

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH**

**ORIGINAL APPLICATIONS 195 & 985 OF 2015**

**DISTRICT : NASIK**

**1) ORIGINAL APPLICATION NO 195 OF 2015**

1. Ms Harshada S. Avhad, )  
R/at HUDCO, H.no. 39, )  
Samarth [W], Manmad, Dist-Nasik. )
2. Mr Vishal K. Sinare, )  
R/at : Nandoor Madhameshwar, )  
Niphad, Dist-Nasik. )
3. Ms Sindhu Tukaram Munde, )  
R/at : At Post Badvani, )  
Tal-Gangakhed, Dist-Parbhani. )
4. Mahendra Dindayal Thete, )  
At post Khairi, Tal-Kamtee, )  
Dist-Nagpur 441 002. )...**Applicant**

**Versus**

1. The State of Maharashtra )  
Through Addl. Chief Secretary, )  
Home Department, Mantralaya, )  
Mumbai 400 032. )
2. The President / Secretary, )  
Maharashtra Public Service )

- Commission, Bank of India Bldg, )  
M.G. Road, Fort, Mumbai. )  
3. The Secretary, )  
General Administration Department)  
Mantralaya, Mumbai. )...**Respondents**

## 2) ORIGINAL APPLICATION NO 985 OF 2015

- Shri Chandrakant T. Thorat )  
Working as Assistant Electrical Inspector )  
In the office of the Electrical Inspector, )  
Inspection Division no. 1, Thane. )  
Add for service of notice : )  
Shri A.V Bandiwadekar, advocate for )  
the Applicant, having office at 9, )  
“Ram Kripa”, Lt. Dilip Gupte Marg, )  
Mahim, Mumbai 400 016. )...**Applicant**

### **Versus**

1. The Chairman / Secretary, )  
Maharashtra Public Service )  
Commission, Bank of India Bldg, )  
M.G. Road, Fort, Mumbai. )  
2. The State of Maharashtra, )  
Through Principal Secretary, )  
Public Works Department, )  
Mantralaya, Mumbai 400 032. )  
3. Smt Hemlata Laxman Dalvi, )  
Working as Electrical Inspector in )

the office of Chief Engineer )  
[Electrical], P.W.D, having office at )  
Fort, Mumbai 400 032. )  
4. The State of Maharashtra, )  
Through Principal Secretary [Energy])  
Industries, Energy and Labour Dept,)  
Mantralaya, Mumbai 400 032. )...**Respondents**

Shri K.R Jagdale, learned advocate for the Applicants in O.A no 195/2015.

Shri A.V Bandiwadekar, learned advocate for the Applicant in O.A no 985/2015.

Shri K.B Bhise, learned Presenting Officer for the Respondents in O.A no 195/2015 and for Respondents no 1, 2 & 4 in O.A no 985/2015.

Shri A.A Desai, learned advocate for Respondent no. 3 in O.A no 985/2015.

**CORAM : Shri Rajiv Agarwal (Vice-Chairman)**

**Shri R.B. Malik (Member) (J)**

**DATE : 25.01.2017**

**PER : Shri Rajiv Agarwal (Vice-Chairman)**

**ORDER**

1. Heard Shri K.R Jagdale, learned advocate for the Applicants in O.A no 195/2015, Shri A.V Bandiwadekar, learned advocate for the Applicant in O.A

no 985/2015, Shri K.B Bhise, learned Presenting Officer for the Respondents in O.A no 195/2015 and for Respondents no 1, 2 & 4 in O.A no 985/2015 and Shri A.A Desai, learned advocate for Respondent no. 3 in O.A no 985/2015.

2. These Original Applications were heard together and are being disposed of by a common order as the issues to be decided are more or less similar and involve the issue of selection to the open post reserved horizontally for women by candidates belonging to other vertical reservation categories.

3. O.A no 195/2015 has been filed by the Applicants praying that the recruitment process for the post of Police Sub-Inspectors as per advertisement no. 20/2013 dated 16.07.2013 issued by the Respondent no. 2 may be cancelled and fresh physical examination and interviews may be held for these posts.

