

**CORAM : JUSTICE SHRI P.R. BORA, VICE CHAIRMAN
AND
SHRI VINAY KARGAONKAR, MEMBER (A)**

DATE : 09.08.2024

ORAL ORDER

(Per : Justice Shri P.R. Bora, Vice Chairman)

Heard Shri S.S. Jadhavar, learned counsel for the applicant, Shri V.G. Pingle, learned Presenting Officer for the respondent authorities and Shri S.B. Solanke, learned counsel for respondent no. 03.

2. Respondent no. 02 had published an advertisement no. 274/2021 on 31.12.2021 for filling in 12 posts of Pathologist in specialized cadre under the Maharashtra Medical and Health Services, Group-A. Minimum qualification prescribed for the said post is M.B.B.S. and M.D. in Pathology or equivalent qualification as per clause 8.1 of the said advertisement. As per clause 8.2 of the said advertisement the candidate is required to possess 3 years' practical experience of working as Pathologist in a Hospital having not less than 20 Beds. From out of 12 posts, 02 were reserved for Open Female candidates.

3. Applicant claims to be possessed of the requisite qualification as well as requisite experience as prescribed in the advertisement. The applicant belongs to NT-D category.

However, out of 12 posts advertised none was reserved for NT-D category. The applicant, therefore, submitted her application form unreserved category. Respondent No. 2, Maharashtra Public Service Commission (for short 'the Commission') declared the result of the selection process carried out for the subject post on 07.12.2022. In the merit list published by respondent No. 2 the name of the applicant figured at Sr. No. 6. She scored 59 marks. Respondent no. 03 scored 57 marks. On the same date the respondent No. 2 published the list of candidates eligible for recommendation, which contains name of respondent No. 3 at Sr. No. 7 and her selection/recommendation is shown to be against the Open Female seat. Selection List, however, does not contain the name of the applicant. Aggrieved by the decision of respondent No. 2 to recommend the name of respondent No. 3 against the Open Female seat the applicant has approached this Tribunal claiming the following reliefs:

"A) This Original Application may kindly be allowed.

B) By issuing appropriate order or directions, Clause No.5.4 and 5.9 of the Advertisement No.274/2021, dated 31.12.2021, issued by respondent No.2 for the post of Pathologist in Specialist Cadre, Maharashtra Medical and Health Services, Group-A, may kindly be quashed and set aside.

C) By issuing appropriate order or directions, the list of candidates eligible for recommendation for the post of Pathologist in Specialist Cadre, Maharashtra Medical and Health Services, Group-A, published by respondent No.2, may kindly be quashed and set aside to the extent of recommendation / selection of respondent No.3 against the post reserved for Open Female Category.

D) By issuing appropriate order or directions, respondent No.2 may kindly be directed to recommend name of the applicant for the post of Pathologist in Specialist Cadre, Maharashtra Medical and Health Services, Group-A, by selecting her against the seat reserved for Open Female Category.

E) By issuing appropriate order or directions, respondent No. 1 may kindly be directed to issue appointment order in favour of the applicant on the post of Pathologist in Specialist Cadre, Maharashtra Medical and Health Services, Group-A.

F) Any other suitable, just and equitable relief may kindly be granted in favour of the applicant.”

4. It is the contention of the applicant that though she has secured more meritorious position than respondent No. 3 she has not been selected and recommended against the Open Female seat for the reason that she does not fall in the category of Non-Creamy-Layer. In the present O.A. the applicant has raised the grievance that clause Nos. 5.4 and 5.9 which require the candidates claiming the seat reserved for female to be falling in the category of Non-Creamy-Layer, is unjust, illegal, arbitrary and contrary to the spirit of reservation. It is the further contention of the applicant that in view of clause 8.3 in the said

advertisement, which prescribes that the candidate shall possess practical experience of pathology work for the period of 3 years or more gained after acquiring the qualification mentioned in sub-clause (ii) of 8.1, that too in the hospital having not less than 20 beds, no such condition as prescribed in clauses 5.4 and 5.9 of the advertisement could have been prescribed by respondent no. 2.

