

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL,  
MUMBAI**

**ORIGINAL APPLICATION NO.21 OF 2017**

**District : Mumbai**

Smt. Ashwini Annasaheb Pawar )  
Age : 39 years, Occ. Govt. Service, )  
4B-203, Atharva Co-op. Housing Soc. )  
New Dindoshi, Goregaon (E), )  
Mumbai 400 065. )

**... Applicant**

**Versus**

1. Maharashtra Public Service Commission )  
Having office at 3<sup>rd</sup> floor, )  
Bank of India Building, M.G. Road, )  
Fort, Mumbai 400 001. )
2. The Secretary, Medical Education and )  
Drugs Department, Mantralaya, )  
Mumbai 400 032. )
3. The Commissioner, )  
Food and Drugs Administration )  
Survey No.341, Bandra-Kurla Complex, )  
Bandra (E), Mumbai 400 051. )

4. The State of Maharashtra, )  
 General Administrative Department, )  
 Through its Principal Secretary, )  
 Mantralaya, Mumbai 400 032. )
5. Shri Mahesh Vinayakrao Deshpande, )  
 Row House No.3, Dream Residency, )  
 Near Serene Hospital, Pratik Nagar, )  
 Vishrantwadi, Haveli, Pune 411 014. ) **... Respondents**

Shri A.A. Karande, learned Advocate for the Applicant.

Smt. K.S. Gaikwad, learned Presenting Officer for the Respondents.

CORAM : Justice Mridula Bhatkar, Chairperson  
 Shri P.N. Dixit, Vice-Chairman

DATE : 23.03.2021.

PER : Shri P.N. Dixit, Vice-Chairman

### **J U D G M E N T**

1. Heard Shri A.A. Karande, learned Advocate for the Applicant and Smt. K.S. Gaikwad, learned Presenting Officer for the Respondents.

2. In response to the advertisement, dated 04.01.2012 to fill 12 posts of Assistant Commissioner (Drugs) the applicant had participated in the same. Out of the 12 posts, 7 posts were ear-marked for open category, while 2 posts were for female, if available. Applicant belongs to VJ (A) category, and she applied for VJ (A) category and also paid the necessary fees for the reserved category i.e. Rs.210. The applicant

secured 43 marks in screening test, 43 marks in interview and thus total marks secured are 86 marks.

3. The MPSC, Respondent No.1 declared the select list on 18.03.2016 [(Exhibit-H) of the paper book page 93 & 94]. On page 93 against the applicant it is mentioned that no post are available (पदे उपलब्ध नाही). The learned Counsel mentions that there are 2 posts meant for female. One female namely, Ms. Pinto Lane Dorothy was given the appointment against unreserved while the second post meant for female remained vacant even though the applicant who is female was available, but was not given the recommendation since she belong to VJ (A) category.

4. In affidavit-in-reply dated 25.04.2017 the G.A.D. on behalf of Respondent No.4 have filed their affidavit through Shri Bajirao Ramchandra Jadhav (page 98 to 101 of the O.A.). He has stated that as per the G.R. dated 13.08.2014 which states as under :-

*“the circular assailed before this court is based on the observation of Apex Court in a case of Anil Kumar Gupta and Other Vs. State of U.P. and Other referred to supra. The circular dated 13.08.2014 is in fact explanation to circular dated 16.03.1999. It deals with three stages. One for the clause in said circular which is in vernacular language reads as under :*

*प्रथम टप्पा :- खुल्या प्रवर्गातून समांतर आरक्षणाची पदे भरताना, गुणवत्तेच्या निकषानुसार खुल्या प्रवर्गातील उमेदवारांची निवड यादी करावी (या ठिकाणी खुल्या प्रवर्गात गुणवत्तेच्या आधारावर मागासवर्गीय उमेदवारांचाही समावेश होईल.) या यादीत समांतर आरक्षणात बसणा-यांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणात बसणाऱ्या उमेदवारांची संख्या पर्याप्त नसेल तर यादीतील आवश्यक पर्याप्त संख्येइतके शेवटचे उमेदवार वगळून उर्वरित कोवळ खुल्या प्रवर्गाचेच आवश्यक पर्याप्त संख्येइतके उमेदवार घेणे आवश्यक आहे.”*

5. Thus, it is clear, the General Administration Department (G.A.D.) has interpreted this G.R. that in the 'open category' persons only belonging to 'non-reserved categories' are to be considered.

