

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3929 OF 2015

Asha D/o Ramnath Gholap

Age: 27 Yrs., occu. Education &

Household, R/o C-D-1-15-1,

Dr.Hedgewar Nagar, CIDCO,

N-4, Nasik.

- PETITIONER

VERSUS

- 1) The President,
District Selection Committee/
Collector, Beed, Dist. Beed.
- 2) The Member,
District Selection Committee/
Chief Executive Officer,
Zilla Parishad, Beed.
District Beed.
- 3) The Member-Secretary,
District Selection Committee/
Deputy Chief Executive
Officer(General)
Zilla Parishad, Beed.
District Beed.
- 4) Kranti Ganesh Khanapurkar
Age: 24 Yrs., occu. Nil.

- 5) Sulbha Raosaheb Fukate,
Age: 25 Yrs., occ. Nil.

Both C/o District Health Officer,
Zilla Parishad, Beed.

- **RESPONDENTS**

Mr.Sachin S.Deshmukh Advocate for Petitioner;
Mr.S.B.Yawalkar,AGP for Respondent No.1;
Mr.A.D.Aghav, Advocate for Respondent Nos.2 & 3;
Mr.P.N.Sonpethkar, Advocate for Respondent No. 4;
Mr.D.J.Choudhari, Advocate for Respondent No.5.

CORAM : S.S.SHINDE &
P.R.BORA,JJ.

DATE OF RESERVING THE JUDGMENT : 5th February,2016
DATE OF PRONOUNCING THE JUDGMENT 30th March, 2016

JUDGMENT (PER:-P.R.BORA,J.)

1) Heard. Rule. Rule made returnable
forthwith by consent of the parties.

2) Petitioner has filed the present petition,
seeking quashment of the select list prepared by
Respondents Nos.1 to 3 pertaining to the appointment
to the posts of Pharmacists on the establishment of
Zilla Parishad, Beed so far as it relates to
inclusion of the names of Respondent Nos.4 and 5 in
the said list. The petitioner has also sought the

direction against respondents Nos.1 to 3 to issue appointment to her on the post of pharmacist on the establishment of Zilla Parishad, Beed. The select list so prepared by Respondent Nos.1 to 3 and the inclusion of the names of Respondent Nos.4 and 5 therein has been challenged by the petitioner on the ground that it is in violation of the constitutional provisions and against the reservation policy.

3) The contents of the petition reveal that the petitioner had applied for the post of Pharmacist to be filled in by Zilla Parishad, Beed in pursuance of the advertisement published in that regard on 22nd August, 2014. Total 23 posts of pharmacists were advertised along with the other posts to be filled in by Zilla Parishad, Beed. According to the advertisement so published, out of 23 posts of pharmacists, 10 posts were to be filled in from the candidates belonging to open category; whereas remaining 13 were reserved for the candidates belonging to reserved categories. The petitioner belongs to scheduled caste and possesses the qualification of Diploma in Pharmacy (D.Pharm.) as well as Bachelor in Pharmacy (B.Pharm.) and thus was

holding the qualification as prescribed in the said advertisement for the post of pharmacist.

4) In the examination conducted by the respondents for the post of pharmacist, the petitioner secured 120 marks out of 200. As averred in the petition, the petitioner stands at serial No.2 in the merit list from amongst the female candidates. It is the contention of the petitioner that though she belongs to scheduled caste category and had also applied from the reserved category, considering the marks secured by her in the written examination, she must have been selected from the female(open) category. However, in the final select list prepared by the District Selection Committee in its meeting held on 17.3.2015, name of the petitioner was not included as the selected candidate. The list so prepared and published contains the name of, - i) Gadade Pallavi Bharat; ii) Khanapurkar Kranti Ganesh (Respondent No.4); and iii) Fukate Sulabha Raosaheb (respondent No.5). It is the contention of the petitioner that Respondent Nos. 4 & 5 have received less marks than the petitioner and as such, both were not liable to be selected. The petitioner has,

therefore, approached this court by invoking the writ jurisdiction of this court under Article 226 of the Constitution of India, seeking quashment of the select list to the extent it contains the names of Respondent Nos.4 and 5 against the seats reserved for the candidates belonging to open female category. As stated earlier, the petitioner has also sought directions against the respondents for issuance of the appointment in her favour on the post of Pharmacist at Zilla Parishad Beed.

