

MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD

COMMON JUDGMENT IN ORIGINAL APPLICATION NOS. 414
AND 613 BOTH OF 2018

(1) ORIGINAL APPLICATION NO. 414/2018

DIST. : JALNA

Vranda D/o Pralhadrao Sadgure,)
Age. 33 years, Occu. : Advocate,)
R/o Sortinagar, Near Ambad Choufulli,))
Old Jalna – 431 213..) -- **APPLICANT**

VER S U S

1) The State of Maharashtra,)
Through Secretary,)
Home Department,)
Mantralaya, Mumbai - 32.)

2) Maharashtra Public Service)
Commission (MPSC),)
through its Deputy Secretary,)
Head Office, 5 ½, 7th & 8th floor,)
Cooperage, Telephone Nigam Bldg.,))
Maharshi Karve Road, Cooperage,))
Mumbai – 400 021.)

3) Director,)
Directorate of Public Prosecution,))
Mumbai (M.S.).)

4) Poonam Satyanarayan Soni,)
Age. : Major, Occ. Advocate,)
Through Assistant Director,)
Office - Near S.P. Office,)
Opp. Ayurvedic College,)
Behind Radhe Govind Hostel,)
S.P. Office Chowk,)
Vajirabad Nanded,)
Tq. & Dist. Nanded.) -- **RESPONDENTS**

WITH

(2) ORIGINAL APPLICATION NO. 613/2018

DIST. : AURANGABAD

Sonelben D/o Dadabhai Pawar,)
 Age. 33 years, Occu. : Legal Practitioner,)
 R/o C/o D.L. Pawar, Changing Room,)
 Sports Authority of India (SAI))
 Dr. Babasaheb Ambedkar Marathwada)
 University Campus, Aurangabad.) -- **APPLICANT**

V E R S U S

- 1) The State of Maharashtra,**)
 Through Secretary,)
 Home Department,)
 Mantralaya, Mumbai – 400 001.)
- 2) Maharashtra Public Service**)
Commission,)
 5 ½, 7th & 8th floor,)
 Cooperage, Telephone Exchange)
 Building, Maharshi Karve Road,)
 Cooperage, Mumbai – 400 021.)
 Through its Secretary.)
- 3) Director,**)
 Directorate of Public Prosecution,)
 Barrack No. 6, Behind Yashodhan)
 Building, Dinsha Vachcha Road,)
 Mumbai – 400 020.)
- 4) Punam Satyanarayan Soni,**)
 Through Assistant Director and)
 Public Prosecutors Office,)
 Near S.P. Office,)
 Opposite of Ayurvedic College,)
 Behind Radhe Govind Hotel,)
 S.P. Office Chowk, Nanded,)
 Tq. & Dist. Nanded.) -- **RESPONDENTS**

 APPEARANCE : Shri V.B. Wagh, learned Advocate for
 applicant in O.A. No. 414/2018.

Shri I.S. Thorat, learned Presenting Officer for respondent Nos. 1 to 3 in O.A. 414/2018.

Ms. Preeti Wankhade, learned Advocate for respondent no. 4 in O.A. 414/2018.

Shri Nitin S. Kadarale, learned Advocate for applicant in O.A. 613/2018.

Shri S.K. Shirse, learned Presenting Officer for respondent Nos. 1 to 3. in O.A. 613/2018.

Shri Avinash S. Deshmukh, learned Advocate for respondent no. 4 in O.A. 613/2018.

CORAM : **Hon'ble Shri Justice P.R. Bora, Member (J)**
AND
Hon'ble Shri Bijay Kumar, Member (A)

DATE : **9th March, 2022**

O R D E R

(Per : Shri Justice P.R. Bora, Member (J))

1. The issues raised and the facts involved in both the aforesaid Original Applications being identical, we have heard the common arguments in these applications. Since the learned Member (A) and I could not arrive at a consensus, we both have decided to write the independent judgments.

2. An advertisement was published bearing advertisement No. 71/2015 inviting online applications from the eligible candidates

for the post of Assistant Public Prosecutor Grade-A. Total 175 such posts were advertised, out of which 166 were fresh, whereas 09 were by way of backlog of the seats reserved for Backward Class. Out of 175 seats, 92 were for Reserved Class and 83 were for the Open Category Candidates. In the Horizontal Reservation 25 seats were reserved for Open Female Candidates. The dispute raised in the present matters relates to these appointments.

3. The applicant in O.A. No. 414/2018 - Ms. Vranda Pralhadrao Sadgure - belongs to Other Backward Class (O.B.C.). She is having qualification of B.A., LL.B. & LL.M. In both the examinations i.e. LL.B. & LL.M. she has secured First Class. She duly secured the SANAD from the Bar Council of Maharashtra & Goa and started practicing as a Lawyer in the District & Sessions Court, Jalna from the year 2009. In pursuance of the aforesaid advertisement No. 71/2015 she applied for the post of Assistant Public Prosecutor Grade-A. In the prescribed application in the Column '*Do you wish to avail the facilities available for Backward Class Candidates?*', the applicant has recorded the answer as '*NO*'. Below the aforesaid question, there is an another question '*Do you want yourself to be considered for the open category post as well?*' and the applicant has recorded an affirmative answer against the said column. This applicant has deposited fees of Rs.

515/- prescribed for the Open category candidates. In the examination held by the M.P.S.C., this applicant appeared and secured 111 marks and was shown in the merit list of the candidates passing the examination at Sr. no. 235. The M.P.S.C., however, did not include her name in the list of selected candidates.

4. Insofar as the applicant in O.A. No. 613/2018 – Ms. Sonelben Dadabhai Pawar – is concerned, she belongs to S.C. category. She is having the educational qualification as LL.M. with First Class and has also passed the National Eligibility Test (N.E.T.). In pursuance of the advertisement bearing No. 71/2015, the said applicant also forwarded online application for the post of Assistant Public Prosecutor Grade-A. In the examination held by the M.P.S.C. and interview taken thereafter, she secured 103 marks and was thus shown at Sr. No. 251 in the merit list published by the M.P.S.C. in order of merit. This applicant has also deposited the fees of Rs. 515/- prescribed for Open Class candidate. In the online application submitted by her, she had given affirmative answer against the question '*whether she wants to avail the benefit for Backward Class candidate*'. However, the next question was also answered by her in affirmative to the effect that *she also wants to be considered as the candidate in the Open*

category. The M.P.S.C. did not include her name in the list of selected candidates.

5. It is the common grievance of the applicants that despite securing more marks than some of the last selected Open Female Candidate like respondent no. 4, M.P.S.C. has not recommended their names for the wrong reason that the applicants belong to Reserved Class. In the circumstances, the applicants have prayed directions for their appointment on the subject post.

6. In the affidavits in reply though the respondents have resisted the contentions in the OAs more particularly the right claimed by the applicants to be considered for appointment on the seats meant for Open Female candidates since both of them have secured more marks than some of the Open Female candidates recommended by M.P.S.C., in view of the law settled by the Hon'ble Apex Court in the case of **Saurav Yadav & Ors. Vs. State of Uttar Pradesh & Ors., (2021) 4 SCC 542**, now there has remained no dispute that both the applicants are liable to be selected in the Open Female category, irrespective of the fact that both belong to backward class, as both have secured more marks than some of the selected last Open Female candidates alike respondent No. 4.

7. The next question arises what order is to be passed? As has been observed in the case of **Saurav Yadav** (cited supra), after having come to the conclusion that both the applicants had secured more marks than some of the last candidates selected in Open category, the logical consequence must be to annul said selection and direct M.P.S.C. to do the exercise de novo. I am however, not inclined to adopt this course for the reason that, as has come on record there are six seats still unfilled and thus there may not be any difficulty in directing the respondents to offer appointment to both the applicants on the said vacant seats without disturbing the appointments of the candidate already appointed and have been working on the subject post for more than 4 years.

8. One more issue deserves to be considered is whether the benefit of the law laid down in the case of **Saurav Yadav** (cited supra), be restricted only to the extent of the present applicants? According to me, the law laid down by the Hon'ble Apex Court would benefit all similarly situated persons provided the persons concern assert the said benefit.

