

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

ORIGINAL APPLICATION NOS 368 WITH 388 OF 2019

DISTRICT : SATARA

1) ORIGINAL APPLICATION NO 368 OF 2019

Amruta Suresh Yadav,)
After marriage [Amruta S. Pol],)
At Post : Kawathe, Tal-Wai.)
Dist-Satara 415 516.)...**Applicant**

Versus

1. The Chief Secretary)
The State of Maharashtra)
Mantralaya, Mumbai 400032)
2. The Secretary)
General Administration Department,)
Mantralaya, Mumbai 400032.)
3. The Secretary)
Women and Child Development)
Department, Mantralaya,)
Mumbai 400032.)
4. The Secretary,)
Home Department,)
Mantralaya, Mumbai.)
5. The Secretary)
Through the Maharashtra Public)
Service Commission)
Floor 5-8, Cooperage MTNL Building,)
Maharshi Karve Road, Cooperage,)
Mumbai, Maharashtra 400021)

2) ORIGINAL APPLICATION NO 388 OF 2019

1. Priyanka Gundu Sawant)
Age. 25 years, Occ. Student)
R/at. Munguswadi, Post. Madilage,)
Tal. Ajara, Dist. Kolhapur 416505)
2. Priyanka Bhimrao Wanave)
Age. 26 years, Occ. Student)
R/at. Post Indapur, Tal Indapur)
Dist. Pune – 413106.)
3. Prajakta Prakash Bhosale)
Age. 25 years, Occ. Student)
R/at. Tambewadi, Tal. Barshi,)
Dist. Solapur 413401.)
4. Ratan Anandrao Patil,)
[After marriage name])
Smt Mansi Mrutyunjay Kadukar,)
Occ : Student, R/at : C/o: Shri Ishwar)
Bhima Kadukar, At Post Gijavane Mal,)
Kadgaon Road, Tal-Gadhinglaj 416 502.)
5. Shashikala Janaba Bolake,)
Occ :Student, R/at: Murude, Post-Ajara,))
Tal-Ajara, Dist-Kolhapur 416 505.)
6. Archana Babaso Khandagale)
Age. 31 years, Occ. Student)
R/at. Post Sangewadi, Tal. Sangola,)
Dist. Solapur 413317)
7. Swati Janardan Aphale)
Age. 27 years, Occ. Student)
R/at. Post Uralgaon, Tal. Shirur,)
Dist. Pune, 412211)
8. Shital Rajaram Patil)
Age. 24 years, Occ. Student)
R/at. Patane, Post. Save,)
Tal. Shahuwadi,)

- Dist. Kolhapur 416213)
9. Bharti Subhash Hanpude)
Age. 26 years, Occ. Student)
R/at. Goundare, Post. Awati,)
Tal. Karmala, Dist. Solapur 413203)
10. Priti Fulchand Lomate)
Age. 24 years, Occ. Student)
R/at. Shahu Nagar, Kakade Plot,)
Ashirinayak Chowk,)
Osmanabad 413501.)...Applicant

V/s.

1. The Chief Secretary)
The State of Maharashtra)
Mantralaya, Mumbai 400032)
2. The Secretary)
General Administration Department,)
Mantralaya, Mumbai 400032)
3. The Secretary)
Women and Child Development)
Department, Mantralaya,)
Mumbai 400032.)
4. The Secretary,)
Home Department,)
Mantralaya, Mumbai)
5. The Secretary)
Through the Maharashtra Public)
Service Commission)
Floor 5-8, Cuprage MTNL Building,)
Maharshi Karve Road, Cuprage,)
Mumbai, Maharashtra 400021)
6. Pravin Nandlal Kolu,)
Occ : Student, At Post Ghodgaon,)
Main Road, Near Ram Mandir,)
Jalgaon, Chopda, Ghodgaon 425 107.)
7. Madhuri RAvindra Kankhare,)

- Occ : Student, At Post Chahardi,)
 Tal-Chopda, Dist-Jalgaon,)
 Chahardi 425 107.)
8. Pooja Niranjana Dharmale.)
 Occ : Student, At BHeskheda, Borala Rd))
 Ward No. 2, Post Borala, Amravati,)
 Chandurbazar, Beskheda 444 704.)
9. Madhuri Ashokrao Telmore,)
 Occ : Student, At Post Dadhi,)
 Bhatkuli, Telmore, Dadhi, Amravati,)
 Bhatkuli, Dadhi 444 601.)
10. Shubhangi S. Selokar,)
 Occ : Student, R/at Ward No. 6,)
 Near Buddha Mandir, Shivaji Chowk,)
 Nagbhir, Budha Vihar, Chandrapur,)
 Nagbhir, Nagbhid 441 205.)
11. Varsha Ramesh Ghode,)
 Occ : Student, R/at 19, New Sangvi)
 Main Road, C, Narsinha Residency,)
 Pune Haveli, Pimpale Gurav 411 027.)
12. Rohini Dhanraj Narsinghe,)
 Occ : Student, At Post Naigaon,)
 Osmanabad, Kalam, Naigaon 413 510)
13. Sonali Raghunath Patil,)
 Occ : Student,)
 At Post Kedgaon, Chikhalthan,)
 04, Patil Vasti, Solapur.)
 Karmala, Kedgaon, 413 202.)
14. Ashvini Chandrarahar Gaikwad,)
 Occ : Student, R/at Shivaji Nagar,)
 Vairag, Madha Road, Solapur,)
 Barshi, Vairag 413 402.)
15. Kavita Bhagwan Takale,)
 Occ : Student, A/P Laxmi Dahiwadi,)
 Mangalwedha-Sangola,)

- Takalevasti, Laxmi Dahiwadi 413 305.)
16. Shahin Zakirhusen Desai,)
Occ : Student, AT Post Herle, Kolhapur.)
Hatkanangle, Herle 416 005.)
17. Ashwini Anandrao Waychal,)
Occ : Student, At Post Bavchi, Sangli,)
Tal-Walva, Bavchi 416 3301.)
18. Shraddha Sambhaji Parase,)
Occ : Student, At Post Ghanwad,)
Tal-Khanapur, Dist-Sangli 415 311.)
19. Geeta Manadeoappa Raskar,)
Occ : Student, R/at: 1068,)
Near Appaswami Temple, Asangalli,)
Amrdas Baba Road, Washim,)
Risod, (MCI) 444 506.)
20. Sonali Arunrao Aglawe,)
R/at Sant Dnyaneshwar Nagar,)
Post Nalwadi, Ward No. 4, Mhasala,)
Wardha (MCI) 442 001.)
21. Pallavi Rajendra Kalamkar,)
Occ : Student, R/at 1416,)
Kalamkar House, Vikramshila Nagar,)
Sindhi Meghe, Wardha, (MCI) 442 001)
22. Khutija Maheboob Shaikh,)
Occ :Student, R/at Ganesh Nagar,)
Khandoba Bazar Road, Near Zakir)
Husen College, Teacher Colony,)
Parbhani 431 401.)
23. Ashwini S. Ubale,)
Occ : Student, R/at Time of India)
Bungalow, Trambak Road,)
BH Panchayat Samiti, Nasik 422 002.)
24. Poonam Rajaram Suryawanshi,)
Occ : Student, R/at: E-14, Belawali,)
Gurudatta Society, Jadhav Colony,)

- Behind Ram Kutir Apt, Thane,)
 Ambernath, Badlapur 421 503.)
25. Renuka Gautam Galphade,)
 R/at: Renuka Nagar, Ambejogai Rd,)
 Gangai Vasahat 2, Latur 413 531.)
26. Priyanka S. Wakale,)
 Occ : Student, A/P Islampur,)
 Matruchaya, Kisan Nagar, Sangli,)
 Walwa, Uran Islampur 415 409.)... Respondents

Shri S.S Dere, learned advocate for the Applicants.

Ms Swati Manchekar, learned Chief Presenting Officer for the Respondents no 1 to 5.

