

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI  
BENCH AT AURANGABAD**

**ORIGINAL APPLICATION NO.778/2023**

**DISTRICT:- Parbhani, Nanded,  
Latur, Hingoli, Aurangabad &  
Dhule**

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1. Vitthal s/o. Ganesrao Shinde,  
Age: 35 years, Occu.: Private practice  
as an Advocate, R/o: At MAK, Post Kok,  
Tal. Jintoor, Dist. Parbhani.
  2. Amit s/o Chandrakant Jawale,  
Age: 37 years, Occu.: Private practice  
as an Advocate, R/o: "Ashirwad",  
Sneh Nagar, Station Road, Dhule.
  3. Anil s/o Govindrao Dange,  
Age: 39 years, Occu. : Private practice  
as an Advocate, R/o: Padmini Niwas,  
Joshi Galli, Kandhar, Dist. Nanded.
  4. Santosh s/o Gopikishan Bharadiya,  
Age: 39 years, Occu. : Private practice  
as an Advocate, R/o: Santosh Niwas,  
Thodogo Rd., Ahmedpur, Dist. Latur.
  5. Jayshankar s/o Govindrao Devsarkar,  
Age: 37 years, Occu.: Private practice  
as an Advocate, R/o: At Lingapur,  
Tal. Hadgaon, Dist. Nanded.
  6. Nagnath s/o Sakharamji Bhosle,  
Age: 38 years, Occu.: Private practice  
as an Advocate, R/o: At Post Amba,  
Tal. Basmath, Dist. Hingoli.
  7. Harsha d/o Bhikaji Gadekar,  
Age: 32 years, Occu.: Private practice  
as an Advocate, R/o: "Shivleela",  
Plot No. 28, Nutan Yeshwant Hsg. Society,  
N-8, D-1, Cidco, Aurangabad.

8. Bhaskar s/o Raosaheb Bhujbal,  
Age: 38 years, Occu.: Private practice  
as an Advocate, R/o: Nila, Post Sonkhed,  
Tal. Loha, Dist. Nanded.

9. Niraj s/o Nandkumar Kolnoorkar,  
Age: 41 years, Occu.: Private practice  
as an Advocate, R/o: Jamkar Galli,  
Kandhar, Dist. Nanded.

10. Pournima Vishvanath Gosalwad,  
Age: 38 years, Occu.: Private practice  
as an Advocate, R/o: At Post Himayatnagar  
[Vitthalwadi], Near Rural Hospital,  
Himayatnagar, Dist. Nanded.

11. Ajay s/o. Surendra Patil,  
Age: 38 Years, Occ: Private practice  
as an Advocate, R/o. Patil Galli,  
Shivaji Road, Ahmedpur, Dist. Latur.

12. Mukund Ramdas Jawle,  
Age: 29 Years, Occ: APP,  
R/o. Mhasobawadi, Sonewadi,  
Pehgaon, Tq. Kopargaon, Dist. Ahmednagar.

13. Anup Diliprao Mane,  
Age-38 Years, Occ-Legal Practitioner,  
R/o. Maulikrupa, Behind Jay Kranti  
Collage, Near Akshay Building,  
Sitaram Nagar, Tq.& Dist. Latur.

14. Amit Subhashrao More,  
Age: 36 years Occ: Advocate,  
R/o. Advocate Colony, 223,  
Bhramampuri, At/post Patan,  
Tq. Patan Dist. Satara.

15. Magdum Siddharth Dharmaraj,  
Age: 38 Years, Occ: Advocate,  
R/o. Bhupal Niwas, Laxmi Narayan  
Mandir Road Compound, Mohili Village,  
Porewadi Mumbai Sainik Kendra,  
Mumbai.

**...APPLICANTS**

**V E R S U S**

1. The State of Maharashtra,  
Through Additional Chief Secretary,  
Home Department, M.S.,  
Mantralaya, Mumbai-400 032.
2. The Maharashtra Public Service Commission,  
Through its Secretary, Trishul Gold Field,  
Plot No.34, Opp. Sarovar Vihar, Sector-11,  
CBD, Belapur, Navi Mumbai-400 614.
3. Rajesh Pralhadrao Lavhale,
4. Nitin Arjun Jadhav
5. Nitin Sambhaji Bhingardiwe
6. Ravikiran Dattatraya Sonawane
7. Kishore Adinath Mule
8. Pritam Jagdeorao Vaidya
9. Anil Balasaheb Vidhate
10. Vijay Rangnath Dhanwat
11. Sanvidhan Mahadu Waghmare
12. Hemant Nana Pagare
13. Prasad Madhukar Kakade
14. Abhijeet Dilip Awale
15. Harshwardhan Sopanrao Dhage
16. Nitin Sudhakar Phad
17. Ajinkya Namdev Doifode
18. Digambar Chandrakant Khopade
19. Bhushan Mahesh Bhamare
20. Bankat Prabhu Shivalkar

21. Pankaj Subhashrao Gajbhiye
22. Pradnya Tukaram Chandane
23. Sheela Achyutrao Gaikwad
24. Kanishka Anil Ubale
25. Manish Jayprakash Gaikwad
26. Dnyaneshwar Madhukar Patil
27. Devendra Chandrakant Dixit
28. Ravindra Rajendra Rokade
29. Deepali Deelip Suryawanshi
30. Dagdu Pandit Gaikwad
31. Vishala Lehandas Wahane
32. Bhalchandra Subhash Supekar
33. Vikas Panjabrao Mujmule
34. Sanjay Nathrao Ambekar
35. Balasaheb Shankarrao Misal
36. Sagar Prabhakar Deshmukh
37. Yuvraj Lahu Varute
38. Parag Ramchandra Bhagyavant  
(Resp. Nos.3 to 38 to be served  
through the Resp. No.2/MPSC)
39. Sarla d/o. Vinayak Patil,  
Age: 42 years, Occu.: Legal Practitioner,  
Working as Advocate At Chopda,  
Tq. Chopda, Dist. Jalgaon,  
R/o: Plot No. 22, Old Shirpur Road,  
Narmada Nagar, Chopda,  
Tq. Chopda, Dist. Jalgaon.

40. Yogesh Prabhakar Rao Pore,  
Age: 36 years, Occu. Legal Practitioner,  
R/o: Plot No. 76, Pilliv Road, Ahilya Nagar,  
Malshiras, Tq. Malshiras, Dist. Solapur.

41. Anuradha Gautam Rao Gaikwad,  
Age: 31 years, Occu. Legal Practitioner,  
R/o: Ganesh Nagar, Parbhani,  
Tq. & Dist. Parbhani.

42. Gopisagar Mansaram Dhiwre,  
Age: 46 years, Occu. Special Asst. Public Prosecutor,  
Appointed under Sec. 25/3 of Cr. P.C.  
R/o: 1255 A, Agra Road, Near Kataria Department,  
Dhule, Tq. & Dist. Dhule.

43. Shaikh Asimahamad A. Basit,  
Age: 34 years, Occu. Special Asst. Public  
Prosecutor, Appointed under Sec. 25/3  
of Cr. P.C. R/o: Islampura Chowk,  
Opp. Abu-Bakr Masjid, Garib Nawaz Colony,  
Shahada, Tq. Shahada. Dist. Nandurbar,

44. Shalini Dnyaneshwar Ghadge,  
Age: 39 years, Occu. Legal Practitioner,  
R/o: Jijamata Nagar, Near Auto Stand,  
Gayatri Mandir Road, Sambodhi Niwas,  
Hingoli, Dist. Hingoli.

45. Rani Rajagonda Patil,  
Age: 42 years, Occu. Legal Practitioner,  
R/o: Shivaji Hsg. Soc. Plot No. 30, 13th Lane,  
Jaysinghpur, Tq. Shirol, Dist. Kolhapur.

46. Sumedh Pandurang Gawale,  
Age: 36 years, Occu. Legal Practitioner,  
R/o: ND-41, A-2, 3/2, Behind LIC Office,  
CIDCO, New Nanded, Tq. & Dist. Nanded.

47. Sangeeta Vishwanath Gopale,  
Age: 38 years, Occu. Legal Practitioner,  
R/o: Jagrut Hanuman Nagar,  
Pawdewadi Road, Wadi Bk, Nanded.

48. Bharat Devram Kale,  
Age: 38 years, Occu. Legal Practitioner,  
R/o: Post, Dhandarpal, BK, Tq. Sangamner,  
Dist. Ahmednagar.

49. Pradnya Madhukar Paikrao,  
Age: 41 years, Occu. Legal Practitioner,  
R/o: Plot No. 12-A, Vikas Nagar, Taroda bk,  
Nanded, Tq. & Dist. Nanded.

50. Kavita Vikas Chandratre,  
Age: 39 years, Occu. Legal Practitioner,  
R/o: F-2, Avani Landmark, Ekdant Nagar,  
Ambad Link Road, Ambad, Nashik,  
Tq. & Dist. Nashik.

51. Bhushan Mahesh Bhamre,  
Age: 34 years, Occ: APP,  
R/o: Lane No. 5, Near Miracha Maruti Mandir,  
Dhule, Dist. Dhule.

52. Pratik Bharat Deshmane,  
Age: 39 years, Occ : Legal Practitioner,  
R/o. 211, Shukwar Peth, Phaltan,  
Tq. Phaltan, Dist: Satara.

53. Kranti Suresh Kumbhar,  
Age: 36 years, Occ : As above,  
R/o. C-804, Whistling Meadows,  
Bavdhan, Pune.

54. Amruta Puroshuttam Wagh,  
Age : 38 years, Occ: As above,  
R/o. Hanuman Nagar, Takom, Chandrapur.

55. Vidya Govindrao Kakde,  
Age: 47 years, Occ: As above,  
R/o. Ganesh Nagar, Temple,  
Siddharth Ward, Warora, Chandrapur.