4. Learned Counsel for the Applicants in O.A no 195/2015 argued that the Applicants no 1 to 3 are women, belong to NT-D category while the Applicant nos 2 & 4 are men belonging to OBC category. The Respondent no. 2 had issued advertisement no, 20/2013 on 16.7.2013 for holding Police Sub-Inspector (Preliminary) Examination 2013. Those who qualified in the Preliminary Examination were allowed to appear in

Police Sub-Inspector (Main) Examination and notification to that effect was issued on 12.11.2013. A total of 714 posts were to be filled. Number of posts reserved horizontally for women were 213, distributed among various vertical reservation categories. The Applicant nos 1 & 3 had applied from NT-D, women category, for which 3 posts were reserved. The Applicants no 2 & 4 had applied from OBC category. The Applicants have qualified in the preliminary examination and appeared for the main examination of 200 marks. The Applicants' names were not there in the list of candidates, who were allowed to participate in the Physical Examination and interview. Learned Counsel for the Applicants argued that cut-off marks in the Written Examination for different categories were arbitrarily changed by the Respondent no. 2 by circular dated 13.8.2014, 6 months after the result of main examination (written) was declared. Learned Counsel for the Applicants argued that the decision of the Respondent no. 2 to apply Government Circular dated 13.8.2014 regarding horizontal reservation was arbitrary and has to be struck down and the Physical Examination (100 marks) and interview (40 marks) should be held afresh for all candidates.

5. Learned Presenting Officer (P.O) argued on behalf of the Respondents that the Respondent no. 2 had prepared the list of candidates to be allowed to

participate in the Physical Examination and interview on the basis of performance in the Written (Main) Examination. Cut-off marks for each reservation (vertical and horizontal) category were fixed. This was done in accordance with Government instruction contained in Government Circular dated 16.3.1999 regarding horizontal reservation which was revised by Circular dated 13.8.2014. The Respondent no. 2 had applied this Circular while revising the cut off marks and so called 'circular' dated 23.9.2014 is actually the Standing Order of M.P.S.C. Learned Presenting Officer argued that the marks obtained by the Applicants in Written Examination (Main) were as follows:-

Sr No	Name	Gender	Category	Marks obtained	Cut off marks
1.	Avhad Harshada Shrikant	F	NT-D	84	89
2.	Thete Mahendra Dindayal	M	OBC	91	92
3.	Mundhe Sidhu Tukaram	F	NT-D	78	89
4.	Sinare Vishal Kondiram	M	OBC	91	92

Initially, cut off marks for different categories were different. However, Maharashtra Public Service Commission, the Respondent no. 2, has decided to follow the procedure followed by U.P.S.C for recruitment and decided that a reserved category candidate, who avails the concession <sup>in</sup> ~~or~~ relaxation in age, fee or any other eligibility criterion, shall not be considered against a

general category post. As a result, the Applicant nos 2 & 4 were not considered for open posts, as they had applied for OBC posts. Otherwise also they could not be considered for open posts as cut off marks were 107. However, after the criterion as per Government Circular dated 16.3.1999 regarding horizontal reservation was applied, the cut-off marks for different categories were required to be changed. The Respondents no. 2 & 4 are from OBC-general category for which cut off marks are 92. Even on the basis of earlier cut off marks of 91, they were not qualified as the number of candidates, who obtained 91 marks was very large and decision was taken on other criterion like date of birth etc. to limit the number of candidates to be called for interview. After the list of eligible candidates was recast, the Applicant nos 2 & 4 have clearly become ineligible. As regards the Applicant nos 1 & 3, they had applied from NT-D female category. They are found ineligible from NT-D general category or open category for which cut off marks are 103 & 107 respectively. Cut-off marks for NT-D female category were 89. These Applicants are seeking selection against open-female category, for which the cut off marks were 73. As per Government Circular dated 16.3.1999, posts which are horizontally reserved for a particular vertical reservation category cannot be filled by candidates from other vertical reservation categories. If suitable candidates from open female category are not

available, the posts will have to be treated as open and cannot be allowed to be filled from NT-D female category.

