

Urmila Ingale

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

WRIT PETITION NO. 12356 OF 2019

Amruta Suresh Yadav
@ Amruta Sachin Pol and ors. .. Petitioners
vs.
The State of Maharashtra and Ors. .. Respondents

**WITH
INTERIM APPLICATION NO. 3781 OF 2019
IN
WRIT PETITION NO. 12356 OF 2019**

Suraj Padmakar Patil and ors. .. Applicants

In the matter between

Amruta Suresh Yadav
@ Amruta Sachin Pol and ors. .. Petitioners
Vs.
The State of Maharashtra and Ors. .. Respondents

**WITH
WRIT PETITION ST. NO. 30282 OF 2019**

Asharani Vasant Suryawanshi .. Petitioner
Vs.
The Chief Secretary,
the State of Maharashtra and ors. .. Respondents

Mr. Arif Bookwala, Senior Advocate a/w Mr. Ashish S. Gaikwad, Ms. Prerana M. Agavekar, Ms. Anjali S. Kolapkar, Mr. Onkar U. Sukale, Mr. Rajendra B. Khaire and Ms. Vijayata Shinde, for Petitioners in WP/12356/2019.
Mr. Sandeep Dere, for Petitioner in WPST/30282/2019.

Mr. P. P. Kakade GP a/w Mr. B. V. Samant, AGP for Respondents No. 1 to 4 – State.

Mr. A. I. Patel, for Respondent No. 5/MPSC in WPST/30282/2019.

Ms. Madhavi Ayyappan i/b Talekar & Associates, for Respondent No. 55 in WP/12356/2019.

**CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

**HEARD ON : AUGUST 20, 2022
JUDGMENT ON : AUGUST 30, 2022**

JUDGMENT (PER M. S. KARNIK, J.) :

1. The issues involved in these writ petitions being common, are heard together and disposed of by a common judgment.
2. We refer to the facts in Writ Petition No. 12356 of 2019 for convenience.
3. The jurisdiction of this Court is invoked by the petitioners under Articles 226 and 227 of the Constitution of India. The petitioners have challenged the order dated October 22, 2019 passed by the Maharashtra Administrative Tribunal (hereafter 'the Tribunal', for short), Mumbai. Dissatisfied with the decision of the Tribunal, the petitioners have approached this Court, *inter alia*, seeking the following substantive reliefs :

“(b) This Hon’ble Court be pleased to issue the order or direction and thereby call for the entire relevant records and proceedings from the Office of the respondent No. 5 MPSC in respect of the impugned

result dated 08.03.2019 and after receipt of the same and after going through its legality, validity and propriety of the same be pleased to quash and set aside the result dated 08.03.2019 to the extent to selection of 54 reserved category women candidates selected against Open Female Candidates for the post of PSI being advertisement No. 23/2017 and advertisement No. 66/2017.

(c) This Hon'ble Court be pleased to issue appropriate order or direction and thereby direct the Office of the respondent No. 5 MPSC to provide the particulars of the 54 candidates of Reserved Category selected against Open Female Candidates, so as to enable the present petitioners to add them as party respondent for complete adjudication of the present petition.

(d) This Hon'ble Court be pleased to issue the writ of mandamus or writ in the nature of mandamus or any other appropriate writ and/or order and/or direction like a nature thereby direct the respondent No. 5 MPSC to consider the representation dated 11th March, 2019 of petitioner forthwith and after considering the same to declare the petitioners as selected from the Open Female Category for the post of PSI on the basis of merit and accordingly modify the result dated 08.03.2019.

(e) This Hon'ble Court be pleased to issue the order or direction and thereby call for the entire relevant records and proceedings of impugned order dated 22nd October, 2019 passed in Original Application being No. 368 of 2019 and 388 of 2019 and after receipt of the same and after going through its legality, validity and propriety of the same be pleased to quash and set aside the impugned order dated 22nd October, 2019 passed in Original Application being no 368 of 2019 and 388 of 2019.

(f) This Hon'ble Court be pleased to issue writ of

mandamus or writ in the nature of mandamus or any other writ or appropriate order or appropriate

direction of this Hon'ble Court and thereby direct to the respondent No. 5 MPSC to declare fresh result in accordance with Government Circular dated 16.03.1999 thereby implement the horizontal compartmental reservation as a special reservation for Open Female/Women Candidates of these petitioner and other Open Female Candidates eligible to it.

(g) This Hon'ble Court be pleased to issue the Order or direction and thereby be pleased to direct the respondent no. 5 MPSC to declare the petitioners as selected from the Open Female Category for the post of PSI on the basis of merit and accordingly modify the result dated 08.03.2019."

