

(2019) 08 BOM CK 0038

In the Bombay High Court

Case No : Writ Petition No. 4159, 6578, 10578, 10837 Of 2018

Charushila And Ors

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 08-08-2019

Acts Referred:

Rajasthan Judicial Service Rules, 2010 — Rule 9(3)
Constitution Of India, 1950 — Article 14, 15(1), 15(3), 15(4), 16(1), 16(4)

Citation : (2019) 08 BOM CK 0038

Hon'ble Judges : R.M. Borde, J; Mangesh S. Patil, J

Bench : Division Bench

Advocate : S.S. Thombre, Ashutosh Kumbhakoni, A.B. Girase, M.B. Kolpe, P.R. Katneshwar, Avinash S. Deshmukh, Hrishikesh A. Joshi, Ajay U. Chandel, Sandeep Dere, M.B. Kolpe, Avinash S. Deshmukh, Sudhakar E. Avhad, S.D. Munde, Abhijeet Awhad, Vijay Dhakane, Chetan R. Nagare, M.B. Kolpe

Final Decision : Disposed Off

Judgement

R.M. Borde, J

1. In this group of petitions, the question, that arises for consideration, is as regards methodology of filling in the vacancies prescribed for horizontal reservation which flows from Article 16(1) of the Constitution of India. Another question, that would be required to be considered is, as to whether rule of migration/shifting can be applied and to what extent.

2. In Writ Petition No.4159 of 2018, the petitioners are objecting to the Government Circular dated 13.08.2014 and are also praying to quash Clause 19 recorded in the call letters issued to them. The petitioners participated in the process of selection conducted by the Maharashtra Public Service Commission for filling up vacancies for the posts of Deputy Collector, Deputy Superintendent of Police, Assistant Commissioner of Police and such other posts. The posts have been earmarked under the advertisement. for. various. vertical. and. horizontal. Reservation categories. The petitioners appeared for main examination and have.

been. declared. qualified. for. the. interview,. which. Was scheduled on 09.04.2018. It is recorded in the call letters issued to the. petitioners,. "while. filling. up. the. posts. from. Horizontal reservation. from. general. category,. firstly. the. selection. of. The candidates should be made on the basis of merit amongst all the candidates including the backward category candidates also". The candidates were directed to bring their school leaving certificate at the time of interview for verifying as to which category they belong to and from which category they have filled in their application forms.

3. The petitioners contend that though they belong to reserved category, they have filled in their application forms as a general category candidates and have not claimed any benefit as a member belonging to reserved category. In view of the Circular dated 13.08.2014, issued by the State of Maharashtra, the petitioners apprehend that since they belong to reserved category, though they have not claimed any benefits of reservation, they will not be considered for the unreserved vacancies even if they are qualified on the basis of their individual merit.

4. In an affidavit-in-reply presented on behalf of Respondent - Maharashtra Public Service Commission, it is recorded that the Circular dated 13.08.2014 is founded on the earlier circular issued on 16.03.1999. The circular dated 16.03.1999 is based on the judgment delivered by the Hon'ble Supreme Court in the matter of Anil Kumar Gupta Vs. State of U.P. and others, (1995) 5 SCC 173. It is recorded in clause 5 of the Circular dated 16.03.1999:

The first step is to prepare the select list of open general competition category and then to identify the available candidates in the list claiming horizontal reservation. If the candidates are available in the general select list in adequate number claiming horizontal reservation, then no need to select additional candidates claiming horizontal reservation. If there is short fall of the candidates claiming horizontal reservation, then candidates from respective categories are to be included in the list.

The second step is to prepare the select list of respective social reservation categories and adopt the same procedure prescribed in Step 1 to accommodate the candidates belonging horizontal reservation, if there is shortfall.

