

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI**  
**BENCH AT AURANGABAD****Common Order in O.A. No. 122 and 123 both of 2012****(1) ORIGINAL APPLICATION NO. 122 OF 2012**

DISTRICT : - OSMANABAD

**Jalindar s/o Kashinath Rathod,** )  
 Age- 26 years, Occu. : Education, )  
 R/o Ghatangri, )  
 Taluka & District Osmanabad ) .. **APPLICANT**

VERSUS

**1. The State of Maharashtra,** )  
 Through its Home Department. )

**2. The Superintendent of Police,** )  
 Osmanabad, District Osmanabad. )

**3. Siddheshwar Maruti Umbare,** )  
 Age. Major, )  
 R/o Jijaunagar, Kallam, )  
 Taluka Kallam, District Osmanabad.).. **RESPONDENTS.**

AND**(2) ORIGINAL APPLICATION NO. 123 OF 2012**

DISTRICT : - OSMANABAD

**Datta s/o Keru Darade,** )  
 Age- 26 years, Occu. : Education, )  
 R/o Mombate Hanuman Chowk, )  
 Near Yellow Water Tank, Osmanabad. ) .. **APPLICANT**

VERSUS

**1. The State of Maharashtra,** )  
 Through its Home Department. )

**2. The Superintendent of Police,** )  
 Osmanabad, District Osmanabad. )

3. **Rahul Shahir Gute,** )  
Age. Major, )  
R/o At Post Chikhali, )  
Taluka and District Osmanabad. ).. **RESPONDENTS.**

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APPEARANCE :- Shri S.S. Jadhavar, learned Counsel for the applicants in both the matters.

Shri M.S. Mahajan, learned Chief Presenting Officer for the respondent nos. 1 & 2 in both the matters.

Shri A.M. Nagarkar, learned counsel for respondent no. 3 in O.A. No. 123/2012 (**absent**).

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**Coram** : **Hon'ble Shri Justice P.R. Bora, Vice Chairman AND Hon'ble Shri Bijay Kumar, Member (A)**

**Reserved on** : **4<sup>th</sup> May, 2022**

**Pronounced on** : **13<sup>th</sup> July, 2022**  
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**COMMON ORDER**

***(Per : Justice P.R. Bora, Vice Chairman)***

Heard Shri S.S. Jadhavar, learned counsel appearing for the applicants in both the matters and Shri M.S. Mahajan, learned Chief Presenting Officer appearing for the respondent nos. 1 & 2 in both the matters. Shri A.M. Nagarkar, learned counsel for respondent no. 3 in O.A. No. 123/2012 (**absent**).

2. Both the Original Applications since are arising out of the same recruitment process and the issues raised are similar, we have heard

both these applications together and deemed it appropriate to decide these two applications by a common reasoning.

3. On 30.9.2011 an advertisement bearing No. 9352 was issued under the signature of the Superintendent of Police, Osmanabad for recruitment of 219 Police Constables. In pursuance of the said advertisement the present applicants submitted their applications. Out of 219 posts, 11 were reserved for the Home Guard candidates and 11 were reserved for the Sports persons. Applicant in O.A. No. 122/2012 had applied through the Home Guard quota, whereas applicant in O.A. No. 123/2012 had applied through the Sports persons quota. Applicant in O.A. No. 122/2012 received 153 aggregate marks out of 200, whereas applicant in O.A. No. 123/2012 received 158 aggregate marks out of 200. Chest No. given to applicant in O.A. No. 122/2012 was 3724 and Chest No. given to applicant in O.A. No. 123/2012 was 2568. Both the applicants did not find place in the list of selected candidates.

