

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

WRIT PETITION NO. 12532 OF 2019

Kum Sayali Nitin Inamke,
Age. 27 years, Occ. Service,
R/o. Osmanabad Medium Project
Division, Sinchan Bhavan, Anand Nagar,
Osmanabad,
Tal. & Dist. Osmanabad.

.. Petitioner

Versus

1. The State of Maharashtra
Through its Principal Secretary,
General Administration Department,
Mantralaya, Mumbai – 32.
2. Maharashtra Public Service Commission,
Having its Office at Bank of India
Building, 3rd Floor, Mahatma Gandhi Road,
Hutatma Chowk,
Mumbai – 400 001,
Through its Additional Secretary.
3. Jyoti Shamrao Bhillare,
Age. Major, Occ. Nil,
4. Seema Balasaheb Raut,
Age. Major, Occ. Nil,
5. Dipali Balasaheb Patil,
Age. Major, Occ. Nil,
6. Apurva Vilas Patil,
Age. Major, Occ. Nil,
Resp. Nos. 3 to 6 to be
served through respondent No.2
Maharashtra Public Service Commission,
Having its Office at Bank of India

Building, 3rd Floor, Mahatma
Gandhi Road, Hutatma Chowk,
Mumbai – 400 001,
Through its Additional Secretary.

.. Respondents

Shri S. S. Thombre, Advocate for the Petitioner.
Shri A.S. Shinde, A.G.P. for the Respondent Nos. 1 and 2.
Shri Avinash S. Khedkar, Advocate for the Respondent No. 6.
The Respondent Nos. 3 to 5 are served.

**CORAM : MANGESH S. PATIL AND
SHAILESH P. BRAHME, JJ.**

**CLOSED FOR JUDGMENT/ORDER ON : 20.06.2023
JUDGMENT/ORDER PRONOUNCED ON : 05.09.2023.**

JUDGMENT (*Per Shailesh P. Brahme, J.*) :-

. Rule. Rule is made returnable forthwith. With the consent of the parties heard learned counsel for final disposal at admission stage.

2. The petitioner is challenging judgment and order dated 02.03.2016, passed by learned Members of the Administrative Tribunal, Mumbai bench at Aurangabad dismissing her Original Application No. 744 of 2015. The petitioner is aggrieved by exclusion of her name from the selection process for the post of Maharashtra Engineer (Civil Service) Group – A. She has also prayed for the directions to recommend her name as per merit from the open category and simultaneously to cancel the recommendations of the respondent Nos. 3 to 6.

3. The petitioner had filed Original Application No. 744 of 2015 with following contentions :

i. She belongs to Other Backward Class (OBC) category. She was holding requisite educational qualification for the post advertised. The respondent no. 3 to 6 are the successful recommended candidates from the open category having less marks than the petitioner.

ii. The respondent No. 2 issued an advertisement No. 62 of 2018 on 13.09.2013 for recruitment of 682 posts. The advertisement provided for horizontal reservation. The petitioner had applied for Maharashtra Engineering (Civil Service) Group A. On 30.10.2013 the preliminary Exam was conducted. She was successful.

iii. On 19.12.2013 advertisement for mains was published. Petitioner applied for it. She was successful in the written test. She was called for interview.

iv. On 23.10.2015 the result was declared. She scored 242 marks with remark not recommended. The respondent nos. 3 to 6 were recommended, though they were having lesser marks.

v. She prayed for the direction that the respondent No. 2 ought to have recommended her having scored more marks than the recommended candidates from OBC and has been claiming horizontal reservation.

4. The respondent No. 2 appeared before the Tribunal and contested the application on the ground that the petitioner had scored less marks in her category. She was not eligible for the recommendation. As per government circular dated 13.08.2014, the candidate from other vertical reservation category was not eligible to be considered for the post reserved for open female category. The respondent no. 6 also contested the matter by filing separate reply. A reliance was placed upon the decision rendered by the Tribunal at Aurangabad in **Irfan Mustafa Shaikh Vs. State of Maharashtra (O. A. No. 301 of 2009 dated 26.08.2009)**. It was stated that the said decision was confirmed by High Court and Supreme Court also. She supported the reply of respondent No. 2.

