

Saurav Yadav vs The State Of Uttar Pradesh on 18 December, 2020

Equivalent citations: AIR 2021 SUPREME COURT 233, AIR ONLINE 2020 SC 906

Author: Uday Umesh Lalit

Bench: Hrishikesh Roy, S. Ravindra Bhat, Uday Umesh Lalit

REPORTAB

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL JURISDICTION

MISCELLANEOUS APPLICATION NO.2641 OF 2019

IN

SPECIAL LEAVE PETITION (CIVIL) NO.23223 OF 2018

SAURAV YADAV & ORS.

...Petitio

Versus

STATE OF UTTAR PRADESH & ORS.

...Respond

WITH

W.P. (C) NO.237 OF 2020

JUDGMENT

Uday Umesh Lalit, J.

MISCELLANEOUS APPLICATION NO.2641 OF 2019

1. This Miscellaneous Application has been preferred by Ms. Sonam Tomar and Ms. Reeta Rani who had participated in the Selection Process initiated for filling up posts of Constables in U.P. Police and secured 276.5949 and 233.1908 marks respectively. They had applied in the categories of OBC-Female and SC-Female respectively.

2. It is submitted by them that their claim has been rejected by the State Government despite directions issued by this Court in its Order dated 24.07.2019 in I.A. No.10394 of 2018 (Ashish Kumar Yadav and Others vs. State of Uttar Pradesh and Others) and that candidates with lower marks have been selected in General Female category disregarding their claim.

3. The basic facts relevant for the purposes of this Miscellaneous Application, as stated in said order dated 24.07.2019 are as under: -

“In the year 2013, selection process was undertaken to fill up 41,610 posts of Police Constables [U.P. Civil Police/Provincial Armed Constabulary (PAC)/Fireman]]. After the requisite examination, results were declared on 16.07.2015, in which 38315 candidates were successful.

Thus, as on that date there were 3295 vacancies which were not filled as no suitable candidates were available.

It must be mentioned that the process for selecting Sub- Inspectors in U.P. Police was going on simultaneously and in a challenge raised in respect of said process, the High Court of Judicature at Allahabad vide its order dated 29.05.2015 in the case of Saket Kumar and Ors. vs. State of U.P. and 2 Ors¹ directed that the candidates who had used blades and whiteners while answering the answer papers of the main examination were disqualified and their names be deleted from the selection list.

The matter was carried in appeal before this Court and by its decision dated 19.01.2016 (Hanuman Dutt Shukla & Ors. vs. State of UP and Others²), it was ruled that those who had used blades and whiteners ought not to have been disqualified. However, by that time, the process of 1 Writ A. No.67782 of 2014, (2015 SCC OnLine All 1250) 2 (2018) 16 SCC 447 selection had gone ahead with re-working of the seniority list in terms of the order passed in Saket Kumar¹. This Court, therefore, observed that those candidates who were selected as a result of directions in Saket Kumar¹ should not be thrown out from the process of selection but the candidates who had used the blades and whiteners should be given the advantage or benefit in a notional selection. In other words, the selection list was ordered to be re- worked and in case the candidates who had used blades and whiteners were now found to be part of the selection list, they be given appropriate advantage including selection to the posts in question. It was also directed that though logically equal number of candidates must be displaced from the original list of selection, since those persons had already undergone training and some of them had joined the posts, those candidates ought not to be thrown out of service. This Court also directed that in the process, the additional number of candidates who were selected over and above the normal selection should be reckoned as against additional posts and should not be taken to be part of the original posts for selection.

The principle so devised in HD Shukla² was then adopted in the process of selection for Police Constables which was going on simultaneously and consequently the selection list was reworked. Thus all the candidates who had used blades and whiteners were considered in the process of selection and some of them did get selected. In the re-working of the selection list 4429 candidates were given advantage or benefit in terms of the law declared in Hanuman Dutt Shukla² which is to

say those 4429 candidates would be taken as additional appointments over and above the number of posts for which selection was undertaken.