5) Respondent No.4 has filed her affidavit in reply and has thereby opposed the submissions raised in the petition. Shri Subhash Narayan Bhavale, the Administrative officer, Zilla Parishad, Beed has filed the reply on behalf of Respondent Nos. 2 and 3, contending therein that since the posts were to be filled in from the Female open category and since the petitioner has applied from the reserved category, she has not been considered for the said appointment. It is also contended that the petitioner cannot claim the benefit of Government Circular dated 13.8.2014, as her case does not fall within the parameters laid down in the said Circular.

6) On 10th April, 2014, this court has granted ad interim relief in terms of prayer clause (B-2) thereby restraining the respondents-authorities from issuing appointment orders in favour of Respondent Nos. 4 and 5 as against open Female category.

7) Heard the learned counsel for the respective parties and perused the documents filed on record by them. Majority facts are undisputed. Total 23 posts of the pharmacists were to be filled in for which an advertisement was issued on 22.8.2014. Out of the 23 posts, as stated earlier, 13 posts were reserved for different backward class candidates categories and 10 posts were to be filled in from the open category. For the 10 posts to be filled in from open category, the horizontal reservations were provided thus : for Women - 3; Ex-Servicemen - 2; Part-time employees - 1; Sportsman - 1; Project affected person - 1; and General - 2. .

8) Inviting our attention to the Provisional Merit List and the select list prepared for the posts of pharmacists, Shri Deshmukh, learned Counsel appearing for the petitioner, submitted that in so

far as candidate, viz. Gadade Pallalvi Bharat is concerned, since she has secured highest marks in open (female) category, the petitioner does not have any objection for her selection; however, the other two candidates, viz. Khanapurkar Kranti Ganesh and Sulabha Raosaheb Phukate (i.e. Respondent Nos.4 and 5) are concerned, since both have secured less marks than the petitioner, could not have been selected. The learned Counsel asserted that in the provisional merit list, since petitioner stands second highest in female category candidates, she must have been selected from Open (Female)category. Shri Deshmukh, has relied upon the judgment of the Hon'ble Apex court in the case of Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and Ors. - (2007) 8 SCC 785, in order to support the contentions raised by him in the petition. Inviting our attention to the observations recorded by the Hon'ble Apex Court in para 9 of the aforesaid judgment, Shri Deshmukh urged that though the petitioner belongs to scheduled caste, since she has secured more number of marks, her candidature ought to have been considered on the basis of the said merit from the open category. As against it, Shri Yawalkar, learned AGP, referring to

the observations of the Hon'ble Supreme Court in para 9 itself, sought to canvass that the said observations are not of any help to the petitioner's case. Learned AGP submitted that the selection of the scheduled caste meritorious candidate from the open category is permissible in so far as vertical reservations are concerned and cannot be applied to horizontal (special) reservations.

9) On hearing the learned Counsel appearing for the respective parties and on perusal of the documents filed on record, following question arises for our determination, -

"Whether the petitioner, who has applied for the post of pharmacist from the reserved category, more particularly scheduled caste, can claim her selection on one of the three(3) posts horizontally reserved for open Female category on the basis that amongst the female candidates, she has secured second highest marks. ?"