56. Shital Vasantrao Dahikar,  
Age: 45 Years, Occ: As above,  
R/o. Maharaja Appt, E/5, Gaurikishan Ward,  
Balarpur, Tq: Balarpur, Dist: Chandrapur.

57. Pradnya Shelar,  
Age: 32 Years, Occ: As above,  
R/o. At Post. Bhigwan,  
Tq: Indapur, Dist: Pune.

58. Sagar Shankar Pawar,  
Age: 35 yrs, Occ- Legal Practitioner,  
R/o. Aitawade (Kh), Tq. Walva, Dist. Sagali.

59. Nivedita Bhupal Karnik,  
Age-39 yrs, Occ- Legal Practitioner,  
R/o. Lane No.5, SP Plaza, Flat No.204,  
Jaisingpur, Tq. Shirol, Dist. Kolhapur.

60. Pravin Sudamrao Javale,  
Age-30 yrs. Occ- Legal Practitioner,  
R/o. N-4, Gurusahani Nagar, CIDCO,  
Aurangabad - 03.

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APPEARANCE : Shri A.S.Deshmukh, learned Counsel for  
applicant nos.1 to 11.

: Shri S.S.Kulkarni, learned Counsel along  
with Shri S.S.Kurundkar, learned Counsel  
for applicant no.12, 13, 14 & 15.

: Shri A.S.Khedkar along with Smt. Pranoti  
R. Karpe, learned Counsel for respondent  
nos.4, 5, 6, 9, 10, 11, 14, 15, 16, 17, 20,  
22, 23, 25, 30, 31, 33, 34, 40, 41, 42, 43,  
44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55,  
56, 57, 58 & 59.

: Shri M.B.Bharaswadkar, learned Chief  
Presenting Officer for the respondent nos.1  
& 2.

: Shri Ganesh P. Darandale, learned  
Counsel for respondent nos.7, 12, 24, 32.

: Shri M.K.Bhosale, learned Counsel for  
respondent no.19,

: Shri Parag Barde along with Parikshit  
Mantri & Anand Kawre, learned Counsel  
for respondent nos.29.

: Shri J.B.Choudhary, learned Counsel for respondent no.8, 28, & 36.

: Shri D.T.Devane, learned Counsel for respondent no.39.

: Shri S.N.Pagare, learned Counsel for respondent no.60.

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**CORAM : JUSTICE SHRI P.R.BORA, VICE CHAIRMAN  
AND  
SHRI VINAY KARGAONKAR, MEMBER (A)**  
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**Reserved on : 09-05-2024  
Pronounced on : 28-06-2024**  
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**O R D E R**  
[Per- Justice P.R.Bora, V.C.]

1. Heard Shri A.S.Deshmukh, learned Counsel for applicant nos.1 to 11, Shri S.S.Kulkarni, learned Counsel along with Shri S.S.Kurundkar, learned Counsel for applicant no.12, 13, 14 & 15 (applicants in M.A.554/24 & 930/24 (applicants no.14 & 15 in O.A.)), Shri A.S.Khedkar along with Smt. Pranoti R. Karpe, learned Counsel for respondent nos.4, 5, 6, 9, 10, 11, 14, 15, 16, 17, 20, 22, 23, 25, 30, 31, 33, 34, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58 & 59, Shri M.B.Bharaswadkar, learned Chief Presenting Officer for the respondent nos.1 & 2, Shri Ganesh P. Darandale, learned Counsel for respondent nos.7, 12, 24, 32, Shri M.K.Bhosale, learned Counsel for respondent no.19, Shri



Parag Barde along with Parikshit Mantri & Anand Kawre, learned Counsel for respondent nos.29, Shri J.B.Choudhary, learned Counsel for respondent no.8, 28, & 36, Shri D.T.Devane, learned Counsel for respondent no.39 and Shri S.N.Pagare, learned Counsel for respondent no.60.

2. Maharashtra Public Service Commission (For short "Commission") had issued an advertisement on 07-01-2022 for filling in 547 posts of Assistant Public Prosecutors Group-I to be appointed all over the State. In the said 547 posts, 212 posts were earmarked for Open Category candidates and amongst that 137 were Open General, 64 were for Open Female and 11 were for Open Sports. The present applicants had applied for the said post and after having undergone the selection process their names have been included in the General Merit List. All the applicants belong to Open Class.

3. It is the grievance of the applicants that the candidates whose names are included in Objection List 1 annexed with the O.A., have been wrongly recommended against Open seats. It is the contention of the applicants that, though candidates in Object List-A have secured meritorious position than some of the Open candidates still

they could not have been selected against Open seats for the reason that, they have availed benefit of age relaxation and fees concession available for their respective castes. It is the contention of the applicants that, law is well settled that if a candidate belonging to any of the reserved class is to be selected against Open seat on the basis of merit, he must not have availed any benefit i.e. of age relaxation or fees concession or any other similar benefit applicable to his caste or tribe.

4. The applicants have alleged that the candidates in the Object List-A who have been recommended against the Open seats have availed such benefits and as such they could not have been selected and appointed against Open seats. It is the further contention of the applicants that because of inclusion of the said candidates and their selection against Open seats, applicants have lost the opportunity of being selected though they have also secured meritorious position. The applicants have, therefore, prayed for direction against the respondents to revise the entire merit list by excluding the names of the reserved category candidates who have been selected against Open seats despite availing the benefits like age relaxation and concession in fees applicable to their caste.

5. The applicants have included about 38 such candidates as respondents in the present O.A. It is the contention of the applicants that these candidates are not liable to be selected against Open seats. It is the further contention of the applicants that on the basis of the number of marks secured by these candidates their selection can be against seats reserved for their respective caste and tribe. The applicants have therefore added 38 more persons as respondents who have been appointed against the seats earmarked for reserved class apprehending that if the appointment of the candidates in Object List-A are set aside and if the said candidates are considered for their appointment, against seats reserved for their respective castes and tribes, candidates in the second Objection list who are already appointed against the said seats will have to vacate the said seats. Applicants have relied upon the terms and conditions incorporated in the advertisement, more particularly, clause 5.10 and 5.11.

6. In the application, applicants have further prayed for filling in the posts reserved for the 'Divyang' candidates and Orphans which have remained unfilled because of non-availability of the candidates of the said

category. It is the contention of the applicants that, in the event of non-availability of the candidates to occupy the posts of Divyang persons or orphans, all such posts are liable to be converted in Open seats and the deserving candidates from Open General category can be appointed on the said posts in order of their merit. The applicants have also raised an objection for not preparing the waiting list of the eligible candidates in every category. The applicants have, therefore, claimed the following reliefs:

*“A) This Original Application may kindly be allowed thereby holding & declaring the impugned action of Resp. No.2 of preparing & publishing the 'list of candidates - eligible for recommendation' dated 10/08/2023 to be illegal and unsustainable in law.*

*B) This Original Application may kindly be allowed thereby directing the Resp. No.2 to recast the 'list of candidates - eligible for recommendation' dated 10/08/2023 by excluding the names of such candidates from reserved categories who had availed the benefit of age relaxation or concession in fees and to include therein the names of applicants and others from the 'Open General' category on the basis of their respective merit positions.*

*C) This Original Application may kindly be allowed thereby further directing the Resp. No.2 to recast the 'list of candidates eligible for recommendation' dated 10/08/2023 by filling-in all the 137 slots available for the 'Open General' category by including the names of applicants and others therein on the basis of their respective merit positions.*

*D) This Original Application may kindly be allowed thereby also directing the Resp. No. 2 to recast the 'list of candidates - eligible for recommendation' dated 10/08/2023 by allotting the vacant 16 slots from the categories of 'Disabled persons' and 'Orphans' to the deserving candidates from 'Open General category on merit basis.'"*

7. The State authorities i.e. Respondent no.1 and Maharashtra Public Service Commission Respondent no.2 (MPSC) have filed their separate affidavits in reply and have resisted the contentions raised and the prayers made in the O.A. The private respondents have also filed the affidavits in reply and have also opposed the O.A.

8. Respondent no.1 in its affidavit in reply has contended that the entire selection process has been carried out strictly in accordance with the provisions under the law by respondent no.2 i.e. MPSC. Respondent no.1 has further contended that there is nothing in the O.A.

against the respondent no.1 and as such no detailed reply has been filed by the said respondent no.1. Respondent no.2 MPSC has filed detailed affidavit in reply to the O.A. Respondent no.2 has contended that vide its Standing Order dated 29-12-2017, it is resolved that even if the backward class candidate has availed the benefit of concession in examination fees still he will be held qualified for to be appointed against the Open General seat if he secures such position in order of merit. It is further contended that, in corrigendum dated 18-06-2019 to Standing Order No.6 issued on 11-06-2019 as per clause 2(a) thereof, the reserved category candidate who has availed the benefit of 'age relaxation' is also made eligible for appointment against unreserved seats on the basis of his merit. In view of the aforesaid Standing Order, according to respondent no.2, no error has been committed by it in recommending the reserved category candidates who have achieved meritorious position against the Unreserved seats.

9. Respondent no.2 has referred to the Judgment of the Hon'ble Supreme Court in the case of **Jitendra Kumar Singh V/s. State of Uttar Pradesh [2010 3 SCC 119]**. Respondents have also referred to the judgment of the

Maharashtra Administrative Tribunal Principal Bench at Mumbai passed on 27-03-2019 in O.A.No.934/2018. Respondent no.2, therefore, has prayed for dismissal of the O.A.

