

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO.704 OF 2017
(Subject : Appointment / Select List)

DISTRICT : MUMBAI

1. Dr. Sulekha Deorao Hiwase,)
C/o. Dr. Vinod N, Kamdi,)
R/o. D-19, Chidanand Society, Pashan,)
SUS Road, Pashan, Pune.)
2. Dr. Nita Vijay Godbole (Kinikar),)
R/o. Venkatesh Nagar, Near Paraskar,)
Motor Bikes, Murtizapur Road, Akola,)
Dist. Akola.)
3. Dr. Savita Pandurang Bokade,)
C/o. Shri Sanjay S. Raut,)
R/o. Flat No.10, Brijvihar Apt. Ruikar Wadi,)
Civil Lines, Yavatmal, Tal. & District Yavatmal.) Applicants

Versus

1. The State of Maharashtra,)
Through its Secretary,)
Agriculture, Husbandry, Dairy Development and)
Fisheries Department, Mantralaya, Mumbai 32.)
2. The Secretary,)
Maharashtra Public Service Commission,)
Bank of India Building, 3rd floor, M.G. Road,)
Mumbai 400 001.)
3. Shri Prashant Ramesh Dharmadhikari,)
Having office at Regional Joint Commissioner,)
Animal Husbandry Office, Opp. Spicer College,)
Aundh, Pune 7. R/o. D-2, Sai Heritage, D.P. Road,)
Near Medipoint Hospital, Aundh, Pune-7.)
4. Dr. Arun Purushottamrao Deshpande,)
Having office at Institute of Vety. Biological Products,)
Aundh, Pune – 7, R/o. F-8, Samarth Park C.H.S.)
Near Shivpushp Chowk, Anand Nagar, Shinghad Road,)
Pune 51.)

A. S. S.

5. Dr. Bhagwat Vishwanathrao Deshmukh,)
Office of Regional Disease Investigation Laboratory,)
Aurangabad, R/o. A/102, Kasliwal Marvel (E),)
Satara Parisar, Aurangabad.) Respondents

Shri S.B. Gaikwad, learned Advocate for the Applicants.

Ms. S.P. Manchekar, learned Chief Presenting Officer for the Respondents No.1 & 2.

Shri B.A. Bandiwadekar, learned Advocate for the Respondent No.3.

CORAM : SHRI P.N. DIXIT, VICE-CHAIRMAN(A)
SHRI A.D. KARANJKAR, MEMBER(J)

RESERVED ON : 20.06.2019

PRONOUNCED ON : 21.06.2019

PER : SHRI A.D. KARANJKAR, MEMBER(J)

J U D G M E N T

1. Heard Shri S.B. Gaikwad, learned Advocate for the Applicants, Ms. S.P. Manchekar, learned Chief Presenting Officer for the Respondents No.1 & 2 and Shri B.A. Bandiwadekar, learned Advocate for the Respondent No.3.

2. The Applicants were serving as Life Stock Development Officers. There were vacancies of Assistant Commissioner of Animal Husbandry on the establishment of that Department, consequently, Respondent No.1 directed the Respondent No.2 to conduct the recruitment proceedings and recommend the names of the suitable candidates.

3. In pursuance of the directions of Respondent No.1, Respondent No.2 published Advertisement No.101 of 2009 to fill 153 posts. Out of 153 posts, 77 posts were available for Open Category and out of this 153 Open Category posts, 23 posts were reserved for Open Female and 4 posts for Open Sports.

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4. There is no dispute about the fact that the Applicants are belonging to OBC category they were not possessing Non-creamy Layer Certificate, therefore they submitted the applications as Open Category candidate.

5. As per the Advertisement the recruitment process was completed and the merit list was published. In this merit list the names of 147 candidates were included for being recommended to the Respondent No.1. The Applicants learnt that their names were not included in this list, consequently, the Applicants challenged the list by filing the O.A.No.662/2012 wherein interim order was passed by M.A.T. Bench Nagpur and direction was given to the Respondent No.2 to prepare the correct list. The correct list was prepared by the Respondent No.2. It was placed before the Bench but dispute was raised. Consequently, again direction was given to prepare the list. Ultimately, after hearing the Applicants and the Respondents in O.A.No.662 of 2012 together with Contempt Application No.46/2015 and C.A.No.549 of 2016, the O.A. was decided. The Respondents were directed by that order dated 06.01.2017 to prepare and submit fresh list of candidates who were eligible for appointment as per the law laid down by Hon'ble Supreme Court in case of Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors, Appeal (Civi) 3132 of 2007 decided on 18.07.2007 [hereinafter referred as Rajesh Kumar Daria (supra)].