The Factual Narration :

4. An Advertisement No. 23 of 2017 dated April 26, 2017 (hereafter 'the advertisement 23/2017', for short) came to be issued by the respondent no 5 – Maharashtra Public Service Commission (hereafter referred to as 'MPSC', for short). The applications were invited from the eligible candidates for the posts of Police Sub-Inspector (hereafter 'PSI', for short), as well as Sales Tax Inspector (hereafter 'STI', for short) and Assistant Section Officer (hereafter 'ASO', for short). The present petition concerns only the posts of PSI. As per the advertisement, 650 posts of PSI were to be filled in. The chart indicating the break-up of reservations is reproduced, which reads thus:

1.3 Home Department											
Police Sub Inspector, Group B (Non-Gazetted) total 650 posts											
Cader	Scheduled Castes	Scheduled Tribes	De-notified Tribes (A)	Normadic Tribes (B)	Normadic Tribe (C)	Normadic Tribe (D)	Other Backward Classes	Special Backward Classes	Total Backward Class	Open	Total Posts
No. of posts	85	46	1	16	20	8	96	12	284	366	650
The statement of category wise Social/Horizontal reservation of vacant posts in as under.											
1) General	55	30	1	10	13	6	62	7	184	238	422
2) Females	226 6	14	-	5	6	2	29	4	86	110	196
3) Sports	4	2	-	1	1	-	5	1	14	18	32
Post in Office of Maharashtra Public Service Commission											

5. The petitioners state to have the requisite educational qualifications as well as the experience prescribed by the advertisement. The petitioners belong to the open female/women category eligible to compete from the open female category as per the advertisement. The petitioners state that the advertisement contains a stipulation that the candidates claiming any benefits under the reserved category shall not be considered for open female category. The preliminary examination was conducted on July 16, 2017. The MPSC declared the result of the preliminary examination on October 3, 2017. The MPSC thereafter issued notification for the main examination vide Advertisement No. 66 of 2017 for the post of PSI on October 3, 2017. The petitioners having qualified in the preliminary examination applied for the main examination by duly filing the application form with the MPSC. The particulars for the post of PSI indicated in the Advertisement No. 66 of 2017 are the same as the one stipulated in the advertisement 23/2017 referred to

hereinabove. The main examination was held on November 5, 2017. The MPSC declared the result of the main examination for the post of PSI on August 2, 2018. The petitioners were thereafter called for physical examination and interview by MPSC.

6. In the meantime, the respondent no. 2-General Administrative Department of the State Government (hereafter 'GAD', for short) issued a corrigendum resolution dated December 19, 2018 substituting clause (1) of government circular dated August 13, 2014, thereby permitting migration of the candidates from vertical reservation to the open general category. This is applied retrospectively to Advertisements No. 23 of 2017 and 66 of 2017. The MPSC then issued a declaration dated December 26, 2018 thereby permitting the candidates to make claims for the respective category.

7. The MPSC, on March 8, 2019 published the final result for the post of PSI. The names of the petitioners did not find place in the final merit list. The petitioners, dissatisfied with the final result, which was declared without considering the mandate of horizontal reservation, made a representation dated March 11, 2019 to the MPSC requesting for cancellation of the final result and declare a fresh result in accordance with law. The petitioners approached the Tribunal praying for the following reliefs :

(a) To hold that the impugned GR dated 19.12.2018 is Ultra Vires to the provision of Article 15(2) and

16(2) of Constitution of India, to the extent it permits migration of Backward Class candidate claiming horizontal reservation to Open Competition category, further this Hon'ble Tribunal may be pleased to hold that the impugned GR dated 19.12.2018 is contrary to the Law laid down by Hon'ble Apex Court in case of Indra Sawhney and Ors. Vs. Union of India and Ors. (1992 Supp (3) SCC 217) more particularly paragraph 514 and 812.

(b) This Hon'ble Tribunal may further be pleased to direct the Respondent Nos. 4 and 5 to revise the list of candidates eligible for recommendation dated 08.03.2019, and further be pleased to direct the Respondent Nos. 4 and 5 not to migrate the candidate belongs to horizontal reservation from one category to another category.

8. The Tribunal for the reasons recorded in the order impugned in these petitions, found the original applications to be devoid of any merit and hence, dismissed the same. The challenge therefore to this decision of the Tribunal by way of the present petitions.

9. **Submissions of learned senior advocate Mr. Arif Bookwala and learned advocate Mr. Sandip Dere on behalf of the Petitioners.**

a) The Government Resolution (hereafter referred to as 'GR', for short) dated December 19, 2018 is ultra vires the provisions of Articles 15(2) and 16(2) of the Constitution of India to the extent it permits migration of backward class candidates claiming horizontal reservation to open competition category. The GR dated December 19, 2018 is contrary to the law laid down by the Supreme Court in

the case of **Indra Sawhney and others Vs. Union of India and others**¹.

b) The declaration dated December 26, 2018 is applicable to those advertisements issued/published after the advertisement bearing no. 50 of 2018. In the instant case, the advertisement for preliminary examination is published on April 26, 2017 and the advertisement for main examination is published on October 3, 2017 and therefore the declaration dated December 26, 2018 cannot be made applicable retrospectively. The intent of declaration dated December 26, 2018 is that the same is to be made applicable to the advertisements published after Advertisement No. 50 of 2018 and not earlier thereto and therefore, giving retrospective effect to the declaration dated December 26, 2018 is arbitrary and illegal. The intent of the declaration dated December 26, 2018 completely nullifies the effect of the government corrigendum dated December 19, 2018 issued by GAD. The action on the part of the MPSC permitting the migration of the reserved category women/female to open female/women category is contrary to the well established principles of law, more particularly, contravenes the provisions of Articles 14, 15(3), 16(1), 16(2) of the Constitution of India .

c) As per the advertisement, 110 posts were reserved for the open female candidates. The MPSC selected 56 seats

¹ 1992 Supp (3) SCC 217

from the open female category, however, 54 seats were selected from other reserved categories for women. These 54 candidates belong to the reserved categories, filled their forms from the reserved categories and did not claim the benefits of reservation for the purpose of considering their claim from open category i.e. general category (unreserved seats/ open to all). In such a case, such candidates who have claimed the benefits of vertical reservation cannot claim migration to the open female category. The action of MPSC is contrary to the law laid down by the Supreme Court in the case of Indra Sawhney (supra), **Anil Kumar Gupta and ors. Vs. State of Uttar Pradesh and ors.**² and **Ms. Rajani D/o Shaileshkumar Khobragade Vs. The State of Maharashtra**³. The government resolution dated May 25, 2001 and the government circular dated March 16, 1999 prescribes that horizontal reservation being compartmental reservation, the seats reserved for each of the categories has to be specifically stated in the advertisement itself. Seats of such compartmentalised reservation made for women/female in the respective vertical reservation should be filled as per the vertical reservation in their respective category, therefore, the seats reserved for open female category should be filled in from only open female category i.e. like the petitioners herein.