10. Respondent no.19 has contended in his affidavit in reply that, he was well within the limit of age when he applied for post and has been duly selected. It is his further contention that though he has not availed any sort of relaxation and has been selected purely on his own merit, the applicants have unnecessarily added him as a respondent in the matter. Said respondent has, therefore, prayed for dismissal of the O.A.

11. Respondent nos.7, 12, 24 and 32 have filed their joint affidavit in reply. According to these respondents as per the Standing Order dated 11/18-06-2019 issued by the MPSC they have been rightly recommended for their appointment against unreserved seats. According to the said respondents, G.R. dated 19-12-2018 also gives eligibility to the meritorious reserved category candidates for their consideration against the seats earmarked for Open category. These respondents have also referred to the judgment of the Hon'ble Bombay High Court in the case of

Vinod D. Dhore V/s. State of Maharashtra & Ors. [Civil Writ Petition No.11977/2017].

12. In her affidavit in reply respondent no.39 though has opposed the O.A. no new ground is made out by her. Her affidavit in reply is on similar lines as that of respondent nos.2, 7, 12 etc.

13. Respondent no.29 in her affidavit in reply has specifically contended that she has not availed the age relaxation though she belongs to SC category and her selection in the Open category is on the basis of her merit. It is contended that at the time of filing application, she was 35 years old and as such was within the age limit prescribed for Open category. Said respondent has further contended that without verifying the particulars as about her age and her performance, she has been unnecessarily arrayed as respondent and is put to harassment. As about relaxation of fees, she has contended that the Hon'ble Apex Court has settled the law that relaxation in fees shall not be considered a disqualification for the reserved category candidates for their selection in Open category. She has, therefore, prayed for dismissal of O.A. with heavy costs.



14. Respondent no.19 has filed additional affidavit in reply wherein he has contended that though he belongs to OBC category, he has not availed the age relaxation or even the concession in fees. He has, therefore, prayed for dismissal of the O.A. by claiming costs.

15. Respondent nos.8, 28 and 36 have filed their joint affidavit in reply referring to the judgment of the Hon'ble Bombay High Court in the case of Vinod D. Dhore V/s. State of Maharashtra & Ors. And few other cases. These respondents have also prayed for dismissal of the O.A.

16. Respondent no.12 in his affidavit in reply has stated that he has not availed the benefit of age relaxation though he belongs to SC category and has secured berth in the list of Open candidates purely on the basis of his merit. It is further contended that, in view of the decision of the Hon'ble Apex Court the objection as about the concession in fees is liable to be just ignored. He has, therefore, prayed for dismissal of O.A. with heavy costs.

17. Respondent nos.38, 42, 45, 49 & 50 have filed their joint affidavit in reply. It is the contention of respondent no.42 that, he is working as a Special Public

Prosecutor appointed under section 25(3) of the Criminal Procedure Code, and as such, he is entitled for the age relaxation as per clause 7.2.2 of the advertisement.

18. Shri Avinash Deshmukh, learned counsel appearing for the applicants vehemently argued that respondent no. 02 could not have recommended the candidates belonging to reserved class, who have availed the age relaxation while participating in the present selection process, against the unreserved seats i.e. Open (General), Open (Female) as well as Open (Sports). Referring to clause 5.10 of the advertisement, learned counsel submitted that the Government did not declare any policy as mentioned in the said clause while present recruitment process was in progress and even thereafter till today. Learned counsel submitted that in absence of any such policy decision, MPSC must have followed the law laid down on the subject by the Hon'ble Supreme Court. Learned counsel further submitted that the Hon'ble Supreme Court has settled the legal position that only such Backward Class Candidates who have not availed the benefit of age relaxation or any other concession on the basis of their caste are liable to be considered on the basis of their merit for selection against unreserved seat.

Learned counsel pointed out that clause 5.11 in the advertisement has been introduced from that point of view. Learned counsel submitted that Reserved Class Candidates whose names are recommended by the MPSC for their appointment against Open General, as well as, Open (Female) and Open Sports Category have availed the benefit of age relaxation, as well as, fee concession and, as such, the said candidates could not have been recommended against the Open Seats. Learned counsel submitted that names of such candidates could have been recommended against the seats reserved for their respective categories, but not against the unreserved seats. Learned counsel submitted that because of inclusion of such candidates, the applicants who have the bona-fide claim on the unreserved seats have been prejudicially affected and chances of their selection on the subject post are taken away.

19. Learned counsel further argued that though the Commission has taken a stand in its affidavit in reply that in view of standing order No. 06 dated 11/18.06.2019 issued by it the Reserved Category Candidates availing the benefit of age relaxation cannot be disqualified on that ground for their selection in the Open Category in order of their merit, the State Government and even the

Commission did not act upon the said modified standing order. Learned counsel pointed out that in fact, it was not within the jurisdiction of the Commission to take any such decision and thereby to grant eligibility to the Reserved Class Candidates availing the age relaxation or concession in fees for their selection against the open seats in order of their merit. Learned counsel submitted that such a decision could have been taken only by the State Government and not by the Commission. Learned counsel submitted that the concerned regulation or amended regulation being beyond jurisdiction of the Commission, cannot be given effect to. Learned counsel further submitted that even the Commission did not act upon the said regulation/standing order or else there was no reason for it to incorporate clauses 5.10 and 5.11 in the advertisement.

20. Learned counsel for the applicants further pointed out that not only in the advertisement of the present recruitment process but in the advertisements published subsequent to the present advertisement i.e. advertisement No.38/2022 as well as, advertisement No. 92/2022 also similar clauses alike 5.10 & 5.11 are incorporated which substantiated his contention that

modified standing order issued on 11/18-06-2019 was not to be acted upon. Learned counsel for the applicants further submitted that even otherwise there is nothing on record to show that the standing order dated 11/19.06.2019 was approved or ratified by the State Government.

21. Learned counsel further submitted that though 137 seats are earmarked for Open (General) respondent no.2 has recommended the names of only 114 candidates and 23 posts of Open General are kept unfilled. Learned counsel submitted that by keeping said number of posts unfilled, the respondents have caused injustice to the Open candidates, who are likely to be selected against the said seats. Learned counsel further submitted that the decision of respondent no. 02 to keep vacant the unreserved seats for 11 unfilled seats reserved for Divyang Category Candidates and 05 unfilled seats for Orphan Category candidates is unjust.

22. Learned counsel placed reliance on the following judgments in support of his arguments:-

- (1) Charushila Choudhary and Ors. Vs. State of Maharashtra & Anr., 2019 (5) ABR 561.

- (2) Saurav Yadav and Ors. Vs. State of Uttar Pradesh and Ors., AIR 2021 SC 233.
- (3) Niravkumar Dilipbhai Makwana Vs. Gujarat Public Service commission and Ors., AIR 2019 SC 3149.
- (4) Gaurav Pradhan and Ors. Vs. State of Rajasthan and Ors., AIR 2017 SC (Supp.) 810.
- (5) Deepa E.V. Vs. Union of India and Ors., AIR 2017 SC 1945.

23. Learned Chief Presenting Officer appearing for respondent no.1 and 2 submitted that in view of the standing order dated 29.12.2017 issued by the Commission, the concession availed by the Reserved Class Candidates in the examination fee is not to be considered as disqualification for the Reserved Class Candidates for to be considered for their selection against Open Category Candidates in order of their merit. Learned C.P.O. further submitted that on 18.06.2019 one corrigendum was issued to the standing order no. 06 of the Commission issued on 11.06.2019 and thereby the Backward Class Candidates, who have taken the benefit of age relaxation, are also made eligible for their selection against the Open Category posts. Learned C.P.O. submitted that the applicants have not raised any challenge to the standing orders so issued by respondent no. 02. Learned C.P.O. submitted that in view of the aforesaid standing orders MPSC has recommended

the names of the candidates belonging to Reserved category against the Unreserved seats irrespective of the fact that they have taken the benefits of age relaxation and/or fees concession.

24. Learned Chief Presenting Officer referring to and relying upon the judgment of the Hon'ble Supreme Court in case of **Jitendra Kumar Singh and Anr. Vs. State of U.P. and Ors., [2010 (3) SCC 110]** submitted that having regard to the facts involved in the present matter the ratio laid down in the said case would squarely apply. Learned C.P.O. further submitted that the Principal Bench of this Tribunal at Mumbai in Original Application No. 934/2018 has accepted the stand taken by the Government that the Reserved Class Candidates availing concession in fee and age relaxation are entitled for the Open posts. Learned C.P.O. cited the judgment of the Hon'ble Bombay High in case of **Vinod Dadasaheb Dhore & another Vs. the Secretary, Maharashtra Public Service Commission, Mumbai & Ors., Writ Petition No. 11970/2017** to support his contentions. Learned C.P.O. submitted that the entire selection process has been completed and, as such, no relief deserves to be granted in favour of the applicants and, therefore, prayed for dismissal of the Original Application.

