

MAHARASHTRA ADMINISTRATIVE TRIBUNAL,

NAGPUR BENCH, NAGPUR

ORIGINAL APPLICATION NO.469/2017.

(D.B.)

Preeti d /o Kamalkishor Morey,
(Sau. Preeti w/o Vinayak Vaidya),
Aged about 28 years,
Occ-Service,
R/o 358, Shree Mahalaxmi Nagar,
New Narsala Road, Nagpur-34.

Applicant.

-Versus-

1. The State of Maharashtra,
Through its Secretary,
Department of Water Resources,
Mantralaya, Mumbai-32.
2. The Executive Director,
Vidarbha Irrigation Development Corporation and
President of the State Level Direct Recruitment
Selection Committee-2016,
Sinchan Seva Bhavan,
Near Old Secretariat Building, Civil Lines,
Nagpur-440 001.

Respondents

Shri S.K. Verma, the learned counsel for the applicant.
Shri M.I. Khan, the learned P.O. for the respondent No.1.
Shri V.G. Palshikar, Ld. counsel for respondent No.2.

**Coram:- Shri J.D. Kulkarni,
Vice-Chairman (J).**

JUDGMENT

(Delivered on this 5th day of December 2017).

This O.A. is being disposed of with the consent of parties on merit.

2. Heard Shri S.K. Verma, the learned counsel for the applicant, Shri M.I. Khan, the learned P.O. for respondent No. 1 and Shri V.G. Palshikar, the learned counsel for respondent Nos. 2.

3. The respondents issued an advertisement on 18.2.2016, calling online applications from the eligible candidates to fill up 1256 post of Junior Engineer (Civil). On account of some writ petitions, second advertisement was issued on 21.7.2016 and it was mentioned that the persons who have applied earlier as per advertisement dated 18.2.2016 and have paid fixed fees for the categories, need not apply again.

3. The applicants belongs to Other Backward Class (OBC) category and fulfilled all required educational qualifications, experience and terms and conditions as per the advertisement and accordingly she has submitted her application in response to the advertisement dated 18.2.2016. She has paid the fees of Rs. 700/- which is for Open (Female) category as against Rs. 350/- for reserved category and it was accepted by the Recruitment Committee.

4. The applicant appeared for recruitment examination held on 25.11.2016. The first proposed merit list was published as

per Annexure A-7 in which the applicant's name appeared. The applicant has obtained 106 marks. However, in the second merit list (Annexure A-9), her name did not appear. According to the applicant, in the list (Annexure A-10), 34 Open (Female) candidates were mentioned who have obtained 106 marks and were considered. However, even though the applicant obtained 106 marks, her name did not appear in the said list. In fact, the applicant's name should have been appeared at the end of the list of Open (Female) category. The applicant has, therefore, filed representation on 29.12.2016. But her representation was not considered. The applicant thereafter approached the Hon'ble High Court and has filed W.P. No. 287/2017. In the said writ petition, the respondents filed affidavit in reply. But vide order dated 12.6.2008, the Hon'ble High Court directed the applicant to approach this Tribunal U/s 19 of the Administrative Tribunals Act, 1985, since the said remedy was available there. The applicant has, therefore, filed this O.A. The applicant has submitted that the select list (Annexure A-1) and (Annexure A-2) be quashed and set aside and it be declared that the applicant has valid right and claim to be considered for appointment under Open (Female) category and her name be included in the final select list having secured 106 marks.

5. Respondent No.2 files reply affidavit. It is stated that the applicant has applied from OBC category and in the application

form, the question was %Do you wish to avail the facility available for backward class candidates ? and %Do you want yourself to be considered from Open category post as well ? To both these questions, the applicant replied in the affirmative and, therefore, the applicant was considered from OBC category as well as OBC (Female) category. It is stated that once the applicant has chosen initially to avail the facility available for Backward Class candidates including her consideration for the post reserved for OBC (Female), her selection is to be considered from the OBC category only by way of vertical reservation and the reservation for women being horizontal reservation, the applicant is required to be adjusted in 30% quota reserved for women in the category of OBC as per *inter se* merit from amongst women candidates in OBC. It is further stated that there were 164 posts reserved for OBC, out of which, 49 posts were reserved for OBC (Female), being 30% horizontal reservation. The cut off date for said 49 candidates from OBC (Female) category was 110. The applicant, however, secured 106 marks only and, therefore, she was not considered for OBC (Female) category.

6. So far as candidates from Open (General) category, it is stated that the cut off date for such candidates is 126 marks (which was earlier wrongly mentioned as 130). The applicant has secured

only 106 marks and, therefore, could not compete from Open (General) category.

7. According to the applicant, clause 7.1 of the advertisement No.1/2016 specifically states that it is available for women and sportsperson selected from amongst the posts to be recruited in the relevant category. In clause 2 of the reservation clause, it is specifically made clear that the reservation for women shall be parallel reservation in respective categories.

8. It is this case of the respondents that the applicant could not compete OBC candidates, since she obtained 106 marks less than the required bench marks 110 for OBC (Female), She could not be considered even from Open (Female) (General) category, since she has secured only 106 marks as against the bench marks of 126 for such category and, therefore, she was rightly not recommended.