5. It is the further contention of the applicant that no candidate possessing the experience as required vide clause 8.2 in the advertisement can have his/her income less than the limit prescribed for to be held as Non-Creamy-Layer. The applicant has asserted that she as well as respondent No. 3 both were getting salary more than Rs. 90,000/- per month when they were working as Medical Officer. It is, therefore, the further contention of the applicant that neither she nor respondent No. 3 could claim Non-Creamy-Layer status in view of their income by way of salary. It is therefore, the further contention of the applicant that in premise of the experience criteria, the respondent No. 2 ought not have provided the condition of submitting Non-Creamy-Layer Certificate by the candidates claiming reservation provided for female as well as other reserved categories.

6. It is the further contention of the applicant that having realized the anomaly in the aforesaid 02 clauses the State Government has taken a policy decision that the candidate claiming reservation of female category shall not be required to possess and produce the Non-Creamy-Layer Certificate to claim the said reservation. It is further contended that the decision has been taken by the State Government in the meeting of Cabinet held on 19.04.2023, however, the copy of the said resolution is not available on the portal of the Government of Maharashtra applicant is unable to produce on record the said G.R.

7. On the aforesaid grounds the applicant has prayed for quashment of the aforementioned clauses. It is the contention of the applicant that she has not been selected against the Open Female seat despite having scored more marks than respondent No. 3 for want of Non-Creamy-Layer Certificate. The applicant has therefore prayed for consequential relief thereby deleting the name of respondent no. 3 from the list of recommended candidates against the post reserved for Open Female category. The applicant has sought further directions against the respondents to recommend the name of the applicant for the post of Pathologist in the

specialized cadre in the Maharashtra Health Services, Group-A by selecting her against the seat reserved for Open Female category.

8. Respondent No. 2 has filed affidavit in reply and has opposed the contentions raised and the prayers made in the O.A. Respondent No. 2 has contended that as per the G.R. dated 25.05.2001 it is mandatory for the candidate claiming reservation from Open Female category to submit Non-Creamy-Layer Certificate. It is further contended that in view of the said G.R. the Commission has inserted clause 5.4 & 5.9 in the advertisement. It is further contended that total 46 candidates applied for the post in issue and the applicant is one of them who applied from unreserved female category, whereas respondent No. 3 submitted her online application from NT-D Female category. Respondent No. 2 has further contended that before the interview respondent No. 3 submitted Non-Creamy-Layer Certificate issued by the competent authority, whereas the applicant did not submit such Non-Creamy-Layer Certificate. In the circumstances, according to respondent No. 2, respondent No. 3 was recommended against the seat reserved for Open Female. It is further contended that since the applicant applied from unreserved Female category and

mentioned to be not falling in Non-Creamy-Layer Category, she was not considered for the seat reserved for female category. It is further contended that since the applicant did not score sufficient marks she could not be recommended against the Open General seat. It is further contended that respondent No. 2 has not committed any error in recommending name of respondent No. 3. Respondent No. 2 has, therefore, prayed for dismissal of the O.A. filed by the applicant.

9. Respondent No. 3 has also filed her affidavit in reply wherein she has contended that since the applicant participated in the selection process without raising any challenge to clauses 5.4 & 5.9 of the advertisement, she is estopped from raising the objection to the said clauses after having failed in securing the appointment on the subject post. According to respondent No. 3, the O.A. filed by the applicant deserves to be dismissed on the sole ground as aforesaid. Respondent No. 3 has further contended that the G.R. dated 04.05.2023 cannot be made applicable to the case of the applicant. It is further contended that since respondent No. 3 complied with all the requirements and placed on record all the relevant documents, respondent No. 2 has rightly recommended her name for the subject post. It is further contended that after

the applicant filled in the information as not falling in Non-Creamy-Layer Category, it was reflected on her form itself that she will not be considered for female reservation. It is further contended that the applicant was well aware of the fact that she will not be considered for the seat reserved for female. According to respondent No. 3 in spite of having knowledge of the aforesaid fact when the applicant did not challenge said clauses and participated in the selection process, she cannot now challenge the concerned clauses. Respondent No. 3 on the aforesaid grounds has prayed for dismissal of the O.A.