² (1995) 5 SCC 173

³ W.P. No.10103 of 2015, decided on 31.03.2017

d) The decision of the Tribunal is erroneous as it failed to apply the correct mandates of the horizontal reservation. The decision of this Court in **Charushila Choudhary and ors. Vs. State of Maharashtra**⁴ is erroneously applied by the Tribunal while dismissing the original application. The Tribunal ought to have considered that in Charushila (supra), this Court has not entirely gone into the legality of the government circular dated August 13, 2014 and the government corrigendum dated December 19, 2018. Moreover, in the present case, the entire selection process such as preliminary, mains, physical tests and interview is concluded prior to the issuance of corrigendum dated December 19, 2018 and therefore, the said corrigendum cannot have a retrospective application. The reservation under Article 16(4) is a social reservation whereas reservation under Article 15(3) is a special and compartmental reservation. The compartmentalised reservation under the open female category to which the petitioners claim is different from open/general/unreserved category.

e) Thus, what is happening is that the women from other categories are getting their own seats from their vertical reservation and also getting the seats in the open female category. The 54 successful candidates, who are erroneously selected, having enjoyed the benefits during the process of selection such as concession in fees,

⁴ 2019 SCC OnLine Bom 1519

relaxation of age as reserved category candidates are not entitled to the benefits of migration from reserved category to open category for claiming seats or posts meant for open category, more particularly, in case of a compartmentalized horizontal reservation.

10. Reliance is placed on the decision in **Madan Mohan Sharma and anr. Vs. State of Rajasthan and ors.**⁵ to contend that once advertisement had been issued on the basis of the circular obtaining at that point of time, the effect would be that the selection process should continue on the basis of the criteria which were laid down and it cannot be on the basis of the criteria which has been made subsequently. Subsequent amendment of the rules made during the pendency of the advertisement which was prospective cannot be made retrospective so as to make the selection on the basis of the rules which were subsequently amended. If this was to be done, then the only course open was to recall the advertisement and to issue a fresh advertisement according to the rules which had come into force. Learned counsel also relied upon the following decisions:

i) **Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and ors.**⁶

ii) **Laxmi Kanwar and anr. Vs. State and ors.**⁷

iii) **Government of A.P. Vs. P.B. Vijaykumar and**

⁵ (2008) 3 SCC 724

⁶ (2007) 8 SCC 785

⁷ 2015 (1) RLW 744 (Raj.)

⁸anr.

iv) **Public Service Commission, Uttaranchal Vs. Mamta Bisht**⁹

Submissions on behalf of Respondents :

11. Learned advocates argued in support of the impugned order passed by the Tribunal. Our attention is invited to the affidavit-in-reply filed by the State before the Tribunal and the one filed before this Court as well. It is contended that the controversy as regards the challenge to the corrigendum dated December 19, 2018 is no longer *res integra* in view of the decision of this Court in case of Charushila (supra). Reliance is placed on decision of the Apex Court in **Saurav Yadav and ors. Vs. State of Uttar Pradesh and ors.**¹⁰ in support of their submissions. It is further submitted that the arguments advanced on behalf of the petitioners as regards the retrospective applicability of the GR dated December 19, 2018 is fallacious, as the final result of the selection process was yet to be declared. In any case, G.R. dated October 19, 2018 is only in the nature of a clarification as regards the correct procedure to be followed, which does not have the effect of changing rules or applying a different eligibility criteria midway during the selection process. The petitioners having taken a chance and awaited for the final result which came to be declared on March 8, 2019, are now precluded from raising any

⁸ (1995) 4 SCC 520

⁹ (2010) 12 SCC 204

¹⁰ 2020 SCC OnLine SC 1034

belated challenge to the corrigendum dated December 19, 2018. Reliance is placed on the decisions in Saurav Yadav (supra) and Charushila (supra).

CONSIDERATION

12. A total number of 650 posts of PSI are advertised by the MPSC to be filled up vide its advertisement no. 23 of 2017 dated April 26, 2017. Pursuant to the preliminary examination, MPSC issued a notification for the main examination vide advertisement no. 66 of 2017 on October 3, 2017. The result of the main examination was declared on August 2, 2018. The GAD issued a corrigendum resolution dated December 19, 2018 thereby substituting clause (1) of the government circular dated August 13, 2014 and permitted migration of candidates from vertical reservation to open general category reserved for women. This according to the petitioners is impermissible as they are claiming the benefits of horizontal reservations.

13. We have carefully perused the pleadings, the impugned order of the Tribunal and the decisions relied upon by the learned advocates in support of their respective contentions. Having extensively heard the submissions made on behalf of the learned advocates, we have no hesitation in concluding that the impugned order passed by the Tribunal does not warrant any interference for the reasons indicated hereinafter.