Ms Madhvi Ayyapan, holding for Shri S.B Talekar, learned advocate for Respondent no. 7.

Respondents no 6 & 8 to 26 were served with notice, but they have not been represented.

CORAM : **Shri P.N Dixit (Vice-Chairman) (A)**
Shri A.P Kurhekar (Member)(J)

DATE : **22.10.2019**

PER : **Shri P.N Dixit (Vice-Chairman) (A)**

O R D E R

1. Heard Shri S.S Dere, learned advocate for the Applicants, Ms Swati Manchekar, learned Chief Presenting Officer for the Respondents no 1 to 5 and Ms Madhvi Ayyapan, holding for Shri S.B Talekar, learned advocate for Respondent no. 7. Respondents no 6 & 8 to 26 were served with notice, but they have not been represented

2. Brief facts of the case:-

In response to the Advertisement No. 66/2017, issued on 3.10.2017 by Respondents no. 5 (M.P.S.C), the applicants participated in the same. The advertisement was for filling up 650 posts of P.S.I. 85 posts were earmarked for SC Category (55 SC General, 26 SC Female, 4

SC Sports), 46 posts earmarked for ST Category, (30 ST General, 14 ST Female, 2 ST Sports), one post earmarked for VJ-A, 16 posts earmarked for NT-B (10 NT-B General, 5 NT-B Female, 1 NT-B Sports), 20 posts earmarked for NT-C (13 NT-C General, 6 NT-C Female, 1 NT-C Sports), 8 posts earmarked for NT-D (6 NT-D General, 2 NT-D Female), 96 posts earmarked for OBC (62 OBC General, 29 OBC Female, 5 OBC Sports), 12 posts earmarked for SBC, (62 SBC General, 29 SBC Female, 5 SBC Sports), 336 posts earmarked for unreserved category, (238 for Open General, 110 for Open Female, 18 for Open Sports), (Exh. 'O', page 13 of O.A 388/2019).

3. All the applicants claim to be belonging to Non Creamy Layer category and thereby sought horizontal reservation. As they qualified in the Main Examination, they remained present for physical test and interview. The applicant in O.A 361/20189 has secured 196 marks in the selection process (Exh. 'Q', page 14 of O.A 388/2019).

4. On 19.12.2018, Respondents no. (G.A.D), issued Government Resolution. This G.R repealed clause (1) of G.R dated 13.8.2014, and permitted migration of candidates from vertical reservation to Open General Category, even though they were claiming benefits of horizontal reservation (Exh. 'R', page 14 of O.A 388/2019).

5. Aggrieved by this G.R, which according to the applicants resulted in their exclusion from the selection process, they have made following prayers:-

“10(a) To hold that the impugned G.R dated 19.12.2018 is ultra vires to the provision of Article 15(2) and 16(2) of Constitution of India, to the extent it permits migration of Backward Class candidate claiming horizontal reservation to Open Competition category, further this Hon'ble Tribunal may be pleased to hold that the impugned G.R dated 19.12.2018 is contrary to the law laid down by Hon'ble Apex Court in case of Indra Sawhney and Ors Vs. Union of India & Ors, (1992 Supp. (3) SCC 217) more particularly paragraph 514 and 812.

(b) This Hon'ble Tribunal may further be pleased to direct the Respondents no 4 and 5 to revise the list of candidates eligible for

recommendation dated 8.3.2019 and further be pleased to direct the Respondent nos 4 and 5 not to migrate the candidate belongs to horizontal reservation from one category to another category.”
(Quoted from page 30 of O.A 388/2019)

6. Learned advocate for the applicants has challenged this impugned G.R on following grounds:-

“A candidate belonging to any class of reservation to which the candidate may be entitled, is entitled to be arrayed in open merit, according to the order of merit. However, the same rule does not apply whenever a women candidate applies in horizontal reservation in a particular class of vertical reservation for shifting/migrating in the open women category on the principles of open competition.

(Quoted from para 14 of int. order dt 11.4.2019 in O.A 368/2019)

7. In support of the above submission, learned advocate for the applicant has relied on the interim order dated 11.4.2019 passed by this Tribunal in O.A 388/2019. Relevant portion of the same reads as under:-

“13. Learned advocate for the applicant has argued out that the impugned G.R dated 19.12.2018 either results in permitting women candidates selected in the process of horizontal reservation based on their claim in vertical reservation, to be transferred/migrated to women reservation in open female reservation category. This act of executive is either based on erroneously drafted G.R dated 19.12.2018 or due to erroneous interpretation of said G.R Either act of the Respondents is wrong in violation of dictum of Hon'ble Supreme Court conferred in para 513 & 514 read with para 812 in the reported judgment of Constitution Bench of Hon'ble Supreme Court in Indra Sawhney Vs. Union of India 1992 Supp (3) SCC 217, as further elaborated and illustrated in subsequent judgment of Hon'ble Supreme Court in Anil Kumar Gupta Vs. State of U.P (1995) 5 SCC 173 through para 15 thereof and in case of Rajesh Daria Vs. Rajasthan Public Service Commission (2007) 8 SCC 785 as well in the judgment of High Court of Judicature of Rajasthan at Jaipur in accompanying group of Writ Petitions in S.B Civil Writ Petition No. 11119/2012, Laxmi Kanwar & Anr Vs. State & Ors, through last four paragraphs of the judgment appearing at page 30 onwards of the judgment on record at page 650 onwards.....

The submission of applicant recorded in foregoing para appears to be well founded on the basis of judgment cited by learned advocate for the applicant.”

(Quoted from para 13 of int. order dt.11.4.2019 in O.A 368/2019)

8. Relevant pleadings from the O.A are as under:-

(i) *The reservation for women violates the Article 16 (2) of the Constitution of India, but considering the disadvantageous position of the women the special provision can be made under Article 15(3) of the Constitution of India. Therefore the preference to the women under Article 15 (3) is not a reservation is in consensus with Article 16 (4) of the Constitution of India. The Hon'ble Supreme Court has also interpreted that the citizens of India cannot be discriminated on the ground of sex (gender) for public employment since the same is prohibited under Article 16 (2) of the Constitution of India, whereas all the reservation in public employment are permissible under Article 16 (4) of the Constitution of India. Therefore, to save the special provision under Article 15 (3), there is no provision for reservation of women but there can be situation under Article 15 (3) to make special provision for women for considering the posts in public employment and the same should filled category wise without applying the principle of reservation which permit the migration.*

(Quoted from para 6.25 of O.A)

(ii) *If para 514 of Indra Sawhney read carefully it appears that the women are considered as vulnerable section of the society, whatever the strata to which they belong. The Hon'ble Supreme Court further held that if the women are kept in the quota of respective class as for other categories are persons in that circumstances there is no need to keep the special quota for the women as such and whatever the percentage of limit of the Reservation under Article 16 need not be exceeded. It is to be noted that the Hon'ble Constitution Bench be pleased to hold that there cannot be separate reservation for women under Article 16 since the same is specifically barred by Article 16 (2). Considering the disadvantageous of women the framer of constitution, indeed, has made a special provision to save this situation under Article 15 (3). Therefore, the provisions made for the women is not a reservation as like under Article 16 of the Constitution of India, the candidate belong to backward class enjoys two fold constitutional privilege either to compete in Open General Category or the category to which he belongs. By migrating to Open General Category the*

quota fixed under Article 16 (4) is remain intact and the same is not counted against the meritorious candidate.

(Quoted from para 6.26 of O.A)

(iii) But the above principle is not applicable in case of provisions made under Article 15 (3), therefore in view of the observation made by Hon'ble Supreme Court in para 514 of its judgment the women candidate shall not migrate from one category to another category as the same privilege is not available under Article 16 (2) of the Constitution of India. The Applicant further states that the observation of Hon'ble Supreme Court in para 514 and para 812 is required to be read together to give harmonious interpretation of horizontal reservation policy laid down by Courts time to time. It is to be noted that the candidate belongs to reserved category may migrate to only one category i.e. Open General Category, the candidate belongs to SC Category cannot migrate to ST Category in spite of though he / she secured more meritorious marks than the candidate belongs to ST / OBC / NT-(D), (C), (B) and SBC. Like the same other candidates belong to any other category would migrate only to Open General Category, therefore the word interchangeability / compartmentalized refers to migration from Backward Class category to Open General category.