10. We have duly considered the submissions made on behalf of the applicant, as well as, the respondents and have also gone through the pleadings of the parties, as well as, the documents placed on record by them. Before advertizing to the submissions made by the learned counsel for the parties we deem it appropriate to reproduce herein below the relevant provisions under the G.R., which are questioned in the present O.A. The challenge is raised to clauses 5.4 and 5.9 of the advertisement, which are thus:-

“५.४) महिलांसाठी आरक्षित पदांकरिता दावा करणा-या उमेदवारांनी महिला आरक्षणाचा लाभ घ्यावयाचा असल्यास त्यांनी अर्जांमध्ये न चुकता महाराष्ट्राचे अधिवासी (Domiciled) असल्याबाबत तसेच नॉन क्रीमीलेअर मध्ये मोडत असल्याबाबत (अनुसूचित जाती व अनुसूचित जमाती वगळून) स्पष्टपणे दावा करणे आवश्यक आहे.

५.९) अद्ययावत नॉन क्रिमीलेयर प्रमाणपत्र/आर्थिकदृष्ट्या दुर्बल घटकातील असल्याबाबतचा पुरावा म्हणून सक्षम प्राधिका-याने वितरित केलेले व अर्ज सादर करण्याच्या अंतिम दिनांकास वेध असणारे (वित्तीय वर्ष २०२१-२२) प्रमाणपत्र सादर करणे आवश्यक आहे.”

11. Clause 8.1 and 8.2 in the said advertisement are also material, since quashment of clauses 5.4 and 5.9 is sought by the applicant in view of the provisions under the said clauses. Clause 8.1 provides educational qualification, whereas clause 8.2 pertains to experience prescribed for the subject post. The aforesaid clauses read thus:-

“८.१ शैक्षणिक अर्हता -

- (i) Possess M.B.B.S. degree or an equivalent qualification;
- (ii) Possess a Master's degree in pathology or an equivalent qualification;

AND THEREAFTER

८.२ अनुभव :-

- १. Possess a practical experience of pathological work for a period of not less than three years gained after requiring the qualification mentioned in sub-clause (ii) of 8.1 above.
- २. शासन पत्र, सार्वजनिक आरोग्य विभाग क्रमांक नामनि १४९९/प्र.क. २४४/सेवा-२, दिनांक २ डिसेंबर, २०२१ अन्वये प्राप्त अभिप्रायानुसार किमान वीस खाटांच्या रुग्णलयातील शरीरविकृतीशास्त्राचा वैद्यकीय अधिकारी (शरीरविकृती शास्त्रज्ञ) या पदावरील अनुभव आवश्यक.”

12. Shri S.S. Jadhavar, learned counsel appearing for the applicant submitted that any Medical Officer working on the post of Pathologist in the Hospital not having less than 20 beds may earn the salary/remuneration around Rs. 80,000/- to Rs.

1,00,000/- per month. As such, according to learned counsel the annual income of such Medical Officer alone goes beyond the prescribed limit of Rs. 8,00,000/- per annum, determined for being considered as Non-Creamy-Layer. Learned counsel further submitted that in fact the income of the family members is also required to be taken in to consideration and if that is taken into account, in no case the person working on the post of Pathologist in a Hospital not having less than 20 beds can show his family income less than 8,00,000/- per annum. Learned counsel submitted that the applicant has made honest disclosure that she does not fall in the criteria of Non-Creamy-Layer, as her income is more than that. Learned counsel further submitted that if the Government wants that for appointment to the post of Pathologist in specialist cadre an incumbent shall be holding experience of working for not less than 3 years in a Hospital having not less than 20 beds, it is irrational to impose the condition that the Female candidate applying for such post must be falling in the category of Non-Creamy-Layer, the learned counsel submitted that no candidate possessing the prescribed experience can claim Non-Creamy-Layer. Learned counsel reiterated that in such circumstances there seems no propriety in providing reservation to the Female Candidate with condition of Non-Creamy-Layer certificate.

Learned counsel further argued that in spite of scoring more meritorious position than respondent no. 3 the applicant is being deprived the appointment on the said seat.