In its judgment dated 16.03.2016 [Ashish Kr. Pandey & 24 others vs. State of U.P. and 29 Others³], the High Court of Judicature at Allahabad observed that horizontal reservation was not properly worked and as such the State was directed to undertake the process of re-calculating horizontal reservation vacancies afresh. This case was also in relation to the process of selection for Sub-Inspectors. Around same time, another decision was rendered by the High Court in Manoj Kr. & Others⁴ adopting the principle in Ashish Kr. Pandey³ in selection process for Constables.

³ Writ A. No.37599 of 2015 (2016 SCC OnLine ALL 187) ⁴ 2017 SCC OnLine ALL 2759 On 4.5.2018, a decision was rendered by the High Court of Judicature at Allahabad in Upendra and others vs. State of U.P. and Others⁵ wherein challenge was raised to certain provisions of the Reservation Act. It was submitted that going by the concept of horizontal reservation, it would not be possible to carry forward the vacancies to the next selection, in case the appropriate number of candidates for horizontal reservation were not available. The High Court accepted the plea and directed that there shall not be any carry-forward of vacancies of horizontal reservation to the next selection.

Thus the matter was clear that in case appropriate number of candidates for filling up seats meant for horizontal reservation were not available, there would not be any carry forward of such vacancies. The order shows that about 2312 vacancies were not filled up by the State adopting the idea of carry forward principle in horizontal reservation. Therefore, as a result of the directions issued by the High Court in Upendra's case, 2312 vacancies must enure to the advantage of the candidates concerning the present selection process itself.

It is accepted by the learned counsel for the State that the State did not undertake any process of selection in respect of those 2312 vacancies.

...
...

It is also accepted that apart from these 2312 vacancies, there are still 982 vacancies to be filled up in the original selection.” In the circumstances this Court directed the State to complete the process of selection in respect of 2312 + 982 vacancies in accordance with law. It was also directed that the principle of reservation would be followed while filling up these vacancies and that the State would adhere to the required minimum qualifying marks as devised during the process of selection and consider all eligible candidates in accordance with merit. It was also declared: -

“It is clarified that no candidate shall be excluded from the selection process merely because he had used blade or whitener. In case his merit position otherwise demands and entitles him to be selected, no prejudice shall be caused to him merely for the use of blade and whitener.”

4. Soon thereafter, apprehension was expressed whether the direction as aforesaid would apply to male candidates only. Therefore, the order dated 17.09.2019 recorded as under: -

“Mr. Vinod Diwakar, learned AAG for the State makes a statement that keeping in view the direction issued by this Court on 24.07.2019, no candidate shall be excluded from the selection process merely because he/she had used blade/whitener and in case merit position of the candidate demands and entitles him/her to be selected, no prejudice shall be caused to him/her merely for using blade/whitener. Statement is taken on record.”

5. In compliance of the order dated 24.07.2019, an affidavit dated 13.11.2019 was filed on behalf of the State stating inter alia :-

“3.3- In open Category 5 DFF males, 1 DFF female and 187 female (General) have been selected. This process completes horizontal reservation.

4- Cut off marks for different categories are as under-

	OC	OBC	SC	ST
Male	313.616	307.233	283.4033	247.233
off				

Female (General Category) cut off – 274.8928.

All the OBC, SC and ST candidates securing more than 313.616 marks have also been selected in open / unreserved category.”

6. Aggrieved by the action on part of the State in not considering the claim of OBC female and SC female candidates against the posts meant for General Category female candidates, this Miscellaneous Application is preferred submitting inter alia:-

“13. That a perusal of paragraph 4 of the Compliance Affidavit dated 13.11.2019 filed by the Respondent State reveals that while all Male Candidates belonging to OBC, SC, ST category securing more than the cut off marks (313.616) for the Male Candidates in the General/Open/Unreserved Category have also been selected, the same standard has not been applied to the OBC/SC/ST Women Category Candidates like the Petitioners/Applicants although they have obtained more than the cut of marks (274.8928) for the Female Candidates in the General/Open/Unreserved Category.