25. Shri Avinash Khedkar, learned counsel appearing for some of the private respondents in the matter vehemently opposed the arguments advanced on behalf of the applicants. Learned counsel placing reliance on the judgment of the Hon'ble Supreme court in case of **Jitendra Kumar Singh and Anr. Vs. State of U.P. and Ors.** (cited supra) submitted that the O.A. filed by the applicants is devoid of any substance. Learned counsel also referred to the standing orders to which the learned C.P.O. had referred in his arguments and submitted that in absence of any challenge to the said standing orders, the applicants are not entitled for any relief and the O.A. deserves to be dismissed on that count alone. Learned counsel further submitted that the judgments, which have relied upon by the applicants, may not apply to the facts of the present case. Learned counsel further submitted that the only judgment, which squarely apply in the present matter, is in the case of **Jitendra Kumar Singh and Anr. Vs. State of U.P. and Ors.** (cited supra). Learned counsel further submitted that several private respondents are unnecessarily impleaded as respondents in the present matter though they have not availed the benefit meant for Reserved Class Candidates. Learned counsel submitted that the



judgments, cited by the applicants are quite distinguishable and are delivered in the peculiar facts and circumstances involved in the said matters. As such, according to the learned counsel, the said judgments may not be relevant for adjudicating the issue raised in the present matter. Learned counsel further submitted that the Hon'ble Supreme Court has well settled the law in respect of migration of Reserved Class Candidates to the Open Class. He further argued that the private respondents have when proved their merit and have secured high position in the merit list above the Open Candidates their selection against unreserved seats cannot be objected. Learned counsel in the circumstances prayed for dismissal of the O.A.

26. It was also argued on behalf of some of the private respondents that since they are in-service candidates working on the post of Assistant Police Prosecutor, no upper age limit is applicable to them. Our attention is invited to clause 7.2.1 of the advertisement. The said respondents have prayed for dismissal of the O.A. with costs.

27. On behalf of some of other private respondents it has been argued that though they have not availed any

benefit provided for Reserved Category Candidates, they have been unnecessarily impleaded as respondents in the present matter. They have also prayed for dismissal of the O.A. with costs.

28. Learned counsel appearing for the private respondents have relied upon the following judgments:-

1. Judgment delivered by Hon'ble Supreme Court in case of Jitendra Kumar Singh and Anr. Vs. State of U.P. and Ors., 2010 (3) SCC 110.
2. Judgment delivered by the Hon'ble Bombay High Court in the case of Vinod Dadasaheb Dhore & another Vs. the Secretary, Maharashtra Public Service Commission, Mumbai & Ors., Writ Petition No. 11970/2017.
3. Judgment of the principal seat of the Tribunal at Mumbai in the case of Sachin Raghunath Choudhary & Ors. Vs. the State of Maharashtra & Ors O.A. No. 934/2018, decided on 27.03.2019.
4. Judgment of the Principal Seat of the Tribunal at Mumbai in the case of Shri Rahul Darbar Pawar & Ors. Vs. the State of Maharashtra & Ors., O.A. No. 524 with O.A. No. 841 both of 2017 delivered on 02.11.2017.
5. Judgment of the Principal Seat of the Tribunal at Mumbai in the case of Sandeep Mali & Ors. Vs. Maharashtra Public Service Commission & Ors., O.A. No.21/2021 delivered on 19.09.2022.

29. We have considered the submissions made by the learned counsel appearing for the applicants, learned Chief Presenting Officer appearing for the State authorities and the learned Counsel appearing for the private

respondents. We have also perused the documents filed on record as well as judgments relied upon by the parties.

30. The applicants have raised an objection that, candidates belonging to reserved category who have availed the benefit of age relaxation and concession in fees cannot be considered for their recommendation against Unreserved seats even though they have secured more number of marks than the candidates in the unreserved category.

31. At the outset, we want to make it clear that in so far as the concession availed by the reserved category candidates in fees is concerned, we do not find any merit in the contention raised by the applicant that on that count the recommendation of such candidates against unreserved seats can be set aside.

32. In the matters of [i] Saurav Yadav & Ors. Vs. State of U.P. & Ors., [ii] Deepa EV Vs. Union of India & Ors., [iii] Neeravkumar Dilipbhai Makwana Vs. Gujrat Public Service Commission & Ors. and [iv] Gaurav Pradhan & Ors. Vs. State of Rajsthan & Ors., Hon'ble Apex Court though has held that the availment of the benefit of age relaxation by the reserved category candidates will disentitle them from claiming the appointment against the

unreserved seats even though they secured more number of marks than the unreserved candidates, in so far as the availment of the concession in fees is concerned, the same has not been considered as a disqualification for the reserved category candidates for claiming appointments against unreserved seats.

33. In the case of **Vinod Dhore** (*cited supra*) the Division Bench of the Hon'ble Bombay High Court has held that the concession in examination fees only enables the reserved category candidates to come within the zone of consideration. It is further observed that that the concession in examination fees did not in any manner tilt the balance in favour of the candidates belonging to unreserved category in the preparation of select list.

34. In view of the law laid down in the above-referred matters, we reject the objection raised by the applicants that availment of concession in fees by the reserved category candidates would disentitle them from claiming appointment against unreserved seat on their merit. In the circumstances, henceforth we have dealt with only the issue of age relaxation availed by the reserved category candidates and its consequences.

35. The question which now require to be considered is “whether the reserved category candidates who have availed the age relaxation provided for the reserved class can be considered for their appointment on the basis of their merit against the unreserved seats?”

36. In the instant matter as is revealing from the list of recommended candidates, the candidates coming from the reserved class are noticed to be recommended against the open seats on the basis of the number of marks scored by the said candidates. It is the precise objection raised by the applicants that the said reserved class candidates since have availed the benefit of age relaxation provided for the said class, are not entitled to be selected against the unreserved seats though they might have scored more marks than the open candidates, whereas, as is revealing from the affidavit in reply of respondent no.2 the recommendations are made on the strength of Standing Order No.6 issued by it on 11-06-2019.

37. Clauses 5.10 and 5.11 in the advertisement issued on 07.01.2022 are of vital importance, having regard to the rival contentions raised by the parties. We deem it

appropriate to reproduce both these clauses hereinbelow,  
which read thus:-

“५.१० सेवा प्रवेशाच्या प्रयोजनासाठी शासनाने मागास म्हणून मान्यता दिलेल्या समाजाच्या वयोमर्यादेमध्ये सवलत घेतलेल्या उमेदवारांचा अराखीव (खुला) पदावरील निवडीकरीता विचार करणेबाबत शासनाच्या धोरणानुसार कार्यवाही करण्यात येईल. याबाबतचा तपशील वेळोवेळी आयोगाच्या सेक्रेटरीच्यावर प्रसिध्द करण्यात येईल.

५.११ अराखीव (खुला) उमेदवारांकरीता विहित केलेल्या वयोमर्यादा तसेच इतर पात्रता विषयक निकषासंदर्भातील अटीची पूर्तता करणा-या सर्व उमेदवारांचा (मागासवर्गीय उमेदवारांसह) अराखीव (खुला) सर्वसाधारण पदावरील शिफारशीकरीता विचार होत असल्याने, सर्व आरक्षित प्रवर्गातील उमेदवारांनी त्यांच्या प्रवर्गासाठी पद आरक्षित/उपलब्ध नसले तरी, अर्जामध्ये त्यांच्या मूळ प्रवर्गासंदर्भातील माहिती अचूकपणे नमूद करणे बंधनकारक आहे.”

38. As averred in clause 5.11 each and every candidate coming from the reserved category was mandatorily required to provide accurate information as about his caste or category to which he belongs irrespective of the fact whether any reservation is provided or not for his caste or category, since the candidates coming from the reserved category were to be considered for appointment on the basis of the merit earned by them against the unreserved seats, provided they fulfill the conditions in respect of the age limit etc. as well as the other eligibility conditions prescribed for Open candidates.

39. Clause 5.10 lays down that the candidates coming from the socially backward classes notified by the Government availing benefit of age-relaxation will be considered for their selection against the unreserved (Open) seats as per the policy of the Government, details of which would be updated on the website of the Commission. As stipulated in clause 5.10, the State Government did not declare its policy. Affidavit in reply filed on behalf of respondent no.1 does not contain any such information.

40. In absence of any policy declared by the Government, according to the applicants law laid down by the Hon'ble Apex Court will be a guiding factor. It is the case of the applicants that in view of the law laid down by the Hon'ble Supreme Court the candidates coming from the Reserved Class though may be holding meritorious position, cannot be appointed against the Unreserved Seats, if they have availed the benefit of age relaxation applicable to their Reserved Class. As against the submission made on behalf of the applicants, it is the contention of the Commission as well as the private respondents that respondent no.2 i.e. the Commission has already declared the said policy vide its standing order No.6 dated 11/18.06.2019. We deem it appropriate to reproduce

hereinbelow the relevant portion in the said standing order, which reads thus:-

“अ) मागासवर्गीय उमेदवारांनी वयोमर्यादित घेतलेली सवलत ही खुल्या (सर्वसाधारण) पदांसाठी अपात्रता समजण्यात येणार नाही. म्हणजेच सवलतीच्या वयोमर्यादेसह त्यांना खुला (सर्वसाधारण) पदांसाठी पात्र समजले जाईल. हा निर्णय यापुढे प्रसिध्द होणाऱ्या निवड प्रक्रियांच्या जाहिरातीपासून लागू राहील.

ब) चालू असलेल्या निवडप्रक्रियांसंदर्भात हा निर्णय मध्येच लागू होणार नाही.

क) यापूर्वी निकाल जाहीर झालेली प्रकरणे पुन्हा खुली करण्यात येणार नाहीत.”

41. The question arises whether the standing order issued by respondent no. 2 i.e. the Commission can be said to be and accepted as the policy decision of the Government. Rival submissions are made in this regard. As per clause 5.10 in the advertisement the policy on the aforesaid subject was to be declared by the State. The State has remained completely silent on this issue in its affidavit in reply. State has not provided any information as to which policy was adopted or what decision was taken in compliance of clause 5.10 of the advertisement. It is more surprising that in paragraph 3 of its affidavit in reply, respondent no. 01 has stated that, “respondent no.1 is a formal party and not a necessary party in the O.A.” In the affidavit in reply respondent no.1 has, however, not referred to the Standing Order No.6 dated 11/18.06.2019 issued by



the Commission. It is also not the case of respondent no. 01 in its affidavit in reply that the said standing order was made applicable to the subject recruitment process. There is nothing on record showing that the standing order no. 06 was issued by respondent no. 2 in concurrence with respondent no. 01. Moreover, as has been argued on behalf of the applicants, the question is whether such a policy decision could have been taken by the Commission.