5. The learned Members of the Tribunal relied upon the decision in case of **Irfan Mustafa Shaikh Vs. State of Maharashtra** (supra) and the circular dated 13.08.2014 to hold that only candidates from the open category and no other candidates like SC, ST, OBC, etc. would be entitled to horizontal reservation in open category. A finding was recorded by the Tribunal that horizontal reservation in open category can be filled up only from the candidates applying from open and open is one of the vertical categories for the purposes of horizontal reservation along with other categories like SC, ST and OBC. Thus, the original application was dismissed.

6. The petitioner has preferred this writ petition on

10.10.2019 challenging the judgment and order dated 02.03.2016. The petitioner has raised grounds that she had applied from OBC category. Being female which is horizontal reservation, she was entitled to be considered from unreserved category. The migration or the interchangeability was permissible which was overlooked. She was more meritorious than the selected candidates. It is further submitted that the circular dated 13.08.2014 was not applicable because the selection process had already commenced and the circular would operate prospectively.

7. The delay and laches are sought to be explained by relying upon the judgment of this Court in Writ Petition No. 4159 of 2018, decided on 08.08.2019.

8. The respondent No. 6 has filed affidavit in reply. The respondent Nos. 3 to 4 did not cause appearance despite service of notice for final adjudication. The respondents reiterated that petitioner having applied from OBC category was not eligible to migrate to open category against the horizontal reservation. The petitioner had availed concession in the fees being an OBC candidate and her candidature could not have been considered for filling the posts from open category. It is contended that in the matters of compartmentalized reservation candidates cannot be permitted to migrate to open category. A preliminary objection was raised on the ground of delay and laches.

9. The petitioner is relying upon following judgments of the

Supreme Court and this Court :

- i. **Suarav Yadav and others Vs. State of Uttar Pradesh,**
reported in **(2021) 4 SCC 542 ;**
- ii. **Charushila and others Vs, The State of Maharashtra and others** reported in **2019(6) Bom.C.R. 651.**
- iii. **Sarla Madhukar Dhoke Vs. Maharashtra Public Service Commission and others in Writ Petition No. 5721 of 2019.**

10. The respondent No. 6 is relying upon following judgments of the Supreme Court:

- i. Sankar Mondal Vs. State of West Bengal and others reported in MANU/SCOR/12400/2022.
- ii. Chairman/Managing Director UP Power Corporation and others Vs. Ram Gopal reported in MANU/SC/0108/2020.
- iii. State of U.P. Vs. Arvind Kumar Shrivastava reported in MANU/SC.0948/2014.
- iv. **Charushila and others Vs, The State of Maharashtra and others** (supra)

11. So far as the preliminary objection raised by the respondents on ground of delay and laches is concerned, an explanation is tendered by the petitioner in the memo of writ petition. A similar issue was under consideration in Writ Petition No. 4159 of 2018 before the High Court. It was finally decided on 08.08.2019, prescribing modality for applying horizontal and vertical reservations. The respondents

accordingly revised the select list on 07.02.2019. The petitioner did not find place in the revised list also. The petitioner filed petition in this Court on 10.10.2019.

12. The learned counsel for the petitioner submits that the cause of action is recurring one. He has drawn our attention to the judgment of the Maharashtra Administrative Tribunal, Mumbai in Original Application No. 1033 of 2015 of Tarkeshwari Devkaran Tayade Vs. Maharashtra Public Service Commission and others. The applicant in that matter had approached the Tribunal being excluded from the selection process though she was meritorious than the respondents. Pertinently, before the Tribunal an identical selection process was under challenge. The Tribunal allowed the original application and directed the applicants to be placed in the list of recommended candidates.

13. The learned counsel has further drawn our attention to the judgment of the Nagpur Bench in the matter of Sarla Madhukar Dhoke Vs. Maharashtra Public Service Commission and others in Writ Petition No. 5721 of 2019. The judgment of the Nagpur Bench is relied upon by the Tribunal in Tarkeshwari Tayade's case. The Nagpur Bench had allowed the writ petition with a direction to include the petitioner's name in the list of recommended candidates. In both the matters the issue was pertaining to migration of reserved category candidates in horizontal reservation in open category. We find that in the present matter the petitioner has raised triable and arguable points. It would not be appropriate to dismiss the petition on the

technical ground of laches.