9. The learned counsel for the applicant submits that it is an admitted fact that the applicant has paid fees of Rs. 700/- which is for Open category as against Rs. 350/- which is required for reserved category and, therefore, she was considered for Open category.

10. The law regarding reservation for Open (Female) has been dealt by this Tribunal as well as the Hon^{ble} High Court and the Hon^{ble} Supreme Court in various cases from time to time.

11. In this regard, this Tribunal has delivered a judgment in O.A. Nos .195 and 985 of 2015 in case of Harshada Avhad and others V/s State of Maharashtra and others by Mumbai Bench of this Tribunal on 25.1.2017. In the said case, the applicants applied from NT (D) women category for which three posts were reserved, whereas some applicants applied from OBC category. They qualified in the preliminary examination, but their names were not in the list of candidates to participate in physical examination and interview. The applicants sought selection against Open (Female) category for which the cut off marks were 73. As per Government Circular dated 16.3.1999 the posts which are horizontally reserved for a particular vertical reservation category, cannot be filled in by candidates from other vertical reservation categories and if the 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 in from NT (B) (Female) category. While referring to the G.R. dated 25.5.2001, this Tribunal has observed thus:-

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.+

12. In the said judgment, this Tribunal further observed thus:-

In the case of **Laxmi Kanwar and another Vs. State (Panchayati Raj Department) and others in S.B. Civil W.P. No. 11119/2012** and 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 interchangeability 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 interchangeability 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 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 Uttranchal 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 86 Ors Vs. State of Maharashtra 86 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 Dania 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 shortfall, 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."

13. In O.A. No. 195 and 985 of 2015 as stated (supra), this Tribunal has referred to the judgment delivered by the Supreme Court in **Anil Kumar Gupta and others V/s State of U.P. and others (1995) 5 SCC 173** in which following observations were made by the Supreme Court:-

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.

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. The learned counsel for the applicant has also referred to the judgment delivered by the High court of Judicature at Bombay in case of **Kanchan Vishwanath Jagtap V/s Maharashtra Administrative Tribunal, Nagpur and others reported in 2016 (1) Mh.L.J. 934**, in which it has been held that if the SC candidates get selected in open competition on the basis of their own merit, they will not be counted against the quota reserved for SC. They will be treated as open competition candidates. It was further observed that meritorious candidates in women category belonging to reserved category cannot be denied the benefit of their meritorious position. In this case, the Honble High Court has considered as to whether the Tribunal has rightly considered the law laid down by Honble Apex Court in the case of **Rajesh Daria V/s Rajasthan Public Service Commission and others reported in AIR 2007 (8) 8 SCC 785**. While referring to para Nos. 7, 8 and 9 of the judgment of Rajesh Daria case, the Bombay High Court has observed as under:-

% The perusal of the aforesaid observations of Their Lordships would reveal that the Apex Court has held that the reservations in favour of SC, ST and OBC under Article 16 (4) were vertical reservation, whereas special reservations in favour of physically handicapped, women etc. under Article 16 (1) or 15 (3) are horizontal reservations. It has been held that

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. It is further held that 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 that the reservation quota for SCs has been filled. It has been further held that the entire reservation quota will be intact and available in addition to those selected under Open Competition category.

8. However insofar as horizontal reservation is concerned, Their Lordships held that the said principle would not be applicable to it. It has been held that where a special reservation for women is provided within the social reservation for S.Cs, the proper procedure is first to fill up the quota for SCs in order of merit and then find out the number of candidates among them who belong to the special reservation group of ~~SC~~ Scheduled Castes Women. It has been further held that 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. It has been further held that only if there is

any shortfall, the requisite number of SC women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to SCs. Their Lordships held that thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.

9. It could thus be seen that the case that fell for consideration before Their Lordships of the Apex Court was regarding the compartmentalized reservation. In the said case, reservation was provided for various categories including SC, ST, OBC and within that reservation, particular number of posts were reserved for women category. In that view of the matter, Their Lordships held that the women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.+

15. From the aforesaid observation, it is clear that the case reported in **Kanchan Vishwanath Jagtap V/s Maharashtra Administrative Tribunal, Nagpur** (supra) is regarding non-compartmentalized reservation and, therefore, this case will not be applicable in the present set of facts. In the present case, reservations are provided for different categories. The horizontal reservation was also provided for women category, which in itself, is an independent category and, therefore, the candidates from one category for which

horizontal reservation is provided, cannot be considered for selection against the posts reserved for any other horizontal reservation.

16. So far as this case is concerned, it is material to note that even for the sake of argument, it is accepted that the applicant has applied from OBC category for Open (Female) in OBC, she got only 106 marks whereas the candidates from OBC category who have been selected had secured bench marks of 110. Thus, the applicant was rightly rejected for OBC (Female) claim. So far as the applicant's claim for Open category is concerned, the bench marks for such category was 126 and the applicant, therefore, cannot be considered for Open category too. Non selection of the applicant, therefore, seems to be legal and proper and hence the following order:-

ORDER

The O.A. stands dismissed with no order as to costs.

Dt. 5.12.2017.

(J.D.Kulkarni)
Vice-Chairman(J)