42. The functions of the Commission are defined in Article 320 of the Constitution of India. Perusal of the said article apparently reveals that it is not within the purview of the Commission to take any policy decision as about the Reservation in employment and the consideration of the reserved category candidate for their appointments against unreserved seats.

43. Article 320 of the Constitution of India pertains to functions of the Public Service Commissions. We deem it appropriate to reproduce the said Article, which reads thus:

**“320. Functions of Public Service Commissions.—** (1) *It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.*

*(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.*

*(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted*

*(a) on all matters relating to methods of recruitment to civil services and for civil posts;*

*(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;*

*(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;*

*(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;*

*(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award, and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:*

*Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.*

*(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.*

*(5) All regulations made under the proviso to clause (3) by the President or the Governor 1 of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.*

44. Perusal of the aforesaid Article makes it clear that UPSC or State PSCs are advisory bodies and their principal function is to conduct the examinations for appointments to the services of the Union and the services of the States, respectively. The aforesaid Article does not cast the duty of framing policy in respect of reservation in the employment upon UPSC or State PSCs. On the contrary, clause 4 of the said Article provides that, nothing

in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause 4 of Article 16 may be made or as respect the manner in which the effect may be given to the provisions of Article 335.

45. Therefore, there remains no doubt that, it is not within the domain of UPSC or State PSCs to take any policy decision as about the reservation in the Government employment or in any matter incidental thereto.

46. It is thus evident that, decision, whether to consider the candidates belonging to the reserved category for their appointment against the unreserved seats on the basis of meritorious position achieved by them irrespective of the fact that the said candidates have availed the benefit of age relaxation provided for them could not have been taken by the MPSC and it was within the exclusive domain of the State Government to take appropriate decision in that regard.

47. The information which is revealed through the judgments relied upon by the parties also indicates that the policy about reservation in Government employment and the matters incidental thereto is to be decided only by the

Government. In the case of **Jitendra Kumar Singh** a reference has come of U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and of Government Order (G.O.) dated 25-03-1994. The said G.O. contains the instructions on the subject of reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes in the U. P. Public Service. Provisions under the said Act and the instructions contained in the said G.O. were ultimately upheld by the Hon'ble Supreme Court in the case of **Jitendra Kumar Singh**. In the case of **Gaurav Pradhan** there is a reference of the Circulars time to time issued by the State Government of Rajasthan laying down the policy in respect of the reservations in the Government employment. In the said matter, the stand taken by the Government vide Circular dated 24-06-2008 was upheld by the Hon'ble Supreme Court. In the case of **Deepa EV**, recruitment rules of 1980 framed by the Kerala Government were involved pertaining to the reservations for the backward class candidates. In the case of **Neeravkumar Makwana**, the reference has come of the Circular dated 23-07-2004 which pertains to policy of reservation adopted by the Gujrat State.

48. In the judgment in the case of **Vinod Dhore** (cited supra) decided by the Hon'ble Division Bench of Bombay High Court, there is a reference of the affidavit in reply filed in the said matter on behalf of the Government, more particularly on behalf of the G.A.D. of the Government. We deem it appropriate to reproduce paragraph nos. 05 to 08 from the said affidavit, which read thus:-

*"5. I say and submit that from time to time vide G.R. dtd.09.04.1965, 25.01.1991 and 18.10.1997, the Government of Maharashtra has issued a policy of appointment of members of backward class on the vacancies for open category, if they are otherwise considered suitable for such appointments on merits. Copies of G.Rs. Dated 09.04.1965, 25.01.1991 and 18.10.1997 are annexed hereto and marked as EXHIBIT 'R-1', EXHIBIT 'R-2' and EXHIBIT 'R-3' collectively.*

*6. I say and submit that the Government of Maharashtra in last para (1st page) of the G.R. Dtd. 09.04.1965 provides that -*

*"These percentages represent the minimum number of vacancies to be filled by the appointment of members of the Backward Class and Government desires to make it clear that it is open to the appointing authorities to recruit members of the Backward Class in excess of these percentage if they are otherwise considered suitable for such appointment vis-a-vis other candidates on merit."*

*7. I say and submit that clarification regarding the candidates belong to Backward Class and selected on merit should not be counted against reserved post earmarked for them, is issued vide*

*G.R. dtd.25.01.1991. It is clarified in last 3 lines of para 2 (2nd page) of the said G.R. that besides the 6 reserved posts, if the members of backward class selected on merit then they should be considered on the 11 open category posts as per their order of merit.*

*8. I say and submit that in para 2(2) of the G.R. dtd. 18.10.1997, it is clearly prescribed that candidates belong to Backward Class and selected on merit should not be counted against reserved post earmarked for them and their appointments should not be shown on the roster point. They should be counted against open/general category."*

The contents of the aforesaid affidavit demonstrate that the policy decision on the issue of reservation in employment is the subject in the domain of the Government and not of the Commission.

49. We have endeavoured to give the aforesaid illustrations to demonstrate that, policies in respect of reservation in the employment and the matters incidental thereto thereto have been framed by the respective Governments and not by the Public Service Commissions in the said States. In the above premise, we reiterate that, it is beyond the jurisdiction of MPSC to decide whether or not to consider the reserved category candidates availing benefits of age relaxation and/or concession in fees for their appointment against the unreserved seats on the basis of

their merit. The Standing Order No.06 issued on 11/18-06-2019 by the Commission, therefore, has to be held without jurisdiction.

50. As is revealing from the circumstances, there is reason to believe that no effect has been given to the said Standing Order and the Commission itself has not acted on it. As has been pointed out by the learned Counsel appearing for the applicants, in the advertisements issued by the MPSC subsequent to issuance of the aforesaid Standing Order i.e. after 11/18-06-2019, more particularly, in the advertisement no.260/2021, in the advertisement no.38/2022 and in the present advertisement issued on 07-01-2022, therefore, there is no such stipulation that the benefit availed of age relaxation by the reserved category candidates will not be a disqualification for them to be considered against the unreserved seats on the basis of their merit. Instead of that a clause is inserted which lays down that the candidates coming from the socially backward class notified by the Government availing benefit of age relaxation will be considered for their selection against the unreserved (Open) seats as per the policy of the Government, details of which would be updated on the website of the Commission.



51. We revert back to the Standing Order dated 11-06-2019 issued by MPSC. As is canvassed by the MPSC the Standing Order No.6 issued on 11-06-2019 is the policy decision which was to be implemented. In the said Standing Order, it is stated that the decision reflected in the Standing Order would be applicable for all subsequent recruitment processes. It is further contended therein that the said decision would be applicable to all the recruitment process, advertisement of which may be issued thereafter. It is, however, the matter of record that neither in the advertisement in the present matter i.e. issued on 07-01-2022 nor in the other two advertisements to which we have referred to hereinbefore, the decision as has been taken vide Standing Order No.6/2019 is made applicable. On the contrary, clauses which are included in the said advertisement stipulate that the policy will be declared by the Government and it will be updated on the website of the Commission. All the facts as aforesaid lead to only inference that the Standing Order No.6/2019 had become redundant and was not to be acted upon. There is further reason to believe that, though MPSC had issued the aforesaid Standing Order, subsequently, it realized that the policy in that regard can only be decided by the State

Government and that appears to be reason for introducing clauses 5.10 and 5.11 in the present advertisement and exactly similar clauses in the subsequent advertisements issued by the MPSC. In the above circumstances, the plea taken by the MPSC in its affidavit in reply that, it has recommended the candidates belonging to reserved category availing benefit of relaxation in age for their appointment against the unreserved seats on the basis of the aforesaid Standing Order cannot be accepted and deserves to be rejected.

52. The situation which has emerged now is that, we have held the Commission to be incompetent or not having the jurisdiction to lay down any policy in regard to the reservations in employment and the matters incidental thereto and on other hand the Government has not placed on record its policy in regard to the issue raised in the present matter. We have noted earlier that the stand taken by the Government in its affidavit in reply is unconscionable. When the matter pertains to policy of reservation, which is in exclusive domain of the State Government, it is contended that it is a formal party and nothing is against it.

53. Though, in the present O.A. the State has failed in putting on record its policy in regard to issue which has fallen for our consideration, as pointed out by learned counsel for the applicants the policy of the Government on the subject issue is reflected in the matter of **Charushila Choudhary and Ors. Vs. State of Maharashtra & Anr.**, (cited supra). In the said matter the question which was for consideration of the Division Bench was as regards methodology of filling in the vacancies prescribed for horizontal reservation which flows from article 16(1) of the Constitution of India. In the said matter the statement was made by learned Advocate General of the State throwing light on the reservation policy of the State and based on that certain conclusions were recorded by the Division Bench. The Division Bench on consideration of reservation policy of the State as explained by learned Advocate General and considering the law laid down by the Hon'ble Supreme Court in the judgments which are discussed by it in the said judgment, has recorded that, "*the candidates, who have applied from amongst the open category and who have not availed of any benefits of relaxed standards such as relaxation in age limit, qualification, percentage of qualifying marks, experience, etc., are entitled to be*

*considered on the basis of their individual merit from amongst open competition category, as candidates belonging to open category.”*

54. Applicants as well as respondents both have cited more than a dozen judgments in support of their respective contentions. We would prefer to discuss judgment in the matter of Jitendra Kumar Singh first for the reason that in all the judgments cited in the matter, it is referred. In some, it is relied upon and in some, it is distinguished.