6. The issue, therefore, boils down to the horizontal reservation for females. G.R dated 25.5.2001 prescribes horizontal reservation for women. There is 30% reservation for women for each of the vertical reservation category and for open category. This reservation is horizontal reservation and it is compartmentalized. These provisions are in para 1(2)3 & (5) of the aforesaid G.R. Paras 1(7) & (8) of this G.R read as follows:-

“(७) भरतीच्या वर्षात त्या त्या प्रवर्गातील, महिला उमेदवार उपलब्ध झाल्या नाहीत तर सदर आरक्षण इतरत्र अदलाबदल न करता त्या त्या प्रवर्गातील पुरुष उमेदवारांमार्फत भरण्यात यावे.

(८) महिलांचा आरक्षणाचा अनुशेष पुढे ओढ्यात येवू नये.”

From these two sub-clauses in this G.R, it is clear that the posts horizontally reserved for women are to be filled in the same year, if possible. If suitable women candidates are not available, these posts are to be filled from the men candidates from that vertical reservation category and the posts are not be carried forward. To give an example, if S.C – female posts are not filled, the unfilled posts are added to S.C-posts without horizontal reservation. As far as the horizontal reservation for women is concerned, it is compartmentalized for S.C, S.T, DT-NT, OBC or SBC categories. This is an admitted



position and there is no confusion in this regard. However, in so far as horizontal reservation for women from open category is concerned, women from other reservation categories are claiming that they should be considered for selection from open-female category also. Such women are claiming two reservations, for example an S.C woman is claiming reservation from S.C category and also from open women category. This Tribunal has consistently taken a view based on various judgments of Hon'ble Supreme Court that for horizontal reservation, open category is also a distinct vertical reservation category and an open post horizontally reserved for women can be filled only from women from open category and women from other vertical reservation categories are not eligible for appointment to the post reserved for open-female category. Let us consider the judgments of Hon'ble Supreme Court on this issue.

7. In the case of **ANIL KUMAR GUPTA & ORS Vs. STATE OF U.P & ORS : (1995) 5 SCC 173**, Hon'ble Supreme Court has distinguished between vertical and horizontal reservations. The case before Hon'ble Supreme Court was regarding admission to Medical Colleges in the State of Uttar Pradesh. There was following vertical reservation provided, viz.

- |      |     |   |     |
|------|-----|---|-----|
| (i)  | S.C | - | 21% |
| (ii) | S.T | - | 02% |

(iii) O.B.C	-	27%
		-----
Total	-	50%
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There were horizontal reservation of 15% for different categories. It was not clear whether the horizontal reservation was 'overall reservation' or 'compartmentalized reservation'. Hon'ble Supreme Court has observed as follows:-

"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". (emphasis supplied)

Hon'ble Supreme Court has also made following observations, viz:

(i) "the special reservation would be a water tight compartment in each of the vertical reservation classes (OC, OBC, SC and ST)".

It is clear that OC (open category) is also treated as a separate vertical reservation category by Hon. Supreme Court and in case of compartmentalized horizontal reservation, no transfer/migration of a post from one vertical reservation category to another will be permitted as per this judgment of Hon'ble Supreme Court. Another observation of Hon'ble Supreme Court is:

(ii) "It is, of course, obvious that the inter se quota between OC, OBC, SC and ST will not be altered." (emphasis supplied).

In the same judgment in para 18, Hon'ble Supreme Court has held that:-

"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 compartmentalized 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”.

In Maharashtra, G.R dated 25.5.2001 as well as Circular dated 16.3.1999 make it very clear that all horizontal reservations including for women, is compartmentalized. If the reservation for women is compartmentalized, then the process of verification and adjustment /accommodation as stated above should be applied to each of the vertical reservation categories. Hon'ble Supreme Court has held that if the horizontal reservation is 'over all reservation', then first open category (merit) quota should be filled and then each of the social reservation quota is to be filled up, i.e. S.C, S.T and O.B.C. The third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. From this discussion, it is quite clear that open women seats can be filled by women from open category only and Government Circular dated 16.3.1999 follows this judgment fully.