5. According to Respondent - Maharashtra Public Service Commission, in view of the Circular dated 13.08.2014, only the candidates belonging to open (Non-reserved) category can be considered for open horizontally reserved posts meaning thereby, the reserved category candidates cannot be considered for open horizontally reserved post. Reference is made to a communication issued by the Additional Chief Secretary (Service) of the State of Maharashtra dated 26.07.2017, whereunder it is prescribed that a female candidate belonging to any reserved category, even if tenders application form seeking employment as an open category candidate, the name of such candidate shall not be recommended for employment against a open category seat.

6. The petitioners contend that the stand taken by the MPSC is fundamentally wrong and is not in consonance with the interpretation put to the principles of reservation under the Constitutional scheme.

7. Writ Petition No.6578 of 2018 is presented by the candidates belonging to open category to support precisely the stand taken by the MPSC in the affidavit-in-reply presented in Writ Petition No.4159 of 2018 and oppose claim raised by petitioners in said petition. According to petitioners herein, in case of compartmentalized horizontal reservation, no migration from one category to another category is permissible and as such, even if a candidate belonging to reserved category, who does not claim any benefit of reservation and is desirous of competing as a general category candidate, cannot be permitted to migrate and claim a seat/post available for the open category.

8. In Writ Petition No.10837 of 2018, an objection is raised to the Standing Order No.06 of 2014, dated 23.09.2014, issued by the MPSC in respect of prescription of reservation for women and sportsmen category candidates. Clause 6 of the Standing Order records that the backward class candidates not claiming any benefits available for reserved category, will not be entitled to raise a claim in respect of the posts prescribed for open horizontal reservation category. It is contended that the condition recorded in the Standing Order is in breach of the Constitutional provisions and as such, deserves to be struck down.

9. Writ Petition No.10578 of 2018 raises a similar issue, as has been raised in Writ Petition No.4159 of 2018. However, petitioners herein belong to reserved category and have presented their application forms as reserved category candidates. They contend that they can compete for a seat prescribed for open/general category and compartmentalization of open/general category shall not be permitted.

10. Heard learned Counsel for respective parties.

11. Shri Kumbhakoni, learned Advocate General, appearing for Respondent-State, submits that Constitutionally there are two types of reservations, which may be described as "vertical" and "horizontal". The same are set out as under:

(A). Vertical: These are "social" reservations provided under Article 15(4) and/or 16(4) of the Constitution. These are meant for Scheduled Castes, Scheduled Tribes, Other Backward Classes.

(B). Horizontal: These are "special" reservations provided under Article 15(1) and/or 15(3) and/or 16(1) of the Constitution. These are meant for Women, Physically Handicapped, Freedom Fighters, Sportsmen, Retired Military personnel, etc.

12. He further submits that, the Horizontal Reservations can be sub-divided into two types, viz:

(A). Overall : In such cases, the percentage of reservation is prescribed without

any sub- classification and is provided on 'an overall' basis, for all categories including open and reserved.

(B). Compartmentalized: In such cases, the seats reserved for horizontal reservations are proportionately divided among the vertical reservations providing each category of vertical reservation with a specific percentage and the same is not interchangeable or inter- transferable.

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.

16. He submits that the steps to be taken for making allotments are very well settled by catena of decisions of the Hon'ble Supreme Court. These steps may be summarized as under:

(a). A common merit list will have to be drawn wherein, each and every candidate will figure, strictly in accordance with inter se merit, without applying any other criteria whatsoever. Similarly, various separate merit lists need to be drawn for every category, whether it is meant for vertical reservation or horizontal reservation, on the basis of inter se merit of all the candidates belonging to that particular category i.e. comprising of only those candidates who are entitled to or eligible to claim benefit of the particular, vertical or horizontal reservation.

(b). Thereafter, in order to fully satisfy vertical and horizontal, both reservations, following steps to be taken in the same chronological order:

(i). All the seats provided for the unreserved or open category to be filled in purely on the basis of merit and merit alone, though provisionally, on the basis of the common merit list prepared, without applying any criteria whatsoever, other

than merit.