14. No doubt, the question for our consideration is of seminal importance. We appreciate the efforts of the

learned advocates appearing for the petitioners while assailing the order of the Tribunal. In our view the controversy involved in the petition is well settled by the decision of the Supreme Court in **Saurav Yadav and Ors.** (supra) and the decision of this Court in **Charushila** (supra).

15. The issue involved in the present petitions is whether female candidates belonging to various categories i.e. scheduled caste, scheduled tribe, other backward class etc. can make a claim to the seats which are earmarked for female candidates belonging to the open category on their own merit. Before we proceed to refer to the relevant observations in **Charushila** (supra) which dealt with the corrigendum dated December 19, 2018, we may profitably refer to the observations made by the Supreme Court in the case of **Indra Sawhney and ors.** (supra) in paragraph 811, which reads thus :

“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.”

16. Learned senior advocate for the petitioners was at pains to point out that the selected women candidates from the reserved category having availed of the age relaxation and fee concession are not entitled to claim the benefits of

migration in the open category. We surely would have been persuaded by this submission of learned senior advocate if the petitioners were to place on record empirical data highlighting instances regarding the concessions of fees and age relaxation availed by the reserved category women candidates. We do not find any materials on record, except for a bald assertion that the selected candidates have availed of such concessions. We therefore do not find any substance in the contentions of the learned senior advocate for the petitioners that the selected candidates are not entitled to claim migration in the open category on this ground.

17. We proceed further. The question whether there is any category like a general category is answered by the Supreme Court in the case of **Bihari Lal Rada Vs. Anil Jain**¹¹. Their Lordships observed 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 person belonging to all categories irrespective of their caste, class or community of 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.”

18. The question regarding the interpretation of the government circular dated August 13, 2014 came up for

¹¹ 2009(4) SCC 1

consideration before the Division Bench of this Court in the case of **Charushila** (supra). As to what is the meaning of the government circular dated August 13, 2014 in its reference to the “open seats” is considered and explained in this decision. We may refer to some pertinent observations made by this Court in '**Charushila**' (supra). Paragraph 22 refers to the relevant extract from the circular dated August 13, 2014 which came to be substituted vide the corrigendum dated December 19, 2018. The same reads thus:

“22. It would be advantageous to record the relevant extract from the circular dated 13.08.2014.

शासन परिपत्रक क्रमांक— एसआरव्ही १०१२/ प्र.क्र. १६/१२/१६/—अ, दिनांक १३ ऑगस्ट, २०१४ मधील परिच्छेद (अ) — प्रथम टप्पा— खुल्या प्रवर्गातून समांतर आरक्षणाची पदे भरताना, गुणवत्तेच्या निकषातून 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 उदभवणार 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 समांतर आरक्षणास पात्र उमेदवारांपैकी केवळ खुल्या प्रवर्गाचेच आवश्यक पर्याप्त संख्येइतके उमेदवार घेणे आवश्यक आहे

23. The said paragraph has been substituted with certain modifications vide corrigendum dated 19.12.2018, which reads thus :

(अ) — प्रथम टप्पा — खुल्या प्रवर्गातील (अराखीव पदे) उमेदवारांची गुणवत्तेच्या

निकषानुसार निवड यादी तयार करावी. या यादीत खुल्या प्रवर्गात गुणवत्तेच्या आधारावर मागासवर्गीय उमेदवारांचाही (अनुसुचित जाती अनुसुचित जमाती वि.जा. भ.ज. वि.मा.प्र. इ.मा.व. व एसइबीसी) समावेश होईल. या यादीत समांतर आरक्षणानुसार उमेदवारांची संख्या पर्याप्त असेल तर कोणताही प्रश्न उदभवणार नाही आणि त्यानुसार पदे भरावीत. जर या यादीत समांतर आरक्षणानुसार आवश्यक उमेदवारांची संख्या पर्याप्त नसेल तर समांतर आरक्षणाची पदे भरण्याकरिता सदर यादीतील आवश्यक पर्याप्त संख्येइतके शेवटचे उमेदवार वगळून पात्र उमेदवारांपैकी आवश्यक पर्याप्त संख्येइतके समांतर आरक्षणमधील गुणवत्तेनुसार पात्र उमेदवार घेणे आवश्यक आहे

19. The co-ordinate Bench in '**Charushila**', then took into consideration the law laid down by the Supreme Court while interpreting the constitutional aspects of horizontal reservation and methodology of filling in the posts. After considering the decisions of the Supreme Court in **Anil Kumar Gupta and ors.** (supra), **Rajesh Kumar Daria** (supra), the co-ordinate Bench made some pertinent observations in paragraphs 32 to 38, which reads thus :

"32. It is, thus, clear that the candidates belonging to backward class may compete for non reserved post and if they are appointed to the non reserved posts on the basis of their own merit, their number will not be counted against the quota reserved for the respective Backward class.

33. So far as the horizontal reservation is concerned a different procedure has been prescribed, which is recorded in the above noted paragraph. In the event of short fall only, after perusal of the merit list, such short fall in horizontal reservation category shall be met by deleting requisite number of candidates from the respective reserved categories and by substituting them from the same category. Thus, the horizontal reservation category candidate selected on the basis

of merit within the vertical reservation quota, will have to be counted against the horizontal reservation category.