(Quoted from para 6.27 of O.A)

(iv) If the Hon'ble Supreme Court barred the migration of candidates from one category to another category on the ground of interchangeability it refers only to migration from Backward Class category to Open Category, since those candidates cannot migrate to any other category except the Open General category. The Applicant therefore states that the classification is prohibited under Article 16 (2) of the Constitution of India, whereas special provisions are made under Article 15 (3) cannot referred as a reservation, it refers only preference in a particular class. Therefore, if any candidate enjoying the under Article 15 (3) chose to migrate from one category to another category that amounts to violation of Article 16 (2) of Constitution of India.

(Quoted from para 6.28 of O.A)

(v) *The impugned GR issued by the Respondent No. 2 is based on various judgments passed by this Hon'ble Tribunal as well as the Hon'ble High Courts. It is to be noted that the judgment referred in the impugned GR does not touch a single ratio of interchangeability or either Article 15 (3) or Article 16 (2) of the Constitution of India at the same time none of the judgment refers to para 514 or 812 of the Indra Sawhney, therefore the view taken in all those cases by ignoring the necessary provisions of Law.*

(Quoted from para 6.29 of O.A)

(vi) *The Law laid down by Hon'ble Apex Court in case of Anil Kumar Gupta is misinterpreted time to time either by the Respondent or not correctly brought to the notice of this Hon'ble Tribunal. The fact to be noted that as per the Law laid down by Indra Sawhney the reservation provided in the public employment under Article 16 (4), the principles of reservation were broadly discussed by the Constitution Bench and it comes to the conclusion the provision made under Article 16 (4), considering the bar under Article 16 (2), the candidate can first compete against the Open Category and shall not be counted against the social reservation to which he is belongs, at the same time the said candidate can migrate / change his own category on the basis of merit under the provisions of under Article 16 (4) only. The principles of Article 16 (4) is not applicable to the Article 15 (3) because the State is not empowered to provide the reservation under Article 15 (3) but the State can make necessary adjustment by keeping specified quota in each and every particular category by not exceeding the number of percentage of reservation.*

(Quoted from para 6.30 of O.A)

(vii) *Therefore in case of Anil Kumar Gupta the situation was considered by Hon'ble Apex Court and be pleased to record the interchangeability is not permissible. The reservation under Article 15 (3) is compartmentalized so as to limit within the constitutional bar under Article 16 (2) of the Constitution of India. The Applicant states that the Applicant has categorically stated in above foregoing paragraphs in Writ Petition No. 6262 of 2016 to the Hon'ble Bombay High Court, Bench at Aurangabad has observed in paragraph 27 that if the migration under vertical*

reservation is permissible the same is permissible in case of horizontal reservation, the observation made by Hon'ble Bombay High Court is contrary to the Law laid down by Hon'ble Apex Court in case of Indra Sawhney particularly in para 514 and 812 of the Constitution of India. It is to be noted that the Hon'ble Apex Court be pleased to hold that all the reservation are not similar in nature and the reservation for women specifically described under para 514 is not considered by the Hon'ble Bombay High Court, therefore the Law laid down by Hon'ble Bombay High Court is per-incuriam. Therefore, the reliance place by the Respondent No. 2 while issuing the said GR is bad in Law.

(Quoted from para 6.31 of O.A)

(viii) The Respondent at the same time relied on the order passed in Writ Petition No. 1925 of 2014 and 1930 of 2014 is not applicable in case of the horizontal reservation since in para 10 of those judgment the Hon'ble High Court categorically made it clear that the compartmentalised is not in question in those cases, therefore without application of mind the Respondent has issued the corrigendum dated 19.12.2018 to the GR dated 31.08.2014 is violating the principles of Law laid down in case of Indra Sawhney. The Applicant states that the Respondent has not considered the Law laid down by Hon'ble High Court, Bench at Aurangabad in case of Writ Petition No. 10103 of 2015 by order dated 07.03.2017 thereby the GR dated 13.08.2014 is upheld by the Hon'ble High Court with remark that the GR issued by the State Government is within the constitutional limit.

(Quoted from para 6.32 of O.A)

(ix) The Respondent No. 2 has not at all taken into consideration the judgment dated 07.03.2017 passed by Hon'ble Bombay High Court in Writ Petition No. 10103 of 2017, the fact to be noted that the Hon'ble High Court be pleased to hold that the GR dated 13.08.2014 is within constitutional limit and the same is valid. While deciding the issue in hand the Hon'ble High Court was pleased to consider the principles of Law laid down in case of Indra Sawhney, Anil Kumar Gupta, Rajesh Kumar Daria, Asha Gholap and Kanchan Jagtap. It is to be noted that the Hon'ble High

Court at the same time relied on Ashish Kumar Pandey, the judgment passed by Hon'ble Allahabad High Court. The Hon'ble Bombay High Court was pleased to hold that the interchangeability of the category of candidates belongs to reserved category amounts to violation of constitutional provisions such as interchangeability / compartmentalized.

(Quoted from para 6.33 of O.A)

(x) The impugned corrigendum dated 19.12.2018 violates two principles of Law, the first principle is Law laid down by Hon'ble Apex Court in case of Indra Sawhney thereby para 514 the Hon'ble Apex Court was pleased to hold that the migration of women claiming the benefits under the provisions of Article 15 (3) is contrary to provisions of Article 16 (2). The said GR also violates the basic concept of reservation in the provisions of Article 16 (4) is exhaustive provision, which has to be read along with the Article 16 (2) of Constitution of India and in the any manner no reservation under Article 16 (4) can be given by violating the provisions of Article 16 (2). The Respondent No. 2 permitted the migration of candidates belongs to reserved category as if the candidate are entitle for the reservation under public employment as per Article 16 (4) of the Constitution of India. No candidate entitled to the reservation in view of the barring provisions under Article 16 (2) of Constitution of India.

(Quoted from para 6.34 of O.A)

(xi) The power of the State Government under Article 15 (3) of the Constitution of India is to be limited extent of making special provision. The State Government cannot transgress its power so as contrary to the Article 16 (2) of the Constitution of India. By issuance of the impugned GR the State Government has rendered the provisions of Article 16 (2) redundant, the State has no authority to interpret the provisions of Constitution at its own convenience so as to include or exclude any class under Article 16 (4) of the Constitution of India. It is to be noted that while making the provision the State has to considered or ought to have brought to the notice of this Hon'ble Tribunal that the special provision under Article 15 (3) is not in the respect of appointment in the favour of any Backward Class of any citizen but the State is under obligation who make the necessary

provisions in respect of women and children considering the limitation under Article 16 (2).

(Quoted from para 6.35 of O.A)

(xii) The power of the State for making provision for reservation under Article 16 (4) is exhaustive in nature whereas the power of the State Government under Article 15 (3) is restricted by Article 15 (1) and 16 (2) of the Constitution of India. If the State ensures to provide the necessary seats to women as by way of special provision the State shall not create further class among the class so as to extend the benefits of special provision.

(Quoted from para 6.36 of O.A)

(xiii) The Respondent No. 5 relied on the said impugned corrigendum GR dated 19.12.2018 and migrated the candidates from the Backward Class category in place of seats earmarked for Open Female Category. The act in the part of Respondent No. 5 is unconstitutional since the same is contravening the provisions of Article 16 (2) of the Constitution of India. Hence the Respondent is required to reverse its action by non considering the reserved category candidates in place of earmarked for Open Female. (The copy of the list of candidates eligible for recommendation dated 8.3.2019 is annexed herein with and marked as Exh. 'S').

(Quoted from para 6.37 of O.A)

9. Learned advocate for the applicant states that the impugned G.R dated 19.12.2018 exceeds the constitutional limit, and therefore, the same is unconstitutional.