5. It is contention of the Applicants that earlier their names were included in the list and when the Respondent No.2 prepared the list as per directions given by M.A.T. Bench Nagpur their names were not included and the candidates who were lower in merit than Applicants were selected and recommended.

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6 It is submission of the Applicants that as they applied to the post under Open General Category and as suitable open female candidates and open Sports candidates were not available, therefore those posts reserved for Open Female and Open Sports Category should have been filled, considering the merits of all the candidates who applied under Open General category. It is submitted that inspite of specific direction issued, that the Select List shall be prepared as per the law laid down in case of Rajesh Kumar Daria (supra), Respondent No.2 prepared the Select List and selected the candidates lower than the Applicant in merit. It is submitted that this procedure followed by Respondent No.2 is illegal and consequently it is submitted by the Applicant that the Select List dated 17.06.2017 be quashed and set aside, and directions be given to the Respondent No.1 to include the names of the Applicants in the Select List and to issue them appointment orders.

7. Respondents have resisted the claim on the ground that their action is legal. Respondent No.2 submitted the reply which is at page 196. At the outset, it is submitted by the Respondent No.2 that the basic origin of the Applicants is OBC Category. The Applicants were not possessing Non-creamy Layer Certificate, therefore, they applied in Open Category. It is contention that 50 posts were available for Open General Category for which the Applicants were considered, but the applicant could not score the marks as per merit, therefore, the applicants were not considered for these 50 posts. According to Respondent No.2 as the basic origin of the Applicants was not Open Category but OBC Category, consequently, decision was taken by the Respondent No.2 to fill the posts reserved for Open Female and Open Sports by selecting the candidates whose basic origin was open category.

8. It is submitted that this action of Respondent No.2 is based on the Government circular dated 13.08.2014. The Respondent No.2 has prepared the chart, page 212 of the reply which is as follow :-

See

| Sr. No | Name of candidates | Merit No. | Marks in the interview | Recommended category | Status of the last candidate recommended for Open (Female) against / Open (Sports) against | Remarks |
|--------|----------------------------------|-----------|------------------------|---------------------------------------|--|---|
| 1 | Dr. Bhosale Uday Dashrath | 111 | 56 | Open Female post no.20 Against | Merit No.113 | Dr. Bhosale, Dr. Gujrathi, Dr. Arle, Dr. Hon. Dr. Mahajan, Dr. Shinde and Dr. Pawar have claimed as belonging to 'Open' category in their application form for the post. Therefore they were considered for posts meant for Open Category. Moreover, these candidates are also considered against the posts reserved for Open Female and Open Sports Persons post if candidates are not available from Open Female and Open Sports, as per the Government Circular dated 13 th August, 2014 and the Commission's Standing order no.06/2014 dated 23 rd September, 2014. As per the merit, these candidates are recommended for the post in question |
| 2. | Dr. Gujrathi Sanjay Ramanlal | 112 | 55 | Open Female post No.21 Against | Marks in the interview - 55 | |
| 3. | Dr. Arle Bankat Kacharu | 113 | 55 | Open Female post No.22 Against | Recommended for Open Female Against post no.22 | |
| 4. | Dr. Hon Balasaheb Pandurang | 114 | 55 | Open Sports Persons post No.1 Against | Merit No.124 | |
| 5. | Dr. Mahajan Dhananjay Narayanrao | 119 | 55 | Open Sports Persons post No.2 Against | Marks in the interview - 55 | |
| 6. | Dr. Shinde Shridhar Gunvantrao | 123 | 55 | Open Sports Persons post No.3 Against | Recommended for Open Sports Against post no.4 | |
| 7. | Dr. Pawar Pravin Kautik | 124 | 55 | Open Sports Persons post No.4 Against | | |

All

9. In the reply it is submission of the Applicant that the law laid down in case of Rajesh Kumar Daria is not properly followed by the Respondent No.2. It is submitted that in the judgment delivered by Hon'ble High Court in case of Shri Suhas Sudhakar Rao Lavhekar & Ors. Versus The Maharashtra Public Service Commission & Ors. in Writ Petition No.6637 of 2014 & Ors. decided on 04.05.2017, (hereinafter referred as Shri Suhas Sudhakar Rao Lavhekar (supra)) the scope of the ratio in the case of Rajesh Kumar Daria (supra) is explained by the Hon'ble Bombay High Court and following view was taken :-

"27) We find the argument advanced as above to be fallacious. Once it is held that general category or open category takes in its sweep all candidates belonging to all categories irrespective of their caste, class or community or tribe, it is irrelevant whether the reservation provided is vertical or horizontal. There cannot be two interpretations of the words 'open category'; one applicable for vertical reservation and other for horizontal {26} wp 6637.15 Bombay. adt reservation. Reservation prescribed may be 'vertical' or 'horizontal' if it relates to open category, the candidate belonging to backward class cannot be precluded from competing for the said posts on their own merit with rest of the candidates."

