CORAM : NITIN JAMDAR, AND
MANJUSHA DESHPANDE, JJ.

RESERVED ON: 2 November 2023.

PRONOUNCED ON: 22 December 2023.

JUDGMENT : (Per Nitin Jamdar, J.)

Rule in all the Petitions. Rule is made returnable forthwith. Taken up for final disposal as per the earlier order.

2. In the year 2018, the State of Maharashtra enacted the *"Maharashtra State Reservation for Socially and Educationally Backward Class Act, 2018"* (SEBC Act), which came into force on 30 November 2018. This legislation conferred a right on the individuals from the Maratha community, SEBC category, to 13% of total admissions in educational institutions and 16% of total appointments in direct recruitment for public services and posts within the State. The constitutional validity of the SEBC Act was challenged in this Court. After this Court upheld the validity, the challenge was taken further to the Hon'ble Supreme Court. The Supreme Court initially granted an interim order and then declared the SEBC Act to be unconstitutional. The State of Maharashtra issued Government Resolutions (GRs), regarding candidates who had applied under the SEBC category in the recruitment process for filling up public posts. These candidates were permitted to apply in the Economically Weaker Section category (EWS) for the process of recruitment of

various posts advertised in the year 2019. The GRs and the actions taken by the State Government in this regard were challenged before the Maharashtra Administrative Tribunal by the candidates who had initially applied under the EWS category. The Tribunal upheld the challenge by the impugned order dated 2 February 2023. The Tribunal directed the State of Maharashtra to prepare a final list of the original EWS candidates along with further directions and disqualified the candidates who had initially applied under the SEBC category.

3. Challenging this order of the Tribunal dated 2 February 2023, the State of Maharashtra and the aggrieved SEBC candidates have brought these writ petitions before us. Intervention applications are filed. The Petitions and Applications are argued together as they arise from the common order passed by the Tribunal and are disposed of by this common judgment and order.

4. In this judgment, the Maharashtra Administrative Tribunal is referred to as the "Tribunal". The Petitioner- the State of Maharashtra, through its different departments, is referred to as the "State". The original Applicants before the Tribunal who had applied from the Economically Weaker Section category are referred to as the "EWS candidates". The Respondents before the Tribunal who belonged to the SEBC category and were permitted to apply in the EWS category are referred to as the "SEBC candidates". We have described the candidates in this manner solely for convenience

and because the Tribunal has referred to them as such. However, it should not be construed that we have made a distinction between these SEBC candidates and EWS candidates when addressing the broader issue- an error, as we will expound upon later, that the Tribunal has fallen into.

5. A total of eight petitions are before us. Writ Petition Nos.2859 of 2023, 2862 of 2023 and 2862 of 2023 are filed by the State. The remaining petitions are filed by the SEBC candidates. Recruitment processes under three Advertisements were under challenge before the Tribunal. One for the posts of Sub-Inspector/Tax Assistant and Clerk-Typist. Second for the posts in the Forest Department. Third for the posts in the Engineering Services. These writ petitions can be grouped as per the Advertisements as under:

(a) For the post of Tax Assistant and Clerk-Typist:
    (i) WP No.2862/2023 filed by the State.

(b) For the posts in the Forest Department:
    (i) WP No.2859/2023 filed by the State.
    (ii) WP No.2891/2023 filed by SEBC candidates.
    (iii) WP No.5521/2023 filed by SEBC candidates.

(c) For the posts in Engineering Services:
    (i) WP No.2861/2022 filed by the State.
    (ii) WP No.2722/2023 filed by SEBC candidates
    (iii) WP(ST.) No.11330/2023 filed by SEBC candidates.
    (iv) WP No.5614/2023 filed by SEBC candidates.

6. As stated earlier, three recruitment processes under the different Advertisements are subject matters of the petitions. The dates and events in these recruitment processes are marginally different in each of them. One factual narration would encompass the dates and events of each recruitment process. The second narration would be tracing the history of the legislative enactments, judicial orders and the various GRs issued by the State of Maharashtra. Both narrations will have to be interwoven, as the way the two streams have proceeded will have a bearing on the merits of the matter.

7. The State of Maharashtra had promulgated an Ordinance in the year 2014 granting reservation to the Maratha community in public employment and in the field of education titled *Maharashtra State Reservation (of seats for admissions in educational institutions in the State and for appointments or posts in the public services under the State) for Educationally and Socially Backward Category (ESBC) Ordinance, 2014*. The ordinance was challenged in this Court, and its operation was stayed. The State legislature passed the ESBC Act of 2014 providing the identical benefits as the Ordinance. This Court stayed the implementation of the ESBC Act of 2014. Thereafter, the State Government set up a Backward Class Commission, which submitted a report on 13 November 2018. The State of Maharashtra enacted the SEBC Act, the subject matter of the petitions, which was brought in force on 30 November 2018. The

enactment provided 13% reservation for the Maratha community in admissions in the education institutes and 16% reservation in the direct recruitment under the State. Several writ petitions were filed before this Court challenging the validity of the SEBC Act and other aspects connected to it on various grounds.

8. The objective of the SEBC Act was to provide for reservation of seats for admission in educational institutes and reservation of posts for appointment in public services. Section 2(j) of the SEBC Act defined who would be a socially and economically backward class in the State of Maharashtra and stated that they would be the one treated as educationally and socially backward by the ESBC Act of 2014 which included the Maratha community. Section 3 of the SEBC Act made the Act applicable to all direct recruitment and appointments made in public services except certain categories. Section 4 stipulated that a certain percentage of the total appointments in the direct recruitment separately reserved for SEBC, including the Maratha community. The other sections of the Act provided for modalities regarding recruitment and admission.

9. On 14 January 2019, the 103rd Amendment to the Constitution of India was brought into effect by the 103rd Amendment Act of 2019. The Parliament amended Articles 15 and 16 of the Constitution of India by adding two new clauses, clause (6) to Article 15 with explanation and clause (6) to Article 16. The Parliament provided a maximum of 10% reservation for the

economically weaker section (EWS) of citizens specified therein. 103rd constitutional amendment enabled the State to provide for reservation for EWS prescribing the 10% ceiling limit. The relevant portion of Article 16 of the Constitution as amended, reads thus:

> *"16. Equality of opportunity in matters of public employment.*
> *(1) ….. ….. ….. ….. …..*
> *(2) ….. ….. ….. ….. …..*
> *(3) ….. ….. ….. ….. …..*
> *(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*
> *(5) ….. ….. ….. ….. …..*
> *(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.".*

The reservation under Article 16(6) was for other than those who were mentioned in Clause (4) of Article 16 of the Constitution.

10. The Maharashtra Public Service Commission (MPSC) issued the subject Advertisements inviting applications for filling up the posts regarding the recruitment under challenge. For the Assistant Conservator of Forests and Range Forest Officer posts, the Advertisement was published on 8 March 2019 for a total of 100 posts in the Forest Department. For the Assistant Conservator of Forests (Group-A) post, 29 posts were to be filled in. 5 posts were

reserved for SEBC and 3 for EWS. For the post of Range Forest Officer, 71 posts were to be filled in, out of which 11 posts were reserved for SEBC and 7 posts were reserved for EWS. On 3 April 2019, the MPSC issued an Advertisement for filling up 1145 posts in the Maharashtra Engineering Services, out of which 148 posts were reserved for SEBC candidates and 11 posts were reserved for EWS candidates. On 16 April 2019, the Advertisement was issued for 126 Tax Assistant and Clerk-Typist posts, of which 16 posts were reserved for SEBC candidates and 13 posts were reserved for EWS candidates.

11. The conditions and clauses of all three Advertisements were the same. The Advertisements first specified the table of the posts was to be filled in, and posts were reserved for each category. Then the general conditions regarding the number of posts and the reservation were prescribed. The Advertisements stated that the number of posts and the reservation are likely to change under the directions issued by the State, and if there was a change it would be included in the notification for the main examination. The Advertisements stipulated that the recruitment process would be undertaken subject to the outcome of the petitions pending in the Bombay High Court. Pursuant to the Advertisements, the EWS candidates applied from the EWS category, and the SEBC candidates applied from the SEBC category.

12. The challenge to the SEBC Act in the group of Petitions

and the Public Interest Litigation was heard by the Division Bench of this Court. By the judgment and order in the case of *Dr.Jaishri Laxmanrao PPatil v. The Chief Minister of State of Maharashtra*[1], and other petitions the Division Bench upheld the validity of the SEBC Act but reduced the extent of the reservation to 12% in educational institutes and 13% in direct recruitment. The petitioners therein challenged the judgment and order passed by the Division Bench of this Court dated 27 June 2019 in the Supreme Court by filing Civil Appeal No.3123/2020.

13. On 9 September 2020, the Hon'ble Supreme Court granted an interim order in Civil Appeal No.3123/2020 and others. The relevant paragraph of the said order reads thus:

> *"17. In view of the foregoing, we pass the following orders:-*
>
> *(A) As the interpretation of the provisions inserted by the Constitution (102nd Amendment) Act, 2018 is a substantial question of law as to the interpretation of the Constitution of India, these Appeals are referred to a larger Bench. These matters shall be placed before Hon'ble The Chief Justice of India for suitable orders.*
>
> *(B) Admissions to educational institutions for the academic year 2020-21 shall be made without reference to the reservations provided in the Act. We make it clear that the Admissions made to Post Graduate Medical Courses shall not be altered.*
>
> *(C) Appointments to public services and posts under the Government shall be made without implementing the reservation as provided in the Act."*

[1] PIL No.175/2018 and others decided by Bombay High Court on 27 June 2019

(emphasis supplied)

Appointments to public services and posts under the Government were directed to be made without implementing the reservation as provided in the SEBC Act. There is a debate at the bar on the purport and implications of this interim order, which we have dealt with later.

14. On 23 December 2020, the State issued a GR, which, in its preamble, referred the history of prior GRs. Initially, it addressed the 10% reservation for public service posts designated for the Economically Weaker Sections (EWS). Subsequently, it clarified that this reservation applied to EWS candidates not falling under any other backward class reservation. Since SEBC candidates already had reservations, the 10% allocation did not apply to them, as they were ineligible for EWS benefits, and the Maratha community was not classified as a backward class by the Central Government. The GR then referred to the interim order granted by the Hon'ble Supreme Court on 9 September 2020. The GR directed that all recruitments should be carried out without enforcing the reservation under the SEBC category. It further referred to the fact that the State has prayed that the matter be placed before the larger Bench in the interest of the public; however, the interim order continues. The GR then stated that it was decided that those who had applied under the SEBC category before 9 September 2020, should be treated from the open category. Citing orders from petitions before the Aurangabad

Bench, which mandated SEBC candidates to obtain EWS certificates, the GR also referred to the Division Bench's suggestion that the State determine whether EWS benefits should be extended to SEBC applicants. Consequently, in this GR, the State Government declared that, due to the interim order and prevailing conditions, SEBC category candidates for the year 2020-21 could apply for EWS certificates.

15. On 5 May 2021, the Hon'ble Supreme Court in Civil Appeal No.3123/2020, *Dr. Jaishri Laxmanrao Patil v. Chief Minister and others*[2], declared the SEBC Act to be unconstitutional being over 50% of social reservation not covered by the exceptional circumstances as contemplated by the Constitution Bench in the case of *Indra Sawhney v. Union of India*[3].

16. On 31 August 2021, the State Government issued a GR in reference to the decision of the Hon'ble Supreme Court dated 5 May 2021. It is stated that the Supreme Court had declared the reservation for the Socially and Economically Backward Classes (SEBC) as unconstitutional, consequently, candidates belonging to the SEBC category became eligible to compete for open posts. To benefit from the Economically Weaker Sections (EWS) reservation, these candidates had to fulfil the eligibility conditions outlined in the GR dated 12 February 2019. In response, the State amended the GR

2 (2021) 8 SCC 1
3 1992 Supp (3) SCC 217

of 12 February 2019 and issued corresponding directives. The GR specified that EWS reservation was contingent upon certain conditions, with the procedures outlined in the GR dated 12 February 2019 being applicable. Additionally, the EWS certificate had to pertain to the relevant financial year. Clause 7 of the GR indicated that SEBC candidates could avail themselves of EWS reservation benefits if they possessed the required certificate. Furthermore, the GR clarified that the benefits, as per the resolution of 23 December 2020, applied from the date of the interim order (9 September 2020) until the date of the final order (5 May 2021). In cases where recruitment processes were concluded before 9 September 2020, and final results were announced but appointment orders were pending, the resolution would retrospectively apply. However, if recruitment processes were completed, and candidates had already commenced their duties based on appointment orders before 9 September 2020, the GR was not applicable.

17. On July 5, 2021, the State Government issued instructions on the course of action to be followed after the decision of the Supreme Court of 5 May 2021. Subsequently, on 14 July 2021, the MPSC issued a notification revising the reservations for the Engineering Services in accordance with the Supreme Court's decision dated 5 May 2021. Similar notifications were issued on 12 July 2021 and other dates for the remaining categories. The SEBC category was consequently eliminated, and the positions were

integrated into the general and open categories. Candidates from the SEBC category were classified either under the Open or EWS category based on their eligibility. The cut-off for the Open category was lowered, while the cut-off for the EWS category was raised due to an increased number of candidates.

18. The Recruitment was in three stages: Preliminary examination, Main examination and Interviews. As regards the dates of stages, there is some variance between the three recruitment processes. As regards all the exact dates, the order of the Tribunal does not provide guidance. Therefore, we have proceeded based on the information tendered by the learned Advocate General on behalf of the State which is not in dispute. The details are as follows.

(A) *Forest Department:*

The Advertisement was issued on 8 March 2019. On 26 May 2019, MPSC conducted the preliminary examination. On 15 September 2019, MPSC conducted the main examination. From 4 to 21 August 2020, MPSC conducted interviews. On 12 July 2021, MPSC published a revised reservation and the posts of SEBC were merged into the Open category. On 21 July 2021, revised results were published. The cut-off for the Open category was lowered from 230 to 224 and the cut-off for the EWS category became higher from 192 to 214. On 23 August 2021, interviews of the additional 38 candidates were held. On 29 September 2021, the final merit list was published by MPSC. On 17 December 2021, the

final results were published. On 21 January 2022, recommendations were made to the Government by the MPSC. The recruitment being multi-cadre, an option of opting out was given to the candidates on 6 April 2022. On 20 June 2022, final revised results were published and on 29 June 2022, final recommendations were made to the Government. On 27 August 2022, the Original Application was filed in the Tribunal.

(B) *Engineering Services:*

The Advertisement was issued on 3 April 2019 for 1145 posts. On 23 June 2019, MPSC conducted the preliminary examination. On 27 September 2019, results of the preliminary examination were declared. The main examination was conducted by the MPSC on 29 November 2019. On 27 July 2020, the results of the main examination were declared. On 14 July 2021, MPSC published a revised reservation for the advertised posts. On 23 July 2021, revised results were published. The cut-off for the Open category was reduced from 258 to 246 and the cut-off for the EWS category was increased from 126 to 212. The revised results were challenged in Writ Petition No.2270/2021. Thereafter interviews were held up to 1 February 2022. On 12 February 2022, the final merit list was published by MPSC. On 4 March 2022, this Court disposed of the writ petition by granting liberty to the Petitioners to approach the Tribunal. In March 2022, the Original Application was filed. On 13 March 2022, the final results were published and on 10 June 2022, the final revised results were published by considering the

options. Thereafter final recommendations were made on 15 June 2022.

(C) *Tax Assistant and Clerk-Typist:*

The advertisement was issued for 126 posts of Tax Assistant on 16 April 2019. On 16 June 2019, the MPSC conducted the preliminary examination. Results were declared on 27 August 2019. On 6 October 2019, MPSC conducted the main examination and on 3 November 2019, final results were published. On 12 July 2021, MPSC issued a publication for revised reservations for the advertised posts and 11 posts reserved for SEBC candidates were merged in the General/ Open category. On 17 September 2021, revised results were published. For the General/ Open Category, the cut-off was lowered from 137 to 135 and the cut-off EWS category was raised from 127 to 132. This was a result of the reduction and addition of candidates. On 20 September 2021, Writ Petition No.3370/2021 was filed which was disposed of on 4 March 2022 granting liberty to approach the Tribunal. In March 2022, the Original Application was filed.

These dates have to be examined in the context of two relevant events, that is, the interim order was passed by the Hon'ble Supreme Court on 9 September 2020 and the final order on 5 May 2021.