34. A reference can be made to a judgment in the matter of Public Service Commission, Uttaranchal Vs. Mamta Bisht (2010) 12, SCC 204: AIR 2010 SC 2613, wherein the principles laid down in the matter of Rajesh Kumar Daria have been reiterated. It is observed in the judgment that the reserved category candidate getting appointed against a non reserved post will not be counted against a reserved quota and the aforesaid principal applies to vertical (social) reservation only and does not apply to horizontal reservation for women, handicapped persons etc.

35. In the matter of Deepa E.V. V. Union of India (2017) 12 SCC 680, it is held that in the event relaxation is granted to a reserved category candidate in respect of age-limit, experience, criteria for qualifying marks, etc., such candidate cannot claim right to be appointed under open/general category. In the reported matter, the appellant before the Hon'ble Supreme Court had secured 82 marks and she was placed in the list of candidates belonging to OBC category. One Ms. Serene Joseph from OBC category, who had secured 93 marks, was selected and appointed. So far as general category is concerned, no candidate had secured the minimum cut-off marks i.e. 70 marks. The appellant filed a writ petition to the High Court which came to be dismissed. Being aggrieved thereby, she she approached the Hon'ble Supreme Court. It was held by the Hon'ble Apex Court that the appellant, who had applied from OBC category by availing age relaxation and also attending the interview under the OBC category, cannot claim right to be appointed under the General category. The Office Memorandum specifically records that the candidates securing relaxed standards in respect of age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general

category candidates, they would be counted against the reserved vacancies and such candidates would be deemed as unavailable for consideration against unreserved vacancies. So far as the applicability of principle in the matter of Jitendra Kumar Singh Vs. State of Uttar Pradesh (2010) 3 SCC 119, it was held that the said principle cannot be made applicable in view of the express bar prohibiting consideration of the candidates from general category. In the circumstances, the Court had taken a view that the relaxation granted to reserved category candidates will operate a level playing field.

36. It would be appropriate to consider the judgment of the Hon'ble Supreme Court in the matter of Gaurav Pradhan Vs. State of Rajasthan, (2018) 11 SCC 352, wherein the Hon'ble Apex Court has reiterated the proposition laid down in the matter of Deepa E. V. (supra), concerning the migration of horizontal reservation category candidates to open category. The issue that arose for consideration was, whether the reserved category candidates who had taken benefit of age relaxation in the selection process in question and have obtained marks equal to or more than the last general category candidate, would be treated in the general/open category candidates or ought to have been confined in the reserved category. The Hon'ble Apex Court has referred to the judgment in the matter of Jitendra Kumar Singh (supra) and observed that it should be read in the context of the statutory provisions and the Government Order and it is further held that the observations in the matter of Jitendra Kumar Singh cannot be applied in a case where Government Orders are to be converse effect. It is recorded that in the matter of Jitendra Kumar Singh, the view was based on statutory scheme and circular dated 25.03.1994 has to be confined to the scheme which was under consideration, and intention of the State Government as indicated from the said scheme cannot be extended to a case where the State circulars are to the contrary especially when there is

no challenge to the converse scheme as delineated by circular dated 24.06.2008. In paragraph 37 of the judgment, it is recorded thus :

"37. The judgment of this Court in Deepa E. V. fully supports the case of the appellants. In Deepa E. V. case also the Circular of the Central Government dated 01.07.1998/02.07.1997 provided the relevant provision, which is to the following effect (SCC pp. 682-83, [para 6)

"6. 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 deeded as unavailable for consideration against unreserved vacancies "

(emphasis in original)

37. The observations made in paragraphs no. 48 and 49 are relevant for consideration, which read thus:

"48. We are thus of the opinion that the Division Bench erred in modifying the judgment of the learned Single Judge and holding that candidates availing relaxation of age belonging to reserved category candidates who find place in merit list of the general/open category has to be treated to be included in the general/open category. The above conclusion of the Division Bench is unsustainable for the reason as indicated above.

49. 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 larger 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 belong 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. We however, also take notice of the fact that the reserved category candidates who had taken benefit of age relaxation and were migrated on the unreserved category candidates, are working for more than last five years. The reserved category candidates who were appointed on migration against unreserved vacancies are not at fault in any manner. Hence, we are of the opinion that SC/ST/BC candidates who have been so migrated in reserved vacancies and appointed, should not be displaced and allowed to continue in respective posts. On the other hand, the unreserved candidates who could not be appointed due to the above illegal migration are also entitled for appointment as per their merit. The equities have to be adjusted by this Court."

38. In the matter of Smt. Kanchan Vishwanath Jagtap vs. Maharashtra Administrative Tribunal, Nagpur Bench (Writ Petition No. 1925 of 2014, etc. decided on 16.12.2015), it was noticed by the Court that the reservation prescribed under the advertisement was overall reservation and not compartmentalized reservation. It was, thus, held that the case would not be governed by the law laid down by the Hon'ble Apex Court in the case of Rajesh Kumar Daria (supra). Since the petitioners therein, who were found to be most meritorious amongst all the candidates, it was held that they can be considered and permitted to migrate to open category."