(ii). All the seats from various vertical reservation categories to be filled in completely, without applying criteria for horizontal reservations. In selecting candidates by observing this exercise, every candidate who has figured in the open category allotment list to be excluded. The allotments so made in favour of the reserved category candidates not to be counted towards the consumption of the reserved category.

(iii). The open category list, as also each vertical reservation list to be checked and verified to find out as to whether or not, the horizontal reservations are satisfied automatically. If they are, nothing more to be done.

(iv). If it is found, upon such verification that, either horizontal reservations are not satisfied or are partly satisfied, then, appropriate number of candidates from the bottom of respective lists are to be removed or deleted and candidates strictly on the basis of merits, from the separate merit list prepared for the respective horizontal reservation category are to be allotted those seats, as and by way of replacement.

17. The learned Advocate General submits that in case if the 'horizontal' reservations are specifically provided in a 'compartmentalized' manner i.e. providing fixed number or fixed percentage of seats, for the specific vertical reservation (s), then the same is not interchangeable or inter-transferable.

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.

19. He also submits that the only exception to the aforesaid rule now carved out by the Hon'ble Supreme Court is that, if the applicable Rules or advertisement specifically provides to the contrary, such migration shall not be permitted, from the reserved category to the open category, for claiming 'compartmentalized' horizontal reservation provided for open category. Thus, if it is specifically provided by the Rules or the advertisement that, a person who has already enjoyed any benefit during the process of selection, such as concession in fees, relaxation of age, etc., as a reserved category candidate, then he or she shall not be entitled to the benefit of migration from the reserved category to open category for claiming seat or post, as the case may be, meant for open category in case of a 'compartmentalized' horizontal reservation.

20. Shri Katneshwarkar, learned Counsel appearing for the petitioners in W.P.No.6578 of 2018, contends that there can be no dispute if a candidate from any category applies from open category, he or she can be given placement in

open category as per his or her merit. There is no controversy involved as regards migration in vertical reservation because a candidate applying from social backward category can migrate in open category in accordance with his or her individual merit. However, it is contended that the rule of migration is not applicable in compartmentalized horizontal reservation and if migration is allowed in compartmentalized horizontal reservation, then there will be violation of Article 14 and Article 16(1) of the Constitution of India.

21. According to Shri Katneshwarkar, if the principle of migration/shifting is made applicable to the compartmentalized horizontal reservation, then the provisions of Article 16(1) would become redundant. The vertical reservation cuts across the horizontal reservation and as such, it is an "interlocking" reservation. The word "interlocking reservation" itself connotes that the compartment of categories blocks automatically after fulfilling the block. In view of the interlocking reservation candidates in horizontal reservation interlocks in their respective compartments and migration is impermissible. Reference is made to various judgments and those would be considered at an appropriate stage.

22. It would be advantageous to record the relevant extract from the Circular dated 13.08.2014:

'kklu. ifji=d. dzekad. &. ,lvkjOgh. 1012@iz-dz-

16@12@16&v]. fnukad. 13. vkWxLV]. 2014. e/khy. ifjPNsn

"¼v½ & izFke VIik & [kqY;k izoxkZrwu lekarj vkj{k.kkph ins Hkjrkaulk] xq.koRrsP;k fud"kkuqlkj [kqY;k izoxkZrhy mesnokjkaph fuoM ;knh djkoh ¼;k fBdk.kh [kqY;k izoxkZr xq.koRrsP;k vk/kkjkoj ekxkloxhZ; mesnokjkapkgh lekos'k gksbZy½ ;k