14. That it is respectfully submitted that 21 of the Petitioners/Applicants belonging to the Female OBC Category have secured marks more than the cut off marks for the Female (General Category) candidates declared to be selected as per the State’s

Compliance Affidavit dated 13.11.2019.” The Applicants, therefore, pray: -

“(a) Allow the instant application and direct the Respondent State to select the Applicants/Petitioners herein [Female OBC/SC candidates] who participated in the 2013 Constables Recruitment Process and secured higher marks than the Cut off marks (274.8928) for the Female Candidates in the General/Open/Unreserved Category;”

7. Thereafter I.A. No.25611 of 2019 has been filed by similarly situated candidates claiming similar relief. The Order dated 04.03.2020 passed by this Court stated: -

“In M.A. No.2641 of 2019 the case in respect of two applicants is projected while in I.A. No.25611/2019 the matter is being agitated with respect to other 20 candidates.

Issue notice in I.A. No.25611/2019 returnable on 24.3.2020.

Ms. Vibha Dutta Makhija, learned Senior Advocate fairly accepts that out of 32 female candidates, 11 candidates belong to the category of SC girls while other 21 belong to the category of OBC girls and that there is no case in so far as candidates belonging to SC-girls category are concerned.

In so far as OBC girls are concerned, Ms. Vibha Dutta Makhija, learned Senior Advocate submits that all these girls had secured marks greater than cut off namely 274.89 which was declared for females (General) category. Our attention is invited to page 110 of the Compliance Affidavit which shows that some female candidates who had scored marks in the range of 274-275, have been selected.

It is the submission that the applicant girls of the category of OBC girls had scored marks greater than those General category girls who were selected.

One of the submissions sought to be advanced by the learned counsel for the State was that the category of OBC Females was already exhausted in the first round and the selection which was undertaken pursuant to the directions issued by this Court in Hanuman Dutt Shukla’s² case and in cases decided subsequently on same lines, was only confined to the candidates who had been disqualified for having used blades/erasers or whiteners. Since the selection was confined to such candidates, and as the category of OBC female was already exhausted, no candidates could be appointed from and out of OBC female candidates. However, the fact remains that females coming from General Category who had secured marks in the range of 274-275, going by Page 110, have definitely been appointed, whereas applicant OBC-girls had secured marks greater than them.

It thus, prima facie does not stand to reason how candidates in the General Category could be appointed who had secured less number of marks than the applicant girls.”

8. Thereafter, the Order dated 22.07.2020 passed by this Court was to the following effect:-

“Mr. Vinod Diwakar, learned AAG for the State submitted that in the category of Male Constables, OBC, SC and ST candidates securing more than the cut-off, namely, 313.616 for Open Category Candidates, were also selected in the open/unreserved category.

However, same yardstick was not applied with respect to the Female Candidates and justification for such exercise was on the basis of the directions issued by the High Court in its order dated 16.03.2016 in Writ Petition No.37599 of 2015 and order dated 20.02.2019 in Writ Petition No.18442 of 2018.”

9. The stand taken by the State Government in its affidavits was as under:-

I] Affidavit dated 29.11.2019 “A. In the year 2013 selection process was undertaken to fill up 41610 posts of police constable (UP civil police/PAC/Fireman). Details are as follows:-

Table-1 S.No Categor Civil PAC Firema Total . y Police n 1 Open 17750 2016 1038 20804 2 OBC 9585 1089 561 11235 3 SC 7455 847 436 8738 Total 35500 4033 2077 41610 B. Horizontal reservation position is as follows-

Table-2 Vertical Total Horizontal Reservation Vacancies Reservatio Vacancies Ex- DFF Home- Femal n Servicema 02% Guard e (only n 05% (only for for civil civil police) police 20% & PAC 05%) Open 20804 1040 416 988 3550 OBC 11235 562 225 534 1917 SC 8738 437 175 415 1491 ST 833 42 17 40 142 Total 41610 2081 833 1977 7100 Results were declared on 16-07-2015 after completing requisite examination and other procedures. 38315 candidates were declared successful and 3295 posts remained vacant due to unavailability of suitable candidates in respective categories.