19. On 8 September 2022, the State created supernumerary posts as per its decision of 24 August 2020 (as mentioned in the

impugned order). As regards the Clerk-Typist, 12 supernumerary posts were created for the original EWS candidates on 27 September 2022. As regards Tax Assistant, 12 posts were earmarked for Tax Assistant and as per communication dated 14 October 2022, the candidates were appointed on supernumerary posts.

20. Meanwhile, in a separate development, several writ petitions were filed before this Court by candidates belonging to the EWS category, challenging the Advertisement issued by the Maharashtra State Electricity Distribution Company Limited (MSEDCL). They also challenged the GR dated May 31, 2021, aggrieved by the inclusion of SEBC candidates in the selection process of the EWS category. Simultaneously, SEBC candidates filed petitions seeking a directive to the MSEDCL to take the decision allowing their participation in the EWS category selection process to its logical conclusion. This group of writ petitions was disposed of by the Division Bench of this Court in *Vikas Balwant Alase v. Union of India*[4], allowing the writ petitions filed by EWS category candidates. The Division Bench declared that the GRs impugned in those writ petitions did not apply to the concerned recruitment process initiated for appointment of the EWS category in furtherance of Advertisement Nos.04/2019, 05/2019 and 6/2019, which were the subject matters of the respective writ petitions. It was further declared that the action on the part of MSEDCL in applying the GRs impugned in those writ petitions retrospectively to the concerned

[4] 2022 SCC OnLine Bombay 1592

selection process was illegal and bad in law. Consequently, the impugned actions of MSEDCL were set aside and MSEDCL was directed to proceed with the selection process in consonance with the Rules prevailing when the advertisements were issued.

21. When the Original Applications came up for consideration before the Tribunal, the EWS candidates heavily relied on the decision in the case of *Vikas Alase*. In Original Application No.280 of 2022 and 281 of 2022, the Maharashtra Administrative Tribunal passed an interim order on 29 March 2022, whereby the joining of the Tax Assistants and Clerks was made subject to outcome of the decision in the Original Applications. In Original Application No.814 of 2022, an interim order was passed on 18 August 2022. Amongst 10 posts reserved for EWS, for Assistant Conservator of Forest 3 candidates, who were already sent for training, their services were made subject to decision in the Original Application and rest of the 7 posts for Range Forest Officer, whereby recommendations were made, were stayed till filing of reply. After considering the rival contentions, the Tribunal held that the GR dated 23 December 2020 was issued at a juncture when the SEBC Act had not been subject to a stay by the Supreme Court, consequently, the issuance of the GR on 23 December 2020 was incompatible with the SEBC Act. The Tribunal held that during the selection process, there was a retrospective application of a change in the rules which was impermissible. The Tribunal held that the

SEBC candidates were bound to the position applicable as of the date of the Advertisements. The Tribunal held that the decision in *Vikas Alase* was a binding precedent in the present facts and circumstances before the Tribunal. The Tribunal disposed of the three Original Applications by the impugned judgment dated 2 February 2023 with the following order:

> *"59. In view of the above, we pass the following order:*
>
> *(a) The Original Applications are partly allowed.*
>
> *(b) Being contrary to the provisions of Articles 16(4) & 16(6) of the Constitution of India, the G.R dated 23.12.2020 is illegal and void as it was issued when the S.E.B.C reservation was in existence. Hence, it is quashed and set aside.*
>
> *(c) The G.R dated 31.5.2021 is held as not applicable to the present selection process in these applications retrospectively.*
>
> *(d) The select list dated 20.6.2022 in O.A 814/2022, select list dated 23.7.2021 in. O.A 2800/2022 & select list dated 14.7.2022 in O.A 281/2022, qua E.W.S candidates are hereby quashed and set aside. The Respondents are directed to prepare the final select list of the originally E.W.S candidates and recommend within four weeks. Remaining select lists except E.W.S in respective examinations are kept intact.*
>
> *(e) The applicants in O.A 281/2022 cannot be appointed on supernumerary posts. The earlier recommendations given by M.P.S.C about the applicants are to be considered by the Respondent-State while filling up the posts. The names of the applicants, if found eligible are to be recommended to the Government, within one month."*

Challenging the common judgment and order of the Tribunal dated 2 February 2023, the Petitioners are before us with their respective writ petitions.

22. This group of writ petitions came up for consideration before the Division Bench on 8 March 2023. In the order passed on that day, the Division Bench noted the controversy in short. The Division Bench referred to the argument of the Petitioners that the Tribunal had relied on the decision of this Court in the case of *Vikas Alase,* however, it was contrary to the legal and factual position. Observing that the matter would be required to be dealt with finally at the admission stage, while deferring the hearing, the Division Bench directed that the position on that day be maintained. Accordingly, we have taken up these petitions for final disposal.

23. We have heard the learned counsel for the parties. On behalf of the State, Dr. Birendra Saraf, Advocate General, Mr. V. A. Thorat, Senior Advocate and Mr. Mihir Desai, Senior Advocate, special counsels, advanced arguments. Mr. Narendra Bandiwadekar, Senior Advocate, Mr.M. D. Lonkar, Mr. Nikhil Pawar Mr. Saurav N. Katkar and Mr. Satyajeet Rajeshirke, learned Advocates appeared for the SEBC candidates. On Behalf of On behalf of EWS candidates, Mr. Sayyed T. Yassen and Ms. Sabiha Ansari, learned Advocates advanced their arguments. Mr. Tejas Deshmukh, Mr. Laukik Pawar,

learned Advocates appeared for the Applicants.

24. For convenience, the arguments advanced by the Petitioners- State of Maharashtra and the Petitions- SEBC candidates, unless otherwise required, are referred to as the Petitioners' contentions. The arguments advanced on behalf of the EWS candidates are referred to as the contentions of the Respondent.

25. A summary of the Petitioners' propositions is as follows.

26. Petitioners contend: The impugned order has misdirected itself in law and facts. The rules governing the recruitment remained consistent throughout the selection process, with no modifications midway, and there is no retrospective application of the impugned GRs. The Advertisements explicitly conveyed that both, posts and reservations were subject to changes, contingent upon the decision regarding the challenge to the SEBC Act. Article 16(6) of the Constitution of India mandates that candidates falling within the SEBC category cannot opt for the EWS category even if eligible. When the Supreme Court initially directed recruitment without considering SEBC reservations and later invalidated the SEBC Act, eligible EWS candidates were afforded the option to benefit from EWS Reservations. The GRs of 23 December 2020, and 31 May 2021, formalized this option. It was known to the candidates that the recruitment process depended on the

challenge to the SEBC Act, and candidates had no grounds for grievance in this regard. The Tribunal's error lies in holding that the impugned GR was applied retrospectively. The ongoing recruitment process was not subject to retrospective application, and the Resolutions gave SEBC candidates the option to switch to the EWS category as per eligibility. The Tribunal should have considered that there was no change in the rules of the game; the qualification, eligibility criteria, and EWS reservation remained unchanged. The GRs were a consequence of the position post the Supreme Court's decision, allowing eligible candidates to avail themselves of the pre-existing EWS reservation. Furthermore, the Tribunal failed to consider a series of judgments of the Supreme Court laying down permissible and impermissible changes in the recruitment process. Notably, all Respondents- EWS candidates were considered in the recruitment process. If there is no midstream change in the rules, the retrospective operation becomes inconsequential, constituting a permissible change in the recruitment process. Even assuming that there was retrospective application, the GRs do not violate any constitutional or statutory embargo. They were procedural directions to ensure that candidates eligible for EWS reservation were not unjustly deprived due to SEBC reservation being subsequently set aside. The objective was to uphold the principle of Article 16(6) of the Constitution, ensuring fair and equal opportunities. The GRs, far from being illegal or arbitrary, aim to promote equal opportunity. The law laid down by judgments of the Supreme Court would

uphold the GRs and changes in the recruitment process that align with the constitutional mandate under Article 16 of the Constitution of India. The legal position also holds that change to promote the engagement of more meritorious candidates is acceptable, provided it does not exclude others from participating. The judgment in *Vikas Alase* is *per incuriam* for not taking into account the constitutional embargo in Article 16(6) of the Constitution of India. In essence, the inclusion of SEBC candidates in the EWS category for selection does not alter the established rules of recruitment. The fundamental criteria for eligibility, such as educational qualifications, professional qualifications, age limits, and specified percentages, constitute the norms governing the selection process. Any modifications to such fundamental eligibility criteria after the initiation of the selection process would constitute a change in the rules. But, in the present case, there has been no alteration to the eligibility criteria specified in the initial Advertisement. The percentage of reservations for EWS candidates remains unchanged. Allowing SEBC candidates to avail themselves of EWS reservations does not constitute a change in the reservation policy or the rules of the game. The advertised eligibility criteria, including age limits and educational qualifications, have remained the same. The Advertisements explicitly notified candidates that recruitment processes were subject to final decisions in various courts. The MPSC, at the outset of the selection process, clarified the potential for changes in the number of posts and reservations, as indicated in the Advertisements. Applicants who

applied under the EWS category accepted these conditions by participating in the selection process without contesting these clauses. Therefore subsequent inclusion of SEBC candidates in the EWS category was as per the State's right to amend conditions outlined in the Advertisements. To issue GRs making them applicable retrospectively is within the competence of the State Government. The Tribunal's conclusion on their illegality is misplaced. The statistics of appointments on posts referred to in the impugned judgment indicate the selection of more meritorious candidates, underscoring the government's prerogative to appoint candidates based on merit. EWS candidates with lower merit cannot assert a right to appointment under the EWS quota. Their challenge arose only after realizing their non-selection on merit. In some instances, appointment orders have already been issued, with some being issued well before the Tribunal's interim order. Some candidates have commenced their services, and despite the passage of almost a year, the Respondents chose not to challenge these orders. They permitted all procedural steps to proceed, including medical examinations, document verification, and issuance of appointment orders for candidates. This delay in approaching the Tribunal is significant. The delay in challenging the GRs and notifications, coupled with active participation in the selection process, renders the Respondent's prayers subject to laches. This aspect is not considered by the Tribunal. The Supreme Court's interim order on 9 May 2020, effectively stayed the operation of the SEBC Act. The striking

down of the SEBC Act, based on the violation of Fundamental rights, essentially means that the Act never existed. The SEBC candidates, even if they belong to the EWS category, would have been denied the benefit of reservation when competing with General category candidates despite their merit. The Tribunal did not examine whether any prejudice was caused to the EWS candidates. The Tribunal has stepped outside its jurisdiction as if it was considering a public interest litigation. There was no warrant to set aside the GR dated 23 December 2020 as the Respondents- EWS candidates did not show how they were directly affected. They were not selected because they scored lesser marks. The impugned order has caused grave prejudice, even to those who were not before the Tribunal. Thus the impugned order be quashed and set aside.

27. The gist of the Respondents' arguments is as follows.

28. Respondents submit: The impugned order passed by the Tribunal is correct and legal. In the Advertisements pertaining to the recruitment processes, the vacancies for SEBC and EWS were notified separately, and even the procedures prescribed for procuring the certificates under the said categories were different and distinct under the various GRs. For the EWS category, the procedure was as per the GR dated 12 February 2019 and for the SEBC category, it was as per the GR dated 7 December 2018. The State issued a GR dated 28 July 2020, reiterating that SEBC candidates cannot avail

themselves of the benefit of the EWS category. Therefore, it was obvious that SEBC category candidates could not avail of the benefit of the EWS category, which was the mandate of Article 16(6) of the Constitution. In the Advertisements, the candidates were required to submit an EWS certificate before the cut-off date. The prescribed cut-off date was as per the GR dated 12th February 2019. From perusal of the Advertisements and the GR dated 12th February 2019, it is very clear that an EWS candidate acquired eligibility to be an EWS candidate only if the criteria prescribed by the said policy were met. Therefore, the candidates should have had the certificate as of the last date. The SEBC candidates were put on notice about the pendency of the challenge to the SEBC reservation before the Supreme Court. The issuance of the GR dated 23 December 2020 is arbitrary and unconstitutional. The SEBC Act was not stayed by the Supreme Court by the order dated 9 September 2020; it was only an interim direction for not making any appointments under the Act. It is important to note that the Supreme Court did not stay the entire recruitment process; instead, it intended to proceed with recruitment without implementing reservation as per the SEBC Act. However, the State stopped the process to provide undue advantage to a specific community, which goes against the Constitution and the Supreme Court's directions. Further, when there was no stay on the SEBC Act, the GR of 23 December 2020 could not have been issued. The Respondents, as citizens, are also entitled to challenge such actions of the State. The State modified the GR, allowing SEBC

candidates to benefit from the EWS category, contradicting their own GR. On 5 May 2021, when the Supreme Court declared that the SEBC reservation was unconstitutional, the corollary was that those seats earlier reserved for SEBC were converted into the open category. Accordingly, the State also converted the seats into the open category in the present recruitment process. By the GR dated 31 May 2021, the State conferred eligibility of the EWS category by giving retrospective effect. When SEBC candidates did not possess the EWS certificate as required before the cut-off date and were made retrospectively eligible, it amounted to changing the rules of the game during the selection process. The GR dated 12 February 2019 was modified by deleting the word SEBC mentioned in the said GR, and Annexure-A of the undertaking was also modified to suit this retrospective operation. The final result was declared for Clerk-Cum-Typist and also for Tax Assistant before the interim order of the Supreme Court. Recommendation letters were issued. Letters for appointment orders were also issued to the original EWS candidates even before the interim order of the Supreme Court. In the case of the Engineering and Forest services, the impugned GRs affected the right of consideration for interviews for those who were qualified after successfully qualifying the preliminary and mains examination, whereas in the case of Tax assistants and clerks/typists, their right to appointment has been affected. The calculation method of income criteria for SEBC and EWS is not the same. The issuance of EWS eligibility certificates to SEBC candidates based on back dated

income certificates, violating the rules, rendered the entire process void from the beginning. According to the Advertisements and GRs, candidates could submit eligibility certificates within six months of application, and changing eligibility criteria afterwards is not permissible. The selection process should continue on the same basis once an advertisement is issued based on the stated eligibility criteria. The petitioner's attempt to change the criteria after the Advertisements goes against this principle. The Respondents have not waived their right to challenge the outcome by participating in the recruitment process. The argument of the petitioners that GRs were issued to increase the competition and bring in more meritorious candidates is not stated, nor was it the purpose of the impugned GRs. All respective categories' cut-off marks were declared before the impugned policy decision. The cut-off marks were already declared for every category, and the SEBC to EWS policy was brought in afterwards. Admittedly, the open category's cut-off was much higher than the EWS category. Therefore, accommodating the SEBC category in a lower category was unfair and arbitrary after the cut-off was declared. The petitions are not maintainable because the issues raised have already been addressed and decided by the Hon'ble Division Bench in the *Vikas Alase* case. The judgement in *Vikas Alase* established that altering eligibility criteria during the selection process is not allowed. The judgment in the *Vikas Alase* case is a binding precedent on this coordinate bench on all the issues and is rightly considered binding by the Tribunal. The Supreme Court has

dismissed the challenge against the decision in the *Vikas Alase* case having not found any error in the judgment of *Vikas Alase*. The grounds raised and argued before the Supreme Court were also the same as those advanced in these petitions. Despite the existence of a GR restricting SEBC candidates from EWS benefits, the State issued conflicting GRs. The State actions, like allowing migration of SEBC to EWS retrospectively, are not permissible at an advanced stage of the recruitment process. The SEBC reservation, already struck down by the Supreme Court, made the reserved seats for SEBC candidates irrelevant. To accommodate them, the State shifted them to EWS, contrary to the Advertisements. Migration from one reservation category to another is not allowed, but the State allowed such options for candidates in ongoing recruitment processes. In conclusion, there is no merit in the challenge and the Petitioner cannot raise these points in court since they have already been addressed in the *Vikas Alase* case. The petitions should be dismissed.

29. The Tribunal has set aside the GR dated 23 December 2020 on the ground that it is illegal and void as it was issued when the SEBC reservation was in existence. The GR dated 31 May 2021 is held as not applicable to the present selection process in these applications retrospectively. The select list *qua* EWS candidates is quashed and set aside. The Petitioner-State is directed to prepare the final select list of the original EWS candidates and recommend them within four weeks. The remaining select lists except EWS in

respective examinations is kept intact. It is held that the applicants could not be appointed to supernumerary posts. When examining the challenge, it needs to be kept at the forefront that we are not considering a broad-based challenge akin to a public interest litigation to adjudicate upon the overall policies of the state. The petitions arise from the order of the Administrative Tribunal, which has to decide the matters in respect of services under the State within the jurisdiction conferred under the governing statute.