;knhr lekarj vkj{k.kkuqlkj vko';d [kqY;k izoxkZP;k mesnokjkaph la[;k i;kZIr vlsy rj dks.krkgh iz'u mn~Hko.kkj ukgh vkf.k R;kuqlkj ins Hkjkojr- tj ;k ;knr lekarj

vkj{k.kkuqlkj vko';d [kqY;k izoxkZP;k mesnokjkaph la[;k i;kZIr ulsy rj [kqY;k izoxkZlkBh jk[kho lekarj vkj{k.kkph ins Hkj.;kdjhrk Inj ;knhrhy vko';d i;kZIr la[;sbrds 'ksoVps mesnokj oxGwu lekarj vkj{k.kkl ik= mesnokjkaiSdh

dsoG. [kqY;k. izoxkZpsp. vko';d. i;kZIr. la[;sbrds

mesnokj. ?ks.ks vko';d vkgs-

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

"¼v½ & izFke VIik & [kqY;k izoxkZrhy ¼vjk[kho ins½

mesnokjkaph xq.koRrsP;k fud"kkuqlkj fuoM ;knh r;kj djkoh-

;k ;knhr [kqY;k izoxkZr xq.koRrsP;k vk/kkjkoj ekxkloxhZ; mesnokjkapkgh ¼vuqlwfpr tkrh] vuqlwfpr tekhr] fo-tk-Hk-t-] fo-ek-iz-] b-ek-o- o ,lbZchl½ lekos'k gksbZy- ;k ;knhr lekarj vkj{k.kkuqlkj mesnokjkaph la[;k i;kZIr vlsy rj

dks.krkgh iz'u mn~Hko.kkj ukgh vkf.k R;kuqlkj ins Hkjkohr-tj ;k ;knhr lekarj vkj{k.kkuqlkj vko';d mesnokjkaph la[;k i;kZIr ulsy rj lekarj vkj{k.kkph ins Hkj.;kdjhrk lnj ;knhrhy vko';d i;kZIr la[;sbrds 'ksoVps mesnokj oxGwu ik= mesnokjkaiSdh vko';d i;kZIr la[;sbrds lekarj vkj{k.kke/khy xq.koRrsuqlkj ik= mesnokj ?ks.ks vko';d vkgs-

23. The learned Advocate General contends that reference to the phrase "open category" in the circular dated 13.08.2014 is comprehensive in nature and is inclusive of all categories, reserved and unreserved. The confusion that was created by making reference to words, "open category" in Circular dated 13.08.2014 has been set at rest by deleting the said words and by substituting the words, "candidates eligible for horizontal reservation category seat on the basis of individual merit".

24. Considering the explanation tendered and in view of the corrigendum, there should be no confusion that the candidates claiming reservation would be entitled to occupy the post on the basis of individual merit while filling up vacancies from amongst the horizontal reservation category and that the induction of a candidate is not restricted to open category, in any case as excluding the reservation category candidates.

25. It would be appropriate, at this stage, to consider the law laid down by the Hon'ble Supreme Court while interpreting the Constitutional aspects of horizontal reservation and the methodology of filling in the posts.

26. In the matter of Anil Kumar Gupta and others Vs. State of U.P. and others, (1995) 5 SCC 173, the distinction between "compartmentalized" reservation and "overall" reservation has been clarified. Where 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. As against this, in the overall reservation while allocating the special reservation candidates to their respective social reservation category, the overall reservation in favour of special reservation categories has to be honoured. In case of overall reservation, if no special reservation category candidate belonging to Scheduled Castes, Scheduled Tribe is available, then the proportionate number of seats meant for special reservation candidates in Scheduled Castes and Scheduled Tribe categories also gets transferred to OC category. The converse may also happen, which will prejudice the candidates in the reserved categories. It is, of course, obvious that the inter se quota between OC, OBC, SC and ST will not be altered. In paragraph no.18 of the judgment in the case of Anil Kumar Gupta (supra), it is observed thus:

"18 Now, coming to the correctness of the procedure prescribed by the revised notification for filling up the seats, it was wrong to direct the fifteen per cent special reservation seats to be filled up first and then take up the OC (merit) quota (followed by filling of OBC, SC and ST quotas). The proper and correct course is to first fill up the OC quota (50%) on the basis of merit; then fill up

each of the social reservation quotas, i.e., SC, ST and BC; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations 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 categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen per cent in favour of special categories, overall, may be satisfied or may not be satisfied.) Because the revised notification provided for a different method of filling the seats, it has contributed partly to the unfortunate situation where the entire special reservation quota has been allocated and adjusted almost exclusively against the OC quota."

