



1. The State of Maharashtra  
Through the Principal Secretary  
Sales Department, Mantralaya  
Mumbai 400 032
2. The State of Maharashtra                      **... Respondents**  
Through the Principal Secretary  
General Administration  
Department, Mantralaya, Mumbai.
3. Maharashtra Public Service  
Commission,  
Through its Secretary,  
Cooperate Telephone Exchange  
Building, Maharashi Karve Road,  
Cooperage, Mumbai 400 021

Mr. S. S. Thombre, Advocate for the petitioner,  
Mr. S.G. Karlekar, A.G.P. for respondent Nos. 1 and 2  
Mr. S.V. Adwant, Advocate for respondent No.3  
Mr. H. A. Joshi, Advocate for the Intervenor

**CORAM        : S. V. GANGAPURWALA   &  
                     A. M. DHAVALE, JJ.**

**DATE         : 26<sup>th</sup> April, 2019**

**ORAL JUDGMENT ( Per S.V. Gangapurwala, J.):**

1.        Rule. Rule made returnable forthwith. With the consent of the parties, taken up for final disposal.
2.        Earlier we had heard learned advocates for respective parties. Today also we have heard Mr. S. S. Thombre, Advocate for the petitioners, Mr. Joshi, learned Advocate for the intervenor and Mr. Munde, learned Advocate for respondent No.3.

3. The petitioners assail the order of the Maharashtra Administrative Tribunal dated 20th July, 2018 dismissing their Original Application Nos.945/2017 and 944/2017, respectively.

4. It is the case of the petitioners that pursuant to Advertisement No.52/2016 for preliminary examination for the post of Sales Tax Inspector and Advertisement No.25/2017 for the main examination, the petitioners had applied from open category. The petitioners have paid fees as is prescribed for the open category candidates. The petitioners belong to reserved category. Case of the petitioners is not considered from open competition category in horizontal reservation for women only on the ground that school record of the petitioners shows that the petitioners belong to reserved category. According to the learned counsel for the petitioners, the petitioners had never given application for being considered from reserved category. The petitioners had chosen not to take benefits of reservation. In view of that, the petitioners ought to have been considered from open competition category for the posts reserved for women

from open category. The learned counsel submits that even otherwise, a candidate of reserved category, if secured more marks than candidates from open category, then candidate from reserved category has to be considered on that post from open category.

5. Learned counsel for the petitioners further submits that with regard to similar advertisement, the Division Bench of this Court at Principal Seat at Bombay, in Writ Petition Nos.5397 and 5396 of 2016, under judgment and order dated 23rd January, 2019, had held that even if a person belonging to reserved category is seeking benefit of horizontal reservation i.e. from open category and that person secures more marks than the candidates of open candidates, the candidate from reserved category has to be considered on that post, reserved for horizontal reservation in open category.

6. It is contended by the learned A.G.P. and Mr. Joshi, learned Advocate for the Intervenor that the petitioners belong to reserved category. As far as horizontal reservation is concerned, horizontal reservation post has to be filled in from the

candidates of the same vertical reservation. Reliance is placed by the learned AGP on the judgment of this Court in the case of **Miss Rajani D/o Shailesh Kumar Khobragade Vs. The State of Maharashtra (Writ Petition No.10103/2015 decided on 31.03.2017)** to which one of us (S.V.Gangapurwala,J.) was party. Reliance was also placed on the judgment of the Apex Court in the case of **Anil Kumar Gupta and others Vs. State of U.P. & others, reported in (1995) 5 SCC 173,** so also the judgment in the case of **Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and others, reported in (2007) 9 SCC 785.** Mr. Joshi, the learned counsel for the intervenor submits that the petitioners can only be considered from open general category and not from open woman category, if they are not seeking benefit of reservation.

7. It appears that the Tribunal, under the impugned order was of the view that Horizontal reservation for woman category will have to be considered from the same vertical reservation to which the candidate belongs. We need not go into the various judgments referred by the respective parties as the facts in

the present case are self eloquent.

8. In the present matters, the petitioners are not claiming benefit of reservation. They have applied for the post as candidates of open category. They have not sought the benefit of reservation. They had only mentioned that they belong to a particular caste but had applied considering that they want to compete from open woman category. They have also paid the fees as is required to be paid by the candidates from open category. In light of that it was not permissible for the respondents to contend that the petitioners have applied from reserved category.

9. The petitioners are not claiming benefits of reservation, as tomorrow if they are not issued with validity certificate of a particular caste, they will have to lose their service. The petitioners consciously did not made this mistake while filling their applications. This particular aspect was lost sight by the Tribunal while considering the case of the petitioners.

10. In light of above, the impugned judgment and

order of the Tribunal is quashed and set aside.

11. The respondents shall consider the petitioners from open women category and proceed further.

12. If on merits, the petitioners are selected from open women category and if the posts are available, then the selected candidates may not be affected.

13. Rule is made absolute in the above terms.

**(A. M.DHAVALA, J.)**

**(S.V.GANGAPURWALA, J.)**

JPC