13. Learned counsel for the applicant further submitted that the anomaly in the aforesaid 02 clauses was realized by the State Government and the State Cabinet in its meeting held on 19.4.2023 relaxed the condition of furnishing Non-Creamy-Layer certificate by the Female Category candidates. Learned counsel further submitted that consequent to the decision taken in the cabinet meeting held on 19.4.2023 the Government has issued G.R. dated 4.5.2023. Learned counsel pointed out that vide the said G.R. the Government has cancelled the condition of submission of Non-Creamy-Layer certificate as well as the Female candidates falling in the category of Reserved Category. Learned counsel submitted that when the applicant filed the present O.A., though the aforesaid Resolution had been passed till then the G.R. was not issued. It was issued subsequently on 4th of May, 2019.

14. Learned counsel for the applicant submitted that the applicant is entitled for the benefit of the aforesaid G.R. dated 4th May, 2019. Learned counsel pointed out that in O.A. No. 932/2023 this Tribunal has given benefit of said Resolution to

the applicants therein. Learned counsel further submitted that the facts in the present case are identical and the applicant deserves to be given benefit of the said G.R. Learned counsel further submitted that having regard to the nature of the experience prescribed for the subject post, in fact, no condition of to be falling in the category of Non-Creamy-Layer can be prescribed. Learned counsel, therefore, prayed for quashment of the clauses 5.4 and 5.9 in the advertisement. Learned counsel submitted that the applicant has secured more meritorious position than respondent no. 3 and, as such, the applicant alone is entitled for selection and appointment to the subject post against the seat reserved for Open Female candidates.

15. As about the objection raised by respondent no. 3 that after having participated in the selection process without raising challenge to the aforesaid clauses in the advertisement the applicant has been estopped from challenging the said clauses after having failed in securing the appointment on the said post is concerned, the learned counsel for the applicant relying on the judgment of the Hon'ble Supreme Court in the case of **Dr. (Major) Meeta Sahai Vs. State of Bihar and Others, (2019) 20 SCC 17** submitted that the principle of estoppel may

not apply in the present matter since the applicant is alleging futility and discriminatory consequences of the said clauses. Learned counsel further pointed out that G.R. issued on 4.5.2023, which is based on the decision taken in the Cabinet meeting held on 19.4.2023 is discriminatory. Learned counsel pointed out that this Tribunal while deciding O.A. No. 932/2023 has held clause 5 of the said G.R. to the extent it restricts the application of said G.R. only to the extent of advertisement no. 83/2021 and to the process of recruitments commenced after 29.9.2022 as unconstitutional and has, therefore, set aside the said clause. Learned counsel further submitted that the Tribunal has further declared that the benefit of the said G.R. shall be applicable to all recruitments commenced subsequent to advertisement no. 83/2021. Learned counsel submitted that the advertisement in the present matter has been admittedly issued after issuance of the advertisement no. 83/2021 and, as such, the applicant is also entitled to the benefit of the said G.R. dated 4.5.2023. Learned counsel for the aforesaid circumstances prayed for allowing the present Original Application.

16. Learned Chief Presenting Officer and learned counsel appearing for respondent no. 3 were common in their

submission that the applicant has been rightly not considered for her appointment since she did not comply with the clauses 5.4 and 5.9 of the advertisement. It was further contended by them that the aforesaid clauses were so explicit that if the applicant was having any grudge grievance in that regard she must have challenged the said clauses before participating in the selection process. It was, therefore, their contention that after having participated in the selection process and failed in securing the appointment, the applicant has lost the right to raise any challenge to the said clauses.

17. Learned counsel Shri Solanke appearing for respondent no. 3 submitted that the income of the applicant is not liable to be considered for grant of Non-Creamy-Layer certificate in favour of the said candidate. Learned counsel submitted that whether a candidate falls in the category of Non-Creamy-Layer or not depends upon the income of the parents of the said candidate and not of his self-income. Learned counsel submitted that as such there appears no substance in the prayer made by the applicant to quash the concerned clauses 5.4 and 5.9 in the advertisement. Learned counsel submitted that the applicant, as well as, respondent no. 3 both belong to NT-D category. He further submitted that since amongst the

eligible candidates, respondent no. 3 secured more meritorious position and was also possessing Non-Creamy-Layer certificate she has been selected. Learned counsel submitted that there is absolutely nothing against respondent no. 3. He, therefore, prayed for dismissal of the Original Application.