10. Learned Advocate for the Applicant has relied upon judgment of Hon'ble Supreme Court in case of Anil Kumar Gupta Etc. Vs. State of Uttar Pradesh and Ors. 1995 SCC (5) 173, JT 1995 (5) 505, decided on 28.07.1995 and judgment in O.A.No.195 & 985 of 2015 dated 25.01.2017 by M.A.T. Mumbai. It is submitted that the procedure adopted by the Respondent No.2 not considering the Applicants as candidates belonging to Open Category is absolutely illegal and it is in violation of law, therefore the Select List is liable to be quashed and set aside.

11. So far as Government circular dated 13.08.2014 is concerned, it is contention of the Applicant that this circular is subsequent to the advertisement and before this circular the first select list was prepared, therefore, dispute arose, hence circular dated 13.08.2014 is not applicable to the present situation.

A. S. S.

12. Learned C.P.O. Ms. S.P. Manchekar for the Respondents has placed reliance on the judgment of Hon'ble High Court of Judicature of Bombay Bench at Aurangabad in case of **State of Maharashtra V/s Irfan Mustafa Shaikh & Ors, Writ Petition No.272 of 2010, decided on 15.11.2010.** Before considering the legal position it is necessary to mention here that when the Advertisement was published, circular dated 16.03.2099 was in force. The Clause (अ) of the circular is as under:-

"अ. प्रयग टप्पा :- गुणवत्तेच्या निकषानुसार खुल्या प्रवर्गातील उमेदवारांची निवड यादी करावी, या यादीत, समांतर आरक्षणात बसणा-यांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर समांतर आरक्षणाच्या प्रवर्गातील उमेदवारांची संख्या पर्याप्त नसेल तर समांतर आरक्षणाकरीता त्या त्या प्रवर्गातील उमेदवारांना उपलब्धतेनुसार पर्याप्त संख्येत यादीतील शेवटचे उमेदवार वगळून समाविष्ट करावेत."

In Clause (अ) it is specifically mentioned that for filling the posts reserved for Horizontal Reservation, if the candidates belonging to particular category are not available then for filling the said posts the candidates of the said Category be included. As a matter of fact, though the subsequent circular is issued on 13.08.2014, it is in fact explanatory corollary and it explains true scope of the circular dated 16.03.1999. In the circular dated 13.08.2014 it is specifically mentioned that one Irfan Mustafa Shaikh & Ors had filed O.A.No.301 of 2009 before M.A.T. Bench Aurangabad and that application was allowed by order dated 26.08.2009. The order passed by M.A.T. Bench Aurangabad, O.A.No.301/2009 was challenged before the Hon'ble Division Bench of Bombay High Court in Writ Petition No.272/2010 decided on 15.11.2010 and for the purpose of removing doubts the Government of Maharashtra issued Circular dated 13.08.2014. In case of **State of Maharashtra V/s Irfan Mustafa Shaikh & Ors, Writ Petition No.272 of 2010, decided on 15.11.2010,** in paragraph No.4 following observation are being made as below :-

"4. The learned Tribunal, while allowing the Original Application, has held that insofar as horizontal reservation is concerned, the candidates from particular category are only entitled to be considered against the posts reserved for such category. It has further been held that the candidates from one category, for which horizontal reservation is provided, cannot be considered for selection against the post reserved for another horizontal reservation. The view taken by the learned Tribunal is

*in consonance with the law laid down by the Apex Court in the case of **Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & others** reported in AIR 2007 SC 3127, wherein it has been held that while filling the posts reserved for horizontal reservation, firstly the candidates from the particular category only be taken into consideration and only if there is a shortfall, then the recourse would be taken to go to another candidates for fulfilling the said quota."*