9. In these two matters before this Tribunal besides the present two applicants there are some more candidates belonging to Reserved Category, who had also secured more marks than some

of the last selected candidates in Open Female Category, but have not been recommended by the M.P.S.C. However, none of them seems to have asserted the said right. This Tribunal is not precluded from passing an order extending the same relief along with the present applicants to said similarly situated candidates even though they have not approached this Tribunal. I would have certainly adopted the said course had it been the case that the said candidates can ill afford to rush to the Tribunal or that it is beyond their reach or that they are illiterate and may be ignorant of the judgment in the case of **Saurav Yadav** (cited supra). I need not to state that all such candidates are Law graduates and are practicing lawyers. It cannot be accepted that the legal developments would not be within their knowledge. Even if it is assumed that at the relevant time the legal position was not settled and conflicting judgments were existing, it cannot be ignored that in the year 2016 and thereafter at least four judgments came to be delivered by the Hon'ble Bombay High Court one after another taking a view that even for horizontal seats in the Open Category, the Reserved Category Candidates can compete and get selected, if they have secured more meritorious position than the Open Category Candidates. Judgment in the case of **Saurav Yadav** (cited supra) too had come prior to about one year. In spite of the facts as above, none of such candidate has

come forward asserting her right or claiming any relief. From such conduct of the said candidates, it can be reasonably inferred that they have acquiesced the decision of M.P.S.C. of rejecting their candidature. As per the observations made by the Hon'ble Apex Court in **Chairman, U.P. Jal Nigam & Anr. Vs. Jaswant Singh & Anr., (2006) 11 SCC 464**, which are reproduced in para 20 of the judgment in **State of Uttar Pradesh & Ors. Vs. Arvind Kumar Srivastava & Ors., (2015) 1 SCC 347**, it would be unnecessary to give such candidates a remedy whereby their conduct they have done that which might fairly be regarded as equivalent to a waiver of it, or whereby their conduct and neglect, though not waiving the remedy, they have put the other parties in a position in which it would not be reasonable to place them, if the remedies were afterwards to be asserted.

10. The judgment in the case of **Saurav Yadav** (cited supra) cannot be in a strict sense said to be a judgment in rem. It however does not mean that the law laid down by the Hon'ble Apex Court in the said judgment would be applicable only to the litigants in the said matter. It is well settled that the law laid down by the Hon'ble Apex Court would bind not only the litigants before it, but also all others in view of the binding nature of its judgment under Article 141 of the Constitution. The law laid

down in the case of **Saurav Yadav** (cited supra,) thus, would undoubtedly apply to the present matters.

11. There is a fine distinction between “judgment in rem” and “the binding nature of the judgment of the Hon’ble Apex Court”. Every judgment of the Hon’ble Apex Court, insofar as law laid down in the said judgment is concerned, is binding on all the Courts in the country; but every such judgment cannot be said to be judgment “in rem”. The judgment pronounced with the intention to give its benefit to all similarly situated persons, whether they approached the Court or not is treated as judgment in rem. From the tenor of the judgment the intention can be gathered. As observed by the Hon’ble Apex Court in the case of **State of Uttar Pradesh & Ors. Vs. Arvind Kumar Srivastava & Ors.** (cited supra) with pronouncement of such judgment the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. As further observed, such a situation can occur when the subject matter of the decision touches upon the policy matters like scheme of regularization and the like.

12. In the case of **Saurav Yadav** (cited supra) directions are to the extent of appointments by the State of Uttar Pradesh, to the O.B.C. Female candidates on the post of Police Constables, who

had received more marks than the last Open Female candidates. However, no general directions are given. The law laid down in the said judgment however would bind not only the litigants before it but all others in view of the binding nature of its judgment under Article 141 of the Constitution. The only distinguishing factor is that, insofar as recruitment process carried out by the State of Uttar Pradesh is concerned, every O.B.C. Female candidate, who had secured more marks than the last Open Female candidate, would be given benefit of the said judgment, irrespective of whether such candidate has approached the Court or not. There may be, however, several Reserved Category Candidates across the country having participated in different recruitment processes, who may have the same grievance that despite securing more meritorious position than the candidates selected to fill the seats for Open Category candidates, the recruiting agency / board or the appointing authorities have declined to recommend their names for the reason that they belong to Reserved Category and therefore cannot be appointed against the seats meant for Open Category candidates. The benefit of the law laid down in the case of **Saurav Yadav** (cited supra) would no doubt flow to all similarly situated persons, but whoever wants to avail the benefit of the said judgment unless

duly asserts his right, the benefit may not automatically flow in his favour.

13. As observed in the case of **State of Uttar Pradesh & Ors. Vs. Arvind Kumar Srivastava & Ors.** (cited supra) there are many decisions of the Hon'ble Apex Court where, in some cases, the Courts have extended the benefit to the similarly situated persons, whereas in some other cases similar benefit is denied to the second set of people who approached the Court subsequently. Their Lordships have referred to few of such previous decisions in (i) **U.P. Jal-Nigam Vs. Jaswant Singh, (2006) 11 SCC 464**, (ii) **State of Karnataka Vs. S.M. Kotrayya, (1996) 6 SCC 267**, (iii) **Jagdish Lal Vs. State of Haryana, 1997 (6) SCC 538**.

14. The issue involved in the case of **Chairman, U.P. Jal Nigam & Anr. Vs. Jaswant Singh & Anr.** (cited supra), was the entitlement of the employees of the Nigam to continue in service up to the age of 60 years. In **Harwindra Kumar Vs. Chief Engineer, Karmik, 2005 (13) SCC 300**, the Hon'ble Supreme Court has earlier held that Nigam employees were, in fact, entitled to continue in service up to the age of 60 years. After the aforesaid decision a spate of writ petitions came to be filed in the Hon'ble High Court by those who had retired long back. The question that arose for consideration of the Hon'ble Apex Court was, as to whether the employees who did

not wake up to challenge their retirement orders, and accepted the same, and had collected their post retirement benefits as well, could be given relief in the light of the decision delivered in **Harwindra Kumar** (supra). The Hon'ble High Court had granted such relief to the said Nigam employees. The Hon'ble Supreme Court, however, refused to extend the benefit applying the principle of delay and laches. The Hon'ble Supreme Court held that when a person who is not vigilant of his rights and has acquiesced into the situation, cannot be heard after a couple of years on the ground that the same relief should be granted to him as was granted to the persons similarly situated who were vigilant about their rights and challenged their retirement.

15. **State of Karnataka & Ors. Vs. S.M. Kotrayya & Ors., 1996 (6) SCC 267** was a service matter. The respondents in the said matter while working as teachers in the Department of Education, availed of Leave Travel Concession (LTC) during the year 1981-82. Later it was found that they have never utilized the benefit of LTC but had drawn the amount and used it. Consequently, recovery was made in the year 1984-86. Some persons in similar cases challenged the recovery before the Administrative Tribunal, which allowed their Applications in August 1989. On coming to know of the said decision, the respondents filed Applications in August

1989 before the Tribunal. The Tribunal allowed the applications filed by them by condoning the delay which has occasioned in filing the applications. The appeal was preferred against the order passed by the Administrative Tribunal and in the appeal the Hon'ble Supreme Court set aside the order passed by the Tribunal holding that the applicants had committed the delay in approaching the Tribunal.

16. In **Jagdish Lal Vs. State of Haryana, 1997 (6) SCC 538**, the Hon'ble Supreme Court reaffirmed rule that if a person chose to sit over the matter and then woke up after the decision of the Court, then said person cannot stand for the benefit. Though in the cases of similarly situated persons, the relief was granted by the Court earlier, on account of delay and laches on part of the petitioner in approaching the Court, the Hon'ble Supreme Court declined to grant any relief.

