

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.81 OF 2017

DISTRICT : SANGLI

Sub.:- Appointment

Shri Rohit Vilasrao Koli.)
Age : 23 Yrs, Occu.: Nil,)
R/o. Dnyaneshwari Apartment,)
Gaon Bhag, Near Biniwale Vitthal Temple,)
Maruti Road, Sangli.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary,)
Water Resources Department,)
Mantralaya, Mumbai – 400 032.)
2. The Chairman.)
Junior Engineer [Civil],)
State Level Direct Recruitment)
Selection Committee, Nagpur cum)
Executive Director [A. Ka.],)
Vidarbha Irrigation Development)
Corporation, Nagpur, having Office)
at Sinchan Bhawan, Civil Lines,)
Nagpur – 440 001.)
3. The Member Secretary,)
Junior Engineer [Civil],)
State Level Direction Committee,)
Nagpur cum Chief Engineer,)
Gosikhurd Project, Water Resources)
Department, Nagpur, having Office)
at Sinchan Bhawan, Civil Lines,)
Nagpur – 440 001.)...**Respondents**

Shri A.V. Bandiwadekar, Advocate for Applicant.

Smt. A.B. Kololgi, Presenting Officer for Respondent No.1.

CORAM : **A.P. KURHEKAR, MEMBER-J**
DEBASHISH CHAKRABARTY, MEMBER-A

DATE : **17.07.2023**

PER : **A.P. KURHEKAR, MEMBER-J**

JUDGMENT

1. The Applicant has challenged the communication dated 13.01.2016 issued by Respondent No.2 – Chairman, State Level Direct Recruitment Selection Committee, Nagpur thereby rejecting Applicant's candidature for the post of Junior Engineer on the ground that he filled-in Application Form from SBC Sports Category, and therefore, not entitled to selection from merit based open category, invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to this O.A. are as under :-

Respondent No.1 – Government through Respondent No.2 – Chairman, State Level Direct Recruitment Selection Committee, Nagpur issued an Advertisement dated 21.07.2016 to fill-in total 1256 posts of Junior Engineer. The Applicant belongs to SBC category and no post was kept reserved for SBC category. He applied from Sports Category for which 62 posts were reserved. Out of these 62 posts, 31 posts were reserved for Open Sports Category and remaining 31 posts were kept reserved for SC, ST, NT, OBC, etc. The Applicant while submitting an application paid full examination fee of Rs.700/- and made declaration that he is meritorious sports person. In recruitment process, he got total 106 marks whereas cut-off marks for Open Category was 94. However, his name is not included in the select list on the ground that he applied from SBC Sports Category and cannot migrate to Open Category in terms of G.R. dated 13.08.2014. He then made representation on 13.12.2016 contending that since he got more marks than cut-off marks from Open Sports Category, he ought to have been selected from Open Sports

Category being meritorious candidate. However, it is not responded by the Selection Committee. The Applicant, therefore, filed this O.A. challenging the communication dated 13.01.2016.

3. Shri A.V. Bandiwadekar, learned Advocate for the Applicant vehemently assailed the legality of communication dated 13.01.2016 *inter-alia* contending that the same is totally arbitrary and unsustainable in law. He has pointed out that though Applicant belongs to SBC Category, not a single post was reserved for SBC though in terms of G.R. and Scheme of reservation at least one post ought to have been shown reserved for SBC Category. That apart, he has pointed out that since Applicant had made declaration that he is meritorious sports candidate, his candidature ought to have been considered and accepted from Open Sports Category for which cut-off for selection was 94. Whereas, Applicant secured 106 marks, and therefore, he being meritorious candidate, he should have been given precedence over other selected candidates from Open Sports Category. In this behalf, he placed reliance on the decision of Hon'ble Supreme Court in **2020 SCC Online SC 1034 [Saurav Yadav Vs. State of Uttar Pradesh & Ors.]**. He submits that the said decision is squarely attracted in the present case.

4. Per contra, Smt. A.B. Kololgi, learned Presenting Officer and Shri D.B. Khaire, learned Advocate for Respondent Nos.2 and 3 in reference to contentions raised in Affidavit-in-reply submits that as per G.R. dated 13.08.2014, migration from horizontal reservation to Open Category was not permissible at the relevant time, and therefore, impugned communication is legal and valid. Shri D.B. Khaire, however, fairly concedes that now in view of decision in **Saurav Yadav's** case, the legal scenario is changed and merit should get precedence with a Caveat that the decision in Saurav Yadav's case being subsequent, it will not apply to the recruitment process of 2016. He further submits that cut-off from Open Category was 126 which is higher than the Applicant, and therefore, he could not have been selected from Open Category.