4. It is the grievance of both the applicants that though both the applicants were liable to be selected from the quota of Home Guards and Sports persons respectively in the Open category on the basis of the marks received by them, the respondents have selected the less meritorious candidates. In O.A. No. 122/2012 Shri Siddheshwar Maruti Umbare (Respondent no. 3) is named as a candidate, who has been selected from the quota of Home Guards in the Open category

though has received less marks than the applicant. Shri Umbare is stated to have received 138 marks out of 200 as against 153 marks out of 200 scored by the applicant. Similarly Shri Rahul Shahir Gute, who is respondent no. 3 in O.A. No. 123/2012 is alleged to have been wrongly selected from the quota of Sports persons in the Open category, though he has received 156 marks out of 200 as against 158 marks out of 200 earned by the applicant in the said O.A. Both the applicants have therefore prayed for directions against the respondents to place them in the list of selected candidates in their respective category in order of merit and consider their claim against the seats respectively reserved for Home Guards and Sportsmen. Applicant in O.A. no. 122/2012 belongs to VJ-A reserved category, whereas applicant in O.A. No. 123/2012 belongs to NT-D category.

5. In both the Original Applications respondent no. 2 i.e. the Superintendent of Police, Osmanabad, has filed the affidavit in reply and resisted the contentions of the applicants. Respondent no. 1 in both the applications has not filed any separate affidavit in reply. It was orally submitted by the learned C.P.O. that in view of affidavit in reply filed by respondent no. 2, respondent no. 1 did not find it necessary to file any separate affidavit in reply. Respondent no. 3 in O.A. No. 122/2012 though has been duly served has not filed any reply to the application. Respondent no. 3 in O.A. No. 123/2012 has filed his reply opposing the contentions raised in the said application.

6. It is the contention on behalf of respondent no. 2 that no illegality has been committed by the respondent in not selecting the applicants, in view of the guidelines issued in that regard by the General Administration Department vide its Resolution dated 16.3.1999. It is the further contention that the list of selected candidates has been prepared in light of the directions given by Maharashtra Administrative Tribunal Mumbai, Bench at Aurangabad in O.A. No. 301/2009 filed by Shri Irfan Mustafa Shaikh. It is further contended that the seats reserved for Home Guards, as well as, Sportsmen falling in the category of horizontal reservations were to be filled by selecting the meritorious candidates coming from the same reserved class against which the said horizontal reservation was shown. As contended by respondent no. 2 since there were more meritorious candidates than the applicants in their respective categories the said candidates were selected in preference to the present applicants. Respondent no. 2 has therefore prayed for dismissal of the applications.

7. Respondent no. 3 in O.A. no. 123/2022 has opposed the application on similar line and has also prayed for dismissal of the application.

8. The learned counsel for the applicants in both these applications argued that insofar as the seats reserved for Home Guards and Sports persons in the Open category are concerned, the

applicants were entitled to their selection in order of merit. The learned counsel submitted that though the applicant in O.A. No. 122/2012 belongs to VJ-A category and the applicant in O.A. 123/2012 comes from NT-D category, both were having right to compete and claim the seats reserved for Home Guards (Open) and Sports Persons (Open). The learned counsel submitted that while selecting the candidates to be appointed against the seats reserved for Home Guards (Open) and Sports person (Open) the respondents were expected to select the candidates for the said posts purely on merits irrespective of their caste, community or tribe. In support of his contention the learned counsel placed his reliance on the following judgments :-

- (i) **Saurav Yadav & Ors. Vs. State of Uttar Pradesh & Ors., (2021) 4 SCC 542,**
- (ii) **Indra Sawhney Vs. Union of India, 1992 Supp. (3) SCC 217.**
- (iii) **R. K. Sabharwal & Ors. Vs. State of Punjab & Ors., 1995 (2) SCC 745.**
- (iv) **Charushila d/o Tukaram Chaudhari and Others Vs. The State of Maharashtra & Ors., 2019 SCC Online Bom. 1519.**

9. The learned C.P.O. submitted that the respondents have strictly followed the guidelines given by the G.A.D. vide G.R. dated 16.3.1999, which came to be issued in light of the directions given by this Tribunal while deciding the matter filed by one Shri Irfan Mustafa Shaikh. The learned C.P.O. further submitted that though

the legal position now stands settled in view of the judgment by the Hon'ble Apex Court in the case of **Saurav Yadav & Ors. Vs. State of Uttar Pradesh & Ors.** (cited supra) no blame can be attributed on the part of the respondents, who have acted according to legal position as was prevailing at the relevant time. The learned C.P.O. further submitted that it would be wholly unjust and improper to unsettle the list of selected candidates after long lapse of about 10 years.