17. It has to be specifically noted that within few days of the publication of the list of recommended candidates, the present 2 applicants approached the Hon'ble Bombay High Court by filing writ petitions, making the grievance therein that, their claim on the seats reserved for Open Female Candidates has been wrongly denied and the candidates securing less marks than them have been recommended by the M.P.S.C. It is the matter of record that

the writ petitions filed by the applicants were disposed of by giving them liberty to approach this Tribunal. It is also the matter of record that the applicants immediately filed the present O.As. before this Tribunal and have been prosecuting these applications with all sincerity. The applicants have been throughout contending that when they had exercised an option that their candidature may be considered even for the seats for Open Female Category and accordingly when they had paid examination fees of Rs. 515/-, prescribed for Open seats and when both of them secured more marks than some of the Open Female Candidates, the applicants were liable to be considered for appointment on Open Female Seats. Such a stand was taken by the applicants even prior to coming of the judgment in the case of **Saurav Yadav** (cited supra). After pronouncement of the said judgment the legal controversy has been finally set at rest. As because these 2 applicants continued to prosecute the present O.As., that the further question had arisen whether the benefit of the law settled by the Hon'ble Supreme Court in the case of **Saurav Yadav** (cited supra) shall also be extended to similarly situated candidates, who have not approached this Tribunal. In other words, had the present applicants not filed the present O.As. or instead of pursuing these applications, had withdrawn the same, perhaps there would be no occasion of extending the benefit in the case of

Saurav Yadav (cited supra) to the similarly situated candidates, who are not before Tribunal. Sum and substance is that if somebody wants to avail the benefit of the law laid down by the Hon'ble Supreme Court claiming parity, he has to assert his right that too within reasonable period. In the instant matter, perusal of the merit list certainly reveals that beside these two applicants there are some more female candidates belonging to reserved category, who have secured more marks than the last selected open female candidate, however, it is a matter of record that none of them has raised any grievance, at least nothing has come on record showing that the said candidates have made even a representation in that regard to the MPSC or any other authority.

18. In the circumstances, merely on hypothetical consideration that besides present two applicants there may be more such identically situated persons in unexhausted merit list, entitled for the said benefit, the relief cannot be refused to the present applicants who have taken pains to approach this Tribunal and who have been prosecuting their grievance with all sincerity.

19. It is the general principle that the law helps them who are vigilant of their rights and cannot come to the rescue of the persons who are sleeping over their rights or sitting on the fence waiting for a favourable decision in some other one's matter. The

only exception will be if the Court finds that the person entitle for any relief has been prevented from knocking doors of the Court because of certain compelling reasons like poverty, social backwardness, illiteracy, remote place of abode wherein transportation facilities are not available etc. In the present matter, I reiterate that the persons who can be said to be similarly situated with the present applicants are from the law faculty having experience of practicing law and may not fall within the category of persons mentioned above.

20. As has come on record there are still 6 posts unfilled. In the circumstances, it appears to me that without disturbing the candidates like the respondent No. 4 who have been working on the subject post for more than 5 years, the respondents can be directed to accommodate the present two applicants against the vacant posts. I reiterate that the applicants have given option that their candidature may be considered even from the Open Female Category, in the application forms filled in by them. It is further not in dispute that none of the applicants has taken any benefit of relaxations available to SC or OBC candidates. For the reasons stated above, I am inclined to pass the following order: -

ORDER

(i) The respondent No. 2, the Maharashtra Public Service Commission, Mumai, is directed to recommend the names of the present applicants for their appointment on the post of Assistant Public Prosecutor Grade-A within four weeks from the date of this order, whereupon the respondent No. 1 shall issue the letters of appointment in favour of both the applicants within four weeks thereafter.

(ii) Original Application Nos. 414 & 613 both of 2018 stand allowed in the aforesaid terms without any order as to costs.

(JUSTICE P.R. BORA)
MEMBER (J)

Place : Aurangabad
Date : 9th March, 2022

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD****ORIGINAL APPLICATION NO. 613 OF 2018
WITH
ORIGINAL APPLICATION NO. 414 OF 2018
(Subject : Appointment)****1. ORIGINAL APPLICATION NO. 613 OF 2018****DISTRICT : AURANGABAD**

Sonelben D/o Dadabhai Pawar,)
 Age :- 30 years, Occupation : Legal Practitioner,))
 R/o. C/o D.L. Pawar, Changing Room,)
 Sports Authority of India (SAI),)
 Dr. Babasaheb Ambedkar Marathwada)
 University Campus, Aurangabad.) ... **APPLICANT**

V E R S U S

- 1. The State of Maharashtra,**)
 Through Secretary,)
 Home Department,)
 Mantralaya, Mumbai - 400001.)
- 2. Maharashtra Public Service Commission,))**
 5 ½, 7th & 8th Floor, Cooperage)
 Telephone Exchange Building, Maharshi)
 Karve Road, Cooperage, Mumbai 400021.))
 Through its Secretary.)
- 3. Director,**)
 Director of Public Prosecution,)
 Mumbai (M.S.).)
 Barrack No. 6, Behind Yashodhan Bldg.))
 Dinsha Vachcha Road, Mumbai -400020)
- 4. Poonam Satyanarayan Soni,**)
 Age : Major, Occupation : Advocate,)
 R/o : Through Assistant Director & Public)
 Prosecutor, Office Near S.P. office, Opposite))
 Of Aurvedic College, Behind Radhe Govind))
 Hotel, S.P. Office Chowk,)
 Nanded, Tq. & Dist. Nanded.) .. **RESPONDENTS**

W I T H**2. ORIGINAL APPLICATION NO. 414 OF 2018****DISTRICT : JALNA**

Vranda D/o Pralhadrao Sadgure,)
 Age :- 33 years, Occupation : Advocate,)
 R/o. Sortinagar, Near Ambad Choufulli,)
 Old Jalna 431 213.)

... APPLICANT**V E R S U S**

1. The State of Maharashtra,)
 Through Secretary,)
 Home Department,)
 Mantralaya, Mumbai - 32.)

2. Maharashtra Public Service Commission (MPSC),
 Through its Deputy Secretary,)
 Head Office, 5 ½, 7th & 8th Floor, Cooperage,))
 Telephone Nigam Building, Maharshi)
 Karve Road, Cooperage, Mumbai 400021.)

3. Director,)
 Director of Public Prosecution,)
 Mumbai (M.S.).)

4. Poonam Satyanarayan Soni,)
 Age : Major, Occupation : Advocate,)
 R/o : Through Assistant Director & Public)
 Prosecutor, Off. Near S.P. office, Opposite))
 Of Aurvedic College, Behind Radhe Govind))
 Hotel, S.P. Office Chowk,)
 Nanded, Tq. & Dist. Nanded.)

..RESPONDENTS

APPEARANCE : Shri Nitin S. Kadarale, Advocate for the
 Applicant in O.A. No. 613/2018.

: Shri S.K. Shirse, Presenting Officer for
 Respondent Nos. 1 to 3 in O.A. No. 613/2018.

: Shri Avinash S. Deshmukh, Advocate for the Respondent No. 4 in O.A. No. 613/2018.

: Shri V.B. Wagh, Advocate for the Applicant in O.A. No. 414/2018.

: Shri I.S. Thorat, Presenting Officer for Respondent Nos. 1 to 3 in O.A. No. 414/2018.

: Ms. Preeti Wankhade, Advocate for the Respondent No. 4 in O.A. No. 414/2018.

CORAM : Justice Shri P.R. Bora, Member (J)
and
Shri Bijay Kumar, Member (A)

DATE : 09.03.2022.

C O M M O N - O R D E R

(Pronounced on 9th March, 2022)

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

1. I am disposing of both the Original Applications by a common order, as the facts and issues involved in both the matters are similar and identical and deciding them by a common order may not prejudice any of the parties.

2. In O.A. No. 613 of 2018, the facts are as follows:-

(a) The applicant Smt. Sonelben Dadabhai Pawar belongs to Scheduled Caste category. She had applied for the post of Assistant Public Prosecutor, Directorate of Public

Prosecution, Grade-A in response to the advertisement issued by the Maharashtra Public Service Commission (in short, "MPSC") vide its advertisement No. 71/2015 issued on 04.07.2015.

(b) The applicant fulfilled all eligibility criteria for the said post to be considered not only as S.C. candidate, but also as an Open category post in terms of age, application fee etc. and had also given option to be considered for Open category candidate.

(c) The applicant secured 251st positions in the final merit list by securing 103 marks. On the other hand, the respondent No. 4 namely Smt. Poonam Satyanarayan Soni's name is at Sr. No. 309 in the final merit-list who had secured only 69 marks. However, the name of the respondent No. 4 was recommended as the last candidate in Open (Female) category, but the applicant's name was not recommended either from S.C. (Female) or from Open (Female) category.

(d) The applicant has claimed benefit of being considered for Open (Female) category as per the provisions of Clause

8.1 of the said advertisement No. 71/2015 dated 04.07.2015, which reads as follows:-

“८. शुल्क :

८.१ अमागास - रु. ५१५/-

८.२ मागासवर्गीय - रु. ३१५/-

“मागासवर्गीय उमेदवारांनी अराखीव पदांसाठीच्या आवश्यक अटी व शर्तीची पूर्तता (उदा. वयोमर्यादा, परीक्षा शुल्क व अर्हता इत्यादी) केल्यासच अशा उमेदवारांची अराखीव पदांवर शिफारस करण्यात येईल.”

