

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 5397 OF 2016
WITH
WRIT PETITION NO. 5396 OF 2016**

Smt. Tajaswini Raghunath Galande	]	
Vrundavan Colony, Dattamal,	]	
Opp. Tahsil Office, Tasgaon,	]	
Tal. Tasgaon, Dist. Sangli		].. Petitioner

Versus

1. The Chairman,	]	
Maharashtra Public Service	]	
Commission, 5, 7 & 8 Floor,	]	
Cooperage Telephone Corporation	]	
Building, N.K. Road,	]	
Cooperage, Mumbai – 21.	]	
	]	
2. State of Maharashtra,	]	
Through Secretary, Department	]	
of Tribal Affairs, Mantralaya,	]	
Mumbai 400 032.	]	
	]	
3. General Administration Department,	]	
Principal Secretary, Mantralaya,	]	
Mumbai – 400 032.	]	
	]	
4. Smt. Hasinabee Laldesab Hipparaje,	]	
Resi. At : Modi Nagar, Murud,	]	
Tal. Latur, Dist. Latur 413510	]	] .. Respondents

Mr.Sagar Ghogare I/b Mr. S.J. Ghogare, Advocate for petitioners in both petitions.

Mr.Ashish Kamath I/b Mr. Asif J. Patel and M.S.Shaikh, Advocate for respondent No.1 -MPSC in both writ petitions.

Mr Y. S. Khochare, AGP for respondent No.3 in both petitions.

Mr N. V. Bandiwadekar a/w. Mr. S.A. Mane, Advocate for respondent No.5 in WP/5397/2016;

Mr Bhushan A. Bandiwadekar, Advocate for R No. 5 and 7 in WP/5396/2016;

Mr S. N. Biradar, Advocate for respondent No. 8 in WP/5396/2016.

**CORAM : B.R. GAVAI &
N.J. JAMADAR, JJ.**

DATE : 23RD JANUARY 2019

P.C.

WRIT PETITION NO. 5396 OF 2016

1 The learned counsel for the petitioner, on instructions, seeks leave to withdraw the petition.

2 The petition is disposed of as withdrawn.

WRIT PETITION NO. 5397 OF 2016

ORAL JUDGMENT (PER B.R. GAVAI, J.) :

1 Rule. Rule is made returnable forthwith and by consent, the petition is taken up for hearing.

2 The petitioner has approached this Court being aggrieved by the order passed by the learned Maharashtra Administrative Tribunal ('MAT') in O.A. No. 119 of 2016, vide which the learned MAT has rejected the said Original Application filed by the present petitioner.

3 The present petitioner had filed two petitions challenging the advertisement issued by the Maharashtra Public Service Commission

('MPSC'); viz., (i) advertisement dated 17th March 2015 to fill vacancy to the post of Assistant Commissioner/Project Officer- Grade-II, Group -B; and (ii) advertisement dated 31st March 2015 to fill vacancy to the post of Assistant Commissioner/Project Officer-Grade-II, Gr-A.

4 Since the petitioner has withdrawn Writ Petition No.5396 of 2016 regarding the post of Assistant Commissioner/Project Officer-Grade-II, Gr-A, we are not going to refer the facts with regard to the said challenge.

5 In so far as advertisement regarding the post of Assistant Commissioner/Project Officer- Grade-II, Group-B is concerned, out of total 20 posts, 11 posts were reserved for Open Category, 2 posts for Scheduled Caste, 1 post for Scheduled Tribe, 4 posts for Other Backward Class (OBC), 1 post each was reserved for VJ-A and N.T.-B categories and 1 post was reserved for physically challenged person. The advertisement also provided for 4 posts for horizontal reservation for Open Women Category, 1 post each was earmarked for Scheduled Caste and OBC woman, respectively. The applicant, who is the petitioner herein, is a woman and belongs to N.T. (C.) category. In the relevant column, the applicant has also stated that *she would like to be considered from Open Category*. The applicant has also paid fees for open candidate.

7 The applicant had approached the learned Tribunal contending that the action of respondent No.1-MPSC, not permitting the petitioner to apply from Open Female Category was not in accordance with law.

8 The learned Tribunal, relying on the judgment of the Hon'ble Apex Court in case of *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors.*¹ held that the action of the respondent No.1-MPSC in respect of the applicant, who belong to N.T.(C.) category, in not permitting the applicant to apply from the quota against 'Open Women Category' could not be faulted with and as such the learned Tribunal had rejected the Original Application. Being aggrieved by the said order, the present petition is filed.

9 We have heard Shri Sagar Ghogare, learned counsel for the petitioner/applicant and Shri Ashish Kamath, learned counsel appearing on behalf of respondent No.1-MPSC and Shri Bandiwadekar, learned counsel appearing on behalf of respondent No.4-who is the last woman selected from 'Open Women Category'.

