 SCC 1 and Union of India and others v. M. Bhaskaran, 1995 Suppl. (4) SCC 100). It is also settled law that a person appointed erroneously on a post must not reap the benefits of wrongful appointment jeopardizing the interests of the meritorious and worthy candidates. However, in cases where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointee is terminated, this Court has taken a sympathetic view in the light*

*of various factors including bonafide of the candidate in such appointment and length of service of the candidate after such appointment (See: Vinodan T. and Ors. v. University of Calicut and Ors.,(2002) 4 SCC 726; State of U.P. v. Neeraj Awasthi and Ors. (2006) 1 SCC 667) : [2006 (1) SLR 774 (SC)].”*

27. In the instant case, if at all, any error has been committed, it is not by the applicants but by the respondents in the matter of allowing the applicants as well as six other candidates to participate in the further selection process inspite of the fact that none of them had received the minimum qualifying marks. However, in the error so committed by the respondents, undisputedly, there is no role of the applicants. It is also not the case of the respondents that the applicants have obtained the appointments by fraud, mischief, misrepresentation or mala fide. It is further not in dispute that, to join the present postings, both the applicants have relinquished their earlier job with Zilla Parishad, Nashik by submitting their resignations for the said posts. In view of the fact that without any fault on their part, the applicants are now subjected to suffer the consequences, and as the cancellation of their appointments would severely affect their economic security, we feel that the dispute in the present matter has to be viewed differently. In the circumstances, as has been held by the Hon'ble Apex Court in the case of **Vikas Pratap Singh and Ors.** cited supra, it would be highly unjust and grossly unfair to cancel the appointments of the applicants who are the innocent appointees. No doubt, in the case of **Vikas Pratap Singh and Ors.** the length of service rendered by the employees who were party in the said dispute was one of the weighing factors along with the fact that in getting such wrongful or irregular appointment, there were no allegations against the said employees that they have played any fraud, mischief or misrepresentation. In the instant matter, we reiterate that there are no allegations against the present applicants of having committed any fraud or misrepresentation or mala fide. In the present matter, according to us, weighing

*factor to consider the cases of the present applicants would be the fact that both of them have relinquished their earlier job with Zilla Parishad, Nashik in order to join the present posting.*

28. Secondly, the applicants belong to backward class and the other six candidates who also have been included in the list of selected candidates though have not received qualifying marks, are also from the backward class. As such, in our opinion, having regard to the observations made and the findings recorded by the Hon'ble Apex Court in the case of **Rajesh Kumar Verma V/s. State of M.P. [1995 (2) SCC 129]** cited supra, the State government may exercise its powers to relax the criteria of minimum qualifying marks in so far as the candidates belonging to backward class are concerned, so that the appointments of the present applicants as well as few others can be saved."

19. In paragraph 8(c) of the order passed in Writ Petition No.11613/2022 & 11763/2022 the Hon'ble High Court has expressed that, *"after receiving the representations from the concerned employees the authority would take into account available vacancies and assess as to whether it was on account of any reservation that these appointees were considered for appointment"*. In para 8(d) Hon'ble High Court has further observed that, *"the points raised by the appointees as well as the judgment cited would be taken into account by the authorities and reasoned order would be passed in light of the rules and policies applicable"*. Respondent no.2 while deciding the representations of the applicants has completely lost sight of



the observations and expectations of the Hon'ble High Court as above.

20. Having considered the objections raised by the applicants and the observations made by the Tribunal in earlier judgment and order, respondents were expected to give some plausible explanation as to in what circumstances the applicants were considered for their appointment though they were not eligible for to be considered for such appointments. While alleging that the applicants were fully aware of the fact that, they were not eligible for to be appointed having regard to the number of marks scored by them, respondent no.2 has lost sight of the fact that, greater blame goes on the officers who were involved in the process of selection, who were also having full knowledge of the terms and conditions incorporated in the advertisement and were also completely aware of the number of marks scored by the applicants. In fact, more liability was on these officers to adhere to the norms of selection prescribed in the advertisement. Neither in the earlier affidavit in reply filed on behalf of the respondents in the earlier O.A.Nos.793/2021 & 794/2021 nor in the affidavits in reply filed in the present two matters, any explanation is provided by the respondents as to selection of the applicants despite the fact that the applicants

did not score the minimum prescribed marks, which was well within their knowledge.