10. Submission by the Respondents:-

Respondent no. 2 (G.A.D) have filed their affidavit in reply. The relevant portion from the same is as under:-

“4. I say and submit that, the Circular dated 16.03.1999 of the Horizontal Reservation was issued after taking into consideration the judgment of Apex Court in case of Anil

Kumar Gupta & Ors. V/s State of Uttar Pradesh & Ors [JT 1995 (5) SC-505]. The Circular of Horizontal Reservation dated 13.08.2014 is based on the Circular dated. 16.03.1999. Vide Circular dated 13.08.2014 Government has issued explanation for the guidance of the procedure for the implementation of Horizontal Reservation for the direct recruitment in Government service in consonance with the law laid down by the Apex Court in a case of Anil Kumar Gupta V/s. State of U.P.

5. I further say and submit that, Circular dated 13.08.2014 is issued after considering the judgment of Hon'ble Maharashtra Administrative Tribunal, Aurangabad Bench in Irfan Shaikh's case, decision of Hon'ble Maharashtra Administrative Tribunal, Mumbai in Kirti Wagh's case and Archana Khambe's case. Moreover, I say and submit that the judgment of Hon'ble Maharashtra Administrative Tribunal, Aurangabad Bench in Irfan Shaikh's case is not only confirmed by the Hon'ble High Court but also by the Hon'ble Supreme Court and thus attained finality and binding on the State.

6. I say and submit that, in the meantime the Circular dated 13.08.2014 was challenged by many candidates before the Hon'ble Maharashtra Administrative Tribunal and Hon'ble Bombay High Court. Out of these cases, some decisions were in favor of the State Government's policy (e.g. Rajani Shailendrakumar Khobhragade O.A. No.189/2015 and Hon. Bombay High Court Bench at Aurangabad in W.P. No. 10103/2015), while some decisions were against the policy. Hon'ble Bombay High Court, Bench at Nagpur in Writ Petitions 1925/2014, 1930/2014, 2070/2017, 5729/2017, 6262/2016, Hon'ble Bombay High Court, Bench at Aurangabad in Writ Petitions 3929/2015, Hon'ble Bombay High Court in Writ Petition 6637/2014,

277/2015, 7034/2016 had given the judgment against the policy framed by Circular dated 13.08.2014. Hon'ble Maharashtra Administrative Tribunal, Mumbai vide its order dated 18.06.2018 in Original application No. 202/2017, 203/2017 (M.A. 19/2018) has quashed and set aside the Circular dated 13.08.2014 and directed the Government to take corrective measures. To avoid further complications and court cases and to clarify the Policy of Horizontal Reservation, Maharashtra Government decided to implement Hon'ble Court's orders. In pursuance of the order of Hon'ble Maharashtra Administrative Tribunal, Government has issued Corrigendum on 19.12.2018. Vide Corrigendum dated 19.12.2018 para (a) of circular dated 13.08.2014 has been substituted which in vernacular language reads as under:-

“(अ) प्रथम टप्पा :- खुल्या प्रवर्गातील (अराखीव पदे) उमेदवारांची गुणवत्तेच्या निकषानुसार निवड यादी तयार करावी. या यादीत खुल्या प्रवर्गात गुणवत्तेच्या आधारावर मागासवर्गीय उमेदवारांचाही (अनुसूचित जाती, अनुसूचित जमाती, वि.जा.भ.ज., वि.मा.प्र., इ.मा.व व एसईबीसी) समावेश होईल. या यादीत समांतर आरक्षणानुसार उमेदवारांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणानुसार आवश्यक उमेदवारांची संख्या पर्याप्त नसेल तर समांतर आरक्षणाची पदे भरण्याकरीता सदर यादीतील आवश्यक पर्याप्त संख्येइतके शेवटचे उमेदवार वगळून पात्र उमेदवारांपैकी आवश्यक पर्याप्त संख्येइतके समांतर आरक्षणामधील गुणवत्तेनुसार पात्र उमेदवार घेणे आवश्यक आहे.”

7. I say and submit that, the Corrigendum is applicable from the date of issue i.e. 19.12.2018. The Corrigendum is applicable to the results which will be declared on or after 19.12.2018. In the present Original Application, the final result of the Police Sub -Inspector, Main Examination-2017 is declared on 08.03.2019. I.e. after 19.12.2018. Therefore, in the present case final selection list of candidates should be prepared as per the State Government's Corrigendum dated 19.12.2018.”

(Quoted from para 4 to 7 of affidavit of Res.no. 2)

11. Respondent no. 5 (M.P.S.C) have justified action taken by them. According to M.P.S.C the correct procedure has been followed. The relevant portion of the affidavit reads as under:-

“7. It is pertinent to note that the final result of the said post has already been declared on 8th March, 2019 in accordance with the provisions contained in the Government Circular dated 19th December, 2018 providing clarification regarding the method of applying horizontal reservation, i.e. as per the provisions contained in the Government Circular dated 19th December, 2018 the migration of the reserved category candidates is permitted for the Open horizontally reserved posts. Moreover, it is to say and submit that the candidates qualified on Lower standard merit (i.e. cut-off line of marks fixed for reserved category) in the Preliminary and/or Main Examination were considered only for their relevant Reserved Category posts.”

(Quote from para 7 of affidavit of Res.no. 5, M.P.S.C)

12. Learned advocate for Private Respondent no. 7 has filed affidavit in reply. Learned advocate for private Respondent no. 7 has pointed out that the prayer made by the applicant to declare the impugned G.R dated 19.12.2018 as ultra vires is not tenable for the following grounds.

13. Learned advocate for the private Respondent no. 7 states that during the pendency of the present original application, the issue regarding the vires of the Government Resolution dated 19.12.2018 came to be decided by the Hon'ble Bombay High Court in Writ Petition No. 4159 of 2018 vide judgment and order dated 08.08.2019.

14. The Hon'ble High Court after considering the provisions of the Government Resolution dated 19.12.2018, the Government Circular dated 13.08.2014, the judgment of the Hon'ble Apex Court in several cases including the case of **Indra Sawhney v. Union of India** reported in **1992 Supp (3) SCC 217** and the provisions of the Constitution, has categorically upheld the Government Resolution dated 19.12.2018 in the following terms:

(vi) It also cannot be disputed that a reserved category candidate claiming reservation as and by way of horizontal reservation or vertical reservation, is always entitled to claim seat from open

*category as per his/her individual merit. This is particularly because open category or quota as such is meant to be fulfilled from amongst all categories and only on the basis of merit. In such allotments, caste, creed, sex or any other criteria relating to any candidate does not at all matter. If a candidate belonging to any reserved category is able to secure allotment of seat, solely on the basis of his merit, such seat or post is not liable to be counted against the said reserved category. Whereas, in the case of horizontal reservations, the position is otherwise. **The procedure prescribed for preparing the select list in the circulars dated 13.08.2014 and 19.12.2018 is correctly recorded.** The reference to “open” seats in the circular dated 13.08.2014 shall be construed as a category comprising of the candidates on the basis of open competition and includes all reservation categories. **The subsequent circular dated 19.12.2018 is of explanatory nature.***

(Emphasis supplied)

15. Learned advocate for private Respondent no. 7 stated that that the edifice of the original application is based on the contention that the GR dated 19.12.2018 is contrary to the circular dated 13.08.2014 and is against the judgment of the Hon’ble Apex Court in the case of **Indra Sawhney** so also the provisions of the Constitution.

16. Learned advocate further stated that Hon’ble High Court has not only upheld the vires of the Government Resolution dated 19.12.2018, but has made it clear that it is nothing but a clarification offered to the Government circular dated 13.08.2014 that too after discussing the judgment of the Hon’ble Apex Court in the case of **Indra Sawhney Vs. Union of India and Ors** reported in **1992 Supp (3) SCC 217** and the provisions of the Constitution.