10) It is not in dispute that vide advertisement published on 22nd August, 2014 by District Selection Committee, Beed, total 23 posts of pharmacists were

advertised along with certain other posts. In so far as said 23 posts of pharmacists are concerned, the reservations provided were to the following effect, -

Scheduled Caste	:	1
Scheduled Tribe	:	2 (out of which 1 for female 1 for General)
Vimukta Jatis (A)	:	1
Nomadic Tribe (N.T.(C))	:	1
Other Backward Class(OBC)	:	5 (out of which 2 for female 1 for Ex-Servicemen 1 for Part-time 1 for General)
Economically special Backward Class (ESBC)	:	2 (out of which 1 for female) 1 for General)
SBC(A)	:	1
Open	:	10 (out of which, - 3 for female 2 for ex-servicemen 1 for part-time 1 for sportsman 1 for Project affected 2 for General)

11) The Petitioner has placed on record the provisional merit list published by Respondent/Zilla Parishad in regard to the post of pharmacist (Aushad

Nirman Adhikari). In the said list, name of Gadade Pallavi Bharat appears at Sr.No.27 and she is shown to have secured 126 marks. Name of the present petitioner is at serial No. 37 and she is shown to have secured 122 marks. Respondent No.4 – Kranti Ganesh Khanapurkar is at serial No. 51 and has secured 120 marks; whereas name of Respondent no.5 – Phukate Sulabha Raosaheb is at serial No. 86 and she has secured 110 marks. There is no dispute that in the female candidates, whose names are included in the provisional merit list, petitioner stands on 2nd position in order of merit.

12) As is revealing from the contentions raised and the arguments advanced on behalf of Respondent Nos. 1 to 3, they have not included the name of the petitioner in the final select list pertaining to the open(female) category published by them for the reason that the petitioner does not belong to open category and had not applied from the said category. It is their further contention that the reservation prescribed under open category for women being horizontal reservation, the candidates from the said category only are entitled to be considered against

the posts reserved for such category. It has also been argued that the principle applicable to vertical (social) reservations will not apply to horizontal(special) reservations.

13) To support the argument advanced as above, the respondents have placed reliance on two Supreme Court judgments, one in the case of Rajesh Kumar Daria Vs. Rajasthan Public Service Commission – AIR 2007 SC 3127; and other in the case of Anil Kumar Gupta and Ors. Vs. State of U.P. And Ors. – (1995) 5 SCC 173. The respondents are also relying upon the Government Circular dated 13th August, 2014.

14) Our attention was invited to the observations recorded by the Hon'ble Apex court in para 9 of the judgment in the case of Rajesh Kumar Daria (cited supra), which are thus, -

“ The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc.,

under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indra Sawhney (Supra), R. K. Sabharwal vs. State of Punjab [\(1995 \(2\) SCC 745\)](#), Union of India vs. Virpal Singh Chauhan - [\(1995 \(6\) SCC 684\)](#) and Ritesh R. Sah vs. Dr. Y. L. Yamul - [\(1996 \(3\) SCC 253\)](#)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women

is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.

Let us illustrate by an example :
If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible

candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.] “

15) The observations in para 18 of the Judgment in the case of Anil Kumar Gupta (cited supra) which have been relied upon by the respondents are thus,

“18. Now, coming to the correctness of the procedure prescribed by the

revised notification for filling up the seats, it was wrong to direct the fifteen percent special reservation seats to be filled up first and then take up the O.C. (merit) quota (followed by filling of O.B.C., S.C. and S.T. quotas). The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit: then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an over-all horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment / accommodation as stated above should be applied separately to each of the

vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.) Because the revised notification provided for a different method of filling the seats, it has contributed partly to the unfortunate situation where the entire special reservation quota has been allocated and adjusted almost exclusively against the O.C. Quota."

16) We also deem it appropriate to reproduce herein below the relevant part of the Government circular dated 13th August, 2014, from which the respondents are deriving support to buttress their contentions, which reads thus, -

"(अ) प्रथम टप्पा :- खुल्या प्रवर्गातुन समांतर आरक्षणाची पदे भरताना, गुणवत्तेच्या निकषानुसार खुल्या प्रवर्गातील उमेदवारांची निवड यादी करावी (या ठिकाणी खुल्या प्रवर्गात गुणवत्तेच्या आधारावर मागासवर्गीय उमेदवारांचाही समावेश होईल). या यादीत समांतर आरक्षणानुसार आवश्यक खुल्या प्रवर्गाच्या उमेदवारांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उद्भवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणानुसार आवश्यक खुल्या प्रवर्गाच्या उमेदवारांची संख्या पर्याप्त नसेल तर खुल्या प्रवर्गासाठी राखीव समांतर आरक्षणाची पदे भरण्याकरिता सदर यादीतील आवश्यक पर्याप्त संख्येइतके शेवटचे उमेदवार वगळून पात्र उमेदवारांपैकी केवळ खुल्या प्रवर्गाचेच आवश्यक पर्याप्त संख्येइतके उमेदवार घेणे आवश्यक आहे."