27. In paragraph no.20 of the judgment, while making reference to OC category, the Court has observed that,

"It is made clear that OC category means the merit list and no distinction shall be made among the candidates in the OC list on the basis of their social status because it is well settled that even a ST/SC/OBC candidate is entitled to obtain a seat in the OC category on the basis of his merit."

28. In the matter of Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & others, (2007) 8 SCC 785, the appellant - Rajesh and the 3rd appellant in the connected matter were the candidates belonging to OBC category and the 5 appellants in the connected appeal were belonging to Open category and they were not selected. According to them, women candidates are selected in excess of their reservation quota. They contend that though the rules provide for 20% horizontal reservation for women categorywise, the Rajasthan Public Service Commission, while preparing the selection list, had wrongly applied the principles of vertical reservation and had selected women in excess of the quota, thereby denying selection of the appellants and other male candidates. According to them, they had secured higher marks than the selected women candidates, but as a result of excess selection of women candidates, they have not been selected. The writ petitions presented by them have been dismissed and as such, they approached the Hon'ble Supreme Court. Rule 9(3) of the Rajasthan Judicial Service Rules provides 20% categorywise reservation for women candidates in direct recruitment. It is provided, in the event of non-availability of the eligible and suitable women candidates in a particular year, the vacancies so reserved for them shall be filled in accordance with the normal procedure and such vacancies shall not be carried forward to the subsequent year and the reservation treated as horizontal reservation i.e. the reservation of women candidates shall be adjusted proportionately in the respective category to

which the women candidate belongs to. While dealing with the issue, the Hon'ble Supreme Court has referred to the observations of the Constitutional Bench in the matter of *Indra Sawhney Vs. Union of India*, 1992 Supp (3) SCC 217, which reads thus:

"All reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservation in favour of Backward Class of citizens remains - and should remain - the same."

29. It cannot be disputed that a special provision for women candidates, made under Article 15(3), is a special reservation as contrasted from the social reservation under Article 16(4). The methodology of implementing the special reservation, referred to in the matter of *Anil Kumar Gupta (supra)*, is quoted herein-above.

30. In paragraph 9 of the judgment in the matter of *Rajesh Kumar Daria (supra)*, it is recorded thus:

"9 The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney*, *R.K. Sabharwal v. State of Punjab*, *Union of India v. Virpal Singh Chauhan* and *Ritesh R. Sah v. Dr.Y.L. Yamul.*) But the aforesaid principle applicable to vertical (social) reservations will

not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women."

31. 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.

32. 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.

33. A reference can be made to a judgment in the matter of Public Service Commission, Uttaranchal Vs. Mamta Bisht and others, 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 principle applies to vertical (social) reservation only and does not apply to horizontal reservation for women, handicapped persons, etc.

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 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 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.

35. It would be appropriate to consider the judgment of the Hon'ble Supreme Court in the matter of Gaurav Pradhan & others Vs. State of Rajasthan & others, (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 the converse effect. It is recorded that in the matter of Jintendra 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 deemed as unavailable for consideration against unreserved vacancies."

(emphasis in original)

36. 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 large 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 belonging 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."

37. In the matter of Smt.Kanchan Vishwanath Jagtap Vs. Maharashtra Administrative Tribunal, Nagpur Bench & others, (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.