30. Both, the Respondents and the Tribunal have heavily relied on the decision of the Division Bench of this Court in *Vikas Alase.* According to the Respondents, the issues which *Vikas Alase* and confirmed by the Supreme Court cannot be reopened by the Petitioners. The Respondents contend that the law laid down in *Vikas Alase* in the identical fact situation is binding. According to the Petitioners, the decision in *Vikas Alase* has not considered the impact of the legal position and is also different on facts and, therefore, the same is *per incuriam* and distinguishable. In light of these rival contentions, we will have to first carefully examine the decision in *Vikas Alase* and the order passed by the Supreme Court dismissing the challenge to this decision.

31. In *Vikas Alase*, the Division Bench considered and disposed of a group of writ petitions. The writ petitions pertained to the recruitment process initiated by MSEDCL pursuant to

Advertisement No.5/2019, dated 12 February 2019, and No.6/2019, dated 12 June 2019. The Division Bench grouped them into two categories, noting that common questions were involved. One group pertained to the challenge by EWS candidates, and the second to the directions sought by the SEBC candidates. The factual position in this group of petitions is narrated in paragraphs- 6 to 13, which read thus:

> *"6. The MSEBC Act was brought into force on November 30, 2018. The State Government took a decision to extend the benefit of reservation in services to the SEBC. Likewise the State Government has extended the benefit of reservation in education and service to the EWS category within the State of Maharashtra vide Government Resolution (hereafter 'G.R.' for short) dated February 12, 2019 issued by the General Administration Department, Government of Maharashtra. The respondent no. 5 - MSEDCL issued an advertisement dated June 2, 2019 bearing No. MSEDCL-06/2019 inviting applications for various posts including that of 'Diploma Engineer - Trainee (Distribution) (hereafter 'the said post' for short) to be filled at various offices of the MSEDCL. MSEDCL is a State owned company/entity. There is no dispute that the MSEDCL is a 'State' within the meaning of Article 12 of the Constitution of India and is amenable to the writ jurisdiction of this Court. The educational qualification prescribed for the said post was 'Diploma in Electrical Engineering'. Out of the total 408 vacancies advertised for the said post, 40 posts were reserved for EWS category candidates and 53 posts were reserved for SEBC category candidates. A corrigendum to the advertisement due to certain changes in the vacancies/backlog position for the said post came to be issued. Consequently, for the said post, the vacancy position was reduced to 29 for EWS category and 43 for SEBC category.*
>
> *7. A reference to some of the conditions of advertisement pertaining to SEBC and EWS categories is relevant. Clause 5.12 provides that for claiming the benefit of reservation under*

SEBC, the candidates have to produce the Caste Certificate issued by the appropriate authority and Caste Validity Certificate issued by Caste Scrutiny Committee. Also the concept of Non-creamy Layer Certificate is applicable to SEBC along with all Backward Class (other than SC/ST) categories. Clause 5.12 provides thus:—

> *"It will be sole responsibility of the candidate to produce the appropriate documents to claim the benefit of reservation under SEBC."*
>
> *Clause 5.13 stipulates thus:—*
>
> *"5.13 As per the guidelines vide GR dated 07/12/2018, the Caste Certificate issued to the candidate under Educationally and Socially Backward Category (ESBC) as per the G.R. No. CBC-10/2013/P.K.35/BCR dated 15/07/2014 earlier will be valid for availing reservation under SEBC under this recruitment."*

8. The caste certificate issued to the candidate under Educationally and Socially Backward Category as per earlier G.R. dated July 15, 2014 is made valid for availing reservation under SEBC under this recruitment.

9. Clause 5.14 provides thus:—

> *"5.14 For claiming the benefit of reservation under EWS the candidates have to produce the Certificate within 6 months from the date of submission of application. The candidates shall produce certificate issued by the appropriate authority as prescribed under Annexure -'A' enclosed to Maharashtra Government Resolution dated 12/02/2019."*

10. Clause 5.16 stipulates that the candidate applying under SEBC should be a domicile of Maharashtra State as per G.R. dated 05/12/2018. Clause 5.21 stipulates that the reserved category candidates who avails concession in age will not be considered against the open/general category posts. The applicants were requested to observe the vacancies before submission of online application. Further, clause 5.23 of the advertisement mentions that recruitment process of the SEBC category candidates is subject to the order from the Hon'ble Supreme Court of India in the SLP (C) No. 015701/2019 and

any instructions by the GoM accordingly are received. The tentative time schedule is provided under clause 7 which is as under:—

"7. TENTATIVE TIME SCHEDULE:

7.1 Opening of submission of online applications : 07/08/2019

7.2 Last date of submission of online application : 20/08/2019

7.3 Candidates to download call letter for online : 10 days prior test to online test

7.4 Online Examination at Test Centre : During August 2019

11. Thus, the last date of submission of online application was August 20, 2019.

12. The procedure to apply is stated in clause 9. Clause 9.1 provides that "candidate applying for the posts advertised should ensure that they fulfill all eligibility criteria. Their admission to all the stages of the recruitment process will be purely provisional subject to satisfying the prescribed eligibility criteria mentioned in this advertisement." The general conditions are prescribed by clause 12. Clause 12(a) stipulates that "mere submission/acceptance of online application and/or appearing for the exams do not ensure eligibility as well as does not confer any right for appointment". Clause (d) provides that "once the application is submitted, no information can be corrected. Candidates should be careful in filling the online application and should cross-check and are responsible for correctness of information in continuation". Clause (r) stipulates that "any request for change of address or any other information provided in online application will not be entertained". Further, by virtue of clause (v), the MSEDCL has reserved the right to cancel the advertisement fully or partly on any grounds and such decision was not to be notified or intimated to the candidates.

13. The candidates appeared for online examination on November 13, 2019. The combined list of selected candidates was published on January 17, 2020. The names of the candidates selected from various categories including EWS and

SEBC category was declared. The candidates received a communication through e-mail dated January 25, 2021 whereby they were informed by the MSEDCL that they are selected and further instructed to report for document verification process. As a result of the interim order passed by the Supreme Court, the MSEDCL did not proceed to issue appointment orders to the candidates selected from SEBC category. Even those from EWS category were not appointed."

The judgment notes that the combined list of selected candidates was published on 17 January 2020. Thereafter the developments which we have adverted to, that is, the order passed by the Aurangabad Bench of this Court, GRs dated 23 December 2020 and 13 January 2021 were noted. Then, two instructions which were issued by the State Government to MSEDCL were referred to in paragraphs- 17 and 18 as under:

"17. The State Government through the Industries, Energy and Labour Department issued a letter dated February 10, 2021 addressed to the Managing Director, MSEDCL, instructing him to comply with the guidelines laid down therein. The relevant portion of the said guidelines read thus:-

"a. To allow the S.E.B.C. candidates who had participated in the recruitment process in pursuance of the Advertisement No. 04/2019 (Electricity Assistant), Advertisement No. 05/2019 (Upkendra Sahayyak) and Advertisement No. 06/2019 (Diploma/Graduate Engineer Trainee) advertised by the M.S.E.D.C.L. in the year 2019 to obtain E.W.S. certificates for the purpose of their recruitment from the E.W.S. category for the aforesaid posts.

b. To take abundant care and caution that no action in contravention and derogation of the Government Resolution dt. 23/12/2020 issued by General Administration Department be taken."

18. Further, vide the aforementioned letter dated February

10, 2021, the Industries, Energy and Labour Department gave retrospective effect to the G.R. dated December 23, 2020 by allowing even the candidates who had participated in the recruitment process held in the year 2019 to obtain EWS category certificate and avail its benefits by changing their caste/reservation category from SEBC category to EWS category for the purpose of recruitment to the said posts. In pursuance of the letter dated February 10, 2021, the Chief General Manager, MSEDCL, issued a public notice dated February 11, 2021 that MSEDCL had activated the URL-line for the purpose of allowing SEBC category candidates to change their category either to "EWS category" or "Open category" with reference to their recruitment to various posts advertised by MSEDCL in the year 2019. The last date provided by MSEDCL for changing reservation category was March 20, 2021. This led to the filing of these writ petitions by the respective category of candidates."

32. With the above factual backdrop, the Division Bench in *Vikas Alase* adverted to the rival contentions before it. The EWS candidates therein had urged that once the recruitment process had already commenced under the Advertisement, the selection process cannot be changed midway to the detriment of EWS candidates who have constitutional reservations in their favour. It was urged that SEBC candidates therein were aware of the challenge to the SEBC Act in the Supreme Court, and even the advertisement stipulated that the recruitment process was subject to the outcome of the proceeding pending in the Supreme Court. It was contended that the SEBC candidates consciously chose to apply against the posts reserved for SEBC candidates. It was contended that EWS being constitutional reservation and SEBC being a distinct class, there

cannot be a change in midway for SEBC candidates. Various decisions were cited before the Division Bench, which are also being referred before us. These are the decisions in the cases of *N.T. Devin Katti* v. *Karnataka Public Service Commission*[5]; *Union of India* v. *Tushar Ranjan Mohanty*[6]; *Gurdeep Singh* v. *State of J & K*[7]; *Madan Mohan Sharma* v. *State of Rajasthan*[8]; *State of Bihar* v. *Mithilesh Kumar*[9]; *Prakash Chand Meena* v. *State of Rajasthan*[10]; *Nalgonda Srinivas Rao* v. *Dr. B. Kishore*[11]; *Bishnu Biswas* v. *Union of India (UOI);*[12] *Neil Aurelio Nunes (OBC RESERVATION)* v. *Union of India*[13], *K. Manjusree* v. *State of A.P.*[14].

33. The SEBC candidates urged before the Division Bench in *Vikas Alase*, that there was nothing arbitrary or discriminatory in extending benefits of EWS candidates to eligible candidates of SEBC. All the candidates were informed that recruitment was subject to the outcome of the decision of the Supreme Court, and since no appointment from SEBC could be made in view of the interim directions of the Supreme Court, the State Government had to issue a Circular safeguarding the interest of the SEBC candidates who fulfil the eligibility of EWS category. The State and MSEDCL were sympathetic to the case of SEBC candidates who were directly

5 (1990) 3 SCC 157
6 (1994) 5 SCC 450
7 1995 Supp (1) SCC 188
8 (2008) 3 SCC 724
9 (2010) 13 SCC 467
10 (2015) 8 SCC 484
11 Conmt.Pet© No.1700/2017
12 (2014) 5 SCC 774
13 (2022) 4 SCC 1
14 (2008) 3 SCC 512

affected, and thereafter, they had permitted the SEBC candidates to fulfil, subject to the eligibility of EWS candidates, to either opt for the open category or EWS category. There was neither any change nor any reservation extended in the midst of the recruitment process. A reference was made to GR dated 12 February 2019 contending that the benefit of EWS reservation would not ensue to such persons who were covered by other statutory reservations, including but not limited to the Maratha community, and once reservation was held to be unconstitutional, they were held to be eligible for the benefit of open and EWS categories.

34. Then, the Division Bench in *Vikas Alase* noted that when MSEDCL published an advertisement on 1 August 2019, the challenge before the Supreme Court was pending. Then, it is noted that MSEDCL published the Select List on 17 January 2020. In paragraphs 42 and 43, the Division Bench observed as under:

> *"42. It is not as if the SEBC category candidates were not put to notice about the matter pending before the Supreme Court. Clause 5.23 of the advertisement makes the recruitment process of the SEBC category candidates as subject to outcome of the order from the Supreme Court. SEBC candidates, despite having knowledge of the matter pending before the Supreme Court, still chose to apply under SEBC category. The select list was published by the MSEDCL on January 17, 2000. In terms of the advertisement, the SEBC candidates were categorized differently from EWS category for due consideration as against the vacancies prescribed for their respective categories. The State of Maharashtra received certain complaints that persons belonging to other reserved categories were seeking to take benefit of EWS reservation. The State Government, therefore,*

issued a G.R. dated July 28, 2000 clarifying that SEBC category candidates would not be entitled to the benefit of the EWS reservation as they are covered by the MSEBC Act.

43. It is therefore apparent that till September 9, 2020 viz. the date when the interim order came to be passed by the Supreme Court directing that the appointments are to be made without implementing the MSEBC Act, the State Government had taken the position that SEBC cannot avail the benefit meant for EWS reservation. After passing of the interim order dated September 9, 2020 by the Supreme Court, the State Government decided to extend the benefit of EWS reservation to the candidates who had applied under SEBC category vide the Cabinet decision dated September 22, 2020. Some of the SEBC candidates approached the Aurangabad Bench of this Court contending that SEBC candidates are entitled to the benefit of EWS reservation. The petitioners before the Aurangabad Bench of this High Court (now transferred to this Court and heard along with the present group of writ petitions), contended that they were persons from SEBC category who were also eligible for EWS reservation in view of the Cabinet decision dated September 22, 2020. MSEDCL did not make any appointments from EWS category in view of the orders passed by the Aurangabad Bench of this Court. On December 23, 2020, the State Government issued a G.R. providing that the candidates from SEBC category would be eligible to take benefit of EWS reservation. They were given an option to opt for open or EWS category. MSEDCL issued a public notice on February 11, 2021 that G.R. dated December 23, 2020 would be applicable to candidates that had applied for recruitment under SEBC category and opt for open or EWS reservation. The MSEDCL issued a public notice on June 8, 2021 calling upon SEBC candidates to avail option either of open or EWS as per eligibility. It is pertinent to note that till the time the Supreme Court passed the interim order dated September 9, 2020 issuing directions for making appointment without implementing the MSEBC Act, the MSEDCL was proceeding ahead with the recruitment on a clear understanding that EWS is a separate and distinct category from SEBC class of citizens. The MSEDCL had taken a firm position which is in consonance with the constitutional scheme

and accordingly issued the advertisement providing for the vacancies earmarked for EWS and other reserved categories including SEBC. The advertisement provided a separate procedure under G.Rs. issued by the State Government for obtaining the certificate meant for EWS category and the one meant for SEBC category. The State Government by issuance of a Circular dated July 28, 2020 in no uncertain terms clarified that SEBC category candidates cannot avail the benefits of the reservation meant for EWS category. Upon issuance of the advertisement this was the representation made to the candidates of the EWS category which the Constitution recognizes as a separate section of citizens."

Then the Division Bench rendered its opinion as under:

47. In the present case, the process of recruitment had been initiated and reached till the stage of publication of select lists, and hence, even otherwise, the State Government could not have issued a G.R./Circular retrospectively applying EWS reservation to those eligible under SEBC category.

48. We are surprised at the stand taken by the State Government as well as the MSEDCL while deliberating on the condition in advertisement stipulating that all appointments made are subject to the orders passed by the Supreme Court, which forms the basis of their submission that EWS category candidates cannot claim a vested right to appointment. It has to be borne in mind that the challenge pending before the Supreme Court was against the decision of this Court upholding the constitutional validity of the MSEBC Act. The caution that all appointments under the advertisement are subject to the order passed by the Supreme Court was for the candidates from SEBC category. The reservation to EWS category was not in issue. The State Government as well as the MSEDCL, therefore, are not justified in contending that EWS category candidates have no vested right in view of such clause in the advertisement. On the contrary, after the interim order was made by the Supreme Court, the State Government could have taken a stand that SEBC category candidates apart from

having no vested right to be considered for appointment are now precluded from participating in the recruitment process. They made a choice despite being fully aware of the challenge pending before the Supreme Court. In view of the interim directions of the Supreme Court, it is more the question of what is the vested right of SEBC category candidates than that of EWS category candidates.

49. It is not as if the candidates could not have opted for the open category or for EWS category if eligible at the stage of making of the application. Such candidates, however, obtained necessary certificates and caste validity certificate and laid a claim to the reservation meant for SEBC category candidates. The embargo at the time when the application was made assumes relevance. The procedure for obtaining the certificate as belonging to EWS category prescribed was different from the one prescribed for SEBC. In our opinion, by issuing the impugned circulars extending the benefit of EWS reservation to the candidates who had initially participated as the SEBC candidate, after the select list was published, is arbitrary and unconstitutional. The Supreme Court while issuing interim directions in the SEBC case observed that the appointments to public services and posts under the Government shall be made without implementing the reservation as provided under MSEBC Act. In the present recruitment initiated pursuant to the advertisement issued by the MSEDCL, the concerned candidates had applied against SEBC category knowing fully well the consequences that may ensue in the pending challenge before the Supreme Court."