20. Then in paragraph 39, the co-ordinate Bench of this court, referred to the decision in Writ Petition No. 3929 of 2015 decided on March 30, 2016 in the case of Asha

Ramnath Gholap. The co-ordinate Bench in paragraph 41 observed thus :

"41. Even in case of compartmentalized horizontal reservations, the seats that are allotted to open category or quota, can be claimed by anybody and everybody, who is entitled to claim a seat or post on the basis of merit, which will include candidates even belonging to open category i.e. all candidates even belonging to any reserved category whichever, horizontal or vertical. However, the only exception can be carved out, as has been stipulated in the judgment of the Hon'ble Supreme Court that if the applicable rule or the advertisement specifically provide to the contrary, such migration shall not be permitted from the reserved category to the open category for claiming compartmentalized reservation provided for open category. Those candidates belonging to reserved category, who have already enjoyed the benefits during the process of selection, such as concession in fees, relaxation of age, relaxation in the merit criteria, would not be eligible to claim benefits of migration from reserved category to open category for claiming a seat or post."

21. Then in paragraph 49, the co-ordinate Bench set out its conclusions. Paragraph 49 reads thus :

49. On consideration of judgments of the Hon'ble Supreme Court, reference to which has been made in this judgment, following conclusions emerge:

(i) There are two types of reservations, which may be described as "vertical" and "horizontal". Vertical reservations are "social" reservations provided under Article 15(4) and/or 16(4) of the Constitution. Those are meant for Schedules Castes, Schedules Tribes and Other Backward Classes. "Horizontal" reservations is provided under Article 15(1) and/or 16(1) of the Constitution and those are available to

women, physically handicapped, freedom fighters, sportsmen, Retired Military personnel etc.

ii) In case the seats reserved for "horizontal" reservations are proportionately divided among the vertical social reservations and are not inter-transferable. It would be a case of compartmentalized reservation.

iii) As against this, what happens in "overall" reservation is that while allocating the special reservation category candidates to their respective social reservation, overall reservation in favour of special reservation categories is to be honoured.

(iv) The proper and correct course is to first fill up the OC quota on the basis of merit; then fill up each of the social reservation quota. i.e. Schedules Castes/ Schedules Tribes and Other Backward Class. The third step would be to find out how many candidates belonging to "special" reservation category have been selected on the above basis. If the quota fixed for horizontal reservation is already satisfied- in case it is an overall 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 category by deleting the corresponding number of candidates therefrom. If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation, as stated above, should be applied separately to each of the vertical reservations.

(see: Anil Kumar Gupta & Rajesh Kumar Dariya (supra)

(v) There is no separate category in law recognized as open category. Open or Open Competition category consists of all the seats and the categories.

(vi) It also cannot be disputed that a reserved category candidate claiming reservation as and by way horizontal or vertical reservation, is always

entitled to claim seat from open category as per his/her individual merit. This is particularly because open category or quota as such is meant to be fulfilled from amongst all categories and only on the basis of merit. In such allotments, caste, creed, sex or any other criteria relating to any candidate does not at all matter. If a candidate belonging to any reserved category is able to secure allotment of seat, solely on the basis of his merit, such seat or post is not liable to be counted against the said reserved category. Whereas, in case of horizontal reservations, the position is otherwise. The procedure prescribed for preparing the select list in the circulars dated 13.08.2014 and 19.12.2018 is correctly recorded. The reference to "open" seats in the circular dated 13.08.2014 shall be construed as a category comprising of the candidates on the basis of open competition and includes all reservation categories. The subsequent circular dated 19.12.2018 is of explanatory nature.

(vii) The horizontal reservation specifically provided in compartmentalized manner is not interchangeable or inter-transferable. The ratio of the judgment in the matter of Jitendra Kumar Singh (supra) has to be read in the context of statutory provisions and the Government Order dated 25.03.1994 and the said observations cannot be applied in case where the Government Orders are to be converse effect.

(viii) 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. In the same context, when candidates availed of the relaxed standards, they are not

entitled to claim migration to the open category.”

22. The decision rendered in '**Charushila**' came up for consideration in **Saurav Yadav and ors.** (supra). Their Lordships while extensively referring to the various decisions in the context of migration, considered the question of applicability of the principle of migration to cases of horizontal reservation. In paragraph 25, it is observed thus :

“25. None of the decisions referred to hereinabove however had an occasion to consider whether the principle as stated in decisions referred to in the preceding paragraph also apply to cases of horizontal reservation. We may, at this stage, consider some of the decisions by High Courts, which dealt with this question:-

A) In Megha Shetty vs. State of Rajasthan, (2007) 8 SCC 785, the following observations were made by the High Court of Rajasthan:-

“21. ...Once the horizontal reservation in favour of woman in general/open category is to be applied, the candidates belonging to all categories, including SC, ST and OBC, are also entitled to be considered against the said posts reserved for General Category (Woman).

23. In the present case, it is evident from a bare look at the part of Advertisement (Annexure-3) that 13 posts were reserved for OBC category. From the result-sheet (Annexure-4) it is seen that out of 42 unserved seats, 4 women candidates found place and, therefore, they were counted against the horizontal reservation provided for woman and thereafter, 9 more women candidates in order of their merit were selected which included candidates belonging to General as well as OBC

Category. It is also noticed that in the main list, 3 women candidates belonging to OBC (Woman) found place on their own merits and after taking 9 candidates against General (Woman) Category which included OBC (Woman) also, further reservation has not been provided qua 2 posts despite the fact that 5 posts were reserved for OBC (Woman), which clearly shows that the horizontal reservation was correctly applied.