14. The judgment cited by the respondents in the matter **Sankar Mondal Vs. State of West Bengal and others**, (supra) is distinguishable. In that case, the candidate instead of approaching the Court was waiting for 07 long years for getting appointment letter and then suddenly filed proceedings. The facts in hand are different. There were proceedings before different forums for consideration during the interregnum period. The next judgment of the Supreme Court in the matter of **Chairman/Managing Director UP Power Corporation and others Vs. Ram Gopal** (supra) is also distinguishable. There is no unreasonable lapse of time and unexplained inordinate delay on the part of present petitioner. The petitioner cannot be said to be a fence seater and barged in the Courts. Last one judgment cited of the Supreme Court in case of **State of U.P. Vs. Arvind Kumar Shrivastava** (supra), also does apply to the facts of the present case.

15. In the present matter the petitioner has explained delay and laches satisfactorily. We prefer to adopt pragmatic approach. The matter needs to be entertained on merits. We, therefore, proceed to examine the matter on merit.

16. The petitioner had applied from vertical reservation for OBC. There was horizontal reservation prescribed in the advertisement for women. The petitioner was eligible to compete from OBC women category. She had secured 242 marks. The

marks secured by the respondent Nos. 3 to 6 were less and still they were selected from unreserved (Open women) category.

17. The social or vertical reservations are provided by Article 15(4) and 16(4) of the Constitution. Whereas the horizontal reservations or special reservations are provided by Article 16(1) and 15(3) of the Constitution. The advertisement issued by the respondent No. 2 does not provide the horizontal reservations. No express instruction, memorandum, policy decision or the communication is placed on record to suggest that there was compartmentalized reservation. There is no reference of break up of the post of horizontal reservation to be adjusted with specific number of post from the vertical reservation. In other words, there is no prohibition for interchangeability or migration of horizontal reservation to any other category.

18. It is noticed that when petitioner applied for the post in pursuance of first advertisement she had paid fees of Rs. 135/- being from backward class category. The regular fees at the relevant time was Rs. 260/-. When she applied for main examination in pursuance of subsequent advertisement she paid fees of Rs. 215/-, when it was Rs. 415/- for non backward class category candidates. She availed the concession in fees. There is no material on record to show that she enjoyed any other benefits during the process of selection such as relaxation of age limit, experience, qualification, permitted attempts etc.

19. It is necessary to examine whether there was any

instruction, circular, memorandum or condition incorporated in advertisement prohibiting migration of the reserved category candidate to the open category by claiming horizontal reservation for those who have availed the benefits during the process of selection such as concession in fees, relaxation of age, relaxation of experience or qualification, etc.

20. Though the petitioner has availed concession of fees that does not affect her entitlement to migration or right to seek interchange. The concession extended to the petitioner in fees has no nexus to her performance on merit. The relaxation given in payment of fees was only to bring her at par with other candidates and to provide equal opportunity of competition and nothing else. The concession has extremely limited role to play. It is relevant to notice the observations of the Supreme Court in the matter of **Jitendra Kumar Singh and another Vs. State of U. P. and others** reported in **(2010) 3 SCC 119**. Para Nos. 72 and 75 of the above judgment read as under :

"72. Soon after the enforcement of the 1994 Act the Government issued instructions dated 25.03.1994 on the subject of reservation for Scheduled Caste, Scheduled Tribe and other backward groups in the Uttar Pradesh Public Services. These instructions, inter alia, provide as under:-

"4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category."

75. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16 (1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been permitted to participate in the open competition."

21. It is expedient for any employer or undertaker of the selection process to declare expressly any stipulation of restrictions or prohibition on a reserved category candidate availing any concession in fees, age limit, experience, etc., before hand. The participants and the people at large are necessarily to be informed about such type of stipulation before commencement of selection process. They can exercise their discretion or option to take benefit of concession or not. Such a declaration before hand would operate as estoppel for any subsequent claims of the defeating candidates. This would ensure the fair play, transparency and equality.

22. In the present case there was no such an express declaration. The respondents are unable to point out any condition or stipulation that reserved category candidates availing the concessions stated above would be ineligible to migrate to an unreserved category. The petitioner cannot be deprived of her eligibility of migration for claiming the horizontal reservation in open category.

23. Both the parties have placed reliance upon the judgment delivered by the High Court in the matter of Charusheela and others Vs. The State of Maharashtra and others. In that judgment High Court considered the previous judgment of the Supreme Court in the matter of Jitendra Kumar Singh and another Vs. State of U. P. and others and Deepa E. V. Vs. Union of India and others. The Supreme Court in the matter of Jitendra Kumar Singh (supra) was dealing with the facts in the context of U. P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Class) Act, 1994. Whereas, in the matter of Deepa E. V. there was office memorandum specifically stipulating the prohibition to the candidates availing the benefits of concessions from claiming any adjustment in the open category. The paragraph No. 34 and 40 in Charusheela's matter are as follows :

34. In the matter of **Deepa E.V. Vs. Union of India and others**, (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 cutoff marks i.e. 70 marks. The appellant filed a writ petition to the High Court, which came to be dismissed. Being aggrieved thereby, 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.