8. In the case of **RAJESH KUMAR DARIA Vs. RAJASTHAN PUBLIC SERVICE COMMISSION & ORS : (2007) 8 SCC 785**, three Judges Bench of Hon'ble Supreme Court has interpreted Rule 9(3) of the Rajasthan Judicial Service Rules, 1955, which is per-materia to the G.R dated 25.5.2001 regarding reservation for women in Maharashtra. It reads:-

“9(3) Reservation for women candidates shall be 20% category wise in direct recruitment. In the event of non-availability of the eligible and suitable women candidates, in a particular year, the vacancies so reserved for them shall be filled in accordance with the normal procedure and such vacancies shall not be carried forward to the subsequent year and the reservation treated as horizontal reservation, i.e. the reservation of women candidates shall be adjusted proportionately in the respective category to which the women candidates belong.”

Hon'ble Supreme court has referred to the judgment in the case of **INDRA SAWHNEY Vs. UNION OF INDIA : 1992 Suppl (3) SCC 217**, In para 9, it is observed that:-

“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.” (single line – emphasis in the original, double line – emphasis supplied).

9. In the case of **LAXMI KANWAR & ANR Vs. STATE (PANCHAYATI RAJ DEPARTMENT) & ORS, in S.B Civil Writ Petition no 11119/2012 & others**, by judgment dated 15.3.2012, Hon’ble Rajasthan High Court has held as follows:-

“It was held that everything being equal, preference can be given to the women. In that event, it would not violate Article 16(2) of the Constitution of India, rather saved by Article 15(3) of the Constitution of India. It can be thus safely held that so far as earmarking certain posts for women are concerned, it can be saved by Article 15(3), if considered special provision for women and not by reservation. In the instant case, 30% posts have been reserved for women, but to simplify the issue, it can be construed to be a special provision for women to



earmark 30% posts for them. By giving aforesaid interpretation, obvious violations of Article 16(2) would be avoided to save provision for keeping 30% posts for women under Article 15(3) of the Constitution of India without holding it to be reservation. Keeping 30% post for women may result and be loudly construed to be reservation, but argument aforesaid can be nullified by holding that for 30% posts for women by special provision, principle as applicable to the reservation would not be applicable. The posts meant for women would be filled from the category it is meant, without inter changeability as women are vulnerable in each category as held in para 514 in the case of Indra Sawhney (supra). There keeping posts for women category-wise is made permissible. The obvious deviation from the general principle of reservation is regarding interchangeability. In reservation, open/general category means every category, but if it is construed to be special provision, it would not be required to be dealt with the same principle of inter changeability as applicable in reservation and while doing so, difference between reservation and special provision would come out and is required to be made otherwise there would be no difference in reservation and special provision. The special provision would provide post to each class separately as women are vulnerable in each

1/11

category, whether general, SC, ST and OBC."  
(emphasis supplied).

This judgment has extensively referred to the judgment of Hon'ble Supreme Court in *INDIRA SAWHNEY* (supra) while arriving at conclusion that the general post, horizontally reserved for women cannot be transferred to other categories

10. In the case of **PUBLIC SERVICE COMMISSION, UTTRANCHAL Vs. MAMTA BISHT & ORS: (2010) 12 SCC 204**, it was pleaded on behalf of the Appellant that:-

"The High Court failed to consider the principle that if a reserved category candidate secures more marks than the last selected candidate in the general category, then he is to be appointed against general category vacancy, does not apply while giving the benefit of horizontal reservation."

It was argued on behalf of the Respondent no. 1. Viz Mamta Bisht, that she has succeeded before the High Court on the sole ground that the last selected candidate receiving the benefit of horizontal reservation in favour of Uttranchal Women could be appointed against the general category vacancy and Respondent no. 1 ought to have been selected giving her benefit of horizontal

reservation in favour of Uttaranchal women. The Hon'ble Supreme Court, allowed the appeal against the order of High Court, based on the judgment in RAJESH DARIA's case (supra). In para 13, it is observed by Hon'ble Supreme Court, that:-

“In fact, the High Court allowed the writ petition “only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social).....”

It is quite clear that the Hon'ble Supreme Court held that horizontal reservation cannot be applied as vertical reservation in favour of reserved category candidate.