38. The petitioner in Writ Petition No.3929 of 2015, decided on 30th March, 2016, - Asha d/o Ramnath Gholap, was a candidate belonging to OBC category

and secured highest number of marks in female category and as such staked her claim for the seat prescribed for female open category which was denied to her and the candidates securing lesser marks were considered. The issue arose for consideration was, whether the petitioner, who had applied for the post of Pharmacist from the reserved category, more particularly scheduled caste, can claim her selection on one of the three (3). posts horizontally reserved for open Female category on the basis that amongst the female candidates, she has secured second highest marks?. The judgment of the Hon'ble Apex Court in the matter of Rajesh Kumar Daria (supra), so also the circular issued by the State on 13.08.2014 have been referred. The interpretation put to "open category" in the matter of Bihari Lal Rada Vs. Anil Jain (Tinu) and others, (2009) 4 SCC 1, has been referred to in the judgment. It is recorded 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 persons 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.

39. The Division Bench, thus, proceeded to accept the prayer of the petitioner and directed that she be appointed on the basis of her individual merit as a candidate belonging to female open category.

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.

41. In the matter of Sangita Gopal Chaudhari Vs. The State of Maharashtra & others (Writ Petition No.8481 of 2018, decided by the Division Bench, the petitioner therein, belonging to reserved category, had specifically applied from open category and did not claim benefits of reservation. The issue in respect of shifting from reserved category to open category, therefore, was not considered and she was held to be entitled to claim benefit of migration.

42. The petitioner in Writ Petition No.5397 of 2016, decided by the Division

Bench of this Court at Mumbai on 23.01.2019, was a candidate belonging to N.T. "C" category. However, in the application form for the post of Assistant Commissioner/Project Officer Grade-II, Group-B. She stated that her application may be considered from open category and also paid fees prescribed for open category candidates. She was not permitted to compete from the open women category and the challenge raised by her to the decision of MPSC has been turned down by the Maharashtra Administrative Tribunal. The Division Bench, referring to the earlier judgment in the matter of Kanchan Vishwanath Jagtap (supra) and also referring to the Constitution Bench judgment in the matter of Indra Sawhney (supra), has observed that since the petitioner is meritorious and has opted to be considered from open category, she cannot be denied an opportunity to compete. The earlier judgment of the Division Bench in the matter of State of Maharashtra Vs. Irfan Mustafa Shaikh and others (Writ Petition No.272 of 2010, decided on 15.11.2010), was considered and the Court has observed that it cannot be treated as ratio decidendi. On the contrary, the view taken by the Division Bench in the matters of Asha Ramnath Gholap and Kanchan Vishwanath Jagtap (supra) has been approved to be a correct view and is relied upon.

43. There is no dispute, according to Shri Katneshwarkar, learned Counsel appearing for petitioners in Writ Petition No.6578 of 2018, that if any candidate from reserved category tenders application from the open category, he/she may be considered and given placement in open category in accordance with his/her individual merit. There is no controversy in respect of migration of candidate from one category to another category in case of vertical reservation since a candidate applying from social reservation category can migrate in open category in accordance with his individual merit.

44. It is further contended that in case of compartmentalized reservation, as in the instant case, it is not permissible to migrate from one category to another compartmentalized horizontal reservation category. The principle of migration/shifting cannot be made applicable to the compartmentalized horizontal reservation, which would render the provisions of Article 16(1) redundant.

45. Reliance is placed by the Respondents, including Shri Katneshwarkar, learned Counsel appearing for petitioners in W.P.No.6578/2018, on the judgments in the matter of:

- (a). Indra Sawhney Vs. Union of India, 1992 Supp (3) SCC 217;
- (b). Anil Kumar Gupta Vs. State of Uttar Pradesh & others,. (1995) 5 SCC 173;
- (c). Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & others, (2007) 8 SCC 785;
- (d). Public Service Commission, Uttaranchal Vs. Mamta Bisht and others, AIR 2010 SC 2613;
- (e). Miss Rajani d/o Shaileshkumar Khobragade Vs. The State. of. Maharashtra.