…. ….. ….. ….. ….. …..

61. Applying the aforestated well settled principles enunciated by the Supreme Court to the facts of the present case, we have no hesitation in holding that the benefit extended to SEBC candidates while granting such candidates an opportunity to be considered in the EWS category at such an advanced stage of the recruitment process is arbitrary and impermissible. The advertisement had clearly spelt out the vacancy position for the various categories. As on the date when the advertisement was published, the challenge to the decision of this Court upholding the constitutional validity of the MSEBC Act was pending in the Supreme Court. The State

Government by issuance of the impugned G.R., which is in the nature of an executive instruction sought to give a retrospective operation to the selection process qua reservations for the EWS. This is impermissible. It is not as if in the exercise of the rule making power of the State that retrospective effect is given to its decision. In our opinion, by issuance of such executive instructions, it is not open for the State Government to stultify the vested right created in favour of EWS category candidates for considering them for appointment to the said posts which were reserved for them. The decision in case of I.C.A.R. v. Satish Kumar affirmed the view taken by the Supreme Court in Tushar Ranjan Mohanty (supra) supports the view we take. All concerned (SEBC candidates) were informed that the selection process would be subject to the outcome of the orders passed by the Supreme Court. The aspirants with full knowledge of the matter pending before the Supreme Court chose to take the benefit of the reservation provided by the MSEBC Act. The selection process reached the stage of publication of the select list of the candidates selected from the respective reserved categories. The Supreme Court on September 9, 2020 by its interim order directed that appointments to public services and posts under the Government shall be made without implementing the reservation as provided under the MSEBC Act. The State Government at this stage issued the impugned G.R. thereby permitting the candidates belonging to the Maratha community to avail the benefit of open category or EWS category as per their eligibility. In our opinion, the State Government and the MSEDCL was not at all justified in permitting SEBC candidates to avail the benefit of EWS category. The EWS category candidates who are duly selected had accrued a vested right to be considered for appointment. The State Government could not have issued a G.R. to the detriment of the EWS category candidates. The Supreme Court has in no uncertain terms held that the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned midway or after the process of selection has commenced. It was not open for the State or the MSEDCL to issue such circulars having retrospective operation in the midst of the selection process and that too, by an executive fiat. While we have sympathy for the SEBC candidates, but we cannot lose sight of the fact that the

situation is the result of their own making. The SEBC candidates were aware about the matter pending before the Supreme Court despite which they took a chance to participate in the recruitment process claiming reservation meant for SEBCs.

…. ….. ….. ….. ….. …..

63. The present is not a case where EWS reservation was introduced after selection process commenced. On the date of the advertisement, the candidates were aware of the number of seats reserved for EWS and SEBC category. The procedure for obtaining the certificates and the manner in which the applications were to be made to the specified number of seats reserved for EWS and SEBC was already prescribed. SEBC candidates took a chance and applied against the seats reserved for SEBC. It is not as if on the date of the advertisement/on the date of the application, the eligible candidates of SEBC category could not have availed of the reservation provided for EWS category. The rules set out on the date of the advertisement were clear that eligible candidates had to either apply against the EWS vacancies or the SEBC vacancies. SEBC candidates took a chance and made a choice of filing application for appointment in the vacancies reserved for the SEBC. Thereupon the selection list is published, whereupon the EWS candidates as well as SEBC candidates were awaiting further consideration of their appointments. It is at this stage that the interim order of the Supreme Court scuttled the chances of the SEBC candidates for appointment against such category. As indicated earlier, the SEBC candidates applied with full knowledge that their applications are made subject to the orders passed by the Supreme Court. EWS category candidates definitely had a accrued right to be considered for appointment. In such circumstances, the decision of the State to permit such migration midway through the selection process is arbitrary and unfair. It is, therefore, we formed an opinion, that the decision of the Supreme Court in Neil Aurelio Nunes (supra) is distinguishable and will not have an application in the present facts.

(emphasis supplied)

In the other paragraphs, interfacing these observations are quotations

from different decisions.

35. The above-quoted passages from the decision in *Vikas Alase* would show that the Division Bench stressed that SEBC candidates participating in the recruitment process had full knowledge of the challenge pending to the SEBC Act and yet chose to apply under the SEBC category when they had the option either to apply under SEBC or EWS category. The Division Bench noted that it was not as if the candidates could not have opted for the Open or EWS category if eligible when making an application. It is observed that the procedure for obtaining an EWS category certificate was different from the one prescribed for SEBC. The observation that the SEBC candidates took a chance and applied to SEBC posts even though they had the option to apply under the EWS category is the reason that is repeated throughout the decision. These factors akin to estoppel and conscious choice of SEBC candidates in selecting which category to apply from is one of the main reasoning in the case of *Vikas Alase*. Also that the EWS candidates therein had accrued vested rights.

36. The Petitioners contend that this foundation in *Vikas Alase* is factually not correct as the candidates belonging to the Maratha community had no choice to apply either under the SEBC category or EWS category, and they had to apply under the SEBC category alone in view of the bar contained in Article 16(6) of the

Constitution and this the constitutional bar was informed to all the candidates by the GR dated 12 February 2019. The Petitioners, therefore, contend that the entire edifice of the decision in *Vikas Alase*, therefore, is on a different premise.

37. Article 16(4) and 16(6) are reproduced below:

> ***"Art 16. Equality of opportunity in matters of public employment.-***
>
> ….. ….. ….. ….. …..
>
> *(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*
>
> ….. ….. ….. ….. …..
>
> *(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."*
>
> ….. ….. ….. ….. …..

Article 16(4) enables the State to provide for reservation in case it is satisfied that there exists backwardness of the class and inadequacy in representation in employment, then such reservation in employment can be provided. Article 16(6) states that nothing in Article 16 shall prevent the State from making the reservation of appointments or posts in favour of any weaker section citizens, in addition to the existing reservation and subject to the maximum of 10% of the posts in each category; however, this reservation is for those other than the

classes mentioned in Clause (4) of Article 16 of the Constitution.

38. Therefore, it is clear, and it is not debated before us, that conjoint reading of Article 16(4) and Article 16(6) would mean that those classes eligible for reservation under Article 16(4) are not entitled to 10% reservation provided under Article 16(6). Therefore, when the candidates belonging to the Maratha community applied pursuant to the Advertisements in 2019 seeking the benefit of reservation, they had no such choice either to apply under the SEBC category for the benefit of the reservation or the EWS category.

39. The unsuccessful SEBC candidates challenged the decision in the case of *Vikas Alase* before the Hon'ble Supreme Court in Special Leave Petition No.29174/2022. The Hon'ble Supreme Court did not interfere with the said decision and dismissed the Petition by order dated 5 May 2020, observing as under:

> *"1. We have heard learned Additional Solicitor General appearing on behalf of the petitioner at a considerable length. Learned counsel appearing on behalf of the candidates, who applied, selected and have been given appointment and/or are in the process of appointment in the EWS category pursuant to the High Court's order, have also been heard.*
> *2. It appears to us that the view taken by the High Court calls for no interference by this Court.*
> *3. The Special Leave Petitions are, accordingly, dismissed.*
> *4. As a result, pending interlocutory applications also stand disposed of."*

The Hon'ble Supreme Court, in paragraph 2, stated that the view taken by the High Court calls for no interference.

40. The learned Advocate General argued that the order dated 5 May 2020 is a summary dismissal of the challenge to the decision in *Vikas Alase*. The Hon'ble Supreme Court in the case of *Kunhayammed and others v. State of Kerala*[15] has considered the consequences of summary dismissal at the stage of SLP without specifically recording reasons. In paragraphs-40 and 41, it was observed thus:

> *"40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are — "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit-worthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into,*

[15] 2000(6) SCC 359

they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make

any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court."

Thereafter, in conclusion, the Hon'ble Supreme Court stated thus:

"44. To sum up, our conclusions are:

(i) to (iii) ….. ….. ….. ….. …..

(iv) <u>An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.</u>

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the

> *order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.*
>
> *….. ….. ….. ….. …..”*
>
> (emphasis supplied)

In the case of *Gregory Patrao v. Mangalore Refinery and Petrochemicals Limited*[16], the Hon’ble Supreme Court followed the decision in *State of Uttar Pradesh v. Karunesh Kumar*[17] and held that the mere dismissal of SLP does not necessarily mean that the order of the High Court has merged with the order of the Supreme Court.

41. The Respondents have sought to argue from the grounds taken in the Special Leave Petition No.29174/2022 that all aspects, including the one that is sought to be raised before us, stand concluded by the order passed by the Supreme Court on 5 May 2020. However, as stated above the substantial foundation in the case of *Vikas Alase* was on estoppel and conscious choice. The implications of Article 16(6) and the GR giving no choice to the candidates in the Maratha community to apply under the EWS category at the relevant time were not considered in the case of *Vikas Alase*.

42. The Tribunal, in the impugned order, has also noted this distinguishing facet from the decision of *Vikas Alase*. The Tribunal

[16] (2022) 10 SCC 461
[17] 2022 SCC OnLine 1706

notes in paragraph 34 that when the State of Maharashtra issued GR dated 12 February 2019, the candidates from the SEBC category, that is, the Maratha community, were not allowed to apply under EWS reservation. Again in paragraph 45, while discussing the decision in *Vikas Alase*, the Tribunal notes Article 16(4) and 16(6) and the GRs dated 12 February 2019 and 20 July 2020 and holds that it is true that SEBC candidates were prohibited from applying under EWS category. The Tribunal however holds that though this factual and legal position is accepted it cannot be considered a decisive factor.

43. Therefore, having carefully analyzed the decision in *Vikas Alase* and the order passed by the Supreme Court dated 5 May 2020 we are of the respectful opinion that it is not possible to simpliciter dismiss the petitions before us by sole reasoning that the issue is covered by the decision in *Vikas Alase* and further enquiry is neither necessary nor permissible. Though the Respondents have sought to contend that the Petitioners themselves have projected the petitions that led to the decision in *Vikas Alase* and the decision in *Vikas Alase* as the primary decision, this position would not be sufficient to dismiss the present petitions on that ground alone.

44. The Respondents then argue that the decision in *Vikas Alase* is still binding, even assuming that the observations regarding estoppel are to be kept aside. The Respondents contend that in

Vikas Alase, the Division Bench has followed the basic and well-settled principle that once the game has commenced, the rules of the game cannot be changed. It is on this basis that the decision of *Vikas Alase* set aside the action of MSEDCL and the same position would apply to the case at hand. The Petitioners argue that this principle is not an absolute one; there are specific well-established exceptions. They argue that in *Vikas Alase,* the rules were modified after certain rights were accrued to selected candidates, however, such a scenario does not exist for the candidates in the current petitions.

45. Since the substantial debate is advanced before us on the facet as to how EWS candidates were prejudiced by the change of rules of the game and making SEBC candidates eligible retrospectively, we will first briefly refer to the ambit of the principle that the rules of game cannot be changed once the game has commenced in the context of Service law. Thereafter we will examine the fact situation in *Vikas Alase's* case. Though the parties have referred to various decisions, we have referred to those which are close to the facts of the case and which have taken a summary of earlier precedents.

46. The principle rules of the game cannot be changed once the game has commenced in the context of Service law would mean that the rules governing the recruitment process cannot be changed when the recruitment process has begun. In the decision of *K.*

Manjusree v. State of A.P.[18], the Supreme Court referred to this principle. This case arose from the selection of the District and Sessions Judges in Andhra Pradesh. On November 30, 2004, the Administrative Committee therein issued guidelines allocating 75 marks for the written exam and 25 marks for the oral exam. Minimum qualifying marks were also set for each criterion. Following interviews, a select list of ten candidates was compiled. However, before approval, the Authority set minimum qualification marks for the interview, stating that those who did not meet them would be considered as failed. This decision was challenged. The Supreme Court considered whether the authority's adoption of minimum marks for the interview in the fresh selection list was legally valid. The Supreme Court ruled in negative, holding that introducing this requirement after completing the entire selection process constituted an impermissible change of rules after the game had been played. In *Karunesh Kumar* , when reliance was placed on the decision in *K. Manjusree* the Hon'ble Supreme Court observed the following:

> *"32. The respondents have also placed reliance on the decision of this Court in the case of K. Manjusree (supra). However, in our considered view, the facts of the aforesaid decision are quite different from the present case. A change was introduced for the first time after the entire process was over, based on the decision made by the Full Court qua the cut off. Secondly, it is not as if the private respondents were nonsuited from participating in the recruitment process. The principle governing changing the rules of game would not have any application when the change is with respect to*

[18] (2008) 3 SCC 512

> *selection process but not the qualification or eligibility. In other words, after the advertisement is made followed by an application by a candidate with further progress, a rule cannot be brought in, disqualifying him to participate in the selection process. It is only in such cases, the principle aforesaid will have an application or else it will hamper the power of the employer to recruit a person suitable for a job."*

47. In *Tej Prakash Pathak v. Rajasthan High Court*[19], the Bench of two learned Judges of the Supreme Court decided that the principle needs to be reconsidered and referred the matter to the larger Bench. While referring the matter to the larger bench, it was observed as under:

> *"7. The question whether the "rules of the game" could be changed was considered by this Court on a number of occasions in different circumstances. Such question arose in the context of employment under the State which under the scheme of our Constitution is required to be regulated by "law" made under Article 309 or employment under the instrumentalities of the State which could be regulated either by statute or subordinate legislation. In either case the "law" dealing with the recruitment is subject to the discipline of Article 14.*
>
> *10. Under the scheme of our Constitution an absolute and non-negotiable prohibition against retrospective law-making is made only with reference to the creation of crimes. Any other legal right or obligation could be created, altered, extinguished retrospectively by the sovereign law-making bodies. However, such drastic power is required to be exercised in a manner that it does not conflict with any other constitutionally guaranteed rights, such as, Articles 14 and 16, etc. Changing the "rules of game" either midstream or after the game is played is an aspect of retrospective law-making power.*

[19] (2013) 4 SCC 540

11. Those various cases [(a) C. Channabasavaih v. State of Mysore, AIR 1965 SC 1293; State of Haryana v. Subash Chander Marwaha, (1974) 3 SCC 220 : 1973 SCC (L&S) 488; P.K. Ramachandra Iyer v. Union of India, (1984) 2 SCC 141 : 1984 SCC (L&S) 214; Umesh Chandra Shukla v. Union of India, (1985) 3 SCC 721 : 1985 SCC (L&S) 919; Durgacharan Misra v. State of Orissa, (1987) 4 SCC 646 : 1988 SCC (L&S) 36 : (1987) 5 ATC 148; State of U.P. v. Rafiquddin, 1987 Supp SCC 401 : 1988 SCC (L&S) 183 : (1987) 5 ATC 257; Maharashtra SRTC v. Rajendra Bhimrao Mandve, (2001) 10 SCC 51 : 2002 SCC (L&S) 720; Pitta Naveen Kumar v. Narasaiah Zangiti, (2006) 10 SCC 261 : (2007) 1 SCC (L&S) 92; K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841; Hemani Malhotra v. High Court of Delhi, (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203; K.H. Siraj v. High Court of Kerala, (2006) 6 SCC 395 : 2006 SCC (L&S) 1345; Ramesh Kumar v. High Court of Delhi, (2010) 3 SCC 104 : (2010) 1 SCC (L&S) 756; Rakhi Ray v. High Court of Delhi, (2010) 2 SCC 637 : (2010) 1 SCC (L&S) 652; Hardev Singh v. Union of India, (2011) 10 SCC 121 : (2012) 1 SCC (L&S) 390 — Where procedural rules were altered.(b) P. Mahendran v. State of Karnataka, (1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727; M.P. Public Service Commission v. Navnit Kumar Potdar, (1994) 6 SCC 293 : 1994 SCC (L&S) 1377 : (1994) 28 ATC 286; Gopal Krushna Rath v. M.A.A. Baig, (1999) 1 SCC 544 : 1999 SCC (L&S) 325; Umrao Singh v. Punjabi University, (2005) 13 SCC 365 : 2006 SCC (L&S) 1071; Mohd. Sohrab Khan v. Aligarh Muslim University, (2009) 4 SCC 555 : (2009) 1 SCC (L&S) 917 — Where the eligibility criteria were altered.] deal with situations where the State sought to alter (1) the eligibility criteria of the candidates seeking employment, or (2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut-off marks to be secured by the candidates either in the written examination or viva voce as was done in Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] or the present case or calling upon the candidates

to undergo some test relevant to the nature of the employment (such as driving test as was in Maharashtra SRTC [Maharashtra SRTC v. Rajendra Bhimrao Mandve, (2001) 10 SCC 51 at pp. 55-56, para 5 : 2002 SCC (L&S) 720]).