10. We have carefully considered the submissions made on behalf of the applicants and the respondents. We have carefully perused the pleadings of the parties, the documents filed on record and the judgments relied upon by the parties. It is not in dispute that the applicant in O.A. No. 122/2012 had applied for the post of Police Constable and was contesting for the seat reserved for Home Guard candidates. Similarly the applicant in O.A. no. 123/2012 was claiming the seat reserved for sports persons. There is further no dispute that applicant in O.A. no. 122/2012 belongs to VJ-A category, whereas the applicant in O.A. No. 123/2012 belongs to NT-D category. It is also not in dispute that the applicants have secured 153 and 158 marks respectively out of 200.

11. As is revealing from the chart placed on record by respondent no. 2, 5% posts each were reserved for Home Guards and Sports persons. Having regard to 219 posts advertised, 11 seats were reserved for Home Guard candidates and 11 seats were reserved for

Sports persons. The respondents have provided the breakup of the said posts, which is thus :-

Open	-	05
S.C.	-	02
S.T.	-	01
VJ-A	-	00
NT-B	-	00
NT-C	-	01
NT-D	-	00
S.B.C.	-	00
O.B.C.	-	02
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TOTAL		11
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12. Following 05 candidates were included in the provisional merit list in the quota of Sport persons in the Open category :-

<b>Sr. No.</b>	<b>Chest No.</b>	<b>Category</b>	<b>Reservation</b>	<b>Physical marks</b>	<b>Written marks</b>	<b>Total marks</b>
35	2259	Open	Sports	92	82	174
47	2099	OBC	Sports	88	84	172
53	2279	Open	Sports	94	69	163
56	1441	Open	Sports	78	78	159
60	1568	Open	Sports	88	64	152

Following candidates were included in the provisional merit list of the Open candidates from the quota of Home Guards :-

<b>Sr. No.</b>	<b>Chest No.</b>	<b>Category</b>	<b>Reservation</b>	<b>Physical marks</b>	<b>Written marks</b>	<b>Total marks</b>
48	2565	Open	H.G.	92	80	172
57	2611	Open	H.G.	90	66	156
58	1941	Open	H.G.	92	61	153
59	2183	Open	H.G.	84	69	153
70	1229	Open	H.G.	80	58	138



13. In view of the legal position as it now stands settled the applicants though belong to reserved class were entitled to compete and claim for the seats reserved in the Open category on the strength of 'merit'. It is evident that the applicant in O.A. no. 122/2012 has received more marks than the last selected candidate from the quota of Home Guards in the Open category. The said candidate has received total 138 marks as against 152 marks received by the applicant. Like-wise applicant in O.A. No. 123/2012 has secured more meritorious position than the last selected candidate in the quota of Sports Persons in the Open Category. The last selected person in the Open Category has received 152 marks as against 158 marks earned by the applicant in the said O.A. In fact, there is one more candidate having chest number 1441, who has received 156 marks i.e. less marks than the marks secured by the applicant.

14. At the relevant time also there was no legal bar for meritorious candidates belonging to reserved class to compete for and claim the seats in the Open category on their own merit. We may usefully refer to the interpretation put to "Open category" in the matter of **Bihari Lal Rada Vs. Anil Jain (Tinu) and others, (2009) 4 SCC 1** by the Hon'ble Supreme Court. It is recorded thus,-

*"There is no separate category like Open or General category. The expression belonging to the Open category wherever employed means the seats or offices earmarked for the persons belonging to all categories irrespective of their caste, community or tribe. The unreserved seats euphemistically described as general category seats are*

*open seats available for all the candidates, who are otherwise eligible to compete to that office.”*

15. In the case of **Indra Sawhney Vs. Union of India** (cited supra) also the Hon'ble Supreme Court had held that the candidate belonging to any reserved class can be selected in the Open competition field on the basis of his own merit.