5. In view of submissions advanced, the question posed for consideration is whether impugned communication dated 13.01.2016 denying the claim of Applicant for selection is legally sustainable.

6. There is no denying that total 62 posts were earmarked for Sports Category and out of it, 31 posts were for Open Sports Category and remaining 31 posts were reserved for SC, ST, etc. Notably, not a single post was reserved for SBC Category to which Applicant belongs. This is very crucial aspect of the matter. It is also not in dispute that Applicant secured 106 marks whereas cut-off marks for Open Sports Category was 94. In other words, though Applicant got more marks than selected candidate from Open Sports Category, he was denied the applicant. In impugned communication, the selection of the Applicant is denied on the ground that he applied from SBC Sports Category, but in terms of G.R. dated 13.08.2014, he could not be included in merit list for Open Category. It would be apposite to reproduce the contents of communication dated 13.01.2016 for ready reference, which are as under :-

“विषयांकित प्रकरणी आपले दि. ३१.१२.२०१६ रोजीचे अर्जानुसार आपणास कळविण्यात येते की, शासन सामान्य प्रशासन विभाग, शासन परिपत्रक क्र.एसआरव्ही-१०१२/(प्र.क्र.१६/१२)/१६-अ मुंबई दि.१३.८.१४ अन्वये खुल्या प्रवर्गातून समांतर आरक्षणाची पदे भरताना गुणवत्तेच्या निकषानुसार खुल्या प्रवर्गातील उमेदवाराची निवड यादी तयार करावी (या ठिकाणी खुल्या प्रवर्गात गुणवत्तेच्या आधारावर मागासवर्गीय उमेदवारांचाही समावेश होईल). या यादीत समांतर आरक्षणानुसार आवश्यक खुल्या प्रवर्गाच्या उमेदवारांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणानुसार आवश्यक खुल्या प्रवर्गाच्या उमेदवारांची संख्या पर्याप्त नसेल तर खुल्या प्रवर्गासाठी राखीव समांतर आरक्षणाची पदे भरण्याकरिता सदर यादीतील आवश्यक पर्याप्त संख्येइतके शेवटचे उमेदवार वगळून पात्र उमेदवारांपैकी केवळ खुल्या प्रवर्गाचेच आवश्यक पर्याप्त संख्येइतके उमेदवार घेणे आवश्यक आहे.

आपण आपला अर्ज विशेष मागास प्रवर्ग व खेळाडू प्रवर्गातून भरलेला आहे. त्यामुळे उपरोक्त शासन निर्णयात स्पष्ट केल्यानुसार आपले नाव खुल्या प्रवर्गाचे गुणवत्ता यादीत समाविष्ट करण्यात आलेले नाही.”

7. Thus, selection is denied on the ground that he cannot be migrated in Open Category. True, cut-off marks for Open Category was 126, whereas Applicant secured 106 marks. However, at the same time, admittedly, cut-off marks for Open Sports Category was 94. This being so, the question arises as to why Applicant's candidature from Open

Sports Category could not have been accepted for the post of Junior Engineer.

8. Since Applicant has made declaration that he is applying as a meritorious sports person and paid full fees of Rs.700/-, his candidature ought to have been considered from Open Sports Category for which cut-off marks was 94. Only because Applicant has shown his caste as SBC for which no post was earmarked or reserved in the Advertisement, his candidature ought to have been considered and accepted from Open Sports Category and not doing so, would amount to denial of appointment though he stands on merit in Open Sports Category. As such, strictly speaking, this is not a case of Applicant asking for migration from horizontal reservation to Open Category. Basically, he has not asked for migration from SBC to Open Category. His claim is for selection from Open Sports Category for which cut-off marks was 94 and though he secured 106 marks, he is denied the appointment.

9. In so far as Circular dated 13.08.2014 is concerned, Shri Bandiwadekar, learned Advocate for the Applicant submits that it is impliedly overruled in view of recent decision of Hon'ble Supreme Court in **Saurav Yadav's** case (cited supra).