13. This Court in State of Haryana v. Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] while dealing with the recruitment of Subordinate Judges of the Punjab Civil Services (Judicial Branch) had to deal with the situation where the relevant rule prescribed minimum qualifying marks. The recruitment was for filling up of 15 vacancies. 40 candidates secured the minimum qualifying marks (45%). Only 7 candidates who secured 55% and above marks were appointed and the remaining vacancies were kept unfilled. The decision of the State Government not to fill up the remaining vacancies in spite of the availability of candidates who secured the minimum qualifying marks was challenged. The State Government defended its decision not to fill up posts on the ground that the decision was taken to maintain the high standards of competence in judicial service. The High Court upheld the challenge and issued a mandamus. In appeal, this Court reversed and opined that the candidates securing minimum qualifying marks at an examination held for the purpose of recruitment into the service of the State have no legal right to be appointed. In the context, it was held: (Subash Chander Marwaha case [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] , SCC p. 227, para 12)
"12. … In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for more (sic mere) eligibility."

14. Unfortunately, the decision in Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] does not appear to have been brought to the notice of Their Lordships in Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] . This Court in Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] relied upon P.K.

Ramachandra Iyer v. Union of India [(1984) 2 SCC 141 : 1984 SCC (L&S) 214] , Umesh Chandra Shukla v. Union of India [(1985) 3 SCC 721 : 1985 SCC (L&S) 919] and Durgacharan Misra v. State of Orissa [(1987) 4 SCC 646 : 1988 SCC (L&S) 36] . In none of the cases, was the decision in Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] considered.

15. No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned as was done in C. Channabasavaih v. State of Mysore [AIR 1965 SC 1293] , etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the "rules of the game" stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard."

(emphasis supplied)

The learned Advocate General has argued that in this case the Reference is made on a limited ground as to whether the principle of not changing the "rules of the game" should be applied in the context of the rules stipulating the procedure for selection, more particularly when the change sought is to impose a more rigorous scrutiny for selection. He contends that the basic position of law that rules can be changed provided it does not take away vested rights and is not arbitrary or changes basic edibility for a candidate is not referred for consideration and continues to hold the field. The reasoning of the Tribunal shows that the Tribunal has also accepted that there is no

inflexible principle.

48. In *Gaurav Pradhan v. State of Rajasthan,*[20] the Rajasthan Public Service Commission issued an Advertisement dated 14 October 2010 for selection to various posts of constables and another on 25 October 2010 for selection to the post of Sub-inspector of Police. During the process of selection, the State Government issued a Circular dated 11 May 2011 providing that candidates of backward classes, irrespective of whether they have availed of any concession including relaxation in age, shall be migrated against open category vacancies if they have secured more marks than availing special relaxation/concessions while participating in competitive test of selection, if find place in select list of open category vacancies, they were not eligible to be migrated against open category vacancies. The issues that arose for consideration of the Supreme Court were: whether the reserved category candidates who had taken benefit of age relaxation in the selection in question and have obtained marks equal or more to the last general category candidate should be treated in the general/open category candidates or ought to have been confined in the reserved category candidates and whether the Circular dated 11 May 2011 issued by the State Government changing the criteria for migrating reserved category candidates into general Category candidates can be applied in respect to the selection which had begun on issuance of Advertisements dated 14 October 2010 and 25 October 2010. The Supreme Court

[20] (2018) 11 SCC 352

answered the issue in the affirmative. This was a case where the eligibility itself was changed. The question that was framed for consideration indicated that the Hon'ble Supreme Court considered the situation where the reserved candidates had taken benefit of age relaxation and thereby obtained marks equal to or more than the candidates of the General category were then permitted to migrate. This was, therefore, a case of having the benefit of age relaxation wherein migration was sought, where there was a clear change in the eligibility.

49. *In Ram Sharma Maurya v. State of U.P.*[21], The Supreme Court observed as under:

> *73. K. Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841] and Hemani Malhotra [Hemani Malhotra v. High Court of Delhi, (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] were the cases which pertained to selections undertaken to fill up posts in judicial service. In these cases, no minimum qualifying marks in interview were required and the merit list was to be determined going by the aggregate of marks secured by a candidate in the written examination and the oral examination. By virtue of stipulation of minimum qualifying marks for interview, certain candidates, who otherwise, going by their aggregate would have been in zone of selection, found themselves to be disqualified. The stipulation of minimum qualifying marks having come for the first time and after the selection process was underway or through, this Court found such exercise to be impermissible.*
>
> *74. These were cases where, to begin with, there was no stipulation of any minimum qualifying marks for interview.*

[21] (2021) 15 SCC 401

On the other hand, in the present case, the requirement in terms of Rule 2(1)(x) read with Rule 14 is that the minimum qualifying marks as stipulated by the Government must be obtained by a candidate to be considered eligible for selection as Assistant Teacher. It was thus always contemplated that there would be some minimum qualifying marks. What was done by the Government by virtue of its orders dated 7-1-2019 was to fix the quantum or number of such minimum qualifying marks. Therefore, unlike the cases covered by the decision of this Court in K. Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841] , where a candidate could reasonably assume that there was no stipulation regarding minimum qualifying marks for interview, and that the aggregate of marks in written and oral examination must constitute the basis on which merit would be determined, no such situation was present in the instant case. The candidate had to pass ATRE 2019 and he must be taken to have known that there would be fixation of some minimum qualifying marks for clearing ATRE 2019.

75. Therefore, there is fundamental distinction between the principle laid down in K. Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841] and followed in Hemani Malhotra [Hemani Malhotra v. High Court of Delhi, (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] on one hand and the situation in the present case on the other.

76. We are then left with the question whether prescription of such minimum qualifying marks by order dated 7-1-2019 must be set aside merely because such prescription was done after the examination was conducted. At this juncture, it may be relevant to note that the basic prayer made in the leading writ petition before the Single Judge was to set aside the order dated 7-1-2019. What could then entail as a consequence is that there would be no minimum qualifying marks for ATRE 2019, which would run counter to the mandate of Rule 2(1)(x) read with clause (c) of Rule 14. It is precisely for this reason that what was submitted was that the same norm as was available for ATRE 2018 must be adopted for ATRE 2019. In order to lend force to this submission, it was argued that Shiksha Mitras who appeared in ATRE 2018 and ATRE 2019

formed a homogeneous class and, therefore, the norm that was available in ATRE 2018 must be applied. This argument, on the basis of homogeneity, has already been dealt with and rejected.

….. ….. ….. ….. …..

78. If the ultimate object is to select the best available talent and there is a power to fix the minimum qualifying marks, in keeping with the law laid down by this Court in State of Haryana v. Subash Chander Marwaha [State of Haryana v. Subash Chander Marwaha, (1974) 3 SCC 220 : 1973 SCC (L&S) 488] , State of U.P. v. Rafiquddin [State of U.P. v. Rafiquddin, 1987 Supp SCC 401 : 1988 SCC (L&S) 183] , MCD v. Surender Singh [MCD v. Surender Singh, (2019) 8 SCC 67 : (2019) 2 SCC (L&S) 464] and Jharkhand Public Service Commission v. Manoj Kumar Gupta [Jharkhand Public Service Commission v. Manoj Kumar Gupta, (2019) 20 SCC 178], we do not find any illegality or impropriety in fixation of cut-off at 65-60% vide order dated 7-1-2019. The facts on record indicate that even with this cut-off the number of qualified candidates is more than twice the number of vacancies available. It must be accepted that after considering the nature and difficulty level of examination, the number of candidates who appeared, the authorities concerned have the requisite power to select a criteria which may enable getting the best available teachers. Such endeavour will certainly be consistent with the objectives under the RTE Act."

(emphasis supplied)

These judicial pronouncements would show there is no absolute principle that the moment the rules are changed midway through the process of recruitment whatever the nature of change, the process is vitiated. The principle is to be applied considering the facts of each case.

50. The first fundamental issue before us is whether the impugned action has changed any eligibility criterion to the prejudice of the Respondents. Even the impugned order has noted this as the test to be guided. The impugned order has observed that in *Tej Prakash Pathak's case,* the Hon'ble Supreme Court has held that the Recruitment Rules can be made retrospectively applicable, however, it cannot be made arbitrarily applicable, and we add, to the prejudice of the candidates taking away their vested right.

51. Since reliance is placed on the decision in *Vikas Alase,* contending that in an identical fact situation, the Division Bench has applied the principle of change of rules after the selection process has commenced, it would be necessary to analyze the facts in *Vikas Alase* case. Our analysis of the facts in *Vikas Alase* will show that there are crucial differences in this aspect.

52. The factual position in *Vikas Alase's* case which we have reproduced above shows that therein the Division Bench specifically referred to EWS candidates having been duly selected and had accrued a vested right for appointment coupled with the fact that SEBC candidates were estopped after exercising their choice. In these facts, the Division Bench allowed the petitions. The Petitioners have placed the same on record by way of a chart which shows the factual position as regards the Advertisement and the dates. *Vikas Alase's* case is referred to as MSEDCL.

Events/ Exams	MSEDCL	ENGINEERING SERVICES	FOREST SERVICES	TAX ASSISTANT
Case Name/ No.	Vikas Balwant Alase & Ors.	WP 2722/2023 WP 2861/2023	WP 2859/2023 WP 2891/2023	WP 2862/2023
Advertisement Date	07/08/2019	03/04/2019	08/03/2019	16/04/2019
Stages	Single Stage Recruitment Process	Three Stage Recruitment Process	Three Stage Recruitment Process	Two Stage Recruitment Process
STAGE -I	Exam Date - 13/11/2019 Final Result- 17/01/2020	Prelims Exam- 23/06/2019	Prelims Exam- 26/05/2019	Prelims Exam- 06/10/2019
STAGE -II	NA	Mains Exam- 24/11/2019(29/11/2019) Mains Result – 28/07/2020(23/07/2020)	Mains Exam- 15/09/2019 Mains Result - 30/01/2020	Main Exam- 03/11/2019 Final Result- 21/07/2020
STAGE- III	NA	Interview Conducted after SEBC Act Struck down	Interviews – 04/08/2020 to 21/08/2020	NA
Stay on SEBC Act by Hon. Supreme Court - 09/09/2020				
SEBC Act Struck down by Hon. Supreme Court -05/05/2021				
Condition after SEBC Act was struck down.				
Events/ Exams	MSEDCL	ENGINEERING SERVICES	FOREST SERVICES	TAX ASSISTANT
Remarks	-	1) Mains result dated 28/07/2020 was revised on 23/07/2021 as per Government Policy	1) Mains Result was revised and interviews were conducted only for new additionally Mains qualified (38) candidates	No Recommendations were done before stay on SEBC Act. Therefore Final result revised as per G.R. dt. 15/07/2021
STAGE-III	NA	Interviews - 04/10/2021 to	Additional Interviews-	NA

		02/02/2022	23/08/2021 (Only new 38 candidates)	

This chart shows that in the *Vikas Alase* case, a single-stage recruitment process was conducted involving an examination, followed by the declaration of final results. The current recruitment process, however, comprises of three stages. Initially, candidates undergo a preliminary examination, followed by the main examination for those who qualify in the preliminary examination. Subsequently, candidates who obtain the necessary marks proceed for an interview, then the selection takes place.

53. The aforementioned dates and stages in the chart should be understood within the context of the interim order issued by the Supreme Court on 9th September 2020. Subsequently, the SEBC Act was invalidated by the judgment and order dated 5th May 2021. In *Vikas Alase's* case, the final results were declared on 17th January 2020. The entire process concluded before the stay was granted by the Supreme Court on 9th September 2020, leaving no further stages except for the actual appointment. All recruitments under consideration were, therefore, complete. This is the crucial facet in the decision in *Vikas Alase* which makes it different from the cases at hand. This factor, that rights created in favour of the EWS candidates therein of appointment was affected by the change, seriously weighed with the Division Bench in *Vikas Alase*, as the

observations in the judgment show. The conclusion in *Vikas Alase* based on this factor was approved by the Supreme Court dismissing the challenge.

54. At this juncture, it is to be noted that as regards the EWS candidates for the post of Tax Assistant and Clerk-Typist, the Petitioner-State created supernumerary posts and sought to accommodate them on the supernumerary posts. The Tribunal has found fault with this decision of the State, which would be addressed subsequently, but as regards the prejudice and vested right are concerned, the State by creating supernumerary posts sought to protect the prejudice caused to EWS candidates in those cases. The only difference between a supernumerary post and a regular post is that the supernumerary post would lapse on the candidate's retirement, but as far as candidates are concerned, it makes no difference to them. Secondly, this was only a one-time exercise, as for all future recruitment, the candidates belonging to the Maratha community can apply under the EWS category if they are eligible. Therefore, the issue is specific and unique to this recruitment for that particular year, and in that sense *sui generis* .

55. There was also a difference in the language of the clauses of the Advertisement in the case of *Vikas Alase* and the clauses of the Advertisements in the case at hand. The Advertisement in the case of *Vikas Alase* issued by MSEDCL is

placed on record. The relevant clause reads thus:

> "*5.23 Recruitment process of the SEBC category candidates is subject to outcome order from the Hon'ble Supreme Court of India in the SLP (C) No.015701/2019 and any instructions by the GOM accordingly are received.*

This clause puts the SEBC candidates specifically to notice that the recruitment process of SEBC was subject to the decision of the Hon'ble Supreme Court. The language used in this clause, which was considered in the case of *Vikas Alase*, is different from the language used in the clause in the case at hand. In the present case, the clause in the Advertisements, that is, 4.26, stated that the entire recruitment process would be subject to the final decision in PIL No.175/2018 and connected cases pending in the High Court.

56. Thus, Clause 4.26 unlike the stipulation in the Advertisement issued by MSDCL, made the entire recruitment process subject to the outcome of the decision. Consequently, even concerning crucial factual aspects, the decision in *Vikas Alase* differs from the facts in the present cases.

57. The Petitioners contend that before concluding that a decision squarely covers the case under examination, facts must be carefully examined as one crucial fact can make a difference. The Petitioners have relied upon the decision in the case of *Ashwani*

Kumar Singh v. U.P. Public Service Commission[22]. In this decision, guidance is provided as to how the court should deal with the decisions cited as precedents and observed thus:

> *10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761) Lord McDermott observed : (All ER p. 14 C-D)*
>
> > *"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge…."*
>
> *11. In Home Office v. Dorset Yacht Co. [(1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL)] Lord Reid said, "Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances" (All ER p. 297g-h). Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] observed : (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" In Herrington v. British Rlys. Board [(1972) 2 WLR 537 : (1972) 1 All ER 749 : 1972 AC 877 (HL)] Lord Morris said : (All ER p. 761c)*

[22] (2003) 11 SCC 584

> *"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."*

> *12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*

> *13. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus : (Abdul Kayoom v. CIT [AIR 1962 SC 680] , AIR p. 688, para 19)*
>
> *"19. … Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*
>
> ***
>
> *"Precedent would be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*
>
> (emphasis supplied)

The underlined portions of the above observations are clear. Following the above-stated dicta, when we analyze the decision in *Vikas Alase*, as above, we find merit in Petitioner's contention that it is distinguishable and cannot be a binding precedent on all points for the

case at hand. This decision has followed the legal principle that change of the rules of the game in the recruitment process should not away vested rights, but while applying the principle we find that there are crucial differences on facts. In *Vikas Alase* vested rights were created in favour of the EWS candidates therein, which is not the case in the present Petitions.