17) The controversy arisen in the present petition revolves around the interpretation of the words "General and/or Open category". The respondents have interpreted the said words to mean 'the candidates belonging to only such castes, which are not prescribed to be socially backward'. In other words, if any candidate belongs to any such caste or tribe which falls in backward class and has been prescribed as scheduled caste, scheduled tribe or Nomadic Tribe and Vimukta Jati, cannot be included in open category and consequently cannot compete and claim the selection on any post from the said category.

18) According to us, the construction of the word "open category" so suggested by the respondents is against the constitutional mandate as well as policy of reservation in employment.

19) The import of the word "General category", which in other words can also be termed as "open category" is explained by the Hon'ble Apex court in the case of Bihari Lal Rada Vs. Anil Jain (Tinu) and Ors. - (2009) 4 SCC 1, thus, -

"There is no separate category like general category. The expression belonging to the general category wherever employed means the seats or offices earmarked for persons belonging to all categories irrespective of their caste, class or community or tribe. The unreserved seats euphemistically described as general category seats are open seats available for all candidates who are otherwise qualified to contest to that office.

The Hon'ble Apex court has further observed that,

The word 'General' is derived from Latin word genus.

"... It relates to the whole kind, class, or order. Pertaining to or designating the genus or class, as distinguished from that which characterizes the species or individual; universal, not particularized, as opposed to special; principal or central, as opposed to local; open or available to all, as opposed to select; obtaining commonly, or recognized universally, as opposed to particular; universal or unbounded, as opposed to limited; comprehending

the whole or directed to the whole, as distinguished from anything applying to or designed for a portion only. Extensive or common to many."

20) "Whether the Municipal Councilor elected from the reserved ward can contest the election to the office of president of the said Municipal Council if by virtue of roaster such office is notified to be filled in by a member belonging to the general category" was the issue for determination before the Hon'ble Apex court in the case of Bihari Lal Rada (cited supra). Said Bihari Lal Rada, who was belonging to reserved class, was elected on the post of president of Municipal Council, Hissar, though at the relevant time, according to the roaster, the post of president of the said Municipal Council was notified to be filled in by a member belonging to the general category. Election of Bihari Lal Rada was challenged in a writ petition seeking writ of certiorari to quash the proceedings where under appellant was declared to have been duly elected as president of Hissar Municipal Council. The learned Single Judge of High Court of Haryana dismissed the writ petition and upheld the election of Bihari Lal

Rada as president of the Municipal Council. In an appeal, preferred against the decision of learned Single Judge the Division Bench set aside the judgment of learned Single Judge and quash the election of said Bihari Lal Rada. The matter was then taken to the Hon'ble Apex court by Bihari Lal Rada and the Hon'ble Apex court set aside the order passed by the Division Bench and upheld the decision of learned Single Judge thereby holding the election of said Bihari Lal Rada as president of the said Municipal Council. Some of the observations, which were made by the Hon'ble Apex court in the aforesaid judgment, we have reproduced herein above. In the instant petition, the petitioner, who belongs to reserved class and more particularly, scheduled caste, is claiming her selection for the post notified to be filled in by a female member belonging to general category. We find that having regard to the facts involved in the present petition, the same principle as was applied by the Hon'ble Apex court in the case of Bihari Lal Rada, will apply to the present case.