16. The Division Bench of the Hon'ble Bombay High Court in the case of **Charushila d/o Tukaram Chaudhari** (cited supra), after having referred to the various judgments of the Hon'ble Supreme Court and the Hon'ble High Courts has recorded a conclusion that a reserved category candidate claiming reservation as and by way of horizontal or vertical reservation, is always entitled to claim seat from Open category as per his / her individual merit. The Division Bench has further held that the Open category or quota as such is meant to be fulfilled from amongst all categories and only on the basis of merits. In such allotment, caste, creed or any other criteria relating to any candidate does not matter.

17. The Hon'ble Supreme Court in the case of **R. K. Sabharwal & Ors.** (cited supra) has ruled that the reserved category candidates can compete for the non-reserved posts. Lastly in the case of **Saurav Yadav & Others** (cited supra) the Hon'ble Supreme Court has settled the legal position by holding the migration of reserved category candidates to the Open category legal & permissible. The Hon'ble Supreme Court has held in the said matter that, “*any selection which*

*results in candidates being selected against Open/General category with less merit than the other available candidates would be opposed to principles of equality.” The contention that “after vertical reservations are provided for, at stage of accommodating candidates for effecting horizontal reservations, reserved category candidates can only be adjusted against their category and not against ‘Open or General’ category,” is rejected by the Hon’ble Supreme Court by observing that ‘that would result in such candidates with less merit (in the open category) being selected, and those with more merit than such selected candidates, (in the social/vertical reservation category) being left out of selection.’*

18. Having regard to the settled legal position as stated above, the respondents must have included the names of both the applicants in the provisional merit list of Open candidates in the quota of Home Guards and Sports Persons respectively.

19. In paragraph no. 7 of the affidavit in reply filed by respondent no. 2 in O.A. No. 122/2012 it is averred that,

“7. -- -- -- -- -- -- -- -----  
-- The applicant belongs to VJ A category, and for this category total 07 posts were available in recruitment. Calculating 5% quota, no post from Home Guards were available in the present recruitment. The applicant is, therefore, expected to stand in Open Merit. The cut off line for open category Home Guards was of 172 marks, the applicant secured only 153 marks and, therefore he could not be selected. Candidate bearing chest no. 1229 of open category (Home guard) who secured less marks (138) than the applicant was selected as recruitment process is carried

*out as per the order passed by Hon. Tribunal in O.A. no. 301/2009.”*

The averments taken as above are apparently unconscionable. As is revealing from the record only first candidate in the Home Guards (Open) category was possessing 172 marks and remaining 04 candidates were having 156, 153, 153 & 138 marks respectively. Respondents have not explained as to why the candidates at Sr. Nos. 2, 3 & 4 in the Home Guards category were selected when they had not received the cut-off marks for Home Guards (Open). Even otherwise also the aforesaid contention is fallacious.

20. It was vehemently argued on behalf of the respondents that insofar as horizontal reservations are concerned, the seats reserved in the horizontal reservations were to be filled in by the candidates belonging to the said category only. It was, therefore, further argued that seats shown to be reserved in the quota of Home Guards and Sports Persons in the Open category were liable to be filled in only by the candidates coming from the Open class and said seats could not have been given to the candidates belonging to reserve class or in other words to the candidates other than the Open category candidates. In view of the legal position discussed by us hereinbefore the argument as aforesaid has to be rejected and is accordingly rejected. On facts also the stand as aforesaid cannot be sustained. We have minutely perused the list of 105 candidates in the Open category. We deem it appropriate to reproduce herein below the

chart placed on record showing the break-up of vertical and horizontal reservations: -