58. Therefore, now we turn to the impugned order as to how the Tribunal has applied this legal principle. Before we examine the impugned order, the basic pleadings of the parties need to be seen. For example, in Original Application No.814/2022, the EWS candidates raised the following grounds:

> *"5. On the date of issuance of advertisement No.04/2019, the MSEBC Act was in force. The SEBC candidates applied in view of the statutory reservation carved out in their favour by Respondent No.1 in view of the enforcement of the MSEBC Act. Thus, Respondent No. 2, at the time of the issuance of the advertisement had reserved 10 percent of posts for EWS category which is a constitutional reservation and 16 percent of posts for the SEBC category which was a statutory reservation. Once the recruitment process has already commenced pursuant to the issuance of. an advertisement, the selection procedure cannot be changed midway to the detriment of the EWS category.*
>
> *6. That, SEBC category candidates were aware that the constitutional validity of the Act was under challenge. Even the advertisement provided a condition that the recruitment process of the SEBC category candidates is subject to the outcome of the order of the Hon'ble High Court of Bombay. SEBC candidates were put on guard even at the stage of issuance of the advertisement. The SEBC category candidates*

still preferred to apply for the posts reserved for SEBC candidates.

7. That, there are clauses present in the advertisement which prohibit making any change in the application or changing the category of reservation at all, once the application form has been submitted. SEBC candidates took a chance by participating 'in the selection process at their own risk.

8. That, changing the selection process midway amounts to infringing the rights of the EWS candidates.

9. That, it is impermissible for Respondent No. 1 to allow such a migration of the SEBC candidates, from SEBC category to EWS category. A distinct and separate constitutional reservation has been carved out in favour of EWS category. Allowing Respondent No. 1 to permit such migration by issuance of G.Rs upon the Supreme Court having struck down the reservation in favour of the SEBC candidates works completely to the detriment and is against the vested rights accrued in favour of the EWS candidates.

10. That, SEBC candidates applied against SEBC category which came into existence by virtue of MSEBC Act. EWS category is a separate and distinct reservation which can be well gathered from the language of clause (6) (a) of Article 15 which provides that "nothing in this article shall prevent the State from making any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5)". SEBC candidates for the purpose of the present advertisement have to be regarded as a separate class and the plain language of clause (6) of Article 15 prohibits the State from including such a class under the category of EWS. The State had recognized SEBC as a separate class. Having done so, there is no question then of allowing a section of that class to participate in the category meant for EWS which is in the teeth of clause (6) of Article 15 of the Constitution of India.

11. That, Respondent No.1's GRs have led to an -

unnecessary intrusion in' the reserved category for E.W.S. candidates, and the level playing field, which was earlier available for EWS candidates, has been taken away after the selection process has commenced.

12. The said GRs of Respondent No.1, seriously prejudice the career prospects of the E.W.S. candidates i.e. Applicants."

On behalf of the State a reply affidavit was filed and it was stated in para-9 to 12 as under:

"9. I further say that, in view of striking down of the constitutional validity of SEBC Act 2018, the GR dated 31.05.2021 was issued. I say that, the said GR dated 31.05.2021 is in consonance with earlier GR dated 23.12.2020. I say that, as per 103rd constitutional amendment to Art 15 and 16 of constitution of India, the reservation of 10 % was provided for EWS category. I say that, in view of said amendment, the Respondent No.4 has issued GR dated 12.02.2019 so as to enable EWS candidates to apply subject to terms and conditions as set out in GR dated 12.02.2019.

10. I further say that, as on the date of issuance of GR dated 12.02.2019, the SEBC Act, 2018 was in force and though Act was challenged in Hon'ble Bombay High Court, the decision on same was awaited. Thereafter, the Hon'ble Bombay High Court held the said SEBC Act as constitutional and valid. However, the Hon'ble Supreme Court vide its judgment and order dated 05.05.2021, set aside the judgment of Hon'ble Bombay High Court and declared the said Act, as unconstitutional. I say that, therefore vide GR dated 31.05.2021, the GR dated 12.02.2019 has been revised and as per Clause No.8 of GR dated 31.05.2021, SEBC candidates have been permitted to avail the benefit of GR dated 12.02.2019 for EWS category on the terms and conditions as set out in said Clause No.8 (i to iv). In sub-clause No. ii of Clause No.8 of GR dated 31.05.2021, the reference of "retrospective effect" has been made. However, said reference to

"retrospective effect" is neither meant to reopen the completed selection process and wherein on issuance of appointment orders candidates joined on the posts before 09.09.2020. By GR dated 31.05. 2021, only those SEBC candidates who have been selected in selection list but not appointed before 09.09.2020 are entitled to avail the benefits of EWS. The reference of "retrospective effect", in GR dated 31.05.2021 is not for those who did not apply earlier or applied but did not find place in Selection list. The SEBC candidates who have been selected in selection list are only permitted to opt for EWS category. The said concession has been given only with an intention to accommodate SEBC Candidates who otherwise, had there been no SEBC Act, 2018 would be entitled to apply under EWS category. Copy of GR. dated 31.5.2021 is annexed hereto and marked as Exhibit R-1-s.

11. I say that, the government has to adopt the said policy as because of pendency of Special Leave Petition before Hon'ble Supreme Court and the appointments in various government sectors were and/ or are pending due to stay which was in operation from 09.09.2020 till 5th May 2021.

12. I say that, the said GR's which are under challenge are neither against the public policy nor the said GR's violates any of provisions of Constitution of India. I say that, the income criteria wider SEBC Act 2018 and under EWS is one and the same. The yearly income of family under both categories should not be more than Rs.8.00 Lakhs. Therefore, SEBC candidate selected in Selection List comes at par with EWS candidates and therefore needs to be treated under Common Pool of EWS and appointment requires to be made in accordance with merit list."

These are basic pleadings on which parties were before the Tribunal.

59. Now, we examine the impugned order as to how the Tribunal has applied the legal principle. The impugned order, up to

paragraph 22, refers to facts and rival contentions, in paragraphs 23 to 25, the clauses of the Advertisement are reproduced. In paragraphs 25 to 27, reference is made to the decisions of the Hon'ble Supreme Court. Paragraph 28 states that to issue the GR and make it applicable retrospectively is within the power of the State. However, the issue in these matters was that could, at a late stage of the process of selection the retrospective application of the GR was justified. Again, in paragraphs 29 and 30, reference is made to the decision of the Hon'ble Supreme Court and then the impugned order refers to the decision in *Karunesh Kumar* and in the case of *K.Manjusree* of the Hon'ble Supreme Court. In paragraph 33, the observations made by the Division Bench of this Court in the case of *Vikas Alase* are quoted. Then, in paragraphs 35 to 38, the law of precedent is discussed. Then in paragraph 48, it is observed that the candidates from the Maratha Caste covered earlier under the S.E.B.C reservation fared better than the candidates who have applied from the original EWS category. Then, in paragraph 49, the results concerning the Forest Department, PWD Engineering Service and the State Tax are analyzed. Then, in paragraph 50, the Tribunal, after recording that those who had opted from the SEBC category to the EWS category had secured almost all the seats, observes that the finding of the Hon'ble Supreme Court that persons from the Maratha community were not entitled to the SEBC reservation was true. Thereafter, it refers to the fact that the State Government had, in the case of candidates from EWS whose final merit list was published on 14 July

2020, and after their names were recommended to the State, the State allowed the SEBC candidates to apply in EWS category, The action of the State of creating supernumerary posts to this category is disapproved by the Tribunal observing that it should have been regular posts. The Tribunal thereafter held that the decision in *Vikas Alase* case is binding and observed that the action of the State to permit SEBC candidates to apply in the EWS category is an arbitrary decision. The impugned order then refers to the decision in the cases of *Y.V.Rangaiah v. J.Sreenivasa Rao*[23]; *Tej Prakash Pathak*; and *K. Manjushree* (supra) and the decisions referred to which were referred to in the case of *Vikas Alase*. In paragraph- 30 of the impugned judgment, the Tribunal notes Clauses 3.1 and 4.1 of the Advertisements and then states the position of law that eligibility criteria of the candidates seeking employment cannot be changed midway. Then the Tribunal again refers to the legal position that recruitment rules cannot be made retrospectively applicable nor they can be made arbitrarily applicable. The Tribunal observes in paragraph- 30 that In *Karunesh Kumar* ,the case of *K. Manjushree* was referred and it was held by the Hon'ble Supreme Court that the rules of the game can be changed, except qualification and eligibility. Then the Tribunal noted that in *Tej Prakash Pathak,* the Supreme Court has held that the recruitment rules can be made retrospectively applicable, however, they cannot be made arbitrarily applicable.

60. Therefore, the impugned order itself acknowledged the

[23] (1983) 3 SCC 284

legal position that the rules of the game can be changed, but not arbitrarily. Despite extracting quotations from prior decisions and referring to the established legal principles, the main inquiry has remained unaddressed in the impugned order, that is, how these legal principles were pertinent to the present case. The impugned order straightaway concludes that eligibility had been modified without providing a detailed explanation of the specific changes made and without noting that this determination hinges on the factual circumstances peculiar to each case.

61. The impugned order lacks clarity in its application of the law concerning mid-process changes in the recruitment procedure to the facts of the cases before it. The impugned interchangeably refers to the observations from *Vikas Alase* case as regards estoppel. The impugned order refers to the legal position that altering qualifications is impermissible while simultaneously acknowledging certain situations where such changes are acceptable. It is clear from the perusal of the impugned order that while it outlined legal principles, it failed to expound how the vested rights of the Respondents were either established or impacted. There is a lack of reasoning on how the principle governing changes in rules applied to the specific cases before the Tribunal.

62. Faced with a lack of reasoning in the impugned order on facts the Respondents have tried to elaborate their case before us as to

how there is change midway in the recruitment process. We have considered the submissions.

63. Clause 4.10 of the Advertisements specified the submission of certificates issued pursuant to the GR dated 12 February 2019 during document verification. Clause 4.26 stipulated that the recruitment process would be subject to the final outcome of WP No.2053/2014 and Public Interest Litigation No.175/2018 and others pending in the Bombay High Court. Clause 4 further specified details of the reservations, and obtaining of valid certificates for claiming reservation. In Clause 5.1, after detailing the application procedure and reservation aspects, it was specifically stated that the State Government or the MPSC reserved the right to change the information at any time with retrospective effect, binding all concerned parties. Such changes would be communicated through notifications on the MPSC website, prompting candidates to regularly check for updates. In response to the Advertisements, EWS candidates applied from the EWS category, and SEBC candidates applied from the SEBC category. Clause 7 detailed eligibility criteria, encompassing age limits and educational qualifications.

64. Clause 9 of the Advertisements outlined the recruitment process structure, consisting of the preliminary examination (100 marks), the main examination (400 marks), and the interview (50 marks). Clause 10 dealt with document verification, specifying that the

eligibility of candidates selected for an interview would be assessed based on original documents at that time. Clause 16 conveyed that information on the examination procedure and process was summarized, with detailed information on the acceptance of applications. eligibility, and reservation, uploaded on the MPSC website.

65. The Respondents argued that the changes have affected the rights of the EWS candidates. They argued that SEBC and EWS category cut-offs were declared, and later, the decision was taken to retrospectively grant EWS benefits to SEBC candidates. In the Engineering services, EWS candidates qualified for the preliminary and main exams and submitted their preferences, and the main exam results were declared and the delay in the selection process by the MPSC until June 2021, without any legal hindrance, was questionable. Although MPSC filed an interim application in the Supreme Court seeking clarification on the recruitment process, it was later withdrawn, as mentioned in the notification dated 21 January 2021. The notification indicated that MPSC approached the Supreme Court to ensure the timely completion of the recruitment process. Contrary to the argument that EWS candidates waited for the revised result to be published, they immediately challenged the validity of the notification allowing SEBC candidates to merge into EWS. Due to this policy change, original EWS candidates from Engineering Services were not selected in the revised mains result, even though they were

on the earlier merit list. The petitioners' argument that increasing competition for more meritorious candidates is not illegal is fallacious, as it was not the purpose of the impugned GRs. Another main plank of the Respondents' arguments on the change of Rules is that there is a retrospective application of the eligibility criteria. It was submitted that as per the Advertisement and GRs, the candidates should submit their respective eligibility certificates within 6 months of the application; consequently, the original EWS candidates submitted certificates for the 2018-19 period based on their income, as calculated according to the E(4) clause in the GR dated 12 February 2019. In contrast, SEBC candidates had SEBC certificates based on Rules governing the creamy layer. It is argued that, however, following the impugned GRs dated 23 December 2020 and 31 May 2021, the SEBC candidates obtained back-dated EWS certificates for the 2018-19 period. These certificates were issued based on the Rules governing the creamy layer, not in accordance with the provisions of the GR dated 12 February 2019. Consequently, the entire process of issuing EWS eligibility certificates to SEBC candidates is void from the beginning. The Respondents argue that candidates from the SEBC category should have been accommodated only within the Open category. They assert that when the Supreme Court declared the SEBC Act unconstitutional, the corresponding seats were transferred to the Open category and while the Open category seats increased, the EWS category seats remained unchanged. The Respondents also contend that the income criteria for EWS and SEBC are different.

66. The specific clauses in the Advertisements pertinent to the present case have been noted earlier. The conditions and stipulations across all three Advertisements were identical. The Advertisements specified, in a table, the posts needed to be filled, with reservations allocated for each category. Clause 4 outlined general conditions regarding the number of posts and reservations. Clause 4.1 mentioned that the State's directions could lead to changes in the number of posts and reservations. Any such alterations would be communicated in the notification for the main examination. Clause 4.9 required SEBC candidates to produce certificates issued in accordance with the GR dated 7 December 2018 during document verification. It clarified that SEBC certificates, as per the GR dated 15 July 2014, would be considered valid for SEBC reservation.

67. The Advertisements mentioned the specified number of posts and the reservation but also indicated the possibility of changes to both the reservation and the number of posts. Any such changes, if they occurred, were to be communicated in the notification for the main examination. Accordingly, the revised criteria were published on this website. The Advertisements inherently acknowledged that the reserved posts were not fixed and that any alterations would be duly notified. This stipulation was never challenged, when the Advertisements issued with this provision allowed for subsequent modifications.

68. EWS candidates applied in response to the Advertisement, participated in the examination, and obtained lower marks which resulted in their non-selection. Therefore, when the unsuccessful EWS candidates approached the Tribunal, a mere assertion that the rules of the game should remain unchanged, was not sufficient. It was imperative first to specify the original rules and what would constitute a change in the rules of the game in law. Fundamental factors such as educational qualifications, age limits, and specific percentage requirements for marks constitute eligibility criteria for recruitment. Changes in age limits, requirements for oral interviews, or the elimination thereof would constitute a modification of the rules. Procedural aspects, such as the conduct of written examinations, fall outside the realm of this principle of the change in Rules. In the present case, there was no alteration in the reservation provided for EWS candidates, nor has any EWS candidate been disqualified. The only adjustment made is the broadening of the candidate pool to include more individuals in the EWS category.

69. The Respondents had approached the Tribunal as unsuccessful candidates in the recruitment process and their arguments are to be understood and restricted as such. This argument also needs to be considered in the backdrop of the question of the stage of recruitment and prejudice to the Respondents and not distinctively. The central question is whether expanding the pool of

candidates, including more individuals for the Respondents to compete against based on merit, caused them prejudice and change in the rules of the game, in law. The answer is in the negative as per the decision of the Hon'ble Supreme Court in *V. Lavanya*.

70. Since the decision of the Hon'ble Supreme Court in V. *Lavanya* is of importance, it would be necessary to reproduce the facts as narrated in the judgment which read as under:

> *"32. The appellants appeared in TET conducted on 17-8-2013 and 18-8-2013. The respondents were to select the suitable candidates. As per the selection criteria laid down in GOMs No. 252 the candidates have to secure minimum 60% in TET so as to qualify the said exam. The weightage of the marks secured in TET was 60% and that of academic qualification was 40%. It is true that the candidates who passed TET were called to attend certificate verification on 23-1-2014 and 24-1-2014; but the selection process has not been completed. Later on, GOMs No. 25 dated 6-2-2014 was issued granting relaxation of 5% marks to SC, ST, Backward Classes, Physically Handicapped, Denotified Communities, etc. The purpose of relaxation was to increase the participation of candidates belonging to Backward Classes in State's pool of teachers. The State Government merely widened the ambit of TET so as to reach out to those candidates belonging to the deprived section of the society who were not able to compete, in spite of possessing good academic records and qualifications. The change brought about in the selection criteria is the Government's prerogative. In terms of their extant reservation policy, the State Government is free to take actions suitable to the socio-economic conditions prevalent in the State, especially with regard to selection of candidates belonging to reserved category to be employed in State service. Merely, because the Government has widened the ambit of selection, so as to enable more and more candidates to take part in the selection process, the right of candidates who were already in the process cannot be said to have been adversely affected. It is in the interest of reserved category of candidates that more candidates*

take part in the selection process and best and most efficient of them get selected. This will not amount to change in the criteria for selection after the selection process commenced."