17. Learned advocate contended that once the issue involved in the original application is decided by the Hon’ble High Court, this Hon’ble Tribunal is bound by the same. The High Court is vested with the power of superintendence over the courts and tribunals in the State to which it

exercises jurisdiction, and as such decisions of the Hon'ble High Court is binding upon the tribunals in the state, particularly when we follow the doctrine of precedents.

18. Learned advocate for private Respondent no. 7 relied on the decision of the Hon'ble Supreme Court in the case of **East India Commercial Co., Ltd. Calcutta and another v. The Collector of Customs, Calcutta**, reported in **(1963) 3 SCR 338** has held as under:-

“It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of the it. If the tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to the smooth working; otherwise there would be confusion in the administration of law and respect for the law would irretrievably suffer”.

19. The Hon'ble Apex Court has taken a similar view in the cases of **Shri. Baradakanta Mishra Ex-Commissioner of Endowments v. Shri. Bhimsen Dixit** reported in **(1973) 1 SCC 446** and **Ram Bai v. Commissioner of Income Tax** reported in **(1999) 3 SCC 30**.

20. Learned advocate for private Respondent no. 7 stated that in the light of several judgments of the Hon'ble Apex Court, it is more than clear that this Hon'ble Tribunal is bound by the law laid down by the Hon'ble High Court.

21. Learned advocate for private Respondent no. 7 contended that the Hon'ble High Court since has now categorically upheld the GR dated

18.12.2018 and has further clarified that the same is in not in conflict with the circular dated 13.08.2014 and the judgment of the Hon'ble Apex Court in the case of **Indra Sawhney** and the constitutional provisions, it will be against judicial propriety to hold it otherwise.

22. Furthermore, the State of Maharashtra has already implemented the GR dated 19.12.2018 in several selection processes. Recently, the Government of Maharashtra has revised the selection list of Group A posts such as Deputy Collector, Deputy Superintendent of Police/Assistant Commissioner of Police etc. in consonance with the judgment and order dated 08.08.2019 in Writ Petition No. 4159 of 2019 and several other connected writ petitions upholding the GR dated 19.12.2018.

23. Learned advocate for private Respondent no. 7 stated that any other view if to be taken by this Hon'ble Tribunal would be contrary to the decision of the Hon'ble High Court with regard to the *lis* involved in the present original application and as such will lead to a chaotic situation. It is, therefore, not possible to accept the contention or proposition sought to be agitated in this Original Application.

24. Learned advocate for private Respondent no. 5 therefore submitted that the Original Application deserves to be dismissed.

25. Learned advocate for the private Respondent no. 7 has relied on the following judgments:-

Sr No.	Case No.	Citation	Issue	Para No.	Page No.
1.	Asha Ramnath Gholap Vs. President, District Selection Committee	2016 SCC online Bom 1623	Definition of open category	17,18, 19, 20	1-10
2.	Kanchan Vishwanath Jagtap Vs. Administrative Tribunal, Nagpur	2016(1) Mh.L.J 934	Concept of Migration	14-14	11-17
3.	Anil Kumar Gupta & Ors Vs. State of U.P and Ors	(1995) 5 SCC 173	Concept of Migration. Meaning of open category	15, 16, 17, 18 & 20	18-32
4.	Rajesh Kumar Daria Vs. Rajasthan Public	(2007) 8 SCC 785	Concept of migration.	9-10	33-41

	Service Commission & Ors		Process of migration operates when there is a shortfall		
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26. The relevant portion of judgments relied on by learned advocate for Respondent no. 7 are as under:-

(1) The Concept of Migration and Meaning of Open Category has been dealt with elaborately by Hon. Supreme Court in Anil Kumar Gupta & Ors Vs. State of U.P & Ors, (1995) 5 SCC 173 as under:-

“15. On a careful consideration of the revised notification of December 17, 1994 and the aforementioned corrigendum issued by the Lucknow University, we are of the opinion that in view of the ambiguous language employed therein, it is not possible to give a definite answer to the question whether the horizontal reservations are overall reservations or compartmentalised reservations. We may explain these two expressions. Where the seats reserved for horizontal reservations are proportionately divided among the vertical (social) reservations and are not inter-transferable, it would be a case of compartmentalised reservations. We may illustrate what we say: Take this very case; out of the total 746 seats, 112 seats (representing fifteen percent) should be filled by special reservation candidates; at the same time, the social reservation in favour of Other Backward Classes is 27% which means 201 seats for O.B.Cs.; if the 112 special reservation seats are also divided proportionately as between O.C.,O.B.C.,S.C. and S.T., 30 seats would be allocated to the O.B.C. category; in other words, thirty special category students can be accommodated in the O.B.C. category; but say only ten special reservation candidates belonging to O.B.C. are available, then these ten candidates will, of course, be allocated among O.B.C. quota but the remaining twenty seats cannot be transferred to O.C. category (they will be available for O.B.C. candidates only) or for that matter, to any other category; this would be so whether requisite number of special reservation candidates (56 out of 373) are available in O.C. category or not; the special reservation would be a water tight compartment in each of the vertical reservation classes (O.C.,O.B.C.,S.C. and S.T.). As against

this, what happens in the over-all reservation is that while allocating the special reservation students to their respective social reservation category, the over-all reservation in favour of special reservation categories has yet to be honoured. This means that in the above illustration, the twenty remaining seats would be transferred to O.C. category which means that the number of special reservation candidates in O.C. category would be $56+20=76$. Further, if no special reservation candidate belonging to S.C. and S.T. is available then the proportionate number of seats meant for special reservation candidates in S.C. and S.T. also get transferred to O.C. category. The result would be that 102 special reservation candidates have to be accommodated in the O.C. category to complete their quota of 112. The converse may also happen, which will prejudice the candidates in the reserved categories. It is, of course, obvious that the inter se quota between O.C., O.B.C., S.C. and S.T. will not be altered.

16. Now coming to the revised notification of December 17, 1994, it says that "horizontal reservation be granted in all medical colleges on total seats of all the courses....". These words are being interpreted in two different ways by the parties; one says it is over-all reservation while other says it is compartmentalised. Paragraph 2 says that the candidates selected under the aforesaid special categories "would be kept under the categories of Scheduled Castes/Scheduled Tribes/Other Backward Classes/General to which they belong. For example, if a candidate dependent on a freedom fighter selected on the basis of reservation belongs to Scheduled Castes, he will be adjusted against the seat reserved for Scheduled Castes". This is sought to be read by the petitioners as affirming that it is a case of compartmentalised reservation. May be or may not be. It appears that while issuing the said notification, the Government was not conscious of the distinction between overall horizontal reservation and compartmentalised horizontal reservation. At any rate, it may not have had in its contemplation the situation like the one which has arisen now. This is probably the reason that this aspect has not been stated in clear terms.

17. It would have been better - and the respondents may note this for their future guidance - that while providing horizontal reservations, they should specify whether the horizontal reservation is a compartmental one or an overall one. As a matter of fact, it may not be totally correct to presume that the Uttar Pradesh Government was not aware of this

distinction between "overall horizontal reservation", since it appears from the judgment in Swati Gupta that in the first notification issued by the Government of Uttar Pradesh on May 17, 1994, the thirty percent reservation for ladies was split up into each of the other reservations. For example, it was stated against backward classes that the percentage of reservation in their favour was twenty seven percent but at the same time it was stated that thirty percent of those seats were reserved for ladies. Against every vertical reservation, a similar provision was made, which meant that the said horizontal reservation in favour of ladies was to be a "compartmentalised horizontal reservation". We are of the opinion that in the interest of avoiding any complications and intractable problems, it would be better that in future the horizontal reservations are compartmentalised in the sense explained above. In other words, the notification inviting applications should itself state not only the percentage of horizontal reservation(s) but should also specify the number of seats reserved for them in each of the social reservation categories, viz., S.T., S.C., O.B.C. and O.C. If this is not done there is always a possibility of one or the other vertical reservation category suffering prejudice as has happened in this case. As pointed out hereinabove, 110 seats out of 112 seats meant for special reservations have been taken away from the O.C. category alone - and none from the O.B.C. or for that matter, from S.C. or S.T. It can well happen the other way also in a given year.