... .. C. In compliance of the Hon’ble Supreme Court order dated 24-07-2019, selections have been made against 3295 posts according to merit, keeping in view the reservation policy of the government. The result has been declared on 11.11.2019. It is pertinent to mention here that 7100 posts were reserved for female candidates as against 35500 posts of civil police (Table-2) in which 3550 posts were earmarked for General female candidates. At this stage OBC and SC female candidates were already taken in surplus to their required number in respective categories Female candidates were only 3062 as against 3550 (Ref. Table-2). Hence, therefore, 188 General Female candidates in Open Category have been selected to fill up their reservation quota against 3550 Open Category Female candidates.” II. Affidavit dated 21.07.2020 “13. That it is again reiterated that in Civil Police, out of total vacancies 3550 were reserved for General Category Women’s, 1970 were reserved for OBC, 1491 were reserved for SC and 142 were reserved for ST Women’s Candidates. It is again reiterated that the OBC and SC women candidate had already been selected against the vacancies hence therefore in subsequent selection their merit has not been considered.”

10. Since reliance has been placed by the State on the Order dated 16.03.20163 passed by the Single Judge of High Court of Judicature at Allahabad in Writ Application No.37599 of 2015, some of the relevant observations in said Order are quoted here:-

“It was, therefore, mandated that upon adjustment/accommodation if the special category candidate belonging to OBC category scored higher marks than his/her counterpart adjusted in open category, cannot be shifted to open category. Shifting would tantamount to vertical reservation which is impermissible and alien to the concept of horizontal reservation. Horizontal reservation cut across vertical reservation, therefore, there is no concept of ‘merit’ while making adjustment/accommodation.

... .. Learned counsel for the respondents⁶ would urge that (i) the women selected on merit should be excluded while determining the number of women candidates to be adjusted in respective category, (ii) open category being ‘open’ based on merit, therefore, the candidates under special reservation quota should be accommodated/adjusted on the basis of their inter se merit in open category, irrespective of their social category, (iii) women are a class, therefore, there can be no 6 State of U.P. and its functionaries discrimination on the basis of their social category, (iv) the principles as sought to be urged, if not followed, would tantamount to reservation in favour of “upper caste” which is not the aim or object of the Constitution.

The argument, in my opinion, is not only misconceived, but malicious and motivated as is being sought to be urged by the petitioners. The principles for horizontal reservation that is being sought to be urged, if accepted, would necessarily be in teeth of the provisions of Act, 1993, Government Orders referred to earlier, and the authoritative pronouncement of the Apex Court. I have no hesitation in observing that both the State and the Board, for the reason best known to them, and the Advocate General, assisted by a battery of lawyers, with impunity have taken a stand against their own Government Orders and the provisions of Act, 1993. When confronted with a query that the Advocate General was arguing not only against the Government Orders but also against the principles which was continuously being followed by the Board, in previous selections regarding horizontal reservation; Sri Singh would contend that the principle adopted by the Board being ‘equitable’, therefore, the State supports the methodology adopted by the Board. The argument, however, was not supported by any authority, rather the authorities referred, herein above, was relied upon by both the contesting parties in support of their arguments.

... ..