(e) To the contrary, the MPSC has treated Horizontal Reservation in all social categories, including Open category, as compartmentalized reservation, thereby, not allowing the present S.C. category female candidate to be considered for selection under Open (Female) category in the present matter.

3. In O.A. No. 414 of 2018, the facts are as follows:-

(a) In this case too, the applicant Smt. Vranda D/o Pralhadrao Sadgure had applied for the post of Assistant Public Prosecutor, Grade-A under Directorate of Public Prosecution, which was advertised by 'MPSC' vide advertisement No. 71/2015 dated 04.07.2015. However, in this case, the applicant belongs to OBC category, but meets

all criterion of application-fee, age etc. prescribed for open category candidate too.

(b) The name of the applicant appeared at Sr. No. 195 in the final merit list, as she secured total marks of 111. However, her name did not appear in the final list of the candidates recommended for appointment. On the contrary, respondent No. 4, i.e. Smt. Poonam Satyanarayan Soni, whose name is at Sr. No. 309 in the final merit list and who secured only 69 marks has been recommended under Open (Female) category.

(c) In this case too, the applicant having secured marks higher than the last candidate selected under Open (Female) category, has sought to be considered for appointment under the Open (Female) category.

(d) However, MPSC has treated Horizontal Reservation in all social categories, including Open category, as compartmentalized reservation and accordingly has not allowed the applicant who belongs to OBC social reservation (Female) category, to be considered for selection under Open (Female) category.

4. Original applicants in both the O.As. have asked for similar relief of being considered for Open (Female) category, as both of them have secured marks higher than the last candidate selected in Open (Female) category. Marks secured and Merit List Ranks of Applicants and the Respondent at a glance are tabulated below : -

Sr. No.	Description of candidates (the 2 applicants and respondent No. 4)	Total marks secured (merit list Rank in parentheses)
1	Respondent No. 4 in both the O.As. i.e. 613/2018 & 414/2018	69 (Merit list Rank 309)
2	Applicant in O.A. No. 613/2018 (falling under SC category)	103 (Merit list Rank 251)
3	Applicant in O.A. No. 414/2018 OBC category)	111 (Merit list Rank 195)

5. The basis of adoption of policy of compartmentalization of Horizontal Reservation as per Social Reservation category, as given by MPSC, may be listed as below:-

(a) MPSC has submitted in affidavit in reply that initially General Administration Department had declared policy regarding method of applying horizontal reservation vide its Circular No. एसआरव्ही-१०९७/प्र.क.३१/९८/१६-अ, dated 16.03.1999 covering horizontal reservation like Open (Female), Open (Sports), Open (Ex-serviceman) etc. The said policy was amended by another Government Circular dated

13.08.2014 to give effect to rule laid down by judicial pronouncements as elaborated in following paras.

(b) According to the Government guidelines issued by the Circular dated 13.08.2014, the clause 8.1 of the advertisement No. 71/2015 dated 04.07.2015, as quoted in preceding para No. 2(d), is applicable only for post in Open (General) category and not to posts under Open (Horizontal Reservation) category.

(c) Government Circular No. एसआरव्ही-१०९७/प्र.क.३१/९८/१६-अ, dated 16.03.1999 issued by the General Administration Department of Government of Maharashtra allowed considering reserved category candidates also for Horizontal Reservation under respective Open Social Reservation category, based on merit. However, this Tribunal laid down a principle in O.A. No. 437/2012 in Kum. Archana Shivaji Khambe & Ors. Vs. State of Maharashtra and Ors., decided on 02.04.2014 and in O.A. No. 820/2013 Lorna Dorothy Pinto and Ors. Vs. MPSC, decided on 01.04.2014, that the Horizontal Reservation is a compartmentalized reservation, ordering all to stay within respective social category for the purpose of social reservation, meaning thereby that the

backward category candidates were not eligible to be considered against Horizontal Reservation quota for Open category. This Tribunal took similar view while deciding O.A. No. 301/2019 in the case of Irfan Mustafa Shaikh Vs. State of Maharashtra and Ors. The said decision of the Tribunal was upheld by the Hon'ble High Court of Judicature at Bombay and also by the Hon'ble Apex Court.

(d) MPSC has further submitted that the method of applying the Horizontal Reservation has been considered in detail by the Hon'ble High Court, Bench at Aurangabad while deciding the **W.P. No. 10103 of 2015** filed by **Miss Rajani D/o Shaileshkumar Khobragade Vs. State of Maharashtra and Ors.** and judgment delivered on 31.03.2017 and the Hon'ble High Court has upheld the provisions of Government Circular dated 13.08.2014, as well as, the procedure followed by the Commission accordingly.

(e) MPSC has further submitted that this Tribunal, bench at Aurangabad, had decided O.A. No. 944/2017 filed by Anjali Kamlakar Kendre along with other connected O.As., invoking the issue of method of applying horizontal

reservation to Open category posts. This Tribunal has also decided that reserved category candidate cannot be considered for the posts horizontally reserved in Open category. The Hon'ble Tribunal also upheld the procedure followed by the MPSC in this respect.

6. Law settled down in respect of availability of the migration in Horizontal Reservation : –

(i) Hon'ble Supreme Court has finally settled down the law relating to availability of migration in Horizontal Reservation in the case of **Saurav Yadav and Ors. Vs. State of Uttar Pradesh and Ors. in Miscellaneous Application No. 2641 of 2019 in Special Leave Petition (Civil) No. 23223 of 2018**, decided on 18.12.2020 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.

(ii) In this background, it is also important to ascertain whether the law settled in **Saurav Yadav and Ors. Vs. State of Uttar Pradesh and Ors. in Miscellaneous Application No. 2641 of 2019 in Special Leave Petition (Civil) No. 23223 of 2018** has retrospective effect? The

parties to the two Original Applications have not made any express claim that the said settled rules have to be given retrospective effect by reopening all the results of selection process conducted by MPSC, or similar agencies, which have been completed and closed as per then applicable laws and rules which in turn, had been upheld by Tribunals and Courts. I too, have not come across any provision under which the said settled law mandates reopening of closed results in recruitment processed held prior to judgment in *Saurav Yadav* case (*supra*).

7. Whether judgment of Hon'ble Apex Court in *Saurav Yadav's* case (*supra*) is judgment in *rem* or judgment in *personam*? –

In order to deal with the issues involved in the two Original Applications in a correct manner, it is, in my opinion, important to determine whether the settled law relating to horizontal reservation through decision on Miscellaneous Application in *Saurav Yadav's* case (*supra*) is for action in *rem* or action in *personam*. As is crystal clear that the settled law relating to horizontal reservation is applicable to all similar matters and does not have application limited to the case of parties to the

Miscellaneous Application No. 2641 of 2019 in Special Leave Petition (Civil) No. 23223 of 2018, decided on 18.12.2020, therefore, the said judgment is in *rem*.

8. Referring to the Hon'ble Apex Court judgment dated 17.10.2014 in **Civil Appeal No. 9849 of 2014 (Arising out of SLP (C) No. 18639 of 2012) in State of Uttar Pradesh and Ors. Vs. Arvind Kumar Shrivastav and Ors.** - in order to prescribe further course of action to be taken by the respondents in the two Original Applications under consideration for giving effect to the order which may be passed by this Tribunal, it is noticed that the Hon'ble Apex Court in **Civil Appeal No. 9849 of 2014 (Arising out of SLP (C) No. 18639 of 2012) in State of Uttar Pradesh and Ors. Vs. Arvind Kumar Shrivastav and Ors.** by its judgment dated 17.10.2014 has laid down following rule :-

“Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of the Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by the Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly

situated persons did not approach the Court earlier, they are not to be treated differently.”

9. Issues/ challenges in *applying the laws settled down in Saurav Yadav’s case (supra) regarding migration in Horizontal Reservation with retrospective effect for results finalized by MPSC as per then prevailing law-*

(a) It is evident from the submissions made by the MPSC, which have not been contested by the applicant, that deviation from rules set out by the Government Circular dated 16.03.1999 took place after issuance of revised Circular dated 13.08.2014 by implementation thereof. However, MPSC has not received any general direction / mandate either from the State Government or from judicial pronouncements to re-open all the results of selection process carried out earlier for the purpose of recruitment in Government services for giving effect to the settled law in *Saurav Yadav’s case (supra)* with retrospective effect, without which MPSC on its own may not be able to reopen the selection processes conducted earlier.