18. Now, coming to the correctness of the procedure prescribed by the revised notification for filling up the seats, it was wrong to direct the fifteen percent special reservation seats to be filled up first and then take up the O.C. (merit) quota (followed by filling of O.B.C., S.C. and S.T. quotas). The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit: then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an over-all horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates

therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment /accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.) Because the revised notification provided for a different method of filling the seats, it has contributed partly to the unfortunate situation where the entire special reservation quota has been allocated and adjusted almost exclusively against the O.C. quota.....

20. (It is made clear that OC category means the merit list and no distinction shall be made among the candidates in the OC list on the basis of their social status because it is well settled that even a ST/SC/OBC candidate is entitled to obtain a seat in the OC category on the basis of his merit).

(2) Hon'ble Supreme Court in *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors*, (2007) 8 SCC 785 has considered the issue of process of migration operates when there is a shortfall as under:-

“ 9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under [Article 16\(4\)](#) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under [Article 16\(4\)](#), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - *Indira*

Sawhney (Supra), R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), [Union of India vs. Virpal Singh Chauhan](#) (1995 (6) SCC 684 and [Ritesh R. Sah vs. Dr. Y. L. Yamul](#) (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]

10. In this case, the number of candidates to be selected under general category (open competition), were 59, out of which 11 were earmarked for

women. When the first 59 from among the 261 successful candidates were taken and listed as per merit, it contained 11 women candidates, which was equal to the quota for 'General Category - Women'. There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven women candidates selected on their own merit (candidates at Sl.Nos.2, 3, 4, 5, 9, 19, 21, 25, 31, 35 & 41 of the Selection List) and another eleven (candidates at Sl.Nos.54, 61, 62, 63, 66, 74, 75, 77, 78, 79 & 80 of the Selection List) included under reservation quota for 'General Category-Women'. This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.

(3) The definition of open category has been considered by the Hon'ble Bombay High Court in *Asha Ramnath Gholap Vs. President, District Selection Committee*, 2016 SCC online Bombay, 1623 and held as under:-

"17) The controversy arisen in the present petition revolves around the interpretation of the words "General and/or Open category". The respondents have interpreted the said words to mean 'the candidates belonging to only such castes, which are not prescribed to be socially backward'. In other words, if any candidate belongs to any such caste or tribe which falls in backward class and has been prescribed as scheduled caste, scheduled tribe or Nomadic Tribe and Vimukta Jati, cannot be included in open category and consequently cannot compete and claim the selection on any post from the said category.

18) According to us, the construction of the word "open category" so suggested by the respondents is against the constitutional mandate as well as policy of reservation in employment.

19) The import of the word "General category", which in other words can also be termed as "open category" is explained by the Hon'ble Apex court in the case of *Bihari Lal Rada Vs. Anil Jain (Tinu) and Ors.* - (2009) 4 SCC 1, thus, -

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

category seats are open seats available for all candidates who are otherwise qualified to contest to that office.

20) The Hon'ble Apex court has further observed that, The word 'General' is derived from Latin word genus.

"... It relates to the whole kind, class, or order. Pertaining to or designating the genus or class, as distinguished from that which characterizes the species or individual; universal, not particularized, as opposed to special; principal or central, as opposed to local; open or available to all, as opposed to select; obtaining commonly, or recognized universally, as opposed to particular; universal or unbounded, as opposed to limited; comprehending the whole or directed to the whole, as distinguished from anything applying to or designed for a portion only. Extensive or common to many."

(4) The concept of migration was considered by Hon. Bombay High Court in *Kanchan Vishwanath Jagtap Vs. Maharashtra Administrative Tribunal, Nagpur, 2016 (1) Mh.L.J 934* as under:-

"11. It will be appropriate to refer to the following observations of the Constitution Bench of the Apex Court in paragraph 811 in the case of *Indra Sawhney Vs. Union of India & Ors.*, reported in 1992 Supp (3) SCC 215:-

"811. In this connection, it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to say, Scheduled Castes get selected in the open competition field on the basis of their own merit, they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

12. It could thus be seen that the Constitution Bench of the Apex Court itself has held that if a Scheduled Caste candidate gets selected in the open competition on the basis of their own merit, they will not be counted against the quota reserved for Scheduled Castes and they will be treated as open competition candidates.

13. In the present case, out of the candidates who had applied against the women category, all the candidates who have been short listed belong to the different reserved categories except the intervenor in Writ Petition No. 1925 of 2014. In the interviews conducted, the petitioners were found to be the most meritorious candidates. We are, therefore, of the considered view that the facts in the present case would not be governed by the law laid down by the Apex Court in the case of *Rajesh Kumar Daria (supra)*. We are of the view that if the view of the learned Tribunal is accepted, then it would result in a situation to exist, which is not permissible in view of the law laid down by the Constitution Bench of the Apex Court in the case of *Indra Sawhney (supra)*. Merely because all the meritorious candidates in the women category belonged to the reserved categories like OBC, SC and ST, in our view cannot be a ground to deny them the benefit of their meritorious position. We find

that if the view as accepted by the learned Tribunal is accepted, it will defeat constitutional mandate as explained in the judgment in the case of Indra Sawhney (supra) by the Constitution Bench of the Apex Court. A situation would exist that a male candidate belonging to a reserved category would be entitled to be selected against an open category post if he is entitled on his own merit. However, a female candidate belonging to a reserved category, even though she is much more meritorious than a candidate belonging to open category women, would not be entitled to be selected against the said post. The said situation in effect would result in permitting a discriminatory treatment to the women reserved candidates as against the male reserved candidates. We find that such a situation is not permissible under the Constitutional Scheme as interpreted by the Constitution Bench of the Apex Court in the case of Indra Sawhney (supra).”

27. Learned advocate for private Respondent no. 7 has also relied on the judgment of Hon’ble Bombay High Court in Charushila T. Chaudhari & Ors Vs. The State of Maharashtra & Ors, W.P no. 4159 of 2018. Learned advocate submits that those candidates who have availed the benefits or concession meant for reserved category such as age relaxation, fee concession shall not be allowed to be considered in open competition, subject to the statutory scheme in horizontal / compartmentalized reservation.

28. Learned advocate for private Respondent no. 7, relied on the judgment of Hon. Supreme Court in the matter of Gaurav Pradhan & Ors Vs. State of Rajasthan & Ors, (2018) 11 SCC 352, wherein the Hon’ble Apex Court has reiterated the proposition laid down in the matter of Deepa E.V (supra) concerning the migration of horizontal reservation category candidates to open category. The issue that arose for consideration was whether the reserved category candidates who had taken benefit of age relaxation in the selection process in question and have obtained marks equal to or more than the last general category candidate, would be treated in the general/open category candidates or ought to have been confined in the reserved category. The Hon’ble Apex Court has referred to the judgment in the matter of Jitendra Kumar Singh (supra) and observed that it should be read in the context of the statutory provisions and the Government Order and it is further held that the observations in the matter of Jitendra Kumar Singh cannot be applied in a case where Government orders are to the converse effect. It is recorded that in the matter of Jintendra Kumar Singh, the view was

based on statutory scheme and circular dated 25.3.1994 has to be confined to the scheme which was under consideration, and intention of the State Government as indicated from the said scheme cannot be extended to a case where the State circulars are to the contrary especially when there is no challenge to the converse scheme as delineated by circular dated 24.6.2008. In paragraph 37 of the judgment, it is recorded thus:-

“37. The judgment of this Court in Deepa D.V fully supports the case of the appellants. In Deepa E.V case also the Circular of the Central Government dated 1.7.1998/2.7.1997 provided the relevant provision, which is to the following effect (SCC pp. 682-83)

“6. In other words, when a relaxed standard is applied in selecting SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.”