11. Aurangabad Bench of this Tribunal by judgment dated 26.8.2009 in O.A no 301 of 2009 (Irfan Mustafa Shaikh & Ors Vs. State of Maharashtra & Ors) has held that open-Home Guard post cannot be filled by a Home Guard from any reserved category. This judgment was upheld by Hon'ble High Court (Aurangabad Bench) in Writ Petition no 272/2010 by judgment dated 15.11.2010. Hon'ble High Court held that:-

“4. The Learned Tribunal while allowing the Original Application has held that in so far as the horizontal reservation is concerned, the candidates

from particular category are only entitled to be considered against the posts reserved for such category. It has further been held that the candidates from one category, for which horizontal reservation is provided, cannot be considered for selection against the post reserved for another horizontal reservation. The view taken by the Learned Tribunal is in consonance with the law laid down by the Apex Court in the case of Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Others, reported in AIR 2007 SC 3127, wherein it has been held that while filling the posts reserved for horizontal reservation, firstly the candidates from that particular category only be taken into consideration and only if there is a short fall, then the recourse would be taken to go to another candidate for fulfilling the said quota.”

This judgment was upheld by the Hon’ble Supreme Court in C.C 15802/2011 by judgment dated 27.9.2011. Hon’ble Supreme Court has held that:-

“In our view the explanation given by the petitioners for delay of 173 days in filing the special leave petition is fully unsatisfactory and does not warrant exercise by this Court under Section 5 of the Limitation Act, 1963.

Even on merits, we are satisfied that the reasons assigned by the Tribunal for issuing a direction for appointment of the Respondent no. 1 were legally correct and the High Court did not commit any error by declining interference with the Tribunal's order."

What applies in case of Open-Home Guard's vacancies, obviously and equally applied to Open-female vacancies in our view.

12. Let us now consider the case of the Applicants that backward class women can be considered for appointment to the open-female posts on the basis of merit. In Maharashtra, Social reservation is 52% for different categories. 30% horizontal reservation is provided for women, which is compartmentalized. There is no dispute about the selection for the vacancies reserved horizontally for women in any of these vertical reservation categories. Only for open category, women from reserved category are claiming that they should be considered. 30% of 48% (open) posts comes to 14.4% of the overall vacancies. If these vacancies are to be filled from women disregarding their social reservation category, this reservation will become indistinguishable from vertical reservation. If it is applied across the social reservation categories for open posts, to ensure that overall reservation does not go beyond 52%, it can only

be applied as an 'overall horizontal reservation' as defined by Hon'ble Supreme Court in **ANIL KUMAR GUPTA's** case (supra). So the open-female quota would be filled by treating horizontal reservation for women in open category as 'overall horizontal reservation'. It will however, be compartmentalized for other vertical reservation categories. Hon'ble Supreme Court has stated in **ANIL KUMAR GUPTA's** case (supra) that:

“We are of the opinion that in the interest of avoiding any complications and intractable problems, it would better that in future any horizontal reservations are compartmentalized in the sense explained above.”

In para 15 of the aforesaid judgment, Hon'ble Supreme Court has not favoured 'overall horizontal reservation' as it may, in a hypothetical case of female reservation, result in all the 30% seats going to women from open category, if no female for S.C, S.T etc. is found eligible and 30% reservation for women has to be necessary filled. A reverse situation may also arise. So, if the open female posts are allowed to be filled by females from other vertical reservation category, it may result in different horizontal reservation criteria being applied to open-female category than the one being applied for other vertical reservation category females. This would be

inadmissible in our opinion. Such an action will be discriminatory and arbitrary.

13. Our attention was drawn to judgment of Hon'ble Bombay High Court dated 10.7.2015 in Writ Petition no 64/2015. However, in this case the selection of a person from NT-D category, who had applied for Open-PAP post from open-category was challenged. In the present case, the Applicants have not applied from open category and not given up their caste claim.

14. In the case of **K.V JAGTAP & ORS Vs. MAHARASHTRA ADMINISTRATIVE TRIBUNAL & ORS : 2016 1 Mh. L.J 934**, Hon'ble High Court has held that a female candidate belonging to a reserved category, if she is more meritorious than a candidate belonging to open category women, can be selected from open-female category.

15. In the case of **ASHA RAMNATH GHOLAP VS. THE PRESIDENT, DISTRICT SELECTION COMMITTEE/COLLECTOR, BEED & ORS**, by judgment dated 30.3.2016, in Writ Petition no 3929 of 2015, Aurangabad Bench of Hon'ble High Court has held a similar view.