(b) Therefore, the first and foremost question that arises in the present matter is whether all or which of the results

of selection examinations conducted by MPSC during period starting from issue of revised guidelines by a circular dated 13.08.2014 by the General Administration Department of Government of Maharashtra till finally settling of law regarding horizontal reservations under Open category in Saurav Yadav case (*supra*) need to be reopened for revising the results according to the settled law? I am of the considered opinion that doing so by MPSC or similar body on its own is not mandated by the settled law. Moreover, if the results already declared by MPSC etc., as per the rules and law prevailing at the time of finalizing the results, are reopened for all Horizontal Reservations for all Social Reservation Categories then there may prevail utter confusion which may be beyond manageable dimensions and also may lead to multiple litigations. Moreover, posts under horizontal reservations may have been converted into general category under respective social reservation category as per rules and may not be available after completion of selection processes. Therefore, this option may not offer a practical solution.

(c) Let us consider the material difference made by the law settled by Saurav Yadav case (*supra*) in the present

context which essentially is the cancellation of “compartmentalization” of horizontal reservation under Open category of social reservation. Under rules of ‘compartmentalization’ a candidate under reserved social reservation category with claims for horizontal reservation too, may have higher merit than the last candidate selected under same horizontal reservation of social reservations category ‘Open’ but he /she may not have been selected under the same horizontal reservation category falling under ‘Open’ social reservation category. Had the rule of ‘compartmentalization’ not been in force then, such a more meritorious candidate could have been selected under ‘Open’ category; resultantly, making room for another candidate from reserved category to get appointments under respective horizontal reservation category. If all such candidates with higher merit are to be given appointment creating parity with the last candidate selected under all horizontal reservation of Open social reservation category, then number of vacant posts available as on today out of those initially advertised, may not be sufficient to accommodate all of them. In order to deal with such a situation, only option which may be available is to accommodate all such candidates against vacancies which occurred subsequent to issue of

advertisement notifying vacancies under the selection process under consideration or against future vacancies or by creating supernumerary posts. All such options may, in effect, amount to curtailing job opportunities for future batches of candidates and the same may also be against the settled laws.

(d) Essence of the prayers in the two Original Applications is clearly to the effect that the concerned recruitment process may be reopened in a limited manner, just for granting the two Original Applications benefit of the settled law by giving retrospective effect to the settled law and accordingly, MPSC may be directed to recommend their names to respondent No. 1 for appointment against existing vacancies. It is implied in the prayer that the applicants have taken pains to approach the Tribunal and therefore, they have a superior claim as compared to any other candidate higher in merit position in the un-exhausted merit-list. This implied reasoning has been voiced during stage of oral arguments and do not sustain scrutiny of law including the principles of natural justice.

(e) Based on analysis in preceding paras 8 (a) to 8 (d), it would be prudent and lawful option not to re-open any of the results and the selection processes completed earlier in general and in view of the two Original Applications under consideration in particular, unless any lawful basis is brought on record.

(f) However, the prevailing fact cannot be overlooked that a few aggrieved candidates have been approaching this Tribunal from time to time by filing Original Applications, even by getting condonation of delay in filing the Original Applications, and have been getting relief in *personam* by getting the completed processes reopened to the extent to accommodate their individual prayers, by invoking the law settled in Saurav Yadav case (*supra*) with retrospective effect. In my considered opinion, continuing with this process deserves to be reviewed at this stage as continuing with the same may amount to breaching the general principle laid down by the Hon'ble Apex Court in the case of State of Uttar Pradesh Vs. Arvind Kumar Shrivastav (*supra*). Moreover, the applicants, who get relief from the Tribunal may not have superior claim for appointment against a few vacancies available, based on their position in

merit list and those having superior claims than the applicants before the Tribunal may not have been joined as respondents despite being proper and necessary parties. In such a situation, passing any judgment in *personam*, on the ground that only those applicants who have taken pains to approach the Tribunal deserve to be granted relief by the Tribunal, may not be just and fair, rather, doing so may amount to violation of principle of natural justice and the general rule laid down by the Hon'ble Apex Court in this regard in Arvind Kumar Srivastava case (*supra*).

(g) It is important to protect the sanctity of recruitment processes which have been completed by running a transparent process in accordance with laws and rules in force at the relevant point of time. In case, the mandate of Hon'ble Apex Court judgment in Saurav Yadav's case (*supra*) is to give retrospective effect to the settled law, then too, giving relief in *personam* to the applicant without confirming whether they have superior claim in comparison with similarly situated others, may be in violation with the principles of natural justice and the law laid down in State of Uttar Pradesh Vs. Arvind Kumar Shrivastav (*supra*) case and therefore, may be *ultra vires*. Therefore, in my

considered opinion, the two applications do not merit being allowed. Hence, following order:-

ORDER

- (A) After considering all the facts on record and oral submissions made, I, hereby, record my finding that the Original Application No. 613 of 2018 and O.A. No. 414 of 2018 are devoid of merit and fit to be dismissed.
- (B) Respondents No. 1 to 3 may take steps to fill up the posts remaining vacant on conclusion of selection process in these O.As. initiated on the basis of MPSC Advertisement No. 71/2015, dated 04.07.2015, as per standard procedure prescribed in this regard, which may be either by reopening the concluded selection process and offering appointments to candidates from un-exhausted merit list, solely on the basis of merit or, by carrying out fresh selection process, as the case may be. While doing so, the settled laws applicable for Horizontal Reservations under 'OPEN' social reservation category must be followed.
- C. No orders as to costs.

MEMBER (A)

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD**

O.A.NOS. 414 & 613 BOTH OF 2018

**Reference under S. 26 of the Administrative Tribunals Act, 1985 in
matter of O.A. NOS. 414 & 613 BOTH OF 2018**

Date: - 30.03.2022

1. It is regarding common orders passed by the Division Bench of this Tribunal at Aurangabad in O.A. No. 414 and 613, both of 2018. As the members of the Division Bench are equally divided on certain points which may be stated in brief in terms of Operating Parts of the two separate orders passed by the two members on 09.03.2022, this reference is being made under provisions of S. 26 of the Administrative Tribunals Act, 1985 (in short, **“The Act, 1985”**). For ready reference the provisions of S. 26 of “The Act, 1985” are being quoted as under:

“26. Decision to be by majority.—If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Tribunal who have heard the case, including those who first heard it.”

2. **Points of Differences:** Points on which the two members differ may be stated in terms of the *Operating Parts* of the separate orders prepared by them, which are as follows. For the rationale based on which the two members have taken different individual views, reference may be made to the part comprising of analysis of facts in the respective orders:-

[I] ORDER as per Justice P. R. Bora, Member (J)

- i. (i) The respondent No. 2, the Maharashtra Public Service Commission, Mumbai, is directed to recommend the names of the present applicants for their appointment on the post of Assistant Public Prosecutor Grade-A within four weeks from the date of this order, whereupon the respondent No. 1 shall issue the letters of appointment in favour of both the applicants within four weeks thereafter.
- ii.
- iii. (ii) Original Application Nos. 414 & 613, both of 2018 stand allowed in the aforesaid terms without any order as to costs.

[II] ORDER as prepared by Mr. Bijay Kumar, Member (A):-

- (A) After considering all the facts on record and oral submissions made, I hereby, record my finding that the Original Application No. 613 of 2018 and O.A. No. 414 of 2018 are devoid of merit and fit to be dismissed.

- (B) Respondent No. 1 to 3 may take steps to fill up the posts remaining vacant on conclusion of selection process in these O.A.s initiated on the basis of MPSC Advertisement No. 71/2015, dated 04.07.2015, as per standard procedure prescribed in this regard, which may be either by reopening the concluded selection process and offering appointments to the candidates from un-exhausted merit list, solely on the basis of merit or, by carrying out fresh selection process, as the case may be. While doing so, the settled laws applicable for Horizontal Reservations under 'OPEN' social reservation category must be followed.
- (C) No order as to costs.

3. Thus, Registrar is directed to forward the record and proceeding of both the OAs to the Hon'ble Chairperson, M.A.T. Mumbai for further decision on the point of Reference as provided Under Section 26 of the Administrative Tribunals Act, 1985.

MEMBER (A)

MEMBER (J)

PLACE : AURANGABAD
DATE : 30.03.2022.

MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD**ORIGINAL APPLICATION NO. 613 OF 2018**
WITH
ORIGINAL APPLICATION NO. 414 OF 2018
(Subject : Appointment)**1. ORIGINAL APPLICATION NO. 613 OF 2018****DISTRICT : AURANGABAD****Sonelben D/o Dadabhai Pawar,**)
Age:-30 years, Occupation : Legal Practitioner,))
R/o. C/o D.L. Pawar, Changing Room,)
Sports Authority of India (SAI),)
Dr. Babasaheb Ambedkar Marathwada)
University Campus, Aurangabad.) **...APPLICANT****V E R S U S**

- 1. The State of Maharashtra,**)
Through Secretary,)
Home Department,)
Mantralaya, Mumbai- 400001.)
- 2. Maharashtra Public Service Commission,))**
5 ½, 7th& 8th Floor, Cooperage)
Telephone Exchange Building, Maharshi)
Karve Road, Cooperage, Mumbai 400021.)
Through its Secretary.)
- 3. Director,**)
Director of Public Prosecution,)
Mumbai (M.S.).)
Barrack No. 6, Behind Yashodhan Bldg.)
Dinsha Vachcha Road, Mumbai -400020)
- 4. Poonam Satyanarayan Soni,**)
Age : Major, Occupation : Advocate,)
R/o : Through Assistant Director & Public)
Prosecutor, Office Near S.P. office, Opposite)
Of Aurvedic College, Behind Radhe Govind)
Hotel, S.P. Office Chowk,)
Nanded, Tq. & Dist. Nanded.) **..RESPONDENTS**

W I T H**2. ORIGINAL APPLICATION NO. 414 OF 2018****DISTRICT : JALNA**

Vranda D/o Pralhadrao Sadgure,)
 Age:-33 years, Occupation : Advocate,)
 R/o. Sortinagar, Near Ambad Choufulli,)
 Old Jalna 431 213.)

...APPLICANT**V E R S U S**

1. The State of Maharashtra,)
 Through Secretary,)
 Home Department,)
 Mantralaya, Mumbai-32.)

2. Maharashtra Public Service Commission (MPSC),
 Through its Deputy Secretary,)
 Head Office, 5 ½, 7th& 8th Floor, Cooperage,)
 Telephone Nigam Building, Maharshi)
 Karve Road, Cooperage, Mumbai 400021.)

3. Director,)
 Director of Public Prosecution,)
 Mumbai (M.S.).)

4. Poonam Satyanarayan Soni,)
 Age : Major, Occupation : Advocate,)
 R/o : Through Assistant Director & Public)
 Prosecutor, Off. Near S.P. office, Opposite))
 Of Aurvedic College, Behind Radhe Govind))
 Hotel, S.P. Office Chowk,))
 Nanded, Tq. & Dist. Nanded.))

..RESPONDENTS

APPEARANCE : Shri Nitin S. Kadarale, Advocate for the
 Applicant in O.A. No. 613/2018.

: Shri I.S. Thorat, Presenting Officer for
 Respondent Nos. 1 to 3 in O.A. No. 613/2018.

: Shri Avinash S. Deshmukh, Advocate for the Respondent No. 4 in O.A. No. 613/2018.

: Shri V.B. Wagh, Advocate for the Applicant in O.A. No. 414/2018.

: Shri I.S. Thorat, Presenting Officer for Respondent Nos. 1 to 3 in O.A. No. 414/2018.

: Ms. Preeti Wankhade, Advocate for the Respondent No. 4 in O.A. No. 414/2018.

CORAM : Shri V.D. Dongre, Member (J)

DATE : 08.06.2022.

COMMON - ORDER

1. In view of dissenting judgments delivered by the learned Division Bench constituting of learned Member (J) and learned Member (A) separately on 09.03.2022, both the Members communicated their reference under Section 26 of the Administrative Tribunals Act, 1985 on 30.03.2022 to the Hon'ble Chairperson, Maharashtra Administrative Tribunal, Mumbai, whereupon the Hon'ble Chairperson was pleased to constitute this Member (J), Bench at Aurangabad for hearing of the points differed by the learned Members of the Maharashtra Administrative Tribunal, Aurangabad Bench. As per the said reference made on 30.03.2022, the points of difference amongst the learned Members are as follows :-

“[I] ORDER as per Justice P. R. Bora, Member (J)

- iv. (i) The respondent No. 2, the Maharashtra Public Service Commission, Mumbai, is directed to recommend the names of the present applicants for their appointment on the post of Assistant Public Prosecutor Grade-A within four weeks from the date of this order, whereupon the respondent No. 1 shall issue the letters of appointment in favour of both the applicants within four weeks thereafter.
- v. (ii) Original Application Nos. 414 & 613, both of 2018 stand allowed in the aforesaid terms without any order as to costs.

[II] ORDER as prepared by Mr. Bijay Kumar, Member (A) :-

- (D) After considering all the facts on record and oral submissions made, I hereby, record my finding that the Original Application No. 613 of 2018 and O.A. No. 414 of 2018 are devoid of merit and fit to be dismissed.
- (E) Respondent No. 1 to 3 may take steps to fill up the posts remaining vacant on conclusion of selection process in these O.A.s initiated on the basis of MPSC Advertisement No. 71/2015, dated 04.07.2015, as per standard procedure prescribed in this regard, which may be either by reopening the concluded selection process and offering appointments to the candidates from un-exhausted merit list, solely on the basis of merit or, by carrying out fresh selection process, as the case may be. While doing so, the settled laws applicable for Horizontal Reservations under ‘OPEN’ social reservation category must be followed.
- (F) No order as to costs.”

This reference is made under Section 26 of the Administrative Tribunals Act, 1985. The provision of Section 26 is as follows :-

“26. Decision to be by majority.—If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or

refer the case for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Tribunal who have heard the case, including those who first heard it.”

So far as scope and ambit of the said Section 26 of the Administrative Tribunals Act, 1985 while deciding the reference is concerned, learned Advocates for the applicants in both the matters submitted that the interpretation of the said provision made by the various decisions of the Hon'ble High Courts and the Hon'ble Supreme Court of India would show that the 3rd Judge has to opine only on the points of difference. To drive home the said preposition, they relied upon the following citations :-

- (i) Manubhai P. Vashi Vs. Bar Council of Maharashtra and Goa delivered by the Hon'ble Full Bench of Hon'ble Bombay High Court reported in 2007 (4) Mh. LJ 641.
- (ii) Vasant Ganu Patil of Thane Vs. Chancellor, University of Mumbai and Others delivered by the Hon'ble Division Bench of the Hon'ble Bombay High Court reported in 2015 (1) AIR Bom. R. 576.
- (iii) State of Andhra Pradesh Through Principal Secretary and Ors. Vs. Pratap Karan and Ors. delivered by the Hon'ble Division Bench of the Hon'ble Supreme Court of India reported in (2016) 2 Supreme Court Cases 82.

2. In this regard, learned Advocates for respondent No. 4 in both the matters relied upon the decision of the Hon'ble High

Court of Jammu and Kashmir and Ladakh at Jammu in the matter of **Arvind Samyal and Ors. Vs. UT of J & K and Others**, decided on 07.03.2022 in which similar preposition is laid down.

3. Learned Presenting Officer for the respondent Nos. 1 to 3 has conceded the said legal position.

4. The facts and law involved in both the matters are of similar nature and therefore, both the O.As. were considered by the learned Division Bench of this Tribunal to hear and decide the same in common.

5. Both the abovesaid applications are made by two different applicants, however against the same respondent Nos. 1 to 4. The MPSC published an advertisement No. 71/2015 on 04.07.2015 inviting online applications from the eligible candidates for the post of Assistant Public Prosecutor, Grade-A, thereby total 175 such posts were advertised. Out of those posts, 166 were fresh, whereas 09 posts were by way of backlog of the seats reserved for Backward Class. Out of 175 seats, 92 were for Reserved Class and 83 were for the Open Category Candidates. Some seats were reserved under Horizontal Reservation. Both these cases are relating to Horizontal Reservation for Open Female Candidates.

25% seats were reserved for Open Female Candidates. The dispute raised in the present matters relates to these appointments.