10 Shri Sagar Ghogare, learned counsel for the petitioner submitted that the learned Tribunal has erred in holding that the petitioner, who belong to N.T.(C.) category, is not entitled to compete against the 'Open Women

1 (2007) 8 SCC 785

Category' category. The counsel submitted that the view taken by the learned Tribunal is totally contrary to the law, as laid down by the Hon'ble Apex Court in the case of *Indra Sawhney & Others Vs. Union of India* ², so also in the judgment of a Division Bench of this Court in case of *Asha D/o. Ramnath Gholap Vs. The President, District Selection Committee & Ors.* ³ and a judgment of a Division Bench (Nagpur Bench) of this Court in *Kanchan Vishwanath Jagtap and Another Vs. Maharashtra Administrative Tribunal and Others* ⁴.

11 Shri Kamath, learned counsel for respondent No.1 and Shri Bandiwadekar, learned counsel for respondent No.5, on the contrary, submit that 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* (Supra). It is further submitted that a Division Bench of this Court (Aurangabad Bench) in the case of *The State of Maharashtra Vs. Irfan S/o. Mustafa Shaikh & Ors.* ⁵ has held that in so far as horizontal reservation for Open category is concerned, the same is available only for the Open category candidates and the same is not available for candidate belonging to the reserved category. The counsel submitted that the Special Leave Petition challenging the same has also been dismissed by the Apex

2 1992 Supp. (3) SCC 215

3 2016 (3) ABR 376

4 2016 (1) Mh.L.J. 934

5 Writ Petition No. 272 of 2010 dt. 15.11.2010

Court holding that no reason for interference was made out with the reasoning given by this Court. It is, therefore, submitted that the law laid down by a Division Bench of this Court in case of ***The State of Maharashtra Vs. Irfan S/o. Mustafa Shaikh & Ors.*** (Supra) is considered by the Hon'ble Apex Court as the correct legal position. The Member, therefore, has not erred in following the law laid down therein.

11 A Division Bench of this Court in case of ***Smt. Kanchan Vishwanath Jagtap*** (Supra) had an occasion to consider the identical issue. It will be relevant to refer the judgment and order of this Court in case of ***Smt. Kanchan Vishwanath Jagtap*** (Supra). The Division Bench, after referring to the law laid down by the Apex Court in the case of ***Rajesh Kumar Daria*** (Supra) as well as in the judgment of the Constitution Bench of the Apex Court in case of ***Indra Sawhney & Others*** (Supra) has observed thus :-

“6 The only question that falls for consideration in the present writ petitions is as to whether the learned Tribunal has rightly considered the law laid down by the Apex Court in the Case of ***Rajesh Kumar Daria*** (supra) or not.

7. Their Lordships of the Apex Court were considering the selection to the post of Munsiff-Magistrate in the Rajasthan Judicial Service made by the Rajasthan Public Service Commission. In the said case it can be seen that in the advertisement issued, the advertisement specifically provided for number of posts available for male as well as female in various categories including Open, SC, ST and OBC. It will be relevant to refer to the observations of the Apex Court in the case of ***Rajesh Kumar Daria*** (supra) in paragraph Nos. 8 and 9:-

"8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be :

"For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus : "For SC : 21 posts for men and 9 posts for women, in all 30 posts".

Obviously, there is, and there can be, no reservation category of 'male' or 'men'.

9. 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 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 *Indira 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.]

The perusal of the aforesaid observations of Their Lordships would reveal that the Apex Court has held that the reservations in favour of SC, ST and OBC under Article 16(4) were vertical reservation, whereas special reservations in favour of physically handicapped, women etc. under Articles 16(1) or 15(3) are horizontal reservations. It has been held that 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. It is further held that 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 the reservation quota for SCs has been filled. It has been further held that the entire reservation quota will be intact and available in addition to those selected under Open Competition category.

8. However, insofar as horizontal reservation is concerned, Their Lordships held that the said principle would not be applicable to it. It has been held that 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?'. It has been further held that 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. It has been further held that 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. Their Lordships held that thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.

9. It could thus be seen that the case that fell for consideration before Their Lordships of the Apex Court was regarding the compartmentalized reservation. In the said case, reservation was provided for various categories including SC, ST, OBC and within that reservation, particular number of posts were reserved for women category. In that view of the matter, Their Lordships held that the women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.

10. However, the facts in the present case are totally different. In the present case, there is no compartmentalized reservation. Out of the six posts available, two are reserved for women. No doubt that it would have been more appropriate that in the light of the observations of Their Lordships in the case of **Anil Kumar Gupta vs. State of U.P.** reported in (1995) 5

Supreme Court Cases 173, the State ought to have provided reservation for women in particular vertical reservation category. However, that has not been done. In the advertisement, two posts are reserved for women category.

11. It will be appropriate to refer to the following observations of the Constitution Bench of the Apex Court in paragraph 811 in the case of **Indra Sawhney Vs. Union of India and ors.** reported in **1992 Supp. (3) Supreme Court Cases 215:-**

811. 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 merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.?

12. It could thus be seen that the Constitution Bench of the Apex Court itself has held that if a Scheduled Castes candidates get selected in the open competition on the basis of their own merit, they will not be counted against the quota reserved for Scheduled Castes and they will be treated as open competition candidates.