21) In Biharilal Rada's case, one another

judgment of the Hon'ble Supreme Court in the case of V.V.Giri Vs. D.Suri Dora – AIR 1959 SC 1318 is referred to. the facts in that case were, - In a double member Parliamentary Constituency one seat was reserved for the Scheduled Tribes and the other was general. Four persons filed their nominations for the election, G1 and G2 for the general seat and S1 and S2 for the reserved seat. In the light of the number of votes received by the candidates at the polls and in accordance with provisions of Section 54 (4) of the Representation of the People Act, 1951, S1 was declared elected to the reserved seat and S2, who had received the largest number of votes out of the remaining candidates, was elected to the general seat. G1 filed an election petition for a declaration that the election of S2 was void. One of the contentions was that upon a proper interpretation of Section 54 (4) a candidate who had filed his nomination for the reserved seat could not be declared elected to the general seat.

. The aforesaid matter was heard by the Constitution bench of the Hon'ble Supreme court, which, after elaborate consideration, held, as under,

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"In our opinion, the true position is that a member of a scheduled caste or tribe does not forego his right to seek election to the general seat merely because he avails himself of the additional concession of the reserved seat by making the prescribed declaration for that purpose. The claim of eligibility for the reserved seat does not exclude the claim for the general seat; it is an additional claim; and both the claims have to be decided on the basis that there is one election from the double-member constituency."

The further observations made by the Hon'ble Supreme Court in the said judgment do have material bearing on the controversy raised in the present petition, which are thus, -

"In this connection we may refer by way of analogy to the provisions made in some educational institutions and universities whereby in addition to the prizes and scholarships awarded on general competition amongst all the candidates, some prizes and scholarships are reserved for candidates belonging to backward communities. In such cases, though the

backward candidates may try for the reserved prizes and scholarships, they are not precluded from claiming the general prizes and scholarships by competition with the rest of the candidates."

22) In R.K.Sabharwal Vs. State of Punjab - (1995) 2 SCC 745, a Constitution Bench of the Hon'ble Apex Court has held as under, -

"When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the

percentage of reservation." (Emphasis supplied)

23) In Indra Sawhni Vs. Union of India 1992, Supp 3 SCC 217, the nine Judges Bench of the Hon'ble Supreme Court has ruled as under, -

"In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merits; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

24) From the law laid down by the Hon'ble Apex court in the aforesaid judgments, it is quite clear that the reservation ensures that at least minimum number of persons belonging to such classes would get elected in the public bodies or secure post in public employment. However, reservation so made in their

favour does not mean that they are not entitled to compete for unreserved posts. The reservation does not limit the number of candidates from reserved category to be filled in in the public employment. They are eligible to compete from the unreserved seats/posts and get selected resulting in increase of their number in the employment. There can never be any Constitutional or legal objection if more members from the weaker sections get selected to the posts on their own merit from the seats meant for unreserved category or open category.

25) The apprehension which was expressed by the learned Counsel appearing for the respondents that if the candidates belonging to reserved class are permitted to compete even for the posts notified for general category, the persons belonging to open category may lose their chances forever or for a long time to get the employment, is totally untenable and unsustainable. As has been observed by the Hon'ble Apex court in the aforesaid judgments, the whole idea is to see that minimum number of seats as provided for are filled in by vulnerable sections of the Society. However, there can never be any

constitutional or legal objection if more members from those weaker sections of the society get selected to the posts on their own merit from the seats meant for the open category.

26) It was sought to be canvassed on behalf of the respondents that the principle which is applicable to vertical (social) reservations which permit the candidates belonging to backward class to compete for unreserved posts and if they are appointed to the non-reserved post on their own merit, their number is not to be counted against the quota reserved for the respective backward class, will not apply to horizontal(special) reservations. It was further canvassed that for the ten posts notified to be filled in by the candidates belonging to open category in vertical reservation, three posts out of the said ten posts, are reserved to be filled in by women candidates and thus it was the horizontal(special) reservation provided for the women candidates and as such, the said posts were liable to be filled in only by the women candidates belonging to open category.

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 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.

28) We have noticed that the law laid down by the Hon'ble Apex court in the case of **Rajeshkumar Daria and Anil Kumar Gupta** (cited supra) is being mis-interpreted by the Administrative authorities. In Rajesh Kumar Daria's case, the Hon'ble Apex court has discussed about horizontal (special) reservation provided for women within the social reservation for scheduled caste and by giving an illustration, a conclusion is recorded that the women selected on

merits within the vertical reservation quota will be counted against horizontal reservation for women. In Anil Kumar Gupta's case, the Hon'ble Apex court has ruled that the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom.

