

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Writ Petition No. 2213 of 2021

Ku. Chanda d/o Mahadeorao Wankhade
Aged about : 43 years,
Occupation : Service
R/O Budhawara Juni Taksal,
Opp. Bholes Mandir Amravati
Tq. & Dist. Amravati

... Petitioner

... Versus ...

(1) Maharashtra State Road Transport
Corporation, through its
General Manager, Central office
Maharashtra Vahatuk Bhavan
Dr. Anandrao Nayar Marg,
Mumbai – 400 008.

Added as
per Court's
order dtd.
10.08.2022

(2) Jyoti Patil, Aged major,
Occupation – Traffic Inspector,
Through General Manager,
Maharashtra State Road Transport
Corporation, Central Office
Maharashtra Vahatuk Bhavan
Dr. Anandrao Nayar Marg,
Mumbai – 400 008.

... Respondents

Mr. V. A. Kothale, Advocate for the petitioner
Mr. V. H. Kedar with Mr. R. D. Bhuibhar, Advocates for respondent 1
None for respondent 2

**CORAM : ROHIT B. DEO AND
ANIL L. PANSARE, JJ.**

Date of reserving judgment : 30-8-2022
Date of pronouncing judgment : 04-05-2023

JUDGMENT (Per : Rohit B. Deo, J.)

Rule. Rule made returnable forthwith.

2. Petitioner is working with respondent 1 - Maharashtra State Road Transport Corporation (MSRTC) as Conductor from 4-1-2014.

3. In 2017, MSRTC initiated direct recruitment process to fill in, *inter alia*, the post of Traffic Inspector (Junior).

4. The grievance of the petitioner is that she scored 110 marks, the merit list for open category (women) closed at 108 marks, and yet, the petitioner was not included in the merit list of open category (women).

5. It appears to be undisputed that since the petitioner belongs to the OBC, and she applied as OBC (women) candidate, she was not included in the merit list of open category (women) although candidates securing lower marks are included in the merit list of open category (women).

6. We have perused the affidavit in response dated 28-1-2022 filed on behalf of the MSRTC.

7. It is submitted that the merit list impugned dated 10-1-2018 and the additional selection list dated 12-1-2018 were prepared by the authorized agency and forwarded to MSRTC. MSRTC submits that the petitioner applied in the reserved category [OBC(women)] and the merit list of the said category ended or closed at 112 marks and, therefore, the petitioner who secured 110 marks was not included in the reserved category merit list. MSRTC submits that the petitioner was not considered from the open category (women) on the premise that there was sufficient representation to the reserved category candidates in the open category list.

8. Both the petitioner and the MSRTC rely on Government Resolution (G.R.) dated 13-8-2014 which purports to clarify the procedure to be adopted for horizontal reservation in direct recruitment. While the petitioner draws support from the said G.R., MSRTC responds with the submission that the understanding of the petitioner is absurdly wrong.

9. The issue involved is not *res integra*. The coordinate Bench in ***Shantabai Laxman Doiphode Vs. State of Maharashtra and others [(2021) 1 Mh.L.J. 429]***, to which one of us (Rohit Deo, J.) was a party considered an identical situation, and held that a candidate who may have applied from the reserved category, can not be excluded from

the open category merit list, and the merit list of the open category must be prepared strictly on the basis of marks secured irrespective of the caste or creed.

10. It is well entrenched that social reservations are made in favour of SC, ST and OBC under Article 16(4) of the Constitution of India which are considered as vertical reservations and special reservations made in favour of physically handicapped, women etc. under Article 16(1) or Article 15(3) are horizontal reservations. It is equally well settled, that where a vertical reservation is made in favour of backward classes under Article 16(4), the candidates belonging to such backward classes are entitled to compete also for non-reserved posts and if such candidates are appointed in open category posts, their numbers will not be counted to determine the reservation quota.

11. It is disconcerting that despite the well entrenched position of law, the State or their instrumentalities, at times, fail to appreciate that open category is not a reserved category. Open category in essence means that every candidate, whether belonging to the reserved category or otherwise, is entitled to compete on merit. The present case is a glaring example of the misconception under which the MSRTC laboured, treated open category as a category reserved only for open category candidates and ignoring the claim of the petitioner who

secured 110 marks, appointed the open category candidate who secured 108 marks.

12. MSRTC will do well to keep in mind that while filling in the open category seats, the merit of the candidates, irrespective of the social reservation category to which they may belong, must be considered and then the merit list is required to be prepared. A candidate who belongs to the social reservation category, cannot be excluded from the merit list for the open category on the premise that the candidate applied under the reserved category.

13. We are not concerned with special reservation for women, physically handicapped etc., which is horizontal reservation, within the social reservation categories. We are concerned with horizontal reservation for women within the open category, and the well settled position of law is that the selection will have to be strictly on the basis of *inter se* irrespective of the caste or creed.

14. We have already observed supra, that the petitioner applied under the reserved category, cannot be the reason for excluding her claim and appointing candidates who have secured lower marks from the open category. In ***Shantabai Laxman Doiphode*** (supra), we have considered a similar situation thus :

“15. In the present case, though the petitioner claims that she had never shown her disinclination to her selection in posts reserved for open (women) category, we find, upon perusal of copy of the online application filled in by her and which is available on record, that she had elected to compete only for the post reserved vertically for N.T.(D) candidates. 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 in spite 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.”

15. The relatively recent decision of the Supreme Court in ***Saurav Yadav and others Vs. State of Uttar Pradesh and others [(2021) 4 SCC 542]*** emphasizes that open category is not a ‘quota’ but is available to all men and women alike and that candidates belonging to social reservation categories are entitled to be selected in open or

general category on the basis of their merit and in such circumstances, their selection cannot be counted against their respective quota for vertical reservation. Noticing the divergence in views expressed by the High Courts, the Apex Court held that the view of the Bombay High Court in *Tajaswini Raghunath Galande Vs. Maharashtra Public Service Commission [(2019) 4 Mh.LJ 527]* and other decisions, is the correct view.

16. Considering the authoritative enunciation of the Hon'ble Supreme Court supra, we have no hesitation in holding that the merit list prepared for the open category (women) is illegal. The candidate who has secured lower marks than the petitioner is included in the open category (women). While the said candidate is impleaded as respondent 2 and is duly served, she has not appeared in the matter.

17. We therefore, issue the following directions.

- (i) We direct the MSRTC to immediately correct and revise the merit list for the open category (women) and include the name of the petitioner therein, since a candidate who has secured lower marks than the petitioner is included in the merit list.
- (ii) We direct the MSRTC to consider the petitioner's claim for appointment as Traffic Inspector (Junior) on the basis of the

revised merit list and if, there is no other impediment to issue the appointment order within two weeks from the date of revision of the merit list. The merit list shall be revised within the next three weeks.

- (iii) We further direct that if the petitioner is found eligible for appointment as Traffic Inspector (Junior), she shall be given notional/deemed date of appointment from the date the other candidates in the other merit list are issued appointment orders. While the deemed date shall be considered for pay fixation, no arrears of difference in salary shall be paid.

18. The petition is allowed in the aforestated terms.

(Anil L. Pansare, J.)

(Rohit B. Deo, J.)

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