55. In the matter of **Jitendra Kumar Singh and Anr. Vs. State of U.P. and Ors.** (cited supra), the facts were thus:

State of Uttar Pradesh had conducted a competitive examination for filling up the posts of Sub Inspectors of Civil Police and Platoon Commanders in PAC by direct recruitment. Candidates belonging to SCs, STs and OBCs were granted waiver of examination fee and also relaxation in upper age-limit, as provided in Section 8(1) of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994. Section 3(6) of the Act provided that if a reserved candidate gets selected on the basis of merit in an open competition

with general candidates, he shall not be adjusted against vacancies reserved for reserved category. Government instructions dated 25-03-1994 also provided the same course. Aforesaid provisions were questioned contending that, the candidates who had availed of waiver of fees and relaxation in upper age limit should be adjusted against reserved vacancies even if marks secured by them in open completion are more than the marks secured by the last General candidate in open competition. The contention so raised was not accepted by the Hon'ble High Court. The matter was ultimately taken to the Hon'ble Apex Court. Hon'ble Apex Court held as under:

*“that the relaxation in age-limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. main written test followed by interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination”*

It was further observed by the Hon'ble Apex Court as under:

*“75. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the*

*concession in fee would in any manner be infringement of Article 16(1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the preliminary test as also in the physical test. It is only thereafter that successful candidates have been permitted to participate in the open competition.”*

56. It is true that though in the matter of Sandeep S. Mali & Ors. Vs. Maharashtra Public Service Commission & Ors. this Tribunal rejected the prayer of removing respondent Nos. 7 to 19 belonging to Open category, it has principally accepted the argument advanced in the said matter that the candidates belonging to reserved category who have secured more marks than cut off marks of the general category candidates were liable to be selected against unreserved seats as Open General candidates. Tribunal has in the said judgment relied upon the judgment of Hon'ble Apex Court in the cases of Bharat Sanchar Nigam Limited V. Sandeep Choudhary and 07

Ors., 2022 Like Law (SC) 419, the Tribunal has also referred to the judgment in the case of Jitender Kumar Singh, Niravkumar Dilipbhai Makwana, and previous judgment of the Tribunal in the case of Sachin Raghunath Choudhary (O.A. No. 934/2018). The reference is also made of the judgment of the Hon'ble Supreme Court in the case of Saurav Yadav. The Tribunal did not accept the contention raised by the learned Chief Presenting Officer to consider the ratio laid down in the case of **Niravkumar Dilipbhai Makwana**, observing that in the case of Makwana the Government of Gujarat had issued Government Resolution stating that the candidates who have availed of relaxation/concession in age and fees are not entitled for migration while the State of Maharashtra has not issued such Government Resolution. It further appears that the earlier judgment of the Tribunal in the case of Sachin Choudhary, wherein the Tribunal has set aside the declaration made by the Commission that 'if the concession in age and fees and other eligibility criteria is availed of by any candidates of reserved category then they are not entitled to migrate to open general category' was also another weighing factor for the Tribunal in arriving at the aforesaid conclusion.

57. In the case of **Sachin Choudhary** this Tribunal set aside the declaration dated 25.09.2014 issued by the Commission to which we have referred above relying on the ratio laid down in the case of Jitender Kumar Singh (cited supra). In paragraph 12 of its judgment in the said matter the Tribunal has observed that, “law laid down by the Hon’ble Apex Court, which is relied upon by the learned counsel for the applicants namely Jitender Kumar Singh Vs. Union of India and others is not shown to be distinguished or overruled expressly or impliedly.” It is thus, evident that in the said matter the judgment of the Hon’ble Supreme Court in the cases of Gaurav Pradhan and Deepa EV were not brought to the notice of the Tribunal, wherein the judgment of the Hon’ble Supreme Court in the case of Jitender Kumar Singh is distinguished. In both the judgments it is held that, the view taken in the judgment of **Jitendra Kumar Singh**, since was based on the statutory interpretation of U.P. Act, 1994 and G.O. dated 25-03-1994, was not applicable in the facts in the respective matters.

58. In the case of **Vinod Dadasaheb Dhore & Anr. Vs. the Secretary, Maharashtra Public Service Commission,**



**Mumbai & Ors., Writ Petition No. 11970/2017,** the judgments in the case of **Gaurav Pradhan and Others Vs. State of Rajasthan and Others** (cited supra), **Deepa E.V. Vs. Union of India and Ors.** (cited supra), as well as **Jitendra Kumar Singh & Anr. Vs. State of Uttar Pradesh & Ors.** (cited supra) all have been referred to. Issue involved in the said matter was in respect of the concession in fees and the Hon'ble Division Bench has considered the request of the petitioners therein restricted to availment of concession in examination fees and has not discussed the issue of availment of benefit of age relaxation.

59. In the case of **Gaurav Pradhan and Others Vs. State of Rajasthan and Others** (cited supra) Rajasthan Public Commission had issued an advertisement dated 14.10.2010 inviting applications for selection on various posts of constables. On 25.10.2010 another advertisement was issued by the Rajasthan Public Service Commission for selection on the post of Sub Inspector of Police. The selection process for the posts of constables as well as post of Sub Inspector of Police comprised of the different stages. During process of selection, the State Government issued a circular dated 11.05.2011 providing that candidates of BC/SBC/SC/ST

irrespective of whether they have availed of any concession including relaxation in age shall be migrated against open category vacancies if they have secured more marks than the last candidate of open category. Select list of constables was issued on 01.07.2011 whereas result of Sub Inspector of Police was issued on 25.02.2013. Various writ petitions were filed by the general category candidates where they have questioned the circular dated 11.05.2011 and preparation of select list accordingly. The case of the general category candidates was that those reserved category candidates who have taken concession of relaxation of age in competition for post of constable/SI of Police cannot be migrated to general category vacancies. Learned Single Judge decided Special Writ Petitions vide judgment dated 27.12.2012 taking view that circular dated 11.05.2011 was not applicable since the recruitment process had begun prior to circular 11.05.2011. It was held that migration of reserved category candidates to open/general category can be permitted as per earlier circular dated 24.06.2008. With regard to circular dated 11.05.2011, it was held that the said circular needs to be given proper interpretation. Learned Single Judge held that

only those who have taken benefit of concession of fee and not the relaxation in age during the process of selection would be allowed to migrate to open/general category if obtained equal or more marks to the last candidate in open/general category. Other group of writ petitions was decided by the Single Judge vide judgment dated 08.11.2013 following the judgment dated 27.04.2012. Special appeals were preferred against the said judgment before the Division Bench. The Division Bench modifying the judgment of learned Single Judge and held that the candidates availing relaxation in age belonging to reserve category candidates who find place in merit of the general/open category has to be included in general/open category. The matter thereafter was taken to Hon'ble Supreme Court. The Hon'ble Supreme Court held the conclusions recorded by the Division Bench unsustainable. The Hon'ble Supreme Court held that the circular of the Government shall be treated to be in force for the purpose of reservation which is in force at the time of recruitment. Recruitment commenced by the advertisement dated 7.10.2010 and 25.10.2010; at that time circular dated 24.06.2008 only was in force, hence, subsequent circular dated 11.05.2011 cannot be applied in the said recruitment.

60. The Hon'ble Supreme Court has further observed that, *"there cannot be any dispute that the policy of reservation can always be changed by the State Government and the State Government can change the manner and methodology of implementing the reservation and criteria of reservation of the reserved category candidates and general category candidates"*. It is also relevant to note that both learned Single Judge and Division Bench have not approved circular dated 11.05.2011 in toto. Both the Courts have held that apart from age relaxation, if the candidate has taken any other relaxation circular dated 11.05.2011 cannot help him in migrating into general category candidate.

It is further significant to reproduce hereinbelow the further observations made by the Hon'ble Supreme Court which are relevant in the context of the present matter:-

*"In view of the foregoing discussion, we are of the considered opinion that the candidates belonging to SC/ST/BC who had taken relaxation of age were not entitled to be migrated to the unreserved vacancies, the State of Rajasthan has migrated such candidates who have taken concession of age against the unreserved vacancies which resulted displacement of a large number of candidates who were entitled to be selected against the unreserved category vacancies. The candidates belonging to unreserved*

*category who could not be appointed due to migration of candidates belonging to SC/ST/BC were clearly entitled for appointment which was denied to them on the basis of the above illegal interpretation put by the State. ”*

61. It has to be further stated that after the judgment of Hon'ble Supreme Court in the case of **Deepa E.V. Vs. Union of India and Ors.** (cited supra) the State of Rajasthan issued a Circular dated 26.07.2017 in light of the said judgment, thereby issuing following directions to all the appointing authorities. We deem it appropriate to reproduce the said circular: -

*“Circular*

*Subject: Treatment to be given to the candidates belonging to the SC/ST/BC who are selected against reserved category vacancies on the basis of their merit. In supersession of this departments circular even number dated 04.03.2014 on the abovementioned subject, the matter has been examined in consultation with the Law Department in the light of the judgment passed by the Hon'ble Supreme Court in Civil Appeal No.3609 of 2012 Deepa E.V. V/s Union of India and Ors. Dated 06.04.2017, following instructions are hereby issued for the guidance of all Appointing Authorities:*

*(a) Of a candidate belonging to SC/ST/BC has not availed of any of the special concessions such as in age limit, marks, physical fitness etc. in the recruitment process, which are available to the candidates belonging to these categories, except the concession of fees, and he secures more marks than the marks obtained by the last UR category candidate who is selected, such a candidate belonging to the SC/ST/BC shall be counted against the UR category vacancies and not the*