40. 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."

24. If we see the decisions of the Supreme Court in the matter of Jitendra Kumar, Deepa E. V. and Gaurav Pradhan then irresistible conclusion can be drawn that there has to be government circular or memorandum or policy or the statutory provision for prohibiting migration of reserved category candidate availing the benefit or concession to horizontal reservation in open category. In absence of any such prohibition to deprive reserved category candidate to migrate to the horizontal open category on his/her merits is against the law laid down in Saurav Yadav's case by the Supreme Court.

25. In Charushila's matter there was no express declaration or stipulation prohibiting migration of reserved category candidate to open category on the concession or benefit of extended age, fees, qualification, etc. The judgment rendered therein was approved by the Supreme Court in Saurav Yadav's case. However, in the matter in hand there is only bald statement of the respondent No. 6 in the reply that the petitioner had availed the concession in fees and, therefore, her migration to open category was impermissible. This defence is not substantiated by the respondents. We have considered the principles laid down in the Jitendra Kumar Singh's case. In that view of the matter, the

defence raised by the respondent No. 6 cannot be accepted.

26. The interplay of vertical and horizontal reservation is explained by the Supreme Court in the matter of **Indra Sawhney Etc. Vs. Union of India and others** reported ***AIR 1993 SC 477***. The same was followed in various judgments. Inconsistent views were expressed by various High Courts. The controversy was ultimately settled by the Three Judges Bench of the Supreme Court in the matter of **Saurav Yadav and others** (supra). In paragraph No. 23 of the judgment two views are referred as follows :

"23. The High Courts of Rajasthan, Bombay, Uttarakhand, and Gujarat have adopted the same principle while dealing with horizontal reservation whereas the High Court of Allahabad and Madhya Pradesh have taken a contrary view. These two views, for facility, are referred to as the "first view" and the "second view" respectively. The second view that weighed with the High Courts of Allahabad and Madhya Pradesh is essentially based on the premise that after the first two steps as detailed in paragraph 18 of the decision in Anil Kumar Gupta and Others¹³ and after vertical reservations are provided for, at the stage of accommodating candidates for effecting horizontal reservation, the candidates from reserved categories can be adjusted only against their own categories under the concerned vertical reservation and not against the "Open or General Category".

27. The first view is to the effect that while operating horizontal reservation in open category, the candidates belonging to any vertical category can be considered. Such candidate having eligibility and merit can be adjusted in open category.

28. The second view adopts different principle which is stated in para 24, which reads as follows :

"24. Thus, according to the second view, different principles must be adopted at two stages; in that:-.

(I) At the initial stage when the "Open or General Category" seats are to be filled, the claim of all reserved category candidates based on merit must be considered and if any candidates from such reserved categories, on their own merit, are entitled to be selected against Open or General Category seats, such placement of the reserved category candidate is not to affect in any manner the quota reserved for such categories in vertical reservation.

(II) However, when it comes to adjustment at the stage of horizontal reservation, even if, such reserved category candidates are entitled, on merit, to be considered and accommodated against Open or General Seats, at that stage the candidates from any reserved category can be adjusted only and only if there is scope for their adjustment in their own vertical column of reservation.

Such exercise would be premised on following postulates: -

(A) After the initial allocation of Open General Category seats is completed, the claim or right of reserved category candidates to be admitted in Open General Category seats on the basis of their own merit stands exhausted and they can only be considered against their respective column of vertical reservation.

(B) If there be any resultant adjustment on account of horizontal reservation in Open General Category, only those candidates who are not in any of the categories for whom vertical reservations is provided, alone are to be considered.

(C) In other words, at the stage of horizontal

reservation, Open General Category is to be construed as category meant for candidates other than those coming from any of the categories for whom vertical reservation is provided.”

29. Ultimately the Supreme Court upheld the first view and disapproved the second view in para Nos. 31, 32, 33. Same are reproduced as under.