& others. (W.P.No.10103/2015, decided on 31.03.2017);

(f) Ashish Kumar Pandey Vs. State of U.P., 2016 SCC Online All 187;

46. Apart from the aforesaid judgments, reference to which is made in the above-mentioned paragraphs of this judgment, our attention is invited to the judgments in the matter of:

(I). Deepa E.V. Vs. Union of India and others, (2017) 12 SCC 680; (ii) Gaurav Pradhan & others Vs. State of Rajasthan & others, (2018) 11 SCC 352

(ii) Niravkumar Dilipbhai Makwana Vs. Gujrat Public Service Commission; MANU/SCOR/06453/2018; to contend that a candidate belonging to backward category, at any stage of recruitment, if avails relaxation, exemption, concession, which is not available to the open category candidates, then in such circumstances, a candidate belonging to reserved category cannot migrate to the merit list of general category on the basis of his individual merit.

47. Shri Katneshwarkar, learned Counsel appearing for petitioners in W.P.No.6578/2018, thus, urges to issue directions to the respondents to prepare afresh recommendation list of the candidates in view of the principles laid down in the judgments of the Hon'ble Supreme Court, referred to above.

48. 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 Scheduled Castes, Scheduled Tribes and Other Backward Classes. "Horizontal" reservation 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. Scheduled Castes/ Scheduled 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 of 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 the 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.

Deepa E.V. And Gaurav Pradhan (supra)

49. For the reasons recorded above and in view of the conclusions drawn in the above noted paragraphs, in the instant petitions,

(I). The candidates, who have applied from amongst the open category and who have not availed of any benefits of relaxed standards such as relaxation in age

limit, qualification, percentage of qualifying marks, experience, etc., are entitled to be considered on the basis of their individual merit from amongst open competition category, as candidates belonging to open category.

(II). In case of compartmentalized reservation, candidates claiming horizontal reservation, shall not be permitted to migrate to horizontal open competition category.

(III). The insistence by the Maharashtra Public Service Commission. to. the. candidates. who. have. applied. from. Open category though they belong to reserved category, to submit the proof in respect of their caste, is uncalled for, since the candidates who have applied from open category and have not secured any benefits available for reserved category, are entitled to claim the seat/post available for horizontal open competition category.

(IV). The directive contained in the letter dated 26.07.2017, issued by the Additional Chief Secretary, General Administration Department, Government of Maharashtra, not to consider the claim of the reserved category candidates who have tendered applications as a general category candidates for the seat/post prescribed for horizontal open competition category, is uncalled for and shall not be acted upon.

(V). The decisions in the matters of Deepa E.V. and Gaurav Pradhan (supra), governing the procedure for selection, laying down the parameters for migration, are binding upon the respondents.

(VI). The procedure in respect of preparation of the select list of candidates referred to in sub-paragraphs (i) to (iv) as under, shall have to be followed:

(i). All the seats provided for the unreserved or open category to be filled in purely on merit and merit alone, though provisionally, on the basis of the common merit list prepared, without applying any criteria whatsoever, other than merit.

(ii). All the seats from various vertical reservation categories to be filled in completely, without applying horizontal reservations. In selecting candidates by undertaking such exercise, every candidate who has figured in the open category allotment list to be excluded. The allotments so made in favour of the reserved category candidates not be counted towards the consumption of the reserved category.

(iii). The open category list, as also each vertical reservation list to be checked and verified to find out as to whether or not, the horizontal reservations are satisfied automatically. If they are, nothing more to be done.

(iv). If it is found, upon such verification that, either horizontal reservations are not satisfied or are partly satisfied, then, appropriate number of candidates from the bottom of respective lists to be removed or deleted and candidates strictly on merits, from the separate merit list prepared for the respective horizontal

reservation category to be allotted those seats, as and by way of replacement.

50. In view of the conclusions, as recorded above, all these writ petitions stand disposed of. In view of disposal of writ petitions, pending Civil Applications do not survive and stand disposed of.