21. Learned P.O. has relied upon the following judgments of the Hon'ble Supreme Court:

- “[i] State of Orissa & Ors. V/s. Gopinath Dash & Ors. [(2005) 13 SCC 495].
- [ii] K. Manjushree V/s. State of Andhra Pradesh & Ors. [(2008) 3 SCC 512].
- [iii] Rakesh Kumar Sharma V/s. State (NCT of Delhi) & Ors. [(2023 11 SCC 58).”

22. There cannot be a dispute in regard to the ratio laid down in the aforesaid judgments, however, facts which existed in the said matter are quite distinguishable with the facts involved in the present matter. In the case of **Rakesh Kumar Sharma V/s. State (NCT of Delhi) & Ors.**, the appellant had misrepresented that on the date of making application, he was possessing requisite qualification whereas he had acquired the said qualification subsequent to the last date of submission of the application. In such circumstances, Hon'ble Apex Court held termination of the services of the said applicant justified. In the present matter, it is not the case of the respondents also that, there was any misrepresentation by the applicants. The aforesaid judgment, therefore, would not apply to the facts of the present case.

23. In the case of **State of Orissa & Ors. V/s. Gopinath Dash & Ors.** (*cited supra*), the issue was in respect of the interference in the policy decision taken by the Government. Obviously, the said judgment would also not apply to the facts of the present case. In the case of **K. Manjushree V/s. State of Andhra Pradesh & Ors.** (*cited supra*), the question for determination was whether correct criteria was adopted in making recruitment for the post of District & Session Judges (Grade-II) which were governed by the A.P. State Higher Judicial Service Rules, 1958. The criteria determined was to hold written examination for 75 marks and 25 marks were for interview. However, while holding written examination 100 marks were prescribed instead of 75. High Court on administrative side made two changes after written examination and interviews were over which resulted in reshuffling of the selection list. It is evident that, the issue which had arisen in the said matter was quite different.

24. In premise of peculiar facts involved in the present matter and considering the observations made by the Hon'ble High Court in the order passed in Writ Petition Nos.11613/2022 & 11763/2022 and having regard to the observations made by

the Hon'ble Supreme Court in the case of **Vikas Pratap Singh & Ors. V/s. State of Chhattisgarh & Ors. [(2013) 14 SCC 494]**, the State Government must have taken a sympathetic view having regard to the fact that, the appointments of the applicants though were wrongful, were made without any mistake on part of the applicants and further that, after their appointments in the present posts, both the applicants had resigned their earlier job with Zilla Parishad.

25. It is not the case that the performance of the applicants is grossly inadequate. When the cut-off is prescribed of 45% marks, the applicants have scored 42% and 43% marks. In the circumstances, though the State Government has failed in taking a holistic view in the matter, according to us, it would be highly unjust and grossly unfair to confirm the decision of the respondent no.2 to cancel the appointments of the applicants who are the innocent appointees. As such, we are inclined to allow both these O.As.

26. We clarify that, in the peculiar facts and circumstances of the case, we have taken such view, which shall not be taken as precedence in other matters. In the result, the following order is passed:

O R D E R

- [i] The order dated 09-06-2023 passed by respondent no.2 thereby rejecting the representations of the applicants dated 31-03-2023, is quashed and set aside.
- [ii] Respondents shall reinstate the applicants in service with continuity of service and 50% back-wages within 6 weeks from the date of this order.
- [iii] Original Applications are allowed in the aforesaid terms, however, without any order as to costs.

**(VINAY KARGAONKAR)**  
**MEMBER (A)**

**(P.R.BORA)**  
**VICE CHAIRMAN**

**Place : Aurangabad**  
**Date : 10.09.2024**