“31. The second view is thus neither based on any authoritative pronouncement by this Court nor does it lead to a situation where the merit is given precedence. Subject to any permissible reservations i.e. either Social (Vertical) or Special (Horizontal), opportunities to public employment and selection of candidates must purely be based on merit. Any selection which results in candidates getting selected against Open/General category with less merit than the other available candidates will certainly be opposed to principles of equality. There can be special dispensation when it comes to candidates being considered against seats or quota meant for reserved categories and in theory it is possible that a more meritorious candidate coming from Open/General category may not get selected. But the converse can never be true and will be opposed to the very basic principles which have all the while been accepted by this Court. Any view or process of interpretation which will lead to incongruity as highlighted earlier, must be rejected.

32. The second view will thus not only lead to irrational results where more meritorious candidates may possibly get sidelined as indicated above but will, of necessity, result in acceptance of a postulate that Open / General seats are reserved for candidates other than those coming from vertical reservation categories. Such view will be completely opposed to the long line of decisions of this Court.

33. We, therefore, do not approve the second view and

reject it. The first view which weighed with the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is correct and rational.”

30. The method of calculation indicated by High Court of Gujrat in the matter of Tammanaben Ashokbhai Desai was declared to be the correct and appropriate procedure for operating both types of reservation. In Saurav Yadav’s case the Supreme Court approved it as follows :

“36. Finally, we must say that the steps indicated by the High Court of Gujarat in para 56 of its judgment in **Tamannaben Ashokbhai Desai**²⁹ contemplate the correct and appropriate procedure for considering and giving effect to both vertical and horizontal reservations. The illustration given by us deals with only one possible dimension. There could be multiple such possibilities. Even going by the present illustration, the first female candidate allocated in the vertical column for Scheduled Tribes may have secured higher position than the candidate at Serial No.64. In that event said candidate must be shifted from the category of Scheduled Tribes to Open / General category causing a resultant vacancy in the vertical column of Scheduled Tribes. Such vacancy must then enure to the benefit of the candidate in the Waiting List for Scheduled Tribes – Female. The steps indicated by Gujarat High Court will take care of every such possibility. It is true that the exercise of laying down a procedure must necessarily be left to the concerned authorities but we may observe that one set out in said judgment will certainly satisfy all claims and will not lead to any incongruity as highlighted by us in the preceding paragraphs.”

31. Let us see the approved procedure laid down by Gujrat High Court in **Tamannaben Desai’s case** :

The High Court then laid down:-

"56. For the future guidance of the State Government, we would like to explain the proper and correct method of implementing horizontal reservation for women in a more lucid manner.

"PROPER AND CORRECT METHOD OF IMPEMETING HORIZONTAL RESERVATION FOR WOMEN.

No. of posts available for recruitment. 100

Social Reservation quota (49%)

Open Competition (OC) 51

Scheduled Caste (SC) 12

Scheduled Tribe (ST)17

Socially and Educationally
Backward Classes (SEBC)20

Horizontal Reservation for Women (33% in each of the above categories)

OC17

SC04

ST06

SEBC07

Step 1: Draw up a list of at least 100 candidates (usually a list of more than 100 candidates is prepared so that there is no shortfall of appointees when some candidates don't join after offer) qualified to be selected in the order of merit. This list will contain the candidates belonging to all the aforesaid categories.

Step 2: From the aforesaid Step 1 List, draw up a list of the first 51 candidates to fill up the OC quota (51) on the basis of merit. This list of 51 candidates may include the candidates belonging to SC, ST and SEBC.

- Step 3: Do a check for horizontal reservation in OC quota. In the Step 2 List of OC category, if there are 17 women (category does not matter), women's quota of 33% is fulfilled. Nothing more is to be done. If there is a shortfall of women (say, only 10 women are available in the Step 2 List of OC category), 7 more women have to be added. The way to do this is to, first, delete the last 7 male candidates of the Step 2 List. Thereafter, go down the Step 1 List after item no. 51, and pick the first 7 women (category does not matter). As soon as 7 such women from Step 1 List are found, they are to be brought up and added to the Step 2 List to make up for the shortfall of 7 women. Now, the 33% quota for OC women is fulfilled. List of OC category is to be locked. Step 2 List becomes final.
- Step 4: Move over to SCs. From the Step 1 List, after item no. 51, draw up a list of 12 SC candidates (male or female). These 12 would also include all male SC candidates who got deleted from the Step 2 List to make up for the shortfall of women.
- Step 5: Do a check for horizontal reservation in the Step 4 List of SCs. If there are 4 SC women, the quota of 33% is complete. Nothing more is to be done. If there is a shortfall of SC women (say, only 2 women are available), 2 more women have to be added. The way to do this is to, first, delete the last 2 male SC candidates of the Step 4 List and then to go down the Step 1 List after item no. 51, and pick the first 2 SC women. As soon as 2 such SC women in Step 1 List are found, they are to be brought up and added to the Step 4 List of SCs to make up for the shortfall of SC women. Now, the 33% quota for SC women is fulfilled. List of SCs is to be locked. Step 4 List becomes final. If 2 SC women cannot be found till the last number in the Step 1 List, these 2 vacancies are to be filled up by SC men. If in case, SC men are also wanting, the social reservation quota of SC is to be carried forward to the next recruitment unless