*vacancies reserved for the SC/ST/BC, as the case may be.*

*(b) If any SC/ST candidate gets selected against the UR category vacancies on the basis of his merit without availing of any of the special concessions which are available to the candidates belonging to these categories, except the concession of fees, such a SC/ST candidate will be treated as a SC/ST candidate, as the case may be, for all further services matters, including further promotions, and all the benefits which are admissible to the other SC/ST persons under the various service rules/government instructions shall be admissible to them.*

*(c) The SC/ST/BC category candidates who get selected against UR category vacancies on the basis of their merit without availing of any of the special concessions which are available to the candidates belonging to those categories, except the concession of fees, will not be counted against the posts reserved for these categories when it comes to the question of determining the total number of posts occupied by the candidates of these categories in the particular post/cadre.”*

Further observations made by the Hon’ble Supreme Court in para 40 of the said judgment are also material to be reproduced which are thus: -

*“Circular dated 26.07.2017 is the reiteration of earlier position as was provided by circular dated 24.06.2008 quoted above. Thus, the position is now well accepted even by State of Rajasthan that those candidates belonging to SC/ST/BC who have obtained concession of age are not eligible to be migrated to the unreserved vacancies. Circular dated 24.06.2008 being very much in existence, law laid down by this Court in Deepa E.V. holds the field and the State of*

*Rajasthan was obliged to not migrate those SC/ST/BC category candidates who are in unreserved category, who have taken concession of age.”*

62. In **Neeravkumar Makwana’s** case, advertisement stipulating that upper age limit relaxation would be granted to the candidates belonging to SC, ST & SEBC category and further stating that reserved category candidates applying in Open category would not be entitled to benefit of age relaxation. It was the recruitment for the post of Assistant Conservator of Forests and Range Forest Officers. The appellant had submitted an application in the category of SEBC. In the list of selected candidates, he was shown at Sr.No.138. It was the grievance of the said applicant that, while preparing the merit list GPSC has ignored the judgment of the Hon’ble Apex Court in the case of **Jitendra Kumar Singh**. The learned Single Judge allowed the petition filed by the appellant which was set aside by the Division Bench of the High Court. The appellant, therefore, approached the Hon’ble Apex Court. The Hon’ble Supreme Court dismissed the appeal by holding that, “*the reserved category candidate availing benefit of age relaxation in selection process cannot be accommodated in or migrated to General Category.*” The Hon’ble Supreme Court referred to its earlier judgments in the case of **Deepa EV** and **Gaurav**

**Pradhan.** The discussion made by the Hon'ble Supreme Court in paragraph 24 to 31 of the said judgment is material to be reproduced hereinbelow:

*"24. Now, let us consider the judgment in Jitendra Kumar Singh, In this case, this Court was considering the interpretation of sub-section (6) of Section 3 of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short "the 1994 Act") and the Government Instructions dated 25-3-1994. Sub-section (6) of Section 3 of this Act provided for reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes which is as under:*

*"3. (6) If a person belonging to any of the categories mentioned in sub-section (I) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (I)."*

*25. The State of U.P. issued Instructions dated 25-3-1994 on the subject of reservation for Scheduled Castes, Scheduled Tribes and Other Backward Groups in the Uttar Pradesh Public Services. Last line of these instructions is as under:*

*"It shall be immaterial that he has availed any facility or relaxation (like relaxation in age-limit) available to reserved category."*

*26. On consideration of sub-section (3) of Section 6 of the 1994 Act and the Instructions dated 25-3-1994, this Court held that grant of age relaxation to a reserved category candidate does not militate against him as general category candidate if he has obtained more marks than any general category candidates. This judgment was based on the statutory interpretation of the 1994 Act and the Instructions dated 25-3-1994 which is entirely different from the statutory scheme under*



*consideration in the instant appeal. Hence, the principle laid down in Jitendra Kumar Singh has no application to the facts of the present case.*

*27. In Deepa, the appellant had applied for the post of Laboratory Assistant Grade II in Export Inspection Council of India functioning under the Ministry of Commerce and Industry, Government of India under OBC category by availing age relaxation. The Department of Personnel and Training had issued proceedings OM dated 22-5-1989 laying down the stipulation to be followed by various Ministries/Departments for recruitment to various posts under the Central Government and the reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes candidates. Para 3 of the said OM is as under:*

*"3. In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standards as applied to general candidates shall not be adjusted against reserved vacancies."*

*28. The judgment in Jitendra Kumar Singh, was pressed into service in support of the contention that when a relaxed standard is applied in selecting Scheduled Castes, Scheduled Tribes and Other Backward Classes candidates. the same cannot be treated as a bar on such candidates for being considered for general category vacancies. This Court did not agree with the said proposition. It was held that Jitendra Kumar Singh was based on the statutory interpretation of the U.P. Act, 1994, and the G.O. dated 25-3-1994 which provides for an entirely different scheme. Therefore, the principles laid down in Jitendra Kumar Singh' cannot be applied to the said case.*

*29. Similar question arose in Gaurav Pradhan. In this case the Government had issued Circular dated 24-6-2008, which is as under:*

*"Circular dated 24-6-2008 6.2. In the State, members of the SC/ST/OBC can compete against non- reserved vacancies and be counted against them, in case they have not taken any concession*

*(like that of age, etc.) payment of examination fee in case of direct recruitment...."*

30. Taking into consideration the above circular, this Court held that the ratio of the judgment in *Jitendra Kumar Singh* has to be read in the context of statutory provisions and the G.O. dated 25-3-1994 and the said observation cannot be applied in a case where the government orders are to the converse effect. It was held as under: (*Gaurav Pradhan* case, SCC p. 368. para 32)

*"32. We are of the view that the judgment of this Court in Jitendra Kumar Singh which was based on statutory scheme and the Circular dated 25-3-1994 has to be confined to scheme which was under consideration, statutory scheme and intention of the State Government as indicated from the said scheme cannot be extended to a State where the State circulars are to the contrary especially when there is no challenge before us to the converse scheme as delineated by the Circular dated 24-6-2008."*

31. The judgments in *Deepa* and *Gaurav Pradhan* fully support the case of the respondents.

63. From the aforesaid judgments it is prominently revealed that the States concern have framed the policy/rules governing the reservations for SC, ST and Other Backward Classes in the Government employment. Difficulty in the present matter is that no such rules have been framed by the State of Maharashtra nor it appears that the State has issued any Circular exhaustively laying down the guidelines monitoring the reservations provided in the employment. In the case of *Sandeep Mali & Ors. Vs. Maharashtra Public Service Commission & Ors.* the

principal Bench of this Tribunal has also observed that the State of Maharashtra has not issued such G.R. as has been issued by Gujarat Government. In the present matter nothing has been brought to our notice and no such material has been produced on record on behalf of the State evidencing the policy adopted by the Government in respect of the reservation in employment and the methodology for implementing or monitoring the said reservations.

64. It is quite evident that in absence of the rules framed by the State of Maharashtra in regard to “Reservation for S.C., S.T., O.B.C. and others in Employment” this Tribunal in the case of Sachin Raghunath Choudhary & Ors. and Sandeep Mali & Ors. has relied upon the case of Jitendra Kumar Singh, which is based on the rules framed by the U.P. Government in that regard. It appears to us that it is a high time that the Government of Maharashtra shall seriously consider framing of rules guided by the law laid down by the Hon’ble Supreme Court. The rules framed by the DOPT can also be a model for our State.

65. Apart from the law laid down by the Hon’ble Apex Court as we have understood, it appears to us that for

making application when age of the candidate is relevant consideration, to illustrate for the open category candidates the upper age limit is 38 years, and the candidate above the prescribed age limit can be held ineligible on that count, the same criteria would apply at the time of recommendation of the candidates. The candidates over the age of 38 years if cannot be held eligible to apply from the Open category, the candidate over the age of 38 years cannot be held eligible to be appointed in the said category.

66. To illustrate: In the present matter a candidate namely Shelke Ashok Bhimrao, who belongs to Scheduled Caste category, has been recommended against open general seat. Question arises had Mr. Shelke applied pursuant to the advertisement in open category, whether his application would have been accepted by the MPSC? Date of birth of the said candidate is 30.05.1982. Thus, at the time when the advertisement was published he has crossed upper age limit provided for open category. It is evident that his application would have been rejected on that count alone. The question therefore, arises when for making application the age of candidate is relevant consideration and the candidate below or over the prescribed age limit can be held ineligible on that count

alone, how such candidate can be recommended against unreserved/open seat. It appears to us that the criteria which is made applicable for making application would apply at the time of recommendation also. If a candidate over the age of 38 years cannot be held eligible to apply from open category he also cannot be held eligible to be appointed against unreserved/open seat even though he would have secured more marks than the last selected candidate in the open category. Such a candidate only can be considered for his recommendation and appointment against the category in which he has made an application. However, if any candidate belonging to reserved category for example if a candidate coming from Scheduled Caste, while filling an application has claimed seat against the Scheduled caste to which he belongs and in the examination he scores more meritorious position than many of the open candidates and if he is below the age of 38 years i.e. upper age limit prescribed for open candidates meaning thereby he has not taken benefit of age relaxation, the said candidate can be undoubtedly recommended and appointed against the open seat in order of merit.