18. Learned counsel for the applicant thereupon brought to our notice the decision taken in the meeting of the Cabinet held on 19.4.2023. Learned counsel submitted that perusal of the said decision reveals that the Cabinet has taken into consideration the contingency as is existing in the present matter. We deem it appropriate to reproduce herein below the said decision, which reads thus:-

**खुल्या, मागास प्रवर्गातील महिलांना
नॉन क्रिमिलेयर प्रमाणपत्राची आवश्यकता नाही**

खुल्या गटातील महिलांकरीता आरक्षित पदावरील निवडीकरीता तसेच सर्व मागास प्रवर्गातील महिलांना नॉन-क्रिमिलेअर प्रमाणपत्राची अट शिथील करण्याचा निर्णय आज मंत्रिमंडळ बैठकीत घेण्यात आला. बैठकीच्या अध्यक्षस्थानी मुख्यमंत्री एकनाथ शिंदे होते.

महाराष्ट्र लोकसेवा आयोगामार्फत प्राध्यापक पदावरील भरती प्रक्रियेदरम्यान अराखीव (महिला) या पदावर गुणवत्ता क्र.३ वरील महिला उमेदवाराची नॉन-क्रिमिलेअर प्रमाणपत्र नसल्यामुळे निवड न करता गुणवत्ता क्र. ६ वरील उमेदवाराची निवड करण्यात आली. या पदाकरीता सहयोगी प्राध्यापक पदावरील तीन वर्षांचा अनुभव अशी अर्हता निश्चित करण्यात आलेली होती. या पदाचे वेतन विचारात घेता सध्याच्या नॉन- क्रिमिलेअर मर्यादितपेक्षा अधिक होत असले तरी नॉन-क्रिमिलेअर प्रमाणपत्र प्राप्त उमेदवारांना या खुल्या गटातील महिला आरक्षित पदावर निवड होऊन त्याचा लाभ होत होता.

हा लाभ सर्व प्रवर्गातील महिला उमेदवारांना होणे आवश्यक असल्याने त्यामध्ये सुधारणा करणे आवश्यक होते. त्यानुसार आता खुल्या गटातील

महिलांकरीता आरक्षित पदावरील निवडीकरीता खुल्या प्रवर्गातील महिला तसेच सर्व मागास प्रवर्गातील महिलांना नॉन-क्रिमिलेअर प्रमाणपत्राची आवश्यकता असणार नाही.

19. Moreover, in the preamble of G.R. dated 4.5.2023 the Government has elaborated the object behind issuance of the said G.R. We deem it appropriate to reproduce herein below the relevant portion in the said G.R., which reads thus:-

“२. महाराष्ट्र लोकसेवा आयोगामार्फत जाहिरात क्र.८३/२०२१ च्या अनुषंगाने प्राध्यापक, समाजसेवी औषध वैद्यकशास्त्र पदावरील भरती प्रक्रियेचा निकाल दि. २९.९.२०२२ रोजी जाहीर करण्यात आला आहे. या निकालामध्ये अराखीव (महिला) या पदावर गुणवत्ता क्र.३ वरील महिला उमेदवाराकडे शासन निर्णय दि. २५.०५.२००१ नुसार आवश्यक नॉन-क्रिमिलेअर प्रमाणपत्र नसल्यामुळे त्यांची निवड न करता गुणवत्ता क्र.६ वरील उमेदवाराची निवड करण्यात आली आहे. या निकालाबाबत गुणवत्ता क्र.३ वरील उमेदवाराकडून महाराष्ट्र लोकसेवा आयोग तसेच वैद्यकीय शिक्षण व औषधी द्रव्ये विभागाकडे आक्षेप नोंदविण्यात आला. या आक्षेपाच्या अनुषंगाने प्राध्यापक, समाजसेवी औषध वैद्यकशास्त्र पदावरील नेमणूक प्रलंबित ठेवण्यात आली.