(Emphasis in original)

29. Learned advocate for private Respondent no. 7 stated that the findings made by the Hon. High Court in Charushila T. Chaudhari & Ors Vs. The State of Maharashtra & Ors, W.P no. 4159 of 2018 are relevant, which reads as under:-

“48 On consideration of judgments of the Hon'ble Supreme Court, reference to which has been made in this judgment, following conclusions emerge:

(i) There are two types of reservations, which may be described as "vertical" and "horizontal". Vertical reservations are "social" reservations provided under [Article 15\(4\)](#) and/or 16(4) of the Constitution. Those are meant for Scheduled Castes, Scheduled Tribes and Other Backward Classes. "Horizontal" reservation is provided under [Article 15\(1\)](#) and/or 16(1) of the Constitution and those are available to women, physically handicapped, freedom fighters, sportsmen, Retired Military personnel, etc.

(ii) In case the seats reserved for "horizontal" reservations are proportionately divided among the vertical (social) reservations and are not inter-transferable. It would be a case of compartmentalized reservation.

(iii) As against this, what happens in "overall" reservation is that while allocating the special reservation category candidates to

their respective social reservation, overall reservation in favour of special reservation categories is to be honoured.

(iv) The proper and correct course is to first fill up the OC quota on the basis of merit; then fill up each of the social reservation quota, i.e. Scheduled Castes/Scheduled Tribes and Other Backward Class. The third step would be to find out how many candidates belonging to "special" reservation category have been selected on the above basis. If the quota fixed for horizontal reservation is already satisfied - in case it is an overall horizontal reservation - no further question arises, but if it is not so satisfied, the requisite number of "special" reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation category by deleting the corresponding number of candidates therefrom. If, however, it is a case of {46} wp415918-3.odt compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation, as stated above, should be applied separately to each of the vertical reservations.

(See: Anil Kumar Gupta & Rajesh Kumar Dariya (supra))

(v) There is no separate category in law recognized as open category. Open or Open Competition category consists of all the seats and the categories.

(vi) It also cannot be disputed 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. This is particularly because open category or quota as such is meant to be fulfilled from amongst all categories and only on the basis of merit. In such allotments, caste, creed, sex or any other criteria relating to any candidate does not at all matter. If a candidate belonging to any reserved category is able to secure allotment of seat, solely on the basis of his merit, such seat or post is not liable to be counted against the said reserved category. Whereas, in case of horizontal reservations, the position is otherwise. The procedure prescribed for preparing the select list in the circulars dated 13.08.2014 and {47} wp415918-3.odt 19.12.2018 is correctly recorded. The reference to "open" seats in the circular dated 13.08.2014 shall be construed as a category comprising of the candidates on the basis of open competition and includes all reservation categories. The subsequent circular dated 19.12.2018 is of explanatory nature.

(vii) The horizontal reservation specifically provided in compartmentalized manner is not interchangeable or inter-transferable. The ratio of the judgment in the matter of Jitendra Kumar Singh (supra) has to be read in the context of statutory provisions and the Government Order dated 25.03.1994 and the said observations cannot be applied in case where the Government Orders are to the converse effect.

(viii) when a relaxed standard is applied in selecting SC/ST/OBC candidates, for example in the age-limit, experience, qualification,

permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies. In the same context, when candidates availed of the relaxed standards, they are not entitled to claim migration to the open category.

Deepa D.V. And Gaurav Pradhan (supra)

49 For the reasons recorded above and in view of the conclusions drawn in the above noted paragraphs, in the instant petitions,

(I) The candidates, who have applied from amongst the open category and who have not availed of any benefits of relaxed standards such as relaxation in age limit, qualification, percentage of qualifying marks, experience, etc., are entitled to be considered on the basis of their individual merit from amongst open competition category, as candidates belonging to open category.

(II) In case of compartmentalized reservation, candidates claiming horizontal reservation, shall not be permitted to migrate to horizontal open competition category.

(III) The insistence by the Maharashtra Public Service {49} wp415918-3.odt Commission to the candidates who have applied from open category though they belong to reserved category, to submit the proof in respect of their caste, is uncalled for, since the candidates who have applied from open category and have not secured any benefits available for reserved category, are entitled to claim the seat/post available for horizontal open competition category.

(IV) The directive contained in the letter dated 26.07.2017, issued by the Additional Chief Secretary, General Administration Department, Government of Maharashtra, not to consider the claim of the reserved category candidates who have tendered applications as a general category candidates for the seat/post prescribed for horizontal open competition category, is uncalled for and shall not be acted upon.

(V) The decisions in the matters of Deepa E.V. and Gaurav Pradhan (supra), governing the procedure for selection, laying down the parameters for migration, are binding upon the respondents.

(VI) The procedure in respect of preparation of the select list of candidates referred to in sub-paragraphs (i) to (iv) as under, shall have to be followed:

(i) All the seats provided for the unreserved or open category to be filled in purely on merit and merit alone, though provisionally, on the basis of the common merit list

prepared, without applying any criteria whatsoever, other than merit.

(ii) All the seats from various vertical reservation categories to be filled in completely, without applying horizontal reservations. In selecting candidates by undertaking such exercise, every candidate who has figured in the open category allotment list to be excluded. The allotments so made in favour of the reserved category candidates not be counted towards the consumption of the reserved category.

(iii) The open category list, as also each vertical reservation list to be checked and verified to find out as to whether or not, the horizontal reservations are satisfied automatically. If they are, nothing more to be done.

(iv) If it is found, upon such verification that, either horizontal reservations are not satisfied or are partly satisfied, then, appropriate number of candidates from the bottom of respective lists to be removed or deleted and candidates strictly on merits, from the separate merit list prepared for the respective horizontal reservation category to be allotted those seats, as and by way of replacement.

30. The Respondents including the private Respondents have therefore submitted that the Original Application is devoid of merit and the same deserves to be dismissed.

31. Issue for consideration:-

(1) Whether the G.R issued on 19.12.2018 is violative of Articles 15(4) & 16(2) of the Constitution of India and the judgments delivered by the Apex Court in Anil Kumar Gupta & Ors Vs. State of U.P & Ors, (1995) 5 SCC 173 and Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors (2007) 8 SCC 785 and Hon'ble Bombay High Court in Kanchan Vishwanath Jagtap Vs. Maharashtra Administrative Tribunal, Nagpur, 2016 (1) Mh.L.J 934 and Asha Ramnath Gholap Vs. President, District Selection Committee, 2016 SCC online Bom 1623.

32. Observations and findings:-

Respondent no. 5 (MPSC) issued advertisement for filling in the post of PSI by Advertisement no. 66/2017. The relevant portion of the advertisement is as under:-

२. प्रस्तुत परीक्षेमधून भरावयाच्या पदांचा तपशील खालीलप्रमाणे आहे.

पोलीस उपनिरीक्षक, गट ब (अराजपत्रिता) (एकूण ६५० पदे)											
प्रवर्ग	अ. जा.	अ.ज	वि.जा (अ)	भ.ज (ब)	भ.ज (क)	भ.ज (ड)	इ.मा. व	वि. मा.प्र.	एकूण मागासवर्गीस	सुला	एकूण पदे
पदयंख्या	८५	४६	१	१६	२०	८	९६	१२	२८४	३६६	६५०
रिक्त जागांचे प्रवर्गनिहारा सामाजिक/समांतर आरक्षणाचे विवरणपत्र खालीलप्रमाणे आहे:-											
(१) सर्वसाधारण	५५	३०	१	१०	१३	६	६२	७	१८४	२३८	४२२
(२) महिला	२६	१४	--	५	६	२	२९	४	८६	११०	१९६
(३) खेळाडू	४	२	--	१	१	--	५	१	१४	१८	३२

Respondent no. 5 (M.P.S.C) has selected candidates to fill up the above vacancies by adopting the procedure mentioned vide G.R dated 19.12.2018 which enables migration of backward class candidates following certain terms and claiming horizontal reservation to open competition category. The applicants have assailed the same on the ground that this G.R is violative of Article 15(2) and 16(2) of the Constitution of India. The applicant in O.A 368/2019 has obtained 196 marks in the selection process and even though not meritorious she is praying for selection by removing the selected candidates who have been selected following the procedure laid down in the Circular dated 19.12.2018.