6. The applicant in O.A. No. 414/2018 i.e. Ms. Vranda Pralhadrao Sadgure belongs to Other Backward Class (O.B.C.). She is qualified Advocate and practicing as a Lawyer in the District & Sessions Court, Jalna from the year 2009. In pursuance of the aforesaid advertisement No. 71/2015 she applied for the post of Assistant Public Prosecutor Grade-A. In the prescribed application in the Column '*Do you wish to avail the facilities available for Backward Class Candidates?*', the applicant has recorded the answer as '*NO*'. Below the aforesaid question, there is another question '*Do you want yourself to be considered for the open category post as well?*' and the applicant has recorded an affirmative answer against the said column. This applicant also produced on record a copy of online Registration Application as part of Annexure-N collectively at page Nos. 149 to 151 of the Paper Book. On page No. 250 in this regard, however there are 3 columns described as under :-

"Do you possess prescribed educational qualifications as per the advertisement ? – Yes

Do You wish to avail facilities available for Backward Class Candidates ?- No

Do you want yourself to be considered for Open (General) Category as well? (Note : 1. If you want yourself to be considered for Open (General) Category, you will have to pay full fees as applicable for Open (General). 2. [Backward Category Female / Sportsman / Ex-serviceman Candidates will not be considered for Open (Female) / Open (Sports) / Open (Ex-serviceman) posts as per provisions of the Govt. circular Dated 13th August, 2014]) – Yes.”

This applicant also deposited fees of Rs.515/- prescribed for the Open category candidates. In the examination held by the M.P.S.C., this applicant appeared and secured 111 marks and was shown in the merit list of the candidates passing the examination at Sr. No. 235. The M.P.S.C., however, did not include her name in the list of selected candidates.

7. Insofar as the applicant in O.A. No. 613/2018 i.e. Ms. Sonelben Dadabhai Pawar – is concerned, she belongs to S.C. category. She is qualified Advocate and practicing as Advocate at Aurangabad since the year 2009. In pursuance of the advertisement bearing No. 71/2015, she also forwarded online application for the post of Assistant Public Prosecutor Grade-A. In the online application submitted by her, she had given affirmative answer against the question '*whether she wants to avail the benefit for Backward Class candidate*'. The next question was also answered by her in affirmative to the effect that *she also wants to*

be considered as the candidate in the Open category. She appeared in the examination held by the M.P.S.C. for the said post and interview taken thereafter and she secured 103 marks and was thus shown at Sr. No. 251 in the merit list published by the M.P.S.C. in order of a merit. She had also deposited the fees of Rs.515/- prescribed for Open Class candidate. The M.P.S.C. did not include her name in the list of selected candidates.

8. It is the common grievance of the applicants that despite securing more marks than some of the last selected Open Female Candidate like respondent No. 4, the M.P.S.C. has not recommended their names for the wrong reason that the applicants belong to Reserved Class. In the circumstances, the applicants have prayed directions for their appointment on the subject post.

9. The respondent No. 2 - MPSC resisted the contentions in the Original Applications contending that in para No. 8 of the advertisement, it was mentioned that the candidates belonging to backward class will be considered against the Open (General) category posts only, if they fulfill the conditions such as age limit, fees, qualification etc. fixed for Open category. The said clause relates to the posts in Open (General) category and not to the Open Horizontal (i.e. Open Female, Open Sports etc.) posts. To

substantiate the same, they placed reliance on the G.R. Dated 16.03.1999 (Exhibit R-1) and Government Circular dated 13.08.2014 (Exhibit R-2). In the circumstances, the applicants being reserved category candidates cannot be considered for the post reserved for Open Female category. In view of the above-said Circular dated 13.08.2014, only Open category candidate is eligible for the Open (Female) posts. Hence, the applicants were rightly not recommended for Open Female category posts. The said Circular dated 13.08.2014 is based on the decision of the Tribunal, and as such, it is implemented in right perspective.

10. It is further submitted by the said respondent No. 2-MPSC that the method of applying the Horizontal Reservation was considered in detail by the Hon'ble High Court, Bench at Aurangabad while deciding the **W.P. No. 10103 of 2015** filed by **Miss Rajani D/o Shaileshkumar Khobragade Vs. State of Maharashtra and Ors.**, delivered on 31.03.2017 and the Hon'ble High Court has upheld the provisions of Government Circular dated 13.08.2014, as well as, the procedure followed by the Commission accordingly. In that regard, they also referred to the decision of this Tribunal, bench at Aurangabad in O.A. No. 944/2017 filed by Anjali Kamlakar Kendre along with other connected O.As.

11. During pendency of both these O.As., the Hon'ble Apex Court delivered the judgment in the case of **Saurav Yadav & Ors. Vs. State of Uttar Pradesh & Ors.** reported in **(2021) 4 SCC 542**. As per the said decision of the Hon'ble Apex Court now there has remained no dispute and thereby it is held that the posts vacant under horizontal reservation in Open category have to be filled on merit basis by allowing migration from other social reservation categories too. In this judgment, above-said ratio is laid down by approving such view taken in the various decisions of the Hon'ble High Courts of Rajasthan, Bombay, Uttarakhand and Gujrat being correct and rational. Hon'ble Bombay High Court decisions in this regard referred are as follows :-

- (i) Asha D/o Ramnath Gholap Vs. The President, District Section Committee / Collector, Beed, Dist. Beed and Ors. reported in 2016 SCC OnLine Bom 1623 : (2016) 3 AIR Bom R 376 in W.P. No. 3929 of 2015 decided on 30.03.2016.
- (ii) Smt. Kanchan Vishwanath Jagtap Vs. Maharashtra Administrative Tribunal Nagpur and Anr. reported in 2016 (1) Mh.L.J. 934 in Writ Petition No. 1925 of 2014 with other connected writ petitions decided on 16th December 2015.
- (iii) Smt. Tejaswini Raghunath Galande Vs. The Chairman, MPSC and Ors. reported 2019 (4) Mh.L.J 527 in W.P.

No. 5397/2016 with W.P. No. 5396/2016 decided on 23.01.2019.

(iv) Charushila Tukaram Chaudari and Ors. Vs. State of Maharashtra and Ors. (W.P. No. 4159/2018 & 3 other W.Ps.) reported in 2019 SCC OnLine 1519 decided on 08.08.2019.

(v) Smt. Shantabai Laxman Doiphode Vs. The State of Maharashtra and Ors. reported in AIR Online 2020 Bom 2259 in W.P. No. 6326/2018 decided on 14.10.2020.

12. Final reliefs granted in the case of **Saurav Yadav** (cited supra) decided by the Hon'ble Apex court are as follows :-

“37. Having come to the conclusion that the Appellant No.1 and similarly situated candidates had secured more marks than the last candidates selected in ‘Open/General Category’, the logical consequence must be to annul said selection and direct the authorities to do the exercise de novo in the light of conclusions arrived at by us. However, considering the facts that those selected candidates have actually undergone training and are presently in employment and that there are adequate number of vacancies available, we mould the relief and direct as under :-

a) *All candidates coming from ‘OBC Female Category’ who had secured more marks than 274.8928, i.e. the marks secured by the last candidate appointed in ‘General Category–Female’ must be offered employment as Constables in Uttar Pradesh Police.*

- b) *Appropriate letters in that behalf shall be sent to the concerned candidates within four weeks.*
- c) *If the concerned candidates exercise their option and accept the offer of employment, communications in that behalf shall be sent by the concerned candidates within two weeks.*
- d) *On receipt of such acceptance, the codal and other formalities shall be completed within three weeks.*
- e) *Letters of appointment shall thereafter be issued within a week and the concerned candidates shall be given appropriate postings.*
- f) *For all purposes, including seniority, pay fixation and other issues, the employment of such candidates shall be reckoned from the date the appointment orders are issued.*
- g) *The employment of General Category Females with cut off at 274.8928 as indicated by the State Government in its affidavits referred to in paragraphs 5 and 8 hereinabove are not to be affected in any manner merely because of this judgment.”*

13. Learned Advocate for the respondent No. 4 relied upon the Clause-(g) of the above-said judgment, which protects the candidates, who are already selected from Open category under General category Females and submitted that in any eventuality the selection of respondent No. 4 has to be protected and cannot

be disturbed. Admittedly, the selection and appointment of the respondent No. 4 is already duly protected.

14. Learned Presenting Officer appearing on behalf of respondent Nos. 1 to 3 on the other hand submitted that the selection process is carried out in view of the then prevailing proposition of law that there was compartmentalized horizontal reservation in respect of Open category also and the posts of Open Female category were to be filled in from Open General category candidates only and migration of reserved candidates, though having secured more marks, was not permissible and the selection is done in accordance with the then prevailing G.R. dated 16.03.1999 and Government Circular dated 13.08.2014 based on the judicial decisions.