याबाबत वैद्यकीय शिक्षण व औषधी द्रव्ये विभागाची धारणा पुढीलप्रमाणे आहे. “जाहिरात क्र.८३/२०२१ मध्ये प्राध्यापक, समाजसेवी औषध वैद्यकशास्त्र पदाकरीता सहयोगी प्राध्यापक पदावरील तीन वर्षांचा अनुभव अशी अर्हता निश्चित करण्यात आलेली होती. शासकीय वैद्यकीय, दंत व आयुर्वेद महाविद्यालयातील सहाय्यक प्राध्यापक व सहयोगी प्राध्यापक या पदांवर काम करणाऱ्या महिला उमेदवारांचे वेतनापोटी मिळणारे स्वतःचे एकूण उत्पन्न रुपये ८,००,०००/- पेक्षा जास्त होत असल्याने त्यांना नॉन क्रिमिलेअर प्रमाणपत्र मिळणे शक्य होत नाही. त्यामुळे महिला आरक्षण अंतर्गत येणाऱ्या पदांकरिता उमेदवारांची केवळ गुणवत्तेनुसार शिफारस करणे योग्य ठरेल”.

20. As mentioned in clause 3 of the preamble of the G.R. dated 04.05.2023, for issuance of Non-Creamy-Layer Certificate in favour of the married female candidate in Open category, the income of the candidate herself as well as her husband and children is also taken into account. Considering the provision as aforesaid there appears substance in the contention raised on behalf of the applicant that no Open female candidate

possessing practical experience of pathological work for the period of not less than 03 years that too in the hospital not having less than 20 beds gained after acquiring the prescribed qualification may fall in the category of Non-Creamy-Layer. While issuing the G.R. dated 04.05.2023 the State Government has considered the aforesaid aspects and after having realized that if the candidate is required to have practical experience of Pathological work for the period of not less than 03 years that too in the hospital having not less than 20 beds, no such condition can be imposed on the Open female candidate applying for the said post to hold the Non-Creamy-Layer Certificate. Resultantly, the State Government cancelled the requirement of Non-Creamy-Layer Certificate for the candidates belonging to Open female category as well as for the female candidates belonging to all backward classes. In sum and substance now no female candidate will be required to hold and submit Non-Creamy-Layer Certificate.

21. The question posed by the applicant is whether the condition of holding Non-Creamy-Layer Certificate by the candidate who is supposed to be possessing practical experience of pathological work for the period of not less than 03 years in a hospital having not less than 20 beds is

sustainable. The person holding the degree of M.D. (Pathology) working in any hospital not having less than 20 beds may ordinarily have annual income more than 8,00,000/- (Rs. Eight lacks). The respondents have not disputed this fact. In the preamble of G.R. dated 04.05.2023 the Government has admitted the same. It is thus, evident that clauses 5.4 and 5.9 cannot coexist with clause 8.2. The Open female candidate complying with clause 5.4 in all probabilities may not comply with clause 8.2 vice a versa Open female candidate possessing experience as prescribed under Clause 8.2 may not comply with clause 5.4 and 5.9. As such, we are convinced with the prayer made by the applicant to quash and set aside clauses 5.4 and 5.9 in the advertisement. No such conditions can be imposed the compliance of which is not possible. The aforesaid clauses, therefore, deserve to be struck down.

22. It has also been argued by the learned counsel appearing for the applicant that benefit of the provisions made under G.R. dated 04.05.2023 could not have been restricted by the Government only to the recruitment process conducted vide advertisement No. 83/2021 and to the processes of recruitment which started after 29.09.2022.

23. Article 16 of the Constitution provides that there shall be equality of opportunity for all citizens in matters related to employment or appointment to any office under the State. Main object of Article 16 is to create Constitutional right to equality of opportunity in the employment in public office. The question of discrimination arises when by law or executive action a classification is made within such a class and two or more classes born out of such classification are treated unequally without any justifiable reason. The Hon'ble Supreme Court has held that, it is not permissible to create a class within a class.