67. As noted by us earlier, in the above circumstances the guiding factor for us shall be the

judgment of the Hon'ble Apex Court laying down the law in this regard. Even otherwise, as per Article 141 of the Constitution of India, the law declared by the Hon'ble Supreme Court shall be binding on all the courts within the territory of India. Hon'ble Apex Court, way back in the year 1997 in the matter of **Post Graduate Institute of Medical Education and Research V/s. K.L.Narasimhan [(1997) 6 SCC 283]** has laid down the following law:

*"5. ... It is settled law that if a Dalit or Tribe candidate gets selected for admission to a course or appointment to a post on the basis of merit as general candidate, he should not be treated as reserved candidate. Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."*

It appears to us that, the issue which has fallen for our consideration is completely answered in the aforesaid judgment.

68. The Department of Personnel and Training had issued proceedings OM No.36012/13/88-Estt. (SCT), dated 22-05-1989 and OM No.36011/1/98-Estt. (Res.), dated 01-07-1998 laying down stipulation to be followed by the various Ministries/Department for recruitment to various posts under the Central Government and the reservation

for SC/ST/OBC candidates. The proceedings read as under:

*“G.I. Dept. of Per. & Trg., OM No.36012/13/88-Estt. (SCT), dated 22-05-1989 and OM No. 36011/1/98-Estt. (Res.), dated 01-07-1998*

*Subject. Reserved vacancies to be filled up by candidates lower in merit or even by released standards-candidates selected on their own merits not to be adjusted against reserved quota.*

*As part of measure to increase the representation of SC/ST in the services under the Central Government, the Government have reviewed the procedure for implementation of the policy of reservation while filling up reserved share of vacancies for Scheduled Castes and Scheduled Tribes by direct recruitment. The practice presently being followed is to adjust SC/ST candidates selected for direct recruitment without relaxation of standards against the reserved share of vacancies. The position of such SC and ST candidates in the final select list, however, was determined by their relative merit as assigned to them in the selection process. When sufficient number of suitable Scheduled Caste and Scheduled Tribe candidates were not available to fill up all the reserved share of vacancies, SC/ST candidates were selected by relaxed standards.*

*2. It has now been decided that in cases of direct recruitment to vacancies in posts under the Central Government, the SC and ST candidates who are selected on their own merit, without relaxed standards along with candidates belonging to the other communities, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible SC and ST candidates which will thus comprise SC and ST candidates who are lower in merit than the last candidate on the merit list but*

*otherwise found suitable for appointment even by relaxed standards, if necessary.*

3. All Ministries/Departments will immediately review the various Recruitment Rules/Examination Rules to ensure that if any provision is contrary to the decision contained in previous paragraph exist in such rules, they are immediately suitably modified or deleted.

4. These instructions shall take immediate effect in respect of direct recruitment made hereafter. These will also apply to selections where though the recruitment process has started, the results have not yet been announced unless in the Examination/Recruitment Rules or in the advertisement notified earlier there is a specific provision to the contrary and the manner in which the SC/ST vacancies could be filled has been indicated.

*Clarification. The instructions contained in the above OM apply in all types of direct recruitment whether by written test alone or written test followed by the interview alone.*

2. The above OM and OM No. 36012/2/96-Estt. (Res.), dated 2-7-1997 provide that in cases of direct recruitment, the SC/ST/OBC candidates who are selected on their own merit will not be adjusted against reserved vacancies.

3. In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standards as applied to general candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies."

*(emphasis supplied)*



[The aforesaid contents are taken from the judgment of the Hon'ble Apex Court in the case of Deepa EV.]

As said by us hereinbefore, while framing the rules the aforesaid instruction may prove useful.

69. In the case of Saurav Yadav, also it is clarified thus:

*“35. We must also clarify at this stage that it is not disputed that the Appellant 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.”*

70. In the case of Sandeep Mali & Ors. Vs. Maharashtra Public Service Commission & Ors., in O.A. No. 21/2021 decided by the Principal Bench of this Tribunal at Mumbai, it has been observed that, the observations made as above in the Saurav Yadav's case are pertaining to horizontal migration and may not apply for the vertical migration. We, with utmost respect state that, it is difficult for us to agree with the observations made by the Tribunal as above. The observations made by the Hon'ble Apex Court as above would apply even for the vertical migration in view of the law laid down by the Hon'ble Apex Court in the case of K.L.Narasimhan (cited supra).

71. It is well settled that there is no separate category like 'Open Category' and the expression 'Open category' includes therein persons belonging to all categories irrespective of their caste, class, community or tribe. It is thus evident that on the Government establishment even if the post is earmarked for open category, the candidate belonging to reserved category can also claim the said post on the basis of his merit. However, when it is so said, it is presumed that only such candidate from the reserved category who satisfies the eligibility criteria prescribed for open category candidate only will be liable to be considered for the said post earmarked for open category candidate on the strength of his merit. It is possible that some other candidates belonging to reserved class may have secured more meritorious position than many of the open category candidate, but if he has crossed upper age limit prescribed for the open category candidate and has availed the benefit of age relaxation he may not be considered from the open category, off course, he will be considered from his reserved category.

72. We reiterate that when at the time of making application age is relevant consideration and hence the reserved category candidate who has crossed the upper age

limit prescribed for the open category if cannot be permitted to apply from the open category, subsequently only on the ground that he has secured more meritorious position, the criteria of upper age limit cannot be changed and such candidate cannot be considered against the open seat. If such permission is granted, it would amount to prescribe two different upper age limits for a single category i.e. open category. It would surely amount to discrimination, which is impermissible and against the constitutional provisions. It cannot be in any way said to be against the policy of reservation for the reason that the candidate concerned does not lose his right to be selected and appointed against the seat reserved for his category.

73. After having considered the entire facts and circumstances involved in the matter and after having understood the import of the judgments relied upon by the parties, we have reached to the conclusion that the reserved category candidates availing benefit of age relaxation in the selection process cannot be accommodated in or migrated to general category. The previous judgments of this Tribunal we have elaborately distinguished. In view of the law laid down in the matters of Post Graduate Institute of Medical Education and

Research, Chandigarh and Ors. Vs. K.L. Narasimhan and Anr., Saurav Yadav, Deepa E.V., Gaurav Pradhan and Niravkumar Dilipbhai Makwana by the Hon'ble Supreme Court and the judgment of the Division Bench of Hon'ble Bombay High Court in the case of Charushila Choudhary, the only conclusion which emerges is that the reserved category candidates availing benefit of age relaxation in the selection process cannot be recommended and appointed against unreserved (Open) seat. At the commencement of our judgment we have clarified that availment of concession in fees by the reserved category candidates shall not be a barrier for their selection on the basis of their merit against unreserved seats if such candidates have not availed the benefit of age relaxation.

74. Before parting with the judgment we deem it necessary to express that the State Government shall formulate a policy in respect of reservation in the employment to the reserved category candidate and all related aspects thereto at the earliest possible time.

75. In the result, the following order is passed:-

*O R D E R*

(i) Inclusion of the candidates belonging to reserved category who have availed the benefit of age relaxation in the list of the candidates – eligible for recommendation for

appointment to the post of Assistant Public Prosecutor, Group-A, published by respondent no. 02 on 10.08.2023, is held unsustainable in law.

(ii) Consequently, respondent no. 02 is directed to recast the list of the candidates - eligible for recommendation for the post of Assistant Public Prosecutor, Group-A. While recasting such list, respondent no. 02 shall ensure that no candidate belonging to reserved category, who has availed the benefit of age relaxation, is recommended against the unreserved (Open) seat. It is clarified that the benefit availed of concession in fees by the reserved category candidates shall not be a barrier for their selection on the basis of their merit against the un-reserved seats, if such candidates have not availed the benefit of age relaxation.

(iii) The aforesaid exercise is to be carried out by respondent no. 02 within 04 weeks from the date of this order and respondent no. 01 shall issue orders of appointment to the candidates who may be recommended, within 04 weeks thereafter.

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

(v) Misc. Applications, if any, pending in the present O.A. stand disposed of.

**MEMBER (A)**

**VICE CHAIRMAN**

76. After pronouncement of the order, learned counsel Shri Khedkar appearing for some of the private respondents, as well as, learned Chief Presenting Officer

appearing for respondent no. 02, the M.P.S.C., have prayed for staying the effect and operation of the order passed by us today in the present matter for 01 week so as to enable the respondents to approach the Hon'ble High Court.

77. The request so made on behalf of the respondent no. 02, as well as, some of the private respondents is opposed by the learned counsel appearing for the applicants. Learned counsel submitted that having regard to the directions containing in the order passed by the Tribunal today even otherwise the recommendations are not likely to be made within 01 week from the date of this order. Learned counsel further submitted that if the Tribunal is accepting the request of learned counsel appearing for some of the private respondents and learned C.P.O. appearing for respondent no. 02, the M.P.S.C., it may be clarified that in the meanwhile period no orders are issued on the basis of the list published on 10.08.2023.

78. On a query made by us to the learned C.P.O. it is informed that till today no appointment orders are issued in favour of any of the candidates recommended in the list published on 10.08.2023.

79. In view of the fact that till today the State Government has not issued the appointment order in favour of any of the candidate recommended by respondent no. 02 vide its list published on 10.08.2023, we are inclined to accept the request made by the aforesaid respondents. Hence, the following order:-

*ORDER*

(A) The effect and operation of the order passed by the Tribunal today shall stand stayed for 01 week from the day the order is uploaded on the official website of the Tribunal. Till then, the respondent nos. 01 to 03 shall maintain Status quo as on today in respect of the appointments of Assistant Public Prosecutors, Group-A.

(B) Steno copy of this operative order be issued to the learned C.P.O.

**MEMBER (A)**

**VICE CHAIRMAN**

**Place : Aurangabad**

**Date : 28.06.2024**

Note : Uploaded on the official website of the Tribunal on 06-07-2024.

2024/DB/YUK ARJ HDD O.A.NO.778.2023 PRB