15. As stated earlier the reference is made stating the difference of opinion regarding grant of relief. Both the judgments record that the principles laid down in the citation of **Saurav Yadav** (cited supra) case decided by the Hon'ble Apex Court is in rem and is binding upon all the judicial forums under Section 141 of the Constitution of India. The view of the learned Member (J) is by way of giving relief to the applicants for recommending them by the MPSC and giving appointment by the State Government considering 6 vacancies available. As against that the learned

Member (A) has rejected both the Original Applications, but ordered filling of remaining vacancies in accordance with settled law as of now from un-exhausted merit list. As per the said order, it is specifically stated that while doing so, the settled laws applicable for Horizontal Reservation under Open Social reservation category must be followed. Learned Member (A) has based his said conclusion more particularly relying upon the case law of the Hon'ble Apex Court in **Civil Appeal No. 9849 of 2014 (Arising out of SLP (C) No. 18639 of 2012) in State of Uttar Pradesh and Ors. Vs. Arvind Kumar Shrivastav and Ors**

wherein it is laid down as under :-

“Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of the Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by the Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.”

16. As against that, the learned Member (J) has been pleased to rely upon the following judgments :-

- (i) Chairman, U.P. Jal Nigam & Anr. Vs. Jaswant Singh & Anr. reported in (2006) 11 SCC 464.
- (ii) State of Karnataka Vs. S.M. Kotrayya reported in (1996) 6 SCC 267.
- (iv) Jagdish Lal Vs. State of Haryana reported in 1997 (6) SCC 538.

17. In the case of **State of Uttar Pradesh & Ors. Vs. Arvind Kumar Srivastava & Ors.** (cited supra) it is observed there are many decisions of the Hon'ble Apex Court where, in some cases, the Courts have extended the benefit to the similarly situated persons, whereas in some other cases similar benefit is denied to the second set of people who approached the Court subsequently. Their Lordships have referred to few of such previous decisions in (i) **U.P. Jal-Nigam Vs. Jaswant Singh, (2006) 11 SCC 464**, (ii) **State of Karnataka Vs. S.M. Kotrayya, (1996) 6 SCC 267**, (iii) **Jagdish Lal Vs. State of Haryana, 1997 (6) SCC 538**.

18. The issue involved in the case of **Chairman, U.P. Jal Nigam & Anr. Vs. Jaswant Singh & Anr.** (cited supra), was the entitlement of the employees of the Nigam to continue in service up to the age of 60 years. In **Harwindra Kumar Vs. Chief Engineer, Karmik, 2005 (13) SCC 300**, the Hon'ble Supreme Court has earlier held that Nigam employees were, in fact, entitled to continue in service up

to the age of 60 years. After the aforesaid decision a spate of writ petitions came to be filed in the Hon'ble High Court by those who had retired long back. The question that arose for consideration of the Hon'ble Apex Court was, as to whether the employees who did not wake up to challenge their retirement orders, and accepted the same, and had collected their post-retirement benefits as well, could be given relief in the light of the decision delivered in **Harwindra Kumar** (supra). The Hon'ble High Court had granted such relief to the said Nigam employees. The Hon'ble Supreme Court, however, refused to extend the benefit applying the principle of delay and laches. The Hon'ble Supreme Court held that when a person who is not vigilant of his rights and has acquiesced into the situation, cannot be heard after a couple of years on the ground that the same relief should be granted to him as was granted to the persons similarly situated who were vigilant about their rights and challenged their retirement.

19. **State of Karnataka & Ors. Vs. S.M. Kotrayya & Ors., 1996 (6) SCC 267** was a service matter. The respondents in the said matter while working as teachers in the Department of Education, availed of Leave Travel Concession (LTC) during the year 1981-82. Later it was found that they have never utilized the benefit of LTC but had drawn the amount and used it.

Consequently, recovery was made in the year 1984-86. Some persons in similar cases challenged the recovery before the Administrative Tribunal, which allowed their Applications in August 1989. On coming to know of the said decision, the respondents filed Applications in August 1989 before the Tribunal. The Tribunal allowed the applications filed by them by condoning the delay which has occasioned in filing the applications. The appeal was preferred against the order passed by the Administrative Tribunal and in the appeal the Hon'ble Supreme Court set aside the order passed by the Tribunal holding that the applicants had committed the delay in approaching the Tribunal.

20. In **Jagdish Lal Vs. State of Haryana, 1997 (6) SCC 538**, the Hon'ble Supreme Court reaffirmed rule that if a person chose to sit over the matter and then woke up after the decision of the Court, then said person cannot stand for the benefit. Though in the cases of similarly situated persons, the relief was granted by the Court earlier, on account of delay and laches on part of the petitioner in approaching the Court, the Hon'ble Supreme Court declined to grant any relief.

21. In this regard few more citations placed on record by the respective learned Advocates for the respective applicants, one of which is as follows :-

(i) In the matter **Neelima Shangla Vs. State of Haryana and Ors.** reported in **(1986) 4 Supreme Court Cases 268.** Ratio laid down in the said citation is as follows

:-

“2.....The net result is that qualified candidates, though available, were not selected and were not appointed. Miss Neelima Shangla is one of them. In the view that we have taken of the rules, Miss Neelima Shangla is entitled to be selected for appointment as Subordinate Judge in the Haryana Civil Service.

3. As a result of our finding a few more candidates would also be entitled to be included in the Select List and ordinarily we would have directed their inclusion in the list. But having regard to the fact that most of the others have not chosen to question the selection and the circumstance that two years have elapsed we do not propose to make any such general order as that would completely upset the subsequent selection and create confusion and multiplicity of problems. The cases of any other candidate who may have already filed a writ petition; this Court or the High Court will be disposed of in the light of the, judgment. These who have not so far chosen to question the selection will not be allowed to do so in the future because of their laches.”

22. In the case in hand, it is not disputed that the applicants in both the O.As. have secured higher marks than the last candidate selected only from Open General category to the post of horizontal

reservation of Open Female category being selected as per the compartmentalized horizontal reservation. However, by now that is not the correct law and the migration of meritorious reserved candidates to the post of horizontal reservation in Open General category is permissible and therefore, those who have secured more marks than the last such candidate would be entitled for the post of the Open Female category. It is true that there may be few more candidates from reserved category in the unexhausted list who would be eligible to get the benefit of horizontal reservation post of Open Female category in view of the ratio laid down by the Hon'ble Apex Court in **Saurav Yadav** (cited supra) case. However, in this regard it is already observed that apart from the applicants nobody else eligible candidates either filed any litigation in the Maharashtra Administrative Tribunal or made any representation to the respondent No. 2 i.e. MPSC ventilating the grievances. Apart from that, during pendency of these litigations, it is not brought on record by the MPSC specifically that more meritorious candidates than the applicants in the unexhausted list from the reserved category are available. But it is a fact that there are candidates from reserved categories including the applicants, who have secured higher marks than the last candidate selected in the horizontal reservation category of Open Female.

23. In the case in hand, the post of Assistant Public Prosecutor is under consideration. Admittedly, the candidates applying for the said posts are highly qualified persons and working in the legal field. In view of the same, it cannot be said that such eligible candidates could be having any difficulty in approaching the competent forum of Maharashtra Administrative Tribunal or even at least making representation to the respondent No. 2 MPSC ventilating their grievance. They may have at least raised their grievance approaching the said forum.

24. It is true that the respondent No. 2 MPSC is autonomous body and the selection process is governed by certain procedure. There is also certain procedure for filling up the left over vacancies. However, in this case, in view of the settled law as regards horizontal reservation in Open General category candidates like the applicants in fact had earlier legitimate claim over the original vacancies advertised. In view of the same, in my considered opinion, by not ordering reopening of filling up vacancies to the limited extent will not cause irretrievable prejudice to some other candidates, who could be said to be eligible at the time of filling up the vacancies from unexhausted list. In these circumstances, I concur the view taken by the learned Member (J) ordering the MPSC and the State Government

to give recommendation and appointment to the applicants out of admittedly six vacant posts.

25. In the circumstances as above, the learned Registrar of this Tribunal is directed to take further steps in the preset matters as per rules.

MEMBER (J)

Kpb/S.B. O.A. 613 with 414 both of 2018 VDD Appointment