10. To begin with, let us see the contents of Circular dated 13.08.2014, which are as under :-

“शासन परिपत्रक :-

शासन परिपत्रक, सामान्य प्रशासन विभाग, क्रमांक एसआरव्ही १०९७/प्र.क्र.३१/९८/१६-अ, दिनांक १६ मार्च, १९९९ मधील परिच्छेद ५ मध्ये विहित करण्यात आलेल्या कार्यपद्धतीमध्ये मार्गदर्शनार्थ स्पष्टीकरणाचा समावेश करण्यात येत असून सुधारित परि.५ खालील खालीलप्रमाणे आहे. शासन सेवेत सरळसेवेने नियुक्ती करताना समांतर आरक्षण कार्यान्वित करण्यासाठी सदर सुधारित कार्यपद्धती अनुसरण्यात यावी :-

(अ) 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 आरक्षणानुसार आवश्यक खुल्या प्रवर्गाच्या उमेदवारांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणानुसार आवश्यक खुल्या प्रवर्गाच्या उमेदवारांची संख्या पर्याप्त नसेल तर खुल्या प्रवर्गासाठी राखीव समांतर आरक्षणाची पदे भरण्याकरिता सदर यादीतील आवश्यक पर्याप्त संख्या इतके शेवटचे उमेदवार वगळून पात्र उमेदवारांनापैकी केवळ खुल्या प्रवर्गाची आवश्यक पर्याप्त संख्येइतके उमेदवार घेणे आवश्यक आहे.

(ब) दुसरा टप्पा :- त्यानंतर प्रत्येक सामाजिक आरक्षणाच्या प्रवर्गातील उमेदवारांच्या निवड याद्या तयार कराव्यात. (जे उमेदवार यापूर्वीच टप्पा “अ” मध्ये सामील झाले असतील त्यांना या यादीतून वगळावे.)

(क) तिसरा टप्पा :- वरील “ब” नुसार तयार करण्यात आलेल्या याद्यांमध्ये सामाजिक आरक्षणातील (Social Reservation) प्रत्येक प्रवर्गाच्या विहित टक्केवारीनुसार “अ” येथे विशद केलेल्या या कार्यपद्धतीनुसार समांतर आरक्षणाचे पुरेसे उमेदवार समाविष्ट करावेत. मात्र असे करताना सामाजिक प्रवर्गांतर्गत रहावे.”

11. Indeed, in Circular dated 13.08.2014 itself, it is made clear that while filing-in the posts of horizontal reservation from Open Category, it should be on purely merit basis inclusive of all candidates on merit basis irrespective of their category. In other words, the candidates belonging to reserved category would be entitled to occupy the post on the basis of their individual merit while filling-up vacancies from amongst the horizontal reservation category. Significant to note, Hon’ble High Court in **Writ Petition No.4159/2018 [Charushila T. Chaudhari & Ors. Vs. State of Maharashtra & Ors.]** after taking note of various leading Judgment on the point of reservation recorded the conclusions in Para No.49 and laid down the procedure for preparation of select list to be followed, which are as under :-

“49. (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.”

12. Now turning to the decision in **Saurav Yadav’s** case, the Hon’ble Supreme Court after elaborate discussion on its earlier catena of decision

held that migration of OBC female to Open Category within horizontal reservation on the basis of merit is legal and permissible and merit is given precedence. The Hon'ble Supreme Court has considered decisions in **Indra Sawhney Vs. Union of India and Ors. (1992) Supp. (3) SCC 217, Anil Kumar Gupta Vs. State of Uttar Pradesh & Ors. (1995) 5 SCC 173, Rajesh Kumar Daria Vs. Rajasthan Public Service Commission (2007) 8 SCC 785, Asha R. Gholap Vs. The President, District Selection Committee/Collector, MPSC & Ors. 2016 SCC Online Bom 1623, Tejaswini R. Galande Vs. Chairman, MPSC (2019) 4 Mah.L.J. 527.** The Judgment of Hon'ble Bombay High Court in **Charushila's** case (cited supra) was also discussed. The Hon'ble Supreme Court held that subject to permissible reservations viz. vertical or horizontal, the selection must be purely merit based. Hon'ble Supreme Court considered two opposite view, one permissibility of migration of OBC female candidate to Open General Category on merit basis and second, non-migration due to interlocking horizontal reservation and accepted first view.