24. The plea sought to be raised by the appellant regarding impermissibility for migration from OBC (Woman) to General (Woman) in case of special reservation under [Article 15\(3\)](#) of the Constitution of India also apparently has no applicability in the present case, inasmuch as, once the candidate belonging to OBC (Woman) category has obtained more marks than a candidate belonging to the General (Woman) category and, therefore, finds place in the select list meant for General (Woman), the same cannot even be termed as migration and, therefore, the plea raised in this regard is without any substance ...”

A-1) The aforesaid decision was followed in [Neelam Sharma vs. State of Rajasthan and Ors.](#) [the expressed used by B.P. Jeevan Reddy, J. in *Indra Sawhney*(supra) by the same High Court as under:-

“6. The Division Bench of this High Court at Jodhpur in [Smt. Megha Shetty vs. State of Rajasthan](#) (2014) 1 WLC 761 (Rajasthan) has already dealt with exactly the same issue raised in the present bunch of appeals. The Division Bench relying upon the above-referred decisions of the Supreme Court has held that in the event of woman candidate belonging to OBC category on securing more marks than the woman candidate of general category finds a position in the select list of candidates of general category, the same cannot be treated as migration. And this decision of the Division Bench is binding on us with which we also fully agree. It is also to be

noted that none of the writ petitioners/respondents herein who are women of general category has secured more marks than the women candidate of OBC category selected in open category. The select list of women candidates prepared by the Rajasthan Public Service Commission is strictly in accordance with the law explained by the Supreme Court...." Special Leave Petition No. 4312 of 2016 arising therefrom was dismissed by this Court on 13.05.2016 with following observations:-

"Application seeking exemption from filing official translation is allowed. We find no infirmity in the order impugned herein. The Special Leave Petition is dismissed."

B) In Asha Ramnath Gholap vs. The President, District Selection Committee/Collector, 2016 SCC OnLine Bom 1623 the High Court of Bombay considered the issue as under:-

"30. 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.

32. ... 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.... ”

B-1) In Kanchan Vishwanath Jagtap vs. Maharashtra Administrative Tribunal, Nagpur and others, (2016) 1 Mah LJ 934 the High Court held:-

“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, 1992 Supp (3) SCC 217. 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, 1992 Supp (3) SCC 217 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 1992 Supp (3) SCC 217.”

B-2) In [Tejaswini Raghunath Galande vs. Chariman, Maharashtra Public Service Commission, Mumbai and others](#) (2019) 4 Mah LJ 527, the High Court set out the facts as under:-

“The learned Tribunal relying on the judgment of the Hon’ble Apex Court in case of [Rajesh Kumar Daria vs. Rajasthan Public Service Commission and ors](#) (2007) 8 SCC 785. 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.”

Following the view taken in [Asha Ramnath Gholap](#), 2016 SCC OnLine Bom 1623 and [Kanchan Vishwanath Jagtap](#), (2016) 1 Mah LJ 934, the High Court allowed the petition and set aside the order of the Tribunal.

[B-3\) In Charushila vs. State of Maharashtra](#) 2019 SCC OnLine Bom 1519, the submissions of the Advocate General for the State were recorded as under :-

“13. The learned Advocate General also submits that there is no separate category in law, recognized as “open category”. Firstly, irrespective of their colour i.e. category, in case of education, all the seats and in case of employment all the posts, as the case may be, are to be taken together. From and out of the same, the reserved posts/seats are to be taken out and what is left behind is commonly known as ‘open category’ or ‘open competition category’ seats.

14. According to him, a reserved category candidate, irrespective of whether he/she claims such reservation, as and by way of vertical or horizontal, is always entitled to claim seat from open category on the basis of his/her merit. This is particularly because, the open category or quota as such, is meant for being allotted only and only on merit and, therefore, in such an allotment, the caste, creed or sex or any other criteria, relating to any candidate, does not at all matter.

15. The learned Advocate General further submits that in case a candidate belonging to any reserved category is able to secure allotment of seat, solely on the basis of his/her merit and merit alone, such allotment cannot consume any seat, reserved for the category to which such a candidate belongs. In such a case, such an allotment, does not, in any manner, diminish the seats or the posts as the case may be, reserved for the category to which such candidate belongs.

18. He also submits that however, even in case of 'compartmentalized' horizontal reservations, seats that are allotted to the open category or quota, can be claimed by everybody and anybody who is entitled to basically claim a seat or post as the case may be, from the open category, which will obviously and of course, include each and every candidate, from the merit list of the open category i.e. all the candidates even belonging to any reserved category whichever, vertical or horizontal."

Accepting the submissions of the State, the High Court concluded:-

"33. So far as the horizontal reservation is concerned, a different procedure has been prescribed, which is recorded in the above noted paragraph. In the event of short fall only, after perusal of the merit list, such short fall in horizontal reservation category shall be met by deleting requisite number of candidates from the respective reserved categories and by substituting them from the same category. Thus, the horizontal

reservation category candidate selected on the basis of merit within the vertical reservation quota, will have to be counted against the horizontal reservation category.

41. Even in case of compartmentalized horizontal reservations, the seats that are allotted to open category or quota, can be claimed by anybody and everybody, who is entitled to claim a seat or post on the basis of merit, which will include candidates even belonging to open category i.e. all candidates even belonging to any reserved category whichever, horizontal or vertical. However, the only exception can be carved out, as has been stipulated in the judgment of the Hon'ble Supreme Court that if the applicable rule or the advertisement specifically provide to the contrary, such migration shall not be permitted from the reserved category to the open category for claiming compartmentalized reservation provided for open category. Those candidates belonging to reserved category, who have already enjoyed the benefits during the process of selection, such as concession in fees, relaxation of age, relaxation in the merit criteria, would not be eligible to claim benefits of migration from reserved category to open category for claiming a seat or post."