24. Beneficiary of G.R. dated 04-05-2023 is a class of Females aspiring for appointments in the Government against seats reserved for Open Female category. Clause 5 of the said G.R. creates therein following three sub-clauses:

[1] of the female candidates who participated in the recruitment process carried out vide advertisement no.83/2021;

[2] of the female candidates who participated in the recruitment process which was commenced subsequent to the recruitment process vide advertisement no.83/2021 but the results of which were declared prior to 29-09-2022; and

[3] of the female candidates who participated in the recruitment process which started after 29-09-2022.

25. Clause 5 has extended the benefit of the said G.R. to the Female candidates falling in sub-class 1 and sub-class 3 and has deprived the Female candidates falling in the sub-class 2 from the said benefit. Present applicant is the Female candidate who falls in aforesaid sub-clause 2. We see no rationale in creating classes within a class. Why the benefit of the said G.R. is restricted only to the aforesaid 2 classes and why it is denied to the Female candidates falling in sub-class 2, is not justified by the respondents.

26. The present recruitment process was commenced vide advertisement no. 274/2021 issued on 31.12.2021. Thus, though the present recruitment process started after the recruitment process vide advertisement no. 83/2021, the benefit of G.R. dated 04.05.2023 has not been given to the Female candidates, who participated in the present recruitment process only for the reason that the result of the present recruitment process was declared before declaration of the results of the recruitment process carried out vide advertisement no. 83/2021. Clause 5 is thus discriminatory. It provides the benefit of the said G.R. to one set of Female

candidates and denies to another without any justifiable reason. The restriction so imposed is against the Constitutional mandate enshrined under Article 16 of the Constitution. Such a clause, therefore, cannot be retained as it is and deserves to be suitably modified so that it would uniformly extend the benefit of the said G.R. to all the Female candidates who participated in the recruitment process commenced after commencement of the recruitment processes vide advertisement no.83/2021.

27. Learned counsel for the applicant pointed out that Clause 5 of the G.R. dated 04-05-2023 issued by Women and Child Development Department to the extent it restricts the applicability of the said G.R. only to the extent of advertisement no. 83/2021 issued by Maharashtra Public Service Commission and to the recruitments commenced after 29-09-2022, is held unconstitutional and hence set aside by this Tribunal while deciding O.A. No. 932/2023 on 10.05.2024. Learned counsel further pointed out that in the order passed in O.A. No. 932/2023 the benefit of the G.R. dated 04.05.2023 is made applicable to all recruitments commenced subsequent to advertisement no. 83/2021. Learned counsel submitted that the recruitment process in the instant matter admittedly

commenced after commencement of the recruitment process vide advertisement no. 83/2021. The applicant is thus entitled for the benefit of the said G.R. It is not in dispute that the applicant has scored more number of marks than respondent no. 03. The applicant was not considered only on the ground that she does not fall in the non-creamy-layer category and hence the appointment was issued in favour of respondent no. 03 as she possessed and produced on record the non-creamy-layer certificate.

28. In view of the fact that the provisions under clauses 5.4 and 5.9 in the advertisement are read down by us, as well as, the benefit of the G.R. dated 04.05.2023 is extended to all the recruitments processes started after recruitment process vide advertisement no. 83/2021, the present applicant has become entitled for her appointment on the subject post against the seat reserved for Open Female candidates.

29. Applicant has admittedly earned more marks than respondent No. 3. We are informed that though the order of appointment was issued in favour of respondent no. 3, in view of the order passed by this Tribunal on 28.04.2023, she has not been permitted to join the duties. Thus, there may not be any impediment for the appointment of the present applicant on the

said post. For the reasons elaborated above, we deem it appropriate to pass the following order:-

ORDER

(i) Clauses 5.4 and 5.9 in the advertisement no. 274/20212 issued on 31.12.2021 by respondent no. 02 are struck down.

(ii) The appointment issued in favour of respondent no. 03 stands cancelled.

(iii) Respondents are directed to issue the order of appointment in favour of the applicant on the post of Pathologist in specialist cadre, Maharashtra Medical & Health Services, Group-A against the seat reserved for open (female) candidate within the period of 08 weeks from the date of this order.

(iv) The Original Application is allowed in the aforesaid terms, however, without any order as to costs.

MEMBER (A)

VICE CHAIRMAN

Place : Aurangabad

Date : 09.08.2024