13. In the present case, out of the candidates who had applied against the women category, all the candidates who have been short-listed belong to the different reserved categories except the intervener in Writ Petition No. 1925 of 2014. In the interviews conducted, the petitioners were found to be the most meritorious candidates. We are, therefore, of the considered view that the facts in the present case would not be governed by the law laid down by the Apex Court in the case of **Rajesh Kumar Daria** (supra). We are of the view that if the view of the learned Tribunal is accepted, then it would result in a situation to exist, which is not permissible in view of the law laid down by the Constitution Bench of the Apex Court in the case of **Indra Sawhney** (supra). Merely because all the meritorious candidates in the women category belonged to the reserved categories like OBC, SC and ST, in our view cannot be a ground to deny them the benefit of their meritorious position. We find that if the view as accepted by the learned Tribunal is accepted, it will defeat constitutional mandate as explained in the judgment in the case of **Indra Sawhney** (supra) by the Constitution Bench of the

*Apex Court. A situation would exist that a male candidate belonging to a reserved category would be entitled to be selected against an open category post if he is entitled on his own merit. However, a female candidate belonging to a reserved category, even though she is much more meritorious than a candidate belonging to open category women, would not be entitled to be selected against the said post. The said situation in effect would result in permitting a discriminatory treatment to the women reserved candidates as against the male reserved candidates. We find that such a situation is not permissible under the Constitutional scheme as interpreted by the Constitution Bench of the Apex Court in the case of **Indra Sawhney** (supra).*

12 It is pertinent to note that another Division Bench of this Court, at Aurangabad in the case of **Asha D/o. Ramnath Gholap** (Supra), without noticing the view taken by the Division Bench at Nagpur in case of **Kanchan Vishwanath Jagtap** (Supra), has taken an identical view. It will be relevant to refer to Paragraphs 28 and 29 of the judgment of the Division Bench in the case of **Asha D/o. Ramnath Gholap** (Supra), which read as under :-

“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.”

13 So far as the contention with regard to the order passed by the Division Bench of this Court in case of **Irfan S/o. Mustafa Shaikh & Ors.** (Supra) and confirmation of the same by the Hon'ble Apex Court is concerned, Writ Petition No. 272 of 2010 was dismissed *in limine* by the Division Bench of this Court to which one of us (B.R. Gavai, J.) was a Member. What has been upheld by the Apex Court is dismissal of the petition *in limine*. However, the said order was passed without hearing the parties and/or considering the provisions of law and, as such, we are of the considered view that the said order cannot be treated as *ratio decidendi*.

On the contrary, the view taken by the Division Bench of this Court in the case of **Smt. Kanchan Vishwanath Jagtap** (Supra) and in the case of **Asha D/o. Ramnath Gholap** (Supra) are the reported judgments which ought to have been referred by the learned Tribunal. The second one is without noticing the first one wherein the judgment of the Hon'ble Apex Court has been considered and relied upon while taking the view. In that view of the matter, we are of the considered view that *ratio decidendi* would be the view taken by the Division Bench of this Court in the cases of **Asha D/o. Ramnath Gholap** (Supra) and **Smt. Kanchan Vishwanath Jagtap** (Supra).

14 In view of the above legal position, we find that the learned Tribunal has erred in dismissing the Original Application.

15 It is not in dispute that the petitioner has secured 64 marks in her written examination whereas respondent No.4 has secured 42 marks. From this, it can thus been seen that though the petitioner is much more meritorious than respondent No.4, she was not allowed to participate in the selection process. We are informed that the final selection is on the basis of the total marks obtained in the written examination as well as in the oral interview. Since the petitioner has not been permitted to appear for the oral interview, she has not been considered for the selection.

16 In that view of the matter, we find that it is just and necessary that the petitioner be permitted to appear for oral interview and after considering the marks obtained by the petitioner in the oral interview, respondent No.1-MPSC should, by combining the marks of written examination as well as oral interview, consider her position as per merit and if the petitioner is found more meritorious than any of the candidate selected against the Open Women category, select the petitioner and recommend her name for the post of Assistant Commissioner/Project Officer- Grade-II, Group -B for appointment against Group 'B' post as per her merit rank in the said examination.

17 In the result, the petition is allowed and the impugned order is quashed and set aside.

18 The respondent No.1-MPSC is directed to consider the candidature of the petitioner from Open Women category and hold her interview. The process of interview be completed within a period of six weeks from today. After combining the marks obtained by the petitioner in oral interview as well as the written examination, if it is found that petitioner has secured more marks than any of the candidate selected from Open Women category, the petitioner be selected and recommended for the appointment to the post of Assistant Commissioner/Project Officer- Grade-II, Group -B

in accordance with her position in the merit in the said examinations.

19 It is further to be noted that vide order dated 2nd May 2017, a Division Bench of this Court has recorded the statement of MPSC that it will keep one post in Group 'B' vacant. In view of this, in case, the petitioner get selected, it would not adversely affect any of the selected candidate.

20 Rule is made absolute in the above terms.

[N.J. JAMADAR, J.]

[B.R. GAVAI, J.]