13. In **Saurav Yadav's** case, the Petitioners applied from the category of OBC Female and SC Female, but they were denied appointment though they had secured more marks than the last candidate selected in Open General Category. In Para Nos.45, 46, 47, 49, 50, 73 and 74, the Hon'ble Supreme Court held as under :-

“45. The second view is thus neither based on any authoritative pronouncement by this Court nor does it lead to a situation where the merit is given precedence. Subject to any permissible reservations i.e. either Social (Vertical) or Special (Horizontal), opportunities to public employment and selection of candidates must purely be based on merit. Any selection which results in candidates getting selected against Open/General category with less merit than the other available candidates will certainly be opposed to principles of equality. There can be special dispensation when it comes to candidates being considered against seats or quota meant for reserved categories and in theory it is possible that a more meritorious candidate coming from Open/General category may not get selected. But the converse can never be true and will be opposed to the very basic principles which have all the while been accepted by this Court. Any view or process of interpretation which will lead to incongruity as highlighted earlier, must be rejected.

46. *The second view will thus not only lead to irrational results where more meritorious candidates may possibly get sidelined as indicated above but will, of necessity, result in acceptance of a postulate that Open / General seats are reserved for candidates other than those coming from vertical reservation categories. Such view will be completely opposed to the long line of decisions of this Court.*

47. *We, therefore, do not approve the second view and reject it. The first view which weighed with the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is correct and rational.*

49. *We must also clarify at this stage that it is not disputed that the Applicant no.1 and other similarly situated candidates are otherwise entitled and eligible to be appointed in 'Open/General Category' and that they have not taken or availed of any special benefit which may disentitle them from being considered against 'Open/General Category' seat. The entire discussion and analysis in the present case is, therefore, from said perspective.*

50. *Finally, we must say that the steps indicated by the High Court of Gujarat in para 56 of its judgment in Tamannaben Ashokbhai Desai contemplate the correct and appropriate procedure for considering and giving effect to both vertical and horizontal reservations. The illustration given by us deals with only one possible dimension. There could be multiple such possibilities. Even going by the present illustration, the first female candidate allocated in the vertical column for Scheduled Tribes may have secured higher position than the candidate at Serial No.64. In that event said candidate must be shifted from the category of Scheduled Tribes to Open / General category causing a resultant vacancy in the vertical column of Scheduled Tribes. Such vacancy must then enure to the benefit of the candidate in the Waiting List for Scheduled Tribes – Female. The steps indicated by Gujarat High Court will take care of every such possibility. It is true that the exercise of laying down a procedure must necessarily be left to the concerned authorities but we may observe that one set out in said judgment will certainly satisfy all claims and will not lead to any incongruity as highlighted by us in the preceding paragraphs.*

73. *In view of these clear decisions, it is too late in the day for the respondent state to contend that women candidates who are entitled to benefit of social category reservations, cannot fill open category vacancies. The said view is starkly exposed as misconceived, because it would result in such women candidates with less merit (in the open category) being selected, and those with more merit than such selected candidates, (in the social/vertical reservation category) being left out of selection.*

74. *I would conclude by saying that reservations, both vertical and horizontal, are method of ensuring representation in public services. These are not to be seen as rigid "slots", where a candidate's merit, which otherwise entitles her to be shown in the open general category, is foreclosed, as the consequence would be, if the state's argument is accepted. Doing so, would result in a communal reservation, where each social category is confined within the extent of their reservation, thus*

negating merit. The open category is open to all, and the only condition for a candidate to be shown in it is merit, regardless of whether reservation benefit of either type is available to her or him.”

14. As such, the principle expounded by Hon'ble Supreme Court in **Saurav Yadav's'** case that merit should get precedence has to be applied in the present case with greater force since admittedly, no post was reserved for SBC to which Applicant belongs. In not doing so, it would be foreclosure of the Applicant's right and he is prevented from competing from Open Sports Category though he made declaration in the Application Form that he is meritorious sports candidate. If the contention of the Respondents is accepted, it would certainly against the principles of equity and would result in discrimination only because he belongs to SBC. Since no post was reserved for SBC, this cannot be said case of migration from horizontal reservation to Open Category. It is a case of non-consideration of Applicant's candidature from Open Sports Category though he is meritorious and had secured 106 marks as against cut-off of 94 marks for Open Sports Category.