there is a rule which permits conversion of SC quota to OC.

Step 6: Repeat steps 4 and 5 for preparing list of STs.

Step 7: Repeat steps 4 and 5 for preparing list of SEBCs."

32. If we see step No. 3 referred above, then it becomes clear that the migration of reserved category woman candidate is permissible to the open category, in case there is shortfall of candidate from horizontal category. It candidly professes migration of horizontal category candidate and his/her adjustment in open category. We are faced with same situation in the present matter.

33. In view of the law laid down by the Supreme Court in the matter of **Saurav Yadav and others** (supra) the findings recorded by the Tribunal that horizontal reservation in open can be filled in only from the candidates applying from open is unsustainable and perverse. Similarly the inference drawn by the Tribunal from Irfan Mustafa's judgment that candidates from open category and no other categories like S.C. S.T. OBC, etc. will be entitled to reservation in horizontal category is also illegal.

34. In Irfan Mustafa's matter the circular of 16.03.1999 was in force. Thereafter there was circular dated 13.08.2014. The appropriate and correct procedure laid down in Tammannaben Desai's case governs the field and would prevail over circulars. The subsequent developments in the legal scenario by

Tammannaben Desai's case and Saurav Yadav's case, annul the decision of Irfan Mustafa's case. In that view of the matter, the impugned judgment and order is unsustainable.

35. The learned counsel for the petitioner has relied upon the judgment delivered by the Nagpur Bench of this Court in the matter of Sarla Madhukar Dhoke @ Mr. Sarla W/o Anil Farkade Vs. The M.P.S.C. and others in Writ Petition No. 5721 of 2019. In that judgment there is reference to the decision of the Supreme Court in Saurav Yadav's case. The judgment in that matter was founded on the matter of Seema Munjewar's case decided in Writ Petition No. 3290 of 2019. It was emanating from the same selection process. The petition was allowed by the Nagpur Bench. We also propose to concur with the view taken by the coordinate Bench of this Court. As the learned counsel for parties have argued the matter relying upon various judgments, we have assigned elaborate and separate reasons.

36. It is further submitted by the respondents that the selection process was concluded long back. The impugned judgment was passed on 02.03.2016. Thereafter, on 07.09.2019, there was revision of final list. Considering the inordinate time spent after the finalization of the selection process it is not appropriate to grant any relief to the petitioner.

37. We have noticed that the Nagpur Bench decided Sarla Dhoke's matter on 25.08.2021. The petitioner in that case was directed to be included in the select list. The Tribunal also in a

distinct matter of Tarkeshwari Tayade has shown indulgence and directed to incorporate name of the then applicant in the list of recommended candidates by judgment dated 05.09.2022. These two judgments pertain to the self same selection process. In the present case the petitioner has made out a case on the basis of law laid down by the Supreme Court. She is illegally deprived of her entitlement. Therefore, we do not find any impediment in directing the respondents to incorporate the name of the petitioner in the list of recommended candidates and to take further steps as permissible in law.

38. For the reasons narrated above, we are of the considered view that the writ petition deserves to be allowed by passing following order.

ORDER

A. The judgment and order dated 02.03.2016 passed by the Maharashtra Administrative Tribunal, Bombay Bench at Aurangabad in Original Application No. 744 of 2015 is quashed and set aside.

B. The respondents shall incorporate the name of the petitioner in the list of recommended candidates from open category according to her merit and to process her claim in accordance with law.

C. The respondent Nos. 1 and 2 are at liberty to consider the entitlement/eligibility of the respondent Nos. 3 to 6 and to take

appropriate action as permissible in law.

D. Rule is made absolute in above terms. There shall be no order as to costs.

[SHAILESH P. BRAHME, J.]

[MANGESH S. PATIL, J.]

bsb/Sept. 23