33. Articles 15(2) & 16(2) of the Constitution of India read as under:-

Article 15(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition

Article 16(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State

34. Respondent no. 2 in their affidavit in reply submitted that following the judgment given by the Apex Court in the case of Anil Kumar Gupta & Ors (supra), the Government had issued Circular dated 16.3.1999 regarding horizontal reservation. The same was further clarified by Circular on horizontal reservation by Circular issued on 13.8.2014. Following a direction by this Tribunal dated 18.6.2018 in O.A 202/2017 & 203/2017 (M.A 19/2018), the Government has issued corrigendum on 19.12.2018. The same reads as under:-

“(अ) प्रथम टप्पा :- खुल्या प्रवर्गातील (अराखीव पदे) उमेदवारांची गुणवत्तेच्या निकषानुसार निवड यादी तयार करावी. या यादीत खुल्या प्रवर्गात गुणवत्तेच्या आधारावर मागासवर्गीय उमेदवारांचाही (अनुसूचित जाती, अनुसूचित जमाती, वि.जा.भ.ज., वि.मा.प्र., इ.मा.व व एसईबीसी) समावेश होईल. या यादीत समांतर आरक्षणानुसार उमेदवारांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणानुसार आवश्यक उमेदवारांची संख्या पर्याप्त नसेल तर समांतर आरक्षणाची पदे भरण्याकरीता सदर यादीतील आवश्यक पर्याप्त संख्येइतके शेवटचे उमेदवार वगळून पात्र उमेदवारांपैकी आवश्यक पर्याप्त संख्येइतके समांतर आरक्षणामधील गुणवत्तेनुसार पात्र उमेदवार घेणे आवश्यक आहे.”

35. In the present case, the results have been prepared keeping in view the clarifications issued above on 19.12.2018. Respondent no. 5 have also confirmed that action has been taken as per this Circular and accordingly migration of reserved candidates is permitted for the open horizontally reserved posts.

36. The concept of migration and meaning of open category has been discussed at length by Hon'ble Supreme Court in Anil Kumar Gupta & Ors Vs. State of U.P & Ors, (1005) 5 SCC 173. Relevant observations are as under:-

“The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit: then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an over-all horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted /accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations.”

(Emphasis added)

37. The Hon'ble Supreme Court also discussed the issue in the case of Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors (2007) 8 SCC 785 as under:-

“Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. *Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women*”.

(Emphasis added)

38. The Hon’ble Bombay High Court has elaborately discussed the issue of open category in the case of Asha Ramnath Gholap Vs. President, District Selection Committee, 2016 SCC Online Bom. 1623. The relevant portion of the same is reproduced below:-

“19) The import of the word "General category", which in other words can also be termed as "open category" is explained by the Hon'ble Apex court in the case of Bihari Lal Rada Vs. Anil Jain (Tinu) and Ors. - (2009) 4 SCC 1, thus, -

"There is no separate category like general category. The expression belonging to the general category wherever employed means the seats or offices earmarked for persons belonging to all categories irrespective of their caste, class or community or tribe. The unreserved seats euphemistically described as general category seats are open seats available for all candidates who are otherwise qualified to contest to that office

39. The Hon’ble Bombay High Court in the case of Kanchan V. Jagtap Vs. Maharashtra Administrative Tribunal, Nagpur, 2016 (1) Mh.L.J 934 has observed as under:-

“Merely because all the meritorious candidates in the women category belonged to the reserved categories like OBC, SC and ST, in our view cannot be a ground to deny them the benefit of their meritorious position.

A situation would exist that a male candidate belonging to a reserved category would be entitled to be selected against an open

category post if he is entitled on his own merit. However, a female candidate belonging to a reserved category, even though she is much more meritorious than a candidate belonging to open category women, would not be entitled to be selected against the said post. The said situation in effect would result in permitting a discriminatory treatment to the women reserved candidates as against the male reserved candidates. We find that such a situation is not permissible under the Constitutional Scheme as interpreted by the Constitution Bench of the Apex Court in the case of Indra Sawhney (supra).”

40. Reading of the above judgments clarifies that the women candidates belonging to reserved category and are meritorious cannot be denied their migration only on the ground that they belonged to reserved category.

41. Hon’ble Supreme Court in the case of Deepa E.V vs. Union of India & Others (2017) 12 SCC 630, has further clarified that:-

“6. In other words, when a relaxed standard is applied in selecting SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.”

42. Various issues which have been raised by the applicants have been addressed by the Hon. Bombay High Court in the case of Charushila T. Chaudhari & Ors Vs. The State of Maharashtra & Ors, W.P 4159/2018. The relevant portion of the same reads as under:-

“(iv) The proper and correct course is to first fill up the OC quota on the basis of merit; then fill up each of the social reservation quota, i.e. Scheduled Castes/Scheduled Tribes and Other Backward Class. The third step would be to find out how many candidates belonging to "special" reservation category have been selected on the above basis. If the quota fixed for horizontal reservation is already satisfied - in case it is an overall horizontal reservation - no further question arises, but if it is not so satisfied, the requisite number of "special" reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation category by deleting the corresponding number of candidates therefrom. If, however, it is a case of compartmentalized horizontal reservation, then the process of

verification and adjustment/accommodation, as stated above, should be applied separately to each of the vertical reservations.

(See: Anil Kumar Gupta & Rajesh Kumar Dariya (supra))

(v) There is no separate category in law recognized as open category. Open or Open Competition category consists of all the seats and the categories.

(vi) It also cannot be disputed 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. This is particularly because open category or quota as such is meant to be fulfilled from amongst all categories and only on the basis of merit. In such allotments, caste, creed, sex or any other criteria relating to any candidate does not at all matter. If a candidate belonging to any reserved category is able to secure allotment of seat, solely on the basis of his merit, such seat or post is not liable to be counted against the said reserved category. Whereas, in case of horizontal reservations, the position is otherwise. The procedure prescribed for preparing the select list in the circulars dated 13.08.2014 and 19.12.2018 is correctly recorded. The reference to "open" seats in the circular dated 13.08.2014 shall be construed as a category comprising of the candidates on the basis of open competition and includes all reservation categories. The subsequent circular dated 19.12.2018 is of explanatory nature.

43. In the present case, the merit list prepared by Respondent no. 5 (M.P.S.C) shows that the selected candidates have not availed the age relaxation and fee concession. They belong to Non Creamy Layer. They are meritorious as they have obtained 205 marks. On the other hand the applicants are demanding exclusion of the selected candidates mentioned above even though they are meritorious only because they belong to reserved category.

44. The Hon'ble Bombay High Court has already upheld the Constitutional validity of the G.R dated 19.12.2018 in Charushila T. Chaudhari's case (supra). The selected candidates though belong to the reserved category, have not availed age relaxation and fees concession. Hence, they cannot be considered as ineligible for being considered in horizontal/compartmentalized reservation.

45. Moreover, once the Hon'ble High Court has examined the issue and concluded that the Circular dated 19.12.2018 is constitutionally

valid, this decision is binding on this Tribunal and hence there is no question of examining the same again.

46. For the reasons stated above, we find that the G.R issued on 19.12.2018 has stated the procedure correctly and the prayer to quash the same is rejected. Action taken by Respondent no. 5 is valid and does not require any interference by this Tribunal.

47. We would like to record our appreciation to advocate Shri S.S Dere for the applicants and Ms Madhvi Ayyappan, learned advocate holding for Shri S.B Talekar, learned advocate for private Respondent no. 7 for their assistance in bringing forth the relevant issue on record.

48. In view of the above, both Original Applications are devoid of merit and are dismissed. Interim relief stands vacated. No order as to costs.

(A.P Kurhekar)
Member (J)

(P.N Dixit)
Vice-Chairman (A)

Place : Mumbai
Date : 22.10.2019
Dictation taken by : A.K. Nair.