B-4) In Shantabai Laxman Doiphode vs. State of Maharashtra 2020 SCC OnLine Bom 1659, the High Court held:-

".....However, in view of the law laid down by the Apex Court in various judicial pronouncements and discussed in aforesaid cases, it is clear that inspite of the petitioner choosing to be selected to a post reserved for N.T.(D.) category, the petitioner still could legitimately stake her claim to post available under the open category and not only that she could do so also to a post horizontally reserved for women in the open category. In the present case, there is no dispute about the fact that from amongst the three short listed

women candidates, the petitioner had secured second highest marks after the top scorer, Smt. Priya Naresh Gajbhiye. While Smt. Priya Naresh Gajbhiye, a S.C. candidate, was selected, on the basis of her merit, for one of the two posts reserved for open (women) category, the petitioner though eligible in view of the settled position of law, was not for the other post. The ground given for selecting Smt. Priya Naresh Gajbhiye and rejecting the petitioner was that though Smt. Priya Naresh Gajbhiye belonged to S.C. category, she had opted for open category while the petitioner had not. This ground is not tenable in law as we have seen from the judgments discussed earlier.”

C) In Uttarakhand Subordinate Service Selection Commission and Another vs. Ranjita Rana and Another (2019) SCC OnLine Utt. 481, the High Court of Uttarakhand relied upon its earlier decision in Sudhir Kumar vs. State of Uttarakhand [Writ Petition (S/B) No. 392 of 2017 dated 11.12.2018 and others and observed:-

“11. The effect of horizontal reservation, being provided under each category, is that it is only women, who belong to the Other Backward Classes, who can compete for posts reserved for Other Backward Classes (Women) and not women who belong to the Scheduled Castes, the Scheduled Tribes and the unreserved category. Likewise, it is only women belonging to the Scheduled Castes and the Scheduled Tribes who can compete for posts horizontally reserved in favour of Scheduled Castes (Women) and Scheduled Tribes (Women). A woman, not belonging to the reserved category (OBC, SC and ST), is not entitled to compete for posts reserved in favour of Other Backward Classes (Women), Scheduled Castes (Women) and Scheduled Tribes (Women).

12. The converse, however, is not true. All women, irrespective of whether they belong, or do not belong,

to the reserved category are entitled to compete for posts earmarked in favour of women under the General Category. There is no reservation for posts in the General Category, and horizontal reservation in favour of women in the General Category is available to be filled up from amongst all women irrespective of their caste status. Posts, reserved in favour of General Category (Women), are available for all women from the State of Uttarakhand, and that would include women belonging to the reserved categories such as OBCs, SCs and STs, and women who do not. Holding otherwise, would result in surreptitious introduction of reservation in favour of those who do not belong to the socially and educationally backward classes, and a disguised attempt at communal reservation frowned upon by the Supreme Court in *The State of Madras Vs. Sm. Champakam Dorairajan and another* : AIR 1951 SC 226. This question is no longer res integra and has, in fact, been answered by a Division Bench of this Court in *Sudhir Kumar Vs. State of Uttarakhand and others* (order in Writ Petition (S/B) No. 392 of 2017 dated 11.12.2018), which order was affirmed by the Supreme Court in its order in Special Leave to Appeal (C) No. 7801 of 2019 dated 15.04.2019.”

23. Their Lordships then went on to consider the view taken by High Court of Allahabad and High Court of Madhya Pradesh which was contrary to the one taken by the High Court of Rajasthan, Bombay, Uttarakhand and Gujarat. Upon a detailed analysis, in paragraph 47, it is observed that they did not approve the view of the High Court of Allahabad and Madhya Pradesh and hence rejected it. The view which weighed with the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is held to be correct and rational.

24. Thus, in **Saurav Yadav and ors.** (supra), the Supreme Court has given an imprimatur to the view taken by this Court in **Charushila** (supra).

25. In our opinion, the question posed for our consideration is squarely covered by the decision in **Saurav Yadav and ors.** (supra) and that of this Court in **Charushila** (supra).

26. We do not find any error in the approach of the Tribunal. The Tribunal has correctly followed the law laid down by this Court in **Charushila** (supra). We have no hesitation in observing that the circular dated December 19, 2018 is of an explanatory nature. This being the position, we do not find any merit in the submission of the learned counsel for the petitioners that the selection criteria in respect of the subject advertisements has been changed and given retrospective operation after the issuance of the corrigendum dated December 19, 2018. The corrigendum dated December 19, 2018 is only clarificatory and explanatory in nature which correctly lays down the proper selection process to be followed while making recruitment as regards the subject advertisements. The present case is not a case of any amendment made to the rules during the pendency of the selection process or there is any change in the criteria laid down for selection. The correct procedure to be followed in view of the decision of this Court in **Charushila** (supra) is explained, whereafter the final merit list was published. We are afraid, the decision relied upon

by the learned senior advocate in the case **Madan Mohan Sharma** (supra) and the one referred to by this Court in **Vikas Alase** in Writ Petition No. 2663 of 2001 have no application in the present facts.

27. We, therefore, do not find any merit in the Writ Petitions. The Writ Petitions are dismissed with no order as to costs.

28. Nothing survives for consideration in the Interim Application and the same is disposed of as such.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)