29) Thus, in both the aforesaid judgments, the aspect dealt within by the Hon'ble Apex court was pertaining to filling up the horizontal quota 'under vertical(social) reservation'. In the instant case, the question for determination is how to fill up the horizontal quota for women not prescribed within the social reservation but under open category. We have elaborately discussed herein before 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 or community or tribe. It is thus evident that when three posts were notified to be filled in by the female candidates belonging to open category, it was open for the petitioner to compete

for the said post irrespective of the fact that she belongs to the reserved category and when she had secured meritorious position amongst the female candidates and had secured 2nd highest marks, her selection could not have been denied by the respondents on the ground that she belongs to scheduled caste and does not fall in the open category. As per the observations of the Hon'ble Apex court in the case of V.V.Giri (cited supra), which we have reproduced herein above, though the petitioner had applied from the scheduled castes category that does not mean that she had given up her right to be selected to the unreserved post or to the post for open category. The claim of eligibility for the reserved post does not exclude the claim for general seat. It is an additional claim.

30) In Devender Kumar Vs. State of Haryana and Anr. - 1997 LAB I.C.106, the Division Bench of the Punjab and Haryana High Court has dealt with somewhat similar controversy as is involved in the present petition. In the said petition though the petitioner had stood higher in merit, the persons junior to him in the merit list in general category were given

letters of appointment on the pretext that since the petitioner had applied under the category of dependent of freedom fighter, his case would not be considered against a seat for general category. The Division Bench of the Punjab & Haryana High court allowed the petition filed by the said petitioner by making following observations,

"6. Stand taken by the respondents that since petitioner had applied in the reserved category of dependent of Freedom Fighter his case could not be considered in the general category in spite of his merit cannot be sustained. Petitioner has competed along with others and is placed in select list at No.32 in order of merit that is within the number of seats advertised for the general category. It has been held in several judicial pronouncements that a reserved category candidate can compete for non-reserved post and in the event of this appointment to the said post his number cannot be added and taken into consideration for working out percentage of reservation. It would be arbitrary to decline the relief to the petitioner who had come within merit for appointment of the general

category only on the ground that he had also claimed his entitlement to the post in the reserved category of freedom fighter. In this particular case, it would be seen that the Freedom Fighter seat was available only if suitable candidates in the E.S.M. category were not available. There was no fixed number of seats for the dependents of Freedom fighters. The same was dependent on the contingency that appointment would be given to them only if suitable candidates from E.S.M. category are not available. Under such circumstances also, he could not be denied the opportunity to compete against the post meant for general category candidate. Denial of appointment to the petitioner and the preference given to the persons lower in merit than the petitioner in the general category under these circumstances cannot be upheld. The action of the respondents is arbitrary and discriminatory thus violative of Articles 14 and 16 of the Constitution of India."

31) For the reasons recorded by us, as above, and more particularly having regard to the law laid

down by the Hon'ble Apex court as well as Punjab and Haryana High court in the judgments, to which we have referred in the foregoing paras, we hold the petitioner eligible to be selected for one of the three posts reserved for female candidates under the horizontal reservation notified for open category candidates since she has secured 2nd highest marks amongst the female candidates. Consequently, her name has to be included in the select list prepared by Respondent Nos.2 and 3 in the meeting held on 17.3.2015 and we direct accordingly . It is obvious that while including the name of the petitioner in the list of selected candidates, at least one name will have to be deleted from the said select list. The respondents 1 to 3 shall take decision considering the order of merit as to name of which candidate is to be deleted from the said select list.

32) Rule is accordingly made absolute in the aforesaid terms. There shall be no order as to costs.

Sd/-
(P.R.BORA)
JUDGE

sd/-
(S.S.SHINDE)
JUDGE

bdv/fldr.5.2.16(2)