15. Shri Bandiwadekar, learned Advocate for the Applicant placed reliance on the decision rendered by this Tribunal on **O.A.No.265/2015 (Mangala L. Shirsat Vs. State of Maharashtra) decided on 03.08.2021** in which in similar situation in the light of legal position expounded by Hon'ble Supreme Court in **Saurav Yadav's** case, O.A. was allowed and directions were given to recommend the name of Applicant for the post of Deputy Director, Industries. In that case, Applicant was from NT(D) Category, but no post was reserved for NT(D) Category in the Advertisement. She secured 103 marks as against cut-off of 72 marks for Open Female Category. The Tribunal held that Applicant being meritorious, her name ought to have been considered from Open Female Category and accordingly directions were given. The said decision has been implemented without challenging the same.

16. In view of above, the reliance placed by Shri D.B. Khaire, learned Advocate for Respondent Nos.2 and 3 on the decision rendered by this

Tribunal in **O.A.No.301/2009 (Irfan Shaikh Vs. State of Maharashtra)** decided on **26.08.2009** which is based on G.R. dated 16.03.1999 which was later replaced by G.R. dated 13.08.2014 is misplaced in view of recent decision of Hon'ble Supreme Court in **Saurav Yadav's** case (cited supra).

17. The submission advanced by Shri Khaire, learned Advocate in reference to decision of Hon'ble Supreme Court in **(2018) 11 SCC 352 [Gaurav Pradhan & Ors. Vs. State of Rajasthan & Ors.]** that impugned communication rejecting the candidature of the Applicant was correct as per the then policy of the Government by G.R. dated 13.08.2014 and subsequent change in legal position will not be attracted is totally misconceived. The Applicant has challenged the communication dated 13.01.2016 by filing this O.A. and if during the pendency of O.A. there is certain development in the law, then we are bound to take note of it and the issue is required to be decided as per present legal scenario. In **Gaurav Pradhan's** case, Hon'ble Supreme Court held that in terms of Circular dated 24.06.2008 which was in force when the recruitment commenced, the members of SC, ST, OBC could compete against non-reserved vacancies only if they have not availed of concession of age, etc. However, subsequent to it, the Government issued Circular dated 11.05.2011 providing that reserved category candidate irrespective of whether they are availed any concession including age relaxation could be migrated against open category vacancies, if they are secured more marks than the candidate of Open Category. In that context, it was held that once the candidates belonging to reserved category have taken concession of age relaxation, they cannot migrate against open category vacancies on the basis of subsequent Circular dated 11.05.2011. As such, in that case, the candidate had already availed the benefit of age relaxation, and therefore, held not entitled to migration to open category on the basis of subsequent Circular dated 11.05.2011 issued by the Government. Whereas in the present case, there is no such issue of taking relaxation of age, etc. from

reserved category. Indeed, in this case, no post was reserved for SBC to which Applicant belongs and he had applied from Open Sports Category and secured marks higher than the candidates selected from Open Sports Category. Therefore, in our considered opinion, the decision in **Gaurav Pradhan's** case is of no help to the Respondents.

18. It is thus explicit that the denial of appointment to the Applicant is totally arbitrary and unsustainable in law. True, the Applicant has not joined last candidate who was selected from Open Sports Category. However, now equities can be done by appointing Applicant from Open Sports Category in view of non-filling of all the vacancies from the said recruitment process. The learned Advocate for the Applicant has filed Additional Affidavit along with minutes of Selection Committee dated 21.07.2017 pertaining to same recruitment process of 2016 in which Applicant participated. The minutes of Selection Committee reveals that 9 posts from Open Sports Category were vacant and could not be filled-in. Admittedly, after 2016, no further recruitment process was conducted. This being so, the Applicant can be accommodated against available vacancy from Open Sports Category and issue of non-joining the last candidate selected from Open Sports Category in the O.A. pales into insignificance.

19. The totality of aforesaid discussion leads us to conclude that Respondent No.2 has committed grave error in not appointing the Applicant from Open Sports Category and impugned communication dated 13.01.2016 is totally bad in law and indefensible. It is liable to be quashed. Hence, the order.

ORDER

- (A) The Original Application is allowed.
- (B) Impugned communication dated 13.01.2016 issued by Respondent No.2 is quashed and set aside.

- (C) Respondent No.2 is directed to appoint the Applicant on the post of Junior Engineer from Open Sports Category against present vacancy within six weeks from today, subject to verification of validity of Sports Certificates.
- (D) No order as to costs.

Sd/-
(DEBASHISH CHAKRABARTI)
Member-A

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai

Date : 17.07.2023

Dictation taken by :

S.K. Wamanse.

D:\SANJAY WAMANSE\JUDGMENTS\2023\July, 2023\O.A.81.17.w.7.2023.Appointment.doc

Uploaded on