13. In the above paragraph, it is specifically observed by the Hon'ble Division Bench of the Bombay High Court that the view taken by M.A.T. Bench Aurangabad in O.A.No.301 of 2009 was in consonance with the law laid down in case of **Rajesh Kumar Daria (supra)**. The learned Advocate for the Applicant has placed reliance on the judgment in case of **Shri Suhas Sudhakar Rao Lavhekar (supra)**. It seems that prior judgment in case of **State of Maharashtra V/s Irfan Mustafa Shaikh & Ors** was not brought to the notice of Hon'ble High Court when the case of **Shri Suhas Sudhakar Rao Lavhekar (supra)** was heard. In addition, in **Writ Petition No.10103 of 2015 Shri Rajani Shaileshkumar Khobragade Vs. The State of Maharashtra, decided on 31.03.2017** the Hon'ble Bombay High Court again examined the law laid down in case of **R.K. Sabharwal, Vs. State of Punjab, Vs. Rajasthan Public Service Commission & Ors, Anil Kumar Gupta and others Vs. State of U.P. and others** and in paragraph no.25 is observed as under

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*"25. In case of **Smt. Kanchan Vishwanath Jagtap Vs. Maharashtra Administrative Tribunal and another** in Writ Petition No.1925 of 2014 with other connected writ petitions decided on 16th December, 2015, this Court was dealing with a case of general reservation and not compartmentalized reservation. In the said case the Court was dealing with the matter, wherein there was general reservation of women and not compartmentalized reservation. In a case of **Asha D/o. Ramnath Ghalap Vs. The President District Selection Committee, Beed** in Writ Petition No.3929 of 2015 decided on 30th March, 2016, the Division Bench of this Court was concerned with the reservation for woman as a whole and not compartmentalized reservation for women. This Court held that, a female candidate from the reservation category having more marks can claim her right for the post meant for female from open."*

14. Thus legal position which is confirmed by the two Hon'ble Division Bench decisions, (which are delivered prior to the decision in case of **Shri Suhas**

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Sudhakar Rao Lavhekar (supra) of the Bombay High Court is that the posts reserved for Horizontal Compartmentalized Reservation for Open Category Candidates can only be filled from Open Category candidates.

15. There is no dispute about the fact that basic origin of the applicants is OBC category. The applicants were not possessing Non-creamy Layer Certificate therefore they applied under Open General Category. The Applicants were considered for Open General Category posts but they were unable to stand in merit. In view of the legal position the Respondent No.2 recommended the names of the candidates who were in Open Category and whose basic origin was Open. That for giving the benefits of social reservations categories as per the castes are created and as per those categories the Applicants were belonging to OBC category. The Applicants are belonging to OBC category, therefore, merely because the Applicants have submitted the applications in Open General Category would not change their original status as OBC. In view of this, we do not see any merit in the contention that less meritorious candidates of the Open Category are recommended to fill the posts reserved for Open Female and Open Sport Category.

16. In this case one more important aspect is that the Applicant is challenging the recommendations of the names of following 7 candidates, details are as below :-

| Sr. No. | Merit No. | Interview No. | Name | Marks |
|---------|-----------|---------------|-----------------------------|-------|
| 1 | 111 | 450 | Bhosale Uday Dshrath | 56 |
| 2 | 112 | 336 | Gujrathi Sanjay Ramanlal | 55 |
| 3 | 113 | 248 | Arle Bankat Kachru | 55 |
| 4 | 114 | 257 | Hon Balasaheb Pandurang | 55 |
| 5 | 119 | 333 | Mahajan Dhnanjay Narayan | 55 |
| 6 | 123 | 313 | Shinde Dhreedhar Gunwantrao | 55 |
| 7 | 124 | 293 | Pawar Pravin Kauthik | 55 |

A.C.S.

But it is pertinent to note that all these persons are not joined as Respondents in this matter. The legal position is settled that no person can be condemned unheard. As a matter of-fact, if relief is granted to the Applicant then it will cause prejudice to these 7 persons who are not before this Bench. The law is settled that If any person is likely to be affected by the decision in any judicial proceeding, then that person is necessary party to the proceedings and in his absence the proceeding be regarded as bad for the non joinder of necessary party.

17. In view of this legal position as the applicants avoided to join the above mentioned 7 persons as Respondents in this matter, consequently we are compelled to say there is defect of non joinder of necessary party. In view of the above discussion, we are of the view that the Applicants are not entitled for any relief. Hence, following order :-

ORDER

Original Application is dismissed with no order as to costs.

Sd/-
(A.D. Karanjkar)
Member(J)

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

*prk