6. The learned Advocate for the Applicant relies on the judgment given by this Tribunal in Transfer Application No.1 of 2016 (Writ Petition No.115 of 2016), Shri Abhay G. Sanap Versus The State of Maharashtra & Anr. dated 12.02.2021. The relevant portion of the same is reproduced as under :-

*“On the point of law of shifting of the candidates of the reserved category to open category in the horizontal reservation, the learned Advocate relied on the judgment of the **Hon’ble Supreme Court in Saurav Yadav & Ors. v/s. State of Uttar Pradesh and Ors. in Miscellaneous Application No.2641 of 2019 in Special Leave Petition (Civil) No.23223 of 2018 and decided on 18.12.2020.***

8. *Respondent No.2 M.P.S.C. and also State both filed the Affidavit-in-Reply and opposed the claim.*

9. *Learned Advocate for the M.P.S.C. has submitted that migration in horizontal reservation is not permissible as it is compartmentalized reservation in view of the judgment of **Hon’ble Bombay High Court, Aurangabad Bench in Charushila Tukaram Chaudhari and Ors. v/s. State of Maharashtra and Ors., Writ Petition No.4159 of 2018 decided on 08.08.2009** and he also relied on the judgment of **Hon’ble Supreme Court in Indra Sawhney v/s. Union Of India and Ors. reported in (1992) Supp (3) SCC 217** and he relies on para. 812 which is reproduced below:-*

*“812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are*

reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

10. A group of matters involving the issue of availability of the migration in horizontal reservation is before us. We have considered the submissions of both the parties on the background of the law settled down by the Hon'ble Supreme Court in the case of **Saurav Yadav & Ors. (Supra)**. The Full Bench of the Hon'ble Supreme Court while discussing this issue threadbare thereby allowed and held that migration to open category within horizontal reservation is legal and permissible. The Hon'ble Supreme Court has addressed the two opposite views, one holding migration in horizontal reservation is barred as the horizontal reservation is compartmentalized which interlocks the vertical reservation. The second view wherein migration is permissible is also discussed on the basis of the earlier judgments passed by the Hon'ble Supreme Court in **Indra Sawhney v/s. Union Of India and Ors. (supra)**, **Anil Kumar Gupta v/s. State of Uttar Pradesh & Ors.**, reported in (1995) 5 SCC 173 and **Rajesh Kumar Daria v/s. Rajasthan Public Service Commission**, reported in (2007) 8 SCC 785. The Judgments decided by the Hon'ble Bombay High Court in **Charushila Tukaram Chaudhari (supra)**, **Asha R. Gholap v/s. The President, District Selection Committee/Collector**, reported in 2016 SCC OnLine Bom 1623, **Tejaswini R. Galande v/s. Chairman, Maharashtra Public Service Commission & Ors**, reported in (2019) 4 Mah L.J. 527 are taken into account. It is useful to refer to the ratio laid down in the case of **Smt. Shantabai Laxman Doiphode (Supra)** as it is relevant to the facts of the present case.

“.....It is clear that inspite of the petitioner choosing to be selected to a post reserved for N.T.-D category, the petitioner still could legitimately stake her claim to post available in the open category and not only that she could do so also to a post horizontally reserved for women in the open category.”

Thus when this issue is fully addressed and the Hon'ble Supreme Court thereby gave its verdict that the migration to open category from the reserved category in horizontal reservation is permissible hence we make it clear that the Respondents have to follow this law of the land.”

7. In the present case, the applicant though has given option by tick-marking in VJ (A) category and though has paid the charges meant for the reserved category, still in view of the discussion above, the applicant, if meritorious, has to be considered in the open category, without taking into consideration, whether the applicant has paid the charges for reserved category or other-wise.

8. The applicant has also submitted the non-creamy layer certificate. The learned Counsel contends that one post of the Assistant Commissioner (Drugs) of open category continues to be vacant.

9. In view of the judgment given by this Tribunal in T.A.No.01/2016 decided on 12.02.2021 (supra) we direct the Maharashtra Public Service Commission (MPSC) to recommend the case of the applicant within two weeks from the receipt of this order provided one post of Assistant Commissioner (Drugs) continues to be vacant.

10. With the above directions, the O.A. is disposed off.

Sd/-  
**(P.N Dixit)**  
**Vice-Chairman (A)**

prk

Sd/-  
**(Mridula Bhatkar, J.)**  
**Chairperson**