The questions framed, consequently, are answered as follows:

(i) The candidates claiming horizontal reservation (women, ex-servicemen and dependent of freedom fighter) cannot be adjusted enmasse in the open category but would have to be adjusted against their respective social category i.e. OBC, SC and ST” (Emphasis supplied)

11. The aforesaid decision of the Single Judge was affirmed in appeal by the Division Bench⁷ of the High Court with following observations: -

7 State of UP & Ors. vs. Ashish Kumar Pandey & Ors. : 2016 SCC OnLine All 2611 “31. While applying the principle of Horizontal Reservation, category has a role to play as at the point of time

when Horizontal Reservation is to be pressed, then based on merit candidates in question are to be adjusted in their respective category and the male candidates, who are at the bottom of the list as per the merit, will have to make place for women candidate. A candidate, who has proceeded to make an application for the purposes of Horizontal Reservation under the OBC/SC/ST category, cannot be permitted to change his/her category, whereas in Vertical Reservation once you are selected, on merit, such a change is permissible by operation of law and in view of this, once such is the factual situation that is so emerging that all the candidates once they have specified their category in reference of Special Reservation, then they have to be adjusted in their respective categories and the reserve category candidate cannot ask for placement against open category by claiming that they have higher merit, inasmuch as, only in the matter of Vertical Reservation, merit has a role to play wherein the list is finalized but at the point of time when for providing Horizontal Reservation adjustment is to be made, then various adjustments is required to be done as per the formula that has been approved and ratified by the Apex Court that in the matter of horizontal reservation, adjustment would be made by making appropriate placement in appropriate categories. Apex Court was conscious of this fact, that such a provision may be subjected to misuse and accordingly, position was sought to be clarified by giving examples and then providing that if horizontal reservation is not satisfied, the requisite number of special reservation candidate has to be taken and accommodated/adjusted against their respective social reservation categories. Sub-section (3) of Section 3 of U.P. Act No.4 of 1993 provides for horizontal reservation to be applied accordingly, Application of horizontal reservation in this prescribed manner maintains the merit of special reservation quota candidate alongwith their representation in service, in view of this, the Learned Single Judge is absolutely right at the point of time when he has proceeded to criticise the State Government for taking such a stand and for adhering to a procedure that was not at all prescribed in law and thus crossing the limit of reservation of 50%, in view of this, the order passed by Learned Single Judge does not deserve interference on this aspect of the matter.” (Emphasis supplied)

12. The observations in the Order dated 20.02.2019 passed by the Division Bench of the High Court of Judicature at Allahabad in Pramod Kumar Singh and Others vs. State of U.P. and Others 8 are also relied upon by the State Government. In that case the horizontal reservation for dependants of Freedom Fighters, Ex. Servicemen and women in the very same selection for Police Constables was in issue. The Division Bench of the High Court dealt with the Note submitted on behalf of the State which indicated the steps undertaken to determine and fill up seats for various categories as under:-

“The procedure as set forth for completion of the recruitment exercise is then described in the following terms:

“Step 3.1 From List -1 select 19158 candidates in open category in order of their merit (Total Marks). This list may contain candidates from any state or any reserved categories (OBC/SC/ST) also. Let us call this list as List 1-A. Step 3.2 Now select 10345 candidates of OBC Category from the candidates left after Step 3.1 from the List-1. This will include only OBC candidates with domicile of U.P. Let us call this list as List-1-B. Step 3.3 Now select 8046 candidates of SC Category from the candidates left after Step 3.1 from the List-1. This will include only SC candidates with domicile

of U.P. let us call this list as List 1-C. Step 3.4 Now select 766 candidates of ST Category from the candidates left after Step 3.1 from the List-1. This will include only ST candidates with domicile of U.P. let us call this list as List 1-D. Step 3.5 If number of candidates in List-1-C is less than the required number 8046 for SC Candidates from shortage will be filled from ST candidates remaining after step 3.4 if available. If required quota of SC remains unfilled, then number of shortage posts should be shown separately. Similarly if number of for ST candidates then shortage will be filled from SC candidates remaining