समाजिक / समांतर आरक्षणचा तपशिल

		एकुण पदे	महिला ३०%	माजी सैनिक १५%	प्रकल्प ग्रस्त ५%	भुकंप ग्रस्त २%	गृहरक्षक दल ५%	खेळाडू ५%	अंशकालीन १०%
खुला (OPEN)		१०५	३१	१६	५	२	५	५	१०
अनुसुचित जाती (S.C.)	१३%	२९	९	४	२	१	२	२	३
अनुसुचित जमाती (ST)	७%	१५	५	२	१	०	१	१	२
विमुक्त जमाती (VJ-A)	३%	७	२	१	०	०	०	०	१
भ.ज.ब. (NT-B)	२.५%	५	२	१	०	०	०	०	१
भ.ज.क. (NT-C)	३.५%	८	२	१	१	०	१	१	१
भ.ज.ड. (NT-D)	२%	४	१	१	०	०	०	०	०
विशेष मागास प्रवर्ग (SBC)	२%	४	१	१	०	०	०	०	०
ठतर मागास प्रवर्ग (OBC)	१९%	४२	१३	६	२	१	२	२	४
एकुण		२१९	६६	३३	११	४	११	११	२२

21. There cannot be a dispute that the seats which are shown to be reserved for ex-servicemen, PAPs, Home Guards, Sports Persons etc. are by way of horizontal reservations.

22. As per the stand taken by the respondents the seats reserved for the particular class in horizontal reservations in the Open category were to be filled by the candidates from the Open category only and not by any other candidate i.e. the candidates belonging to any backward class. However, if list of 105 candidates shown to have been selected in the Open category is perused it reveals that in the Ex-servicemen quota, candidate belonging to SC bearing chest No.

1341 is shown to be selected and his name is included at Sr. No. 32. Similarly, in the quota of PAPs the candidate belonging to NT-C category is shown to have been selected and the name of said candidate bearing chest No. 1334 has been included at Sr. No. 42 of the said list. Further the candidate at Sr. No. 52 bearing chest No. 927 who belongs to VJ-A category is shown to have been selected in the quota meant for earthquake affected persons. In the category of Sports Persons also 01 OBC candidate having chest No. 2099 is shown to have been selected as Open category candidate. When the aforesaid candidates belonging to reserved class have been selected in the Open category to fill up the seats reserved for Ex-servicemen, PAPs etc. by way of horizontal reservations, the question arises why the respondent did not apply the same criteria in the cases of the applicants who had secured more meritorious position than the last selected Open candidates in their respective category. Respondents have not provided any explanation or justification in that regard. It is apparently a discriminatory practice adopted by respondent no. 2 and would also amount to arbitrary exercise of powers by the said respondent. Such action cannot be sustained.

23. For the aforesaid reasons we are inclined to allow the present O.As. Now the question arises as to what order can be passed in these applications. Having come to the conclusion that both the applicants had secured more marks than the last selected candidates in Home Guards (Open) and Sports persons (Open) category

respectively, the logical consequence must be to annul the said selection and direct the respondents to do exercise de-novo in light of conclusions arrived at by us. However, taking into account the fact that the selected candidates i.e. respondent no. 3 in respective applications have been selected and appointed prior to about 10 years and are actually serving with the Police Department since then till today, it would be unjust and impracticable to annul their appointments. During pendency of the present applications the following order was passed by us on 12.4.2022 :-

*“Heard Shri S.S.Jadhavar, learned Advocate for the applicants and Shri M.S.Mahajan, learned Chief Presenting Officer for the respondents.*

*2. The arguments are heard. The present matter pertains to the recruitment carried out in the year 2011 for the post of Police Constable. After having heard the arguments, we felt it necessary to have the vacancy position on record in so far as the recruitment carried out in the year 2011.*