16. Considering the judgments of Hon'ble Supreme Court, especially **RAJKUMAR GUPTA (supra)** where

Hon'ble Supreme Court has held that all vertical reservation categories including open-category are distinct water tight categories for compartmentalized horizontal reservation and no migration from one vertical reservation category to another is allowed, we are unable to accept the claim of the Applicants no 1 & 3 in this Original Application. Whether this will amount to discrimination is examined by Hon. Rajasthan High Court and it is held to be in accordance with the judgment of Hon'ble Supreme Court in INDRA SAWHNEY's case (supra). It was held that the posts meant for women would be filled from the category it is meant without interchangeability as women are vulnerable in each category as held in para 514 in the case of INDRA SAWHNEY's case (supra).

The Applicant nos 2 & 4, had applied from O.B.C category and could not reach the cut-off marks for that category. They are clearly not entitled to any relief.

17. In O.A no 985/2015, the Applicant has challenged the selection of the Respondent no. 3 as Executive Engineer (Electrical) in the Public Works Department from Open-female post, though she belongs to S.C category. The claim of the Applicant is that no suitable open female candidate was available for the post reserved for open-female category. Therefore, as per G.R dated 25.5.2001, the post should have been added to



open posts. In that case, the Applicant would have selected as he secured 58 out of 100 marks in interview and the Respondent no. 3 scored only 41 marks.

18. Learned Advocate Shri A.A Desai argued on behalf of the Respondent no. 3. He argued that she was selected as per Government Circular dated 16.3.1999. Clause (5) of this G.R postulates three stage for selection of candidates and the Applicant was selected following the provision of that Circular. Learned Counsel for the Respondent no. 3 argued that the Applicant has not challenged the selection of Respondent no. 3 in time and now a fresh advertisement has been issued on 7.2.2014, and therefore, this Original Application is not maintainable. He contended that the present Original Application is in the nature of a Public Interest Litigation as the Applicant is not eligible for selection based on merit criterion. Such petition cannot be maintained before this Tribunal. Even if, for the sake of argument, the selection of the Respondent no. 3 is held to be illegal, the Applicant cannot be selected as there is at least one more person who secured more marks than the Applicant and who would be eligible to be selected from Open-general category

19. Learned Counsel for the Applicant argued that the candidates, who scored more marks than the Applicant belong to O.B.C category and therefore, cannot

compete for the post reserved for open-female category. On dereservation, such posts can be filled by open category persons only.

20. In the present case, the Respondent no. 1 had issued advertisement on 27.4.2009 to fill up a total of 4 posts. One post was reserved horizontally for women from open category. The Respondent no. 3 though belonging to S.C – female category, was selected to the post reserved for open-female category. It is seen that the marks obtained by <sup>some of the</sup> unsuccessful candidates were as follows:-

Sr No	Name	Marks obtained	Category
11	Patil Anant Amrut	60	O.B.C
14	Karajekar Ulhas Pandurang	58	O.B.C

The Applicant also scored 58 marks. Admittedly, the Respondent no. 3 scored 41 marks and another women at Sr. No. 17, viz. Smt Dapke Sneeta Fakirrao scored 55 marks. But Smt Dapke was not considered as she had not applied from female category, probably because no vacancy from OBC-female was advertised.

21. We are not inclined to go into this issue, as to whether the selection of the Respondent no. 3 was legal, as the Applicant has no locus to challenge her selection.

As per G.R dated 25.5.2001, if a suitable open-female candidate was not available, the post should have been treated as open without horizontal reservation. The claim of the Applicant that he would have been eligible to be selected on that post as only open candidate is unfounded. Once a post is open, it has to be filled on merit regardless of the caste/class to which a candidate belongs. The Applicant has relied on a number of case laws, but as held by Hon'ble Supreme Court in INDRA SAWHNEY (supra), he is not eligible to be selected as at least one candidate was more meritorious than him. This Original Application cannot succeed.

22. Having regard to the aforesaid facts and circumstances, these Original Applications are dismissed with no order as to costs.

Sd/-  
**(R.B. Malik)**  
**Member (J)**

25.1.17

Sd/-  
**(Rajiv Agarwal)**  
**Vice-Chairman**

**Place : Mumbai**  
**Date : 25.01.2017**  
**Dictation taken by : A.K. Nair.**