(Emphasis supplied)

The factual backdrop of this case was that the concerned State Government had widened the ambit of the pool so as to reach out to those candidates belonging to the deprived section of society who were not able to compete in spite of possessing good academic records and qualifications. The question arose whether this could give rise to a breach of principle governing change in rules. The Hon'ble Supreme Court observed as under:

"34. The Government has not changed the rules of selection so far as the present appellants are concerned. Weightage of marks obtained in TET as well as that of academic qualification is still the same. The entire selection process conforms to the equitable standards laid down by the State Government in line with the principles enshrined in the Constitution and the extant reservation policy of the State. It is not the case where basic eligibility criteria has been altered in the midst of the selection process. Conducting TET and calling for certificate verification thereafter is an exercise which the State Government is obliged to conduct every year as per the Guidelines issued by NCTE. By calling for CV along with certificates of other requisite academic qualifications, a candidate's overall eligibility is ascertained and then he/she is recruited. Such an exercise by which qualified teachers in the State are segregated and correspondingly certified to that effect cannot be equated to finalisation of select list which comes at a much later stage. No prejudice has been caused to the appellants, since the marks obtained by the appellants in TET are to remain valid for a period of seven years, based on which they can compete for the future vacancies. Merely because the appellants were called for certificate verification, it cannot be contended that they have acquired a legal right to the post.

> *Impugned GOMs No. 25 did not take away the rights of the appellants from being considered on their own merits as pointed out by the Madras Bench. We entirely agree with the views taken by the Madras Bench that "by merely allowing more persons to compete, the petitioners cannot contend that their accrued right has been taken away"."*
>
> (Emphasis supplied)

The Supreme Court thus laid down that if basic eligibility criteria is not changed and a candidate is not disqualified, then widening the pool cannot be a change in the rules of the game. The Tribunal has noticed the decision of the Supreme Court in the case of *V. Lavanya*; however, it did not apply the legal principles from that case. In light of the observations of the Supreme Court in V. *Lavanya*, the Tribunal was called upon to consider whether the Respondents acquired any legal right which was prejudiced. The Supreme Court has laid down that a mere increase in the pool will not change the rules of the game. The Respondents were not disqualified; rather, they had to compete with more eligible candidates due to an expanded field. Subsequently, they were selected based on their performance. The Tribunal has held that the EWS candidates were not aware that they would have to compete with the SEBC candidates. This very factual position was considered and held to be not prejudicial in the decision of *V. Lavanya*. Despite noting the decision, the impugned order has made general comments as to the candidates not knowing whom they are competing with. The answer was not in numbers. The fact that EWS candidates had to compete with other EWS candidates remained constant. The key point is that

the number of candidates did not affect the fact that EWS candidates were competing against other EWS candidates. In the examination and interview, each candidate is expected to give their best.

71. The Respondents have relied upon the order passed by the Supreme Court in *Nalgonda Shrinivas*. In this case, the Supreme Court considered the contempt petition in respect of the decision arising from *M S Raj v. State of Andhra Pradesh*[24]. The Respondents have also placed heavy reliance on the decision of the Supreme Court in the case of *N.T. Devin Katti*. Based on the observations in paragraph 11, the Respondents contend that once an Advertisement has been issued based on a specific set of criteria at that time, the subsequent selection process should adhere to those criteria and not on criteria changed afterwards, and retrospective changes are not permissible. These decisions emphasizes the principle that all proceedings initiated following an advertisement should be brought to a logical conclusion in accordance with the rules in place when the advertisement was issued. However, it is crucial to consider that the circumstances may vary in each case. As emphasized in the decision in the case of *V. Lavanya*, which is more relevant to the present situation, the mere expansion of the field should not be automatically regarded as a change in the rules. This principle should have formed the basis of the impugned order.

72. Further, as stated earlier the challenge should be

[24] 2016 SCC 410

evaluated in conjunction with the aspect of prejudice to EWS candidates. It is essential to bear in mind that we are examining the challenge to the recruitment process based on the grievances of unsuccessful candidates. The change from SEBC to the EWS category, under scrutiny applied only to that specific time frame. Currently, candidates from the Maratha community meeting the EWS criteria have the option to apply under the EWS category.

73. As to the application of the principle of change in rules of the game when the Advertisements itself contemplated change, the Petitioners relied on the decision of the Division Bench of this Court in the case of *Secretary, Maharashtra Public Service Commission v. Arjun Ramkrishnarao Tarke*[25]. In this case, the Maharashtra Public Service Commission (MPSC) issued an advertisement to conduct a combined preliminary examination for recruitment in Group-C services of the Government of Maharashtra. The advertised positions spanned various departments within the State, with eligibility criteria stated in the Advertisement, including reservations for Orphans. Subsequently, after the preliminary examination results were declared, another Advertisement was released. The respondent, Arjun Tarke, had applied for candidacy under the Orphan category and was successful. However, according to the later advertisement, Arjun Tarke was required to possess typing eligibility on the date of filing the application for the main examination, which he did not meet. A GR was issued which

[25] WP No.12210/2022 decided on 19 October 2022.

benefited Arjun Tarke and others leading to a request for relaxation. The prayer for relaxation was denied. Subsequently, Arjun Tarke sought relief from the Tribunal, which granted permission to participate in the examination. MPSC challenged the order in this Court. The respondent- Arjun Tarke, argued that the rules of the game cannot be altered once the process has commenced. However, the Division Bench rejected this argument by the following observations:

> *"14. Contention raised by Mr. Jagtap that the rules of the game cannot be changed after the game has commenced is misconceived. In the present case, the advertisements made it clear in no uncertain terms that horizontal reservation for, inter alia, orphan candidates shall be as per instructions issued by the GoM from time to time in this respect. Once the game was started on the clear understanding that the rules could be changed midway as per instructions of the GoM, it is not open for the Commission, which bound itself by clause 4.2, to take a different stand now. The ratio of the decisions in K. Manjusree vs. State of A.P., reported in (2008) 3 SCC 512,and State of Orissa vs. Mamata Mohanty, reported in (2011) 3 SCC 436, would have no application here. For similar reason, since a change during the process was expressly made permissible, the decision in Madan Mohan Sharma vs. State of Rajasthan, reported in (2008) 3 SCC 724, cited by Mr. Jagtap would also not apply here.*
>
> (emphasis supplied)

The Division Bench observed that the decision in *K.Manjusree* would not apply as the advertisement itself permitted change. The Respondents have attempted to distinguish this decision by asserting that it involves horizontal reservation, and the Division Bench did not intervene because the mere possibility of an alternative

perspective is not sufficient grounds for interference. Nevertheless, it is crucial to note that the Division Bench acknowledged the stipulation in the Advertisement, recognizing the potential for changes. In fact, the case in *Arjun Ramkrishnarao Tarke* was where he was disqualified by subsequent changes. In the present case, none of the EWS candidates have faced disqualification; the only alteration is an increase in the pool from which they had to compete. Based on the directions of the State Government, the MPSC, pursuant to the stipulation in the Advertisements, notified the change. Therefore, there is no question of retrospective operation of the GRs. The issue only was, as emphasized earlier, the prejudice to the Respondents and the right of the Respondents to challenge the change.

74. The Respondents then relied on the decision in *Gurdeep Singh v. State of J.K.*[26]. Reliance was placed on paragraph-9 of the judgment which reads thus:

> *"9. As pointed out earlier, it was not the eligibility or quality of this sport for inclusion or non-inclusion that was in question. The question was whether having regard to the stage at which and the manner in which it came to be included, it was permissible. That apart, both at the time of sending up their applications for entrance examination as well as at the time the candidates offered themselves for selection before the Sports Council, the candidates were to set out the specific basis of their claims for inclusion in the sports category and furnish the requisite certificates. We are told that the further requirement was that the qualification for such eligibility should have been acquired prior to the 12th standard*

[26] 1995 Supp (1) SCC 188

> *examination. In the case of Respondent 6, it is stated that he acquired the sports qualification long after he had passed the 12th standard examination. Then again, the inclusion of mountaineering as an approved sporting activity at that stage denied the other candidates, who might have had similar eligibility, an equal opportunity to compete."*

Based on this observation, the Respondents argued that candidates were required to obtain EWS certificates on the date of the Advertisements. Based on this decision and of the Supreme Court in *Ashok Kumar Sharma,* it is sought to be argued by the Respondents that others could have applied if they knew that change was permissible. They argued that if this had been allowed other candidates could have applied. The Respondents argue that SEBC candidates needed to meet eligibility criteria as of the date of the Advertisement. However, this argument overlooks the crucial point that the Tribunal did not conclude that obtaining EWS certificates at the time of the Advertisements was a specific eligibility criterion. In fact, the Advertisements specifically stated that certificates were to be produced at the time of the interview.

75. The Tribunal has not rendered any specific finding that SEBC candidates have to posses a certificate designating them under the EWS category at the time of the Advertisement. The scrutiny of documents was scheduled to take place after the final examination, with certificates required to be presented at the time of the interview. Clause 4.9 required SEBC candidates to produce certificates issued in

accordance with the GR dated 7 December 2018 during document verification which was at the time of the interview. Moreover, the current situation, for which a one-time measure was sought, could not have anticipated that SEBC candidates would possess EWS certificates at the time of the interview. Therefore, the reasoning behind this conclusion of the Tribunal was not relevant.

76. The Respondents also contend that the income criteria for EWS and SEBC are different. This is also of no relevance as it was only after getting a due certificate as an EWS candidate that the SEBC candidates were permitted to participate in the EWS category. The Respondents further contend that the cut-off marks were already declared for every category and the cut-off of the open category was much higher as compared to the EWS category, therefore, the SEBC category could not be accommodated in the lower category after the cut-off is declared. This submission is misplaced, the cut-off marks are not an eligibility criterion but will only depend on respective marks and the number of posts. The candidates get selected based on the marks they obtain. There is no vested right based on the marks obtained that no one above such marks should be considered.

77. To reiterate, the impugned order has consistently highlighted the principle of altering the rules during the selection process without providing specific details on how this legal principle was applicable to the case before us. The Advertisements explicitly

indicated that reserved posts were subject to change. The Advertisements directed individuals to detailed information on the website, which, in turn, outlined provisions for alterations in the reservation. Moreover, the Advertisements explicitly mentioned that the entire recruitment process was contingent upon challenges to the SEBC Act. Collectively, these aspects implied that modifications to reservation could be introduced in subsequent stages. Applying the principle of retrospectivity requires consideration of the fact that GRs were issued under the executive power of the State to address perceived injustices for a specific class. It was communicated to all concerned parties that the recruitment process was subject to change, and as the recruitment process was actively underway, there is no basis for contending retrospective application of the GRs.

78. In the decisions in *Tej Prakash* and in *V. Lavanya,* the Supreme Court has laid down that changing the rules in the midst of selection is not entirely forbidden in all circumstances, but it must be done within certain constraints. While it's true that if a candidate gets retrospectively disqualified after the commencement of the selection process or vested rights are taken away, the candidate can raise objections using this principle to challenge the disqualification, it is essential to analyze the specific circumstances of each case. This principle is not a rigid formality but requires a case-by-case examination. Here we find that the Tribunal fell in error while examining (rather not examining) facts of the present case in light of

the law governing the changes in the Rules governing recruitment process and has wrongly concluded that the changes to the eligibility were made retrospectively to the prejudice of the Respondents.

79. Now to consider the petitioner's challenge to the declaration of the Tribunal quashing and setting aside that the G.R dated 23 December 2020 as illegal and void being contrary to the provisions of Articles 16(4) & 16(6) of the Constitution of India as it was issued when the SEBC reservation was in existence.

80. The GR dated 23 December 2020 is a larger policy decision. It gave the background of the reservation for SEBC and highlighted that on 9 September 2020, a stay was granted by the Hon'ble Supreme Court, and because of that, many candidates from SEBC had applied for an EWS certificate, and the Aurangabad Bench of this Court had observed that the State should take a decision for considering SEBC candidates applying for an EWS certificate. Thereafter, the GR permitted those SEBC candidates to apply for the EWS category. The Petitioners argue that the impugned declaration given by the Tribunal setting aside the GR dated 23 December 2020 was not only based on legally and factually incorrect grounds but also entirely unnecessary. The Tribunal should have assessed the specific prejudice faced by the applicants due to the GR dated 23 December 2020. The case had to be seen in its due perspective. If the respondents had scored higher marks, they would

have secured the top positions on the list, regardless of the subsequent inclusion of SEBC candidates since the selection was based on their respective marks. In such a scenario, the Respondents would not have had reason to challenge the selection process or this GR and the policy. The Respondents on the other hand contend that even assuming they may not have suffered direct prejudice but they, as citizens, retain right to challenge actions of the State Government.

81. The Respondent's argument fails to consider the nature of the dispute before the Tribunal and the Tribunal's jurisdiction to address such challenges. It is well-established that the Administrative Tribunal does not possess plenary jurisdiction. The Supreme Court in *Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra*[27], laid down that the ambit of the administrative jurisdiction of the Tribunal as follows:

> *15. Section 20 provides that the Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant rules. Section 21 provides for a period of limitation for approaching the Tribunal. A perusal of the above provisions shows that the Tribunal can be approached only by "persons aggrieved" by an order as defined. The crucial expression person aggrieved" has to be construed in the context of the Act and the facts of the case.*
>
> ***
>
> *18. The constitution of Administrative Tribunals was necessitated because of the large pendency of cases relating to service matters in various courts in the country. It was expected that the setting up of Administrative Tribunals to deal*

[27] (1998) 7 SCC 273

exclusively in service matters would go a long way in not only reducing the burden of the courts but also provide to the persons covered by the Tribunals speedy relief in respect of their grievances. The basic idea as evident from the various provisions of the Act is that the Tribunal should quickly redress the grievances in relation to service matters. The definition of "service matters" found in Section 3(q) shows that in relation to a person, the expression means all service matters relating to the conditions of his service. The significance of the word "his" cannot be ignored. Section 3(b) defines the word "application" as an application made under Section 19. The latter section refers to "person aggrieved". In order to bring a matter before the Tribunal, an application has to be made and the same can be made only by a person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal. We have already seen that the word "order" has been defined in the explanation to sub-section (1) of Section 19 so that all matters referred to in Section 3(q) as service matters could be brought before the Tribunal. If in that context Sections 14 and 15 are read, there is no doubt that a total stranger to the service concerned cannot make an application before the Tribunal. If public interest litigations at the instance of strangers are allowed to be entertained by the Tribunal, the very object of speedy disposal of service matters would get defeated.

19. Our attention has been drawn to a judgment of the Orissa Administrative Tribunal in Amitarani Khuntia v. State of Orissa [(1996) 1 OLR (CSR) 2] . The Tribunal after considering the provisions of the Act held that a private citizen or a stranger having no existing right to any post and not intrinsically concerned with any service matter is not entitled to approach the Tribunal. The following passage in the judgment is relevant:

> *"… A reading of the aforesaid provisions would mean that an application for redressal of grievances could be filed only by a 'person aggrieved' within the meaning of the Act.*
>
> *Tribunals are constituted under Article 323-A of the Constitution of India. The above article empowers Parliament to enact law providing for adjudication or trial by Administrative Tribunals of disputes and complaints*

> *with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government and such law shall specify the jurisdiction, powers and authority which may be exercised by each of the said Tribunals. Thus, it follows that Administrative Tribunals are constituted for adjudication or trial of the disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts. Its jurisdiction and powers have been well defined in the Act. It does not enjoy any plenary power."*
>
> *We agree with the above reasoning.*
>
> (emphasis supplied)

The above position of law should have been kept at the forefront by the Tribunal.

82. The Respondents have sought to contend that this GR did not modify the earlier GR by which those who were entitled to SEBC reservation could not have applied under EWS. As stated earlier, the main question is whether the Respondents before the Tribunal were directly affected by this GR. It is important to highlight that in the case of *Vikas Alase*, the Division Bench did not invalidate the same GRs as challenged before the Tribunal but rendered them inapplicable to the specific Advertisement under consideration. Despite the constitutional challenge raised against the GRs in *Vikas Alase*, the Division Bench only declared that they did

not apply to the particular recruitment process in question. Even if the Tribunal had to pass the same order as in *Vikas Alase*, it would have been that the GR dated 31 May 2021 did not apply to the current recruitment process. Even on such a declaration, the Respondents would have succeeded. However, the Tribunal went beyond this specific case to set aside the GR dated 23 December 2020. As mentioned earlier, the challenge to the general policy is based on the argument that the Respondents can challenge it as citizens of the country. It is important to note that the Respondents approached the Tribunal as unsuccessful candidates in the recruitment process, invoking the limited jurisdiction of the Administrative Tribunal.

83. The additional factor concerns the entitlement of the respondents, which fundamentally hinges on whether they possess a vested right to appointment. It has been a consistent legal position that the mere inclusion of candidates in a selection list does not automatically grant them a vested right to appointment. This view is followed from *State of Haryana* v. *Subash Chander Marwaha*[28] to *Punjab SEB* v. *Malkiat Singh*[29] where earlier decisions were referred to. This position was emphasised in *State v. Umesh Kumar*[30]. In the case of *State of Himachal Pradesh v. Raj Kumar*[31], a Bench of three learned Judges of the Hon'ble Supreme Court was considering the

[28] (1974) 3 SCC 220
[29] (2005) 9 SCC 22
[30] (2020) 10 SCC 448
[31] 2022 SCC OnLine SC 680

issue of filling up the vacancies based on the law which existed on the date they arose. After taking review of earlier decisions on the subject cases, it was observed it is not obligatory for the appointing authority to fill up the posts immediately. The petitioners argued that thus employees do not possess any inherent rights beyond those outlined in the rules governing their service. This underscores the restricted entitlement of the EWS candidate contesting their non-selection.

84. While the Respondents have attempted to argue various issues extending beyond their individual cases to challenge the GR dated 23 December 2020, the arguments before the Tribunal and now before us lack perspective. As earlier emphasized, the Tribunal was dealing with the grievances of candidates who were unsuccessful in the recruitment process. The matter had to be approached from that specific perspective instead of delving into broader issues. The data reproduced in the impugned judgment, indicating the SEBC candidates secured all and, in some cases, the majority, is not relevant. This result is also due to the marks obtained. The general comment in the impugned order that this situation indicates the Maratha community was never intended to be granted SEBC reservation is out of context and not necessary in the present service dispute. Furthermore, this aspect is irrelevant since now in all future recruitment processes all those who are eligible for EWS can participate, including those from the Maratha community and will be

selected based on *inter se* merit. Therefore, the fact that the Petitioner SEBC candidates (now in EWS) secured most seats was not decisive. They did so by securing higher marks. The focus in the impugned order should have been on the rights of the candidates challenging their non-selection in the recruitment process, assessing whether they were prejudiced by the alleged mid-process change, and determining whether the change could be deemed entirely arbitrary. These general observations ultimately led to the setting aside of the GR dated 23 December 2020. The learned Advocate General is right in making a grievance that the broad relief granted by the Tribunal has affected a considerable number of candidates who are not parties before the Tribunal. In our view, the declaration in the impugned order setting aside the GR dated 23 December 2020 was unnecessary.

85. Assuming that the Tribunal should have gone into the challenge to GR dated 23 December 2020 on its merits, the Respondents argue that the interim order of the Supreme Court dated 9 September 2020 did not constitute a stay of the SEBC Act. Therefore, according to the Respondents, two reservations could not have been granted simultaneously to SEBC candidates. The Tribunal noted that EWS reservation is a vertical reservation, and allowing the option of EWS to SEBC candidates was akin to having 'two sides of bread buttered'. The Tribunal, based on this observation, concluded that it had not come across any law

permitting interchangeability between the vertical reservation of SEBC and Other Backward Classes (OBC). The Tribunal found that there was interchangeability between the reservation for Nomadic Tribe in the State of Maharashtra, but for the SEBC, such migration is not permissible. However, the Tribunal needed to first examine who was challenging this GR, what their pleadings were in the original application, and the foundation of the challenge before embarking upon detailed scrutiny.

86. The Petitioners submitted that the Hon'ble Supreme Court, through its order dated 9 September 2020, essentially suspended the operation of the SEBC Act. Consequently, the benefits of the Act were not available under the orders of the Hon'ble Supreme Court. Subsequently, in the final judgment and order dated 5 May 2021, the Supreme Court declared the SEBC Act as unconstitutional. The Petitioners rely on the decision of the Hon'ble Supreme Court in the case of *State of Tamil Nadu v. Shyam Sunder*[32], which considered the legal position as to what is the effect of the law when the law is declared unconstitutional. The Supreme Court held that in case the statute violates any fundamental right enshrined in Part-III of the Constitution of India, such statute remains stillborn, void, ineffectual and nugatory without having legal force. The effect of a declaration of the statute as unconstitutional amounts to as if it had never been in existence. The Petitioners contend that, therefore, when the Tribunal was considering the

[32] 2011(8) SCC 737

matter, the Supreme Court had already declared the SEBC Act as unconstitutional. This declaration implied that the SEBC Act was deemed non-existent. Further contention is that the interim order granted by the Hon'ble Supreme Court had suspended the operation of the SEBC Act for the recruitment process.

87. The interim order issued by the Hon'ble Supreme Court on 9 September 2020 has been reproduced earlier. The objective of the SEBC Act was to provide reservations for the Maratha community in both, educational institutions and public service appointments. In furtherance of this objective, the Act defined SEBC citizens in the State of Maharashtra, particularly incorporating the Maratha Community within the Educationally and Socially Backward Category. The SEBC Act aimed to address disparities and provide opportunities for social and educational upliftment. Section 3 of the SEBC Act extended its application to direct recruitment and appointments in public services, with specific exceptions outlined. Section 4 further specified a designated percentage of total appointments in direct recruitment exclusively reserved for SEBC, including the Maratha community. With its eighteen sections, the Act was fundamentally centred on addressing social imbalances through targeted reservation policies in recruitment processes. The scheme of the SEBC Act showed its exclusive focus on providing reservations in educational institutes and public employment. This was the primary purpose of the SEBC Act, with other provisions

serving as modalities to achieve this objective. When the Hon'ble Supreme Court directed on 9 September 2020 that the recruitment processes should continue without considering the Act, it effectively suspended the purpose of the Act itself. However, our main foundation against the Tribunal's finding on the validity of the GR dated 23 December 2020 is that the Tribunal's decision to set it aside was unwarranted and unnecessary in these original applications filed by those who did not demonstrate how they were directly affected by it and the relief could have been granted to them without setting aside this GR. On the other hand, this order impacted beneficiaries of the GR who were not before the Tribunal and had no direct connection with the impugned recruitment process.

88. Following the direction to proceed with recruitment without the SEBC Act and its subsequent invalidation as unconstitutional, candidates from the SEBC category, who were also economically weaker, would have been compelled to compete in the Open category. This was due to the merging of seats reserved for SEBC candidates with the Open category. There was no objection to this merger. It's important to note that the seats did not lapse; rather, those who had applied under SEBC in the ongoing recruitment process were required to compete in the Open merit. Meanwhile, those who were already in the Open merit (without the benefit of any reservation) but economically weaker could compete in the EWS category, but not those economically weaker from the SEBC category

whose seats were merged in the Open category. If the State perceived this situation as unjust and sought to address it, it cannot be declared that such an action is arbitrary.

89. The State Government was of the opinion that in view of the predicament faced by the SEBC candidates, the most appropriate action was to allow them to apply under the EWS category, provided they obtained the necessary certificates. In one of the petitions, there is a mere suggestion that the State might have done this to favour a particular community, resembling an implication of mala fides. However, this aspect lacks detailed support in pleadings, and asserting mala fides requires a substantial burden of proof, which the Respondents did not discharge. The State has sought to address the cause of those who are economically weaker and entitled to EWS reservation. While affirming reservation in favour of economically weaker sections (EWS), the Supreme Court in *Janhit Abhiyan v. Union of India*[33] noted that in the intricate social framework, achieving genuine and tangible equality requires continuous efforts to eliminate existing inequalities in any form. Hence, the State is entrusted with the responsibility of affirmative action aimed at mitigating discrimination and ultimately eradicating it to achieve true and substantial equality. This approach has led to the adoption of reservations in recruitment. Thus, the State's action in permitting the economically and socially backward segment of society and issuing the impugned GR cannot be deemed arbitrary.

[33] (2023) 5 SCC 1

The State attempted to address a one-time situation by allowing a class that, according to it, was prejudiced to compete for the benefits of reservation. The Tribunal has not given any specific findings on how it considers the State's actions arbitrary.

90. The impugned order has not noted the fundamental reason and objective behind providing reservation as a form of affirmative action. The reservation under Article 16(6) is designated for the EWS category. The SEBC candidates before the Tribunal were part of the EWS, meaning that all candidates before the Tribunal belonged to the EWS category. However, throughout the discussion, the Tribunal consistently distinguished between two groups of EWS candidates: those who originally applied under the EWS category and those who gained permission to apply under this category through the impugned GR. By drawing this distinction, the impugned order effectively excluded candidates belonging to the EWS category who are otherwise entitled to the benefits of constitutional reservation and scored more marks.

91. When the Advertisement was issued, candidates from the Maratha community for benefits of reservation had to apply under the SEBC category. Subsequently, the recruitment process proceeded without implementing the SEBC Act, which was later declared unconstitutional. Later, the seats initially designated for SEBC candidates were allocated to the Open category and did not

lapse. Since there was no reservation provided for the Maratha community, they were treated as part of the Open category. Those who were economically weaker were entitled to the benefits of reservation under the EWS category. The State, through MPSC, made necessary adjustments. Consequently, the seats reserved for SEBC candidates were integrated into the general category. The selection process for the additional posts was meant to be based on merit, even for the Other Backward Class category. However, when a similar merit-based approach was applied to the EWS category, the Tribunal found fault with it. Thus, the impugned order disqualifies candidates despite their obtaining higher marks and possessing necessary certificates as EWS, because they initially applied under the SEBC category, albeit without a choice.

92. The Petitioners have also made a grievance regarding the observations of the Tribunal about the supernumerary posts created by the State in respect of Applicants in Original Application No.281/2022. The only finding in the impugned order is that the original EWS candidates were completely sidetracked, and in the decision of the Government, giving supernumerary posts to EWS candidates is illegal, and if supernumerary posts were to be offered, they should be given to those from SEBC candidates who shifted to EWS category. However, the legal basis for this conclusion is not found in the impugned order. For the concerned EWS candidates, there is no difference between a supernumerary post and a regular

post, as highlighted by the Petitioners. Although a supernumerary post may cease upon the occupant's retirement, in practical terms there is no distinction, and it does not affect the candidates appointed to such posts. The issue of *inter se* seniority is currently hypothetical. Once again, it is evident that the Tribunal did not approach the matter from the perspective of service law but rather in a general sense. The State Government, in its effort to support the class without the benefit of reservation post the Supreme Court's decision, sought to balance the rights and prejudices involved. Firstly, by allowing those from the SEBC category to apply from the EWS category and secondly, by ensuring that those from the EWS category were given appointments by creating supernumerary posts. This was a one-time exercise and cannot be deemed arbitrary.

93. Another error in the impugned order is that it invalidated the select list from EWS of original SEBC candidates, but approved the list of original EWS candidates. The Petitioners point out that the selection process encompassed multiple cadres, and, with the exception of the EWS select list, all other select lists remain unaltered. This position resulted in complications and confusion, and the directions in the impugned order were impractical, making the selection exercise unworkable.

94. The Petitioners have argued that, according to Article 16(6) of the Constitution of India, the highest permissible quota for

EWS is 10% within the General category. Consequently, following the merging of SEBC candidates into the General category, there was an adjustment to accommodate the 10% quota. Hence, the Petitioners assert that the Government's policy, as reflected in the impugned GR was fair and balanced. This aspect is not considered by the Tribunal in proper perspective.

95. One of the aspects the Tribunal should have considered was the argument of delay and latches on the part of the Respondents-original applicants made by the Petitioner in Civil Writ Petition No.5521 Of 2023. These Petitioners have contended that, in some cases, appointment orders were already issued. Orders of ten EWS category candidates were made on 12 August 2022, including the Petitioner, to the posts of Range Forest Officers reserved for the EWS category and with a direction to join training at Chandrapur on 22 August 2022. The order of appointment was before the passing of the interim order passed by the Tribunal. Some candidates appointed to the post of Assistant Conservator of Forest Officer had already joined services on 18 July 2022. It was contended that for almost a year, Respondents did not approach the Tribunal, thereby allowing all procedures, formalities to be completed such as medical examination, verification of documents and issuing of appointment orders and joining of the candidates. On this position also there is no due consideration by the Tribunal.

96. In conclusion, the decision in *Vikas Alase* does not comprehensively address all the issues presented before us. While *Vikas Alase* emphasized the principle akin to estoppel and conscious choice for SEBC candidates therein, it has not taken into consideration the implications of Article 16(6) and the decision is based on a different set of facts where the entire selection process was complete. The Tribunal acknowledged this difference but followed the decision in *Vikas Alase*, emphasizing the principle of impermissibility of changing rules after the selection process has commenced. However, this principle is not universally inflexible and can be deviated from in certain circumstances. The central question before the Tribunal was whether the facts and circumstances of the present case justified such a deviation. The impugned order has wrongly concluded that the eligibility and qualification were changed retrospectively due to the impugned GRs. The record would show there were no changes made to the eligibility or qualification criteria for EWS candidates. The EWS candidates remained eligible, albeit competed with a widened competition pool. Faced with the SEBC candidates otherwise in the economically weaker category being deprived of benefits of reservation under Article 16(6), the State took corrective action to address this one-time situation. These SEBC candidates with higher marks secured posts, while those with fewer marks were not selected. The Tribunal extended the scope of enquiry to set aside the GR dated 23 December 2020 beyond the parameters of a service dispute even though the Respondents did not

demonstrate how they were directly prejudiced by it, resembling consideration of a public interest litigation. This declaration impacted beneficiaries of the GR not before the Tribunal. The SEBC candidates were allowed to participate before the selection process concluded, without there being any vested rights on the EWS candidates. In the case of some EWS candidates, the State created supernumerary posts, but the Tribunal, without legal basis, set aside this decision. The impugned order to bifurcate the list ignored the multi-cadre selection adversely affecting the entire process. The generalised observations in the impugned order that SEBC candidates from the Maratha community scored higher marks imply that they were never entitled to SEBC reservation exceeded the scope of the service dispute and were unnecessary. The impugned order has deviated from established legal principles, leading to cascading effects and negatively impacting a substantial number of candidates.

97. The candidates from the Maratha community (SEBC) seeking reservation benefits had to apply for the subject Advertisements under the SEBC category even if they belonged to the economically weaker section in view of the constitutional bar. The recruitment process proceeded without implementing the SEBC Act, which was later declared unconstitutional. Consequently, seats initially reserved for SEBC candidates were allocated to the Open category without lapsing. The seats reserved for Maratha (SEBC) candidates were integrated into the general category and those

Maratha (SEBC) candidates who were in economically weaker sections, upon getting the due certificate, were allowed by the State to apply under the EWS category with a merit-based approach. However, the consequence of the impugned order is that candidates who belong to the economically weaker section despite securing higher marks are disqualified. The impugned order thus has created an inequitable situation.

98. As a result of this discussion, we conclude that the Petitioners are entitled to succeed and the impugned judgment and order is required to be set aside.

99. Accordingly, the Writ Petitions are allowed. The impugned common judgment and order dated 2 February 2023 passed by the Maharashtra Administrative Tribunal in Original Application Nos.814/2022, 280/2022 and 281/2022 is quashed and set aside. The Original Application Nos.814/2022, 280/2022 and 281/2022 filed before the Maharashtra Administrative Tribunal are dismissed. Rule is made absolute in all the Writ Petitions in the above terms. No order as to costs.

100. In view of the disposal of Writ Petitions, Interim Applications do not survive and are disposed of.

(MANJUSHA DESHPANDE, J.) (NITIN JAMDAR, J.)

101. At this stage, the learned counsel for the Respondents seeks continuation of the ad-interim order for a period of six weeks. The Petitioners oppose the said prayer contending that the ad-interim order was sought by them and that is an order of status-quo. The learned Advocate General on behalf of the State contends that vacancies have remained to be filled in because of this litigation. In these circumstances, we observe that if the State proceeds to appoint candidates within a period of four weeks from today, then in that event the said appointments would be subject to further challenge that the Respondents intend to raise in the higher forum.

(MANJUSHA DESHPANDE, J.) (NITIN JAMDAR, J.)