*3. Learned CPO shall place on record such information in respect of the seats filled in reserved for Home Guards and Sports Persons and number of post reserved for Home Guards and Sports Persons which are vacant at the point of time of conclusion of recruitment process along with date of occurrence of vacancies. The learned CPO shall also place on record information whether any other candidate, besides the present applicants, has raised any grievance in respect of the recruitment process carried out in the year 2011 and, whether the posts vacant out of those notified by advertisement dated 30-09-2011 had been incorporated in next recruitment process, if any.*

*4. S.O. to 27-04-2022.”*

The aforesaid information was sought with the specific purpose that ultimately if the applicants succeed, the Tribunal shall be in a position to pass appropriate order. We regret to state that

respondents have not submitted the information as was required. We, however, are not inclined to disturb the appointments of respondent no. 3 in the respective matters, instead, the respondents can be directed to accommodate the present applicants against vacant seats available if any or direction also can be given to the respondents to create 02 supernumerary posts and to accommodate both these applicants on their establishment.

***(Per : Bijay Kumar, Member (A))***

24. I concur with the Order prepared by Hon'ble Vice Chairman, however, for the limited purpose of setting out the context following facts, which are critical to the present matter in O.A. No. 122 & 123, both of 2012, are being taken on record:-

1. By judgment dated 18.12.2020 delivered by Hon'ble Supreme Court in the Miscellaneous Application No. 2641 of 2019 in Special Leave Petition (Civil) No. 23223 of 2018, in the case of Saurav Yadav and Ors. Vs. State of Uttar Pradesh and Ors. the law has been finally settled relating to availability of migration of candidates from any backward caste social reservation category under any Horizontal Reservation to Open social reservation category under the same horizontal reservation category and accordingly, posts vacant under horizontal reservation in Open category have to be filled on merit basis by allowing migration from other social reservation categories too. There was a difference of opinion in the manner of implementation of this mainly on the following points which first cropped up in O.A. No. 414 & 613 of 2018-



(i) Whether the said judgment of Hon'ble Apex Court is to be given retrospective effect by reopening the recruitment process concluded prior to the date of delivery of the said judgment, only to the extent of filling of posts notified in the already concluded recruitment process which are still vacant due to non-availability of suitable candidates or, due to resignation after joining or non-joining of selected candidates?

(ii) If the answer to the above be in affirmative, then whether the Tribunal should issue appropriate directions to the State Government and the Maharashtra Public Service Commission (in short, MPSC) or any other agency authorized to select candidates as per recruitment rules and prescribed procedure to make offer to candidates available in unexhausted waiting list strictly in accordance with / in order of merit treating the judgment of Hon'ble Apex Court as *in rem* or the Tribunal should issue direction to the State Government and MPSC or above mentioned any other authorized agency to directly offer appointment to the Original Applicant who has approached the Tribunal for relief, irrespective of the fact that candidates at higher merit position in unexhausted merit list may be there who have not been heard by joining them as respondents to the Original Application?

2. Above issues were referred by Hon'ble Chairperson to Hon'ble Shri V. D. Dongre, Member –J, under provisions of S. 26 of the Administrative Tribunals Act, 1985 and the same has been settled by majority of 2:1 vide order dated 08.06.2022.

3. I, therefore, concur with the Common Order being passed by Hon'ble Vice Chairman in the O.A. No. 122 & 123, both of 2012.

25. For the reasons stated above, the following order is passed :-

### **ORDER**

(i) Respondent no. 2 is directed to include the names of the applicants namely Shri Jalindar s/o Kashinath Rothad in O.A. No. 122/2012 and Shri Datta s/o Keru Darade in O.A. No. 123/2012 in the list of selected candidates from their respective quota i.e. Home Guards and Sports persons in the Open category and issue appointment in their favour within 6 weeks from the date of this order, against the vacant seats, if any, or else by creating two supernumerary posts.

(ii) It is clarified that the applicants shall not be entitled for any monetary benefits of the past period. However, their seniority shall be reckoned from the date the last selected candidates in the Open category were appointed.

(iii) Original Applications are allowed in the aforesaid terms. No order as to costs.

**MEMBER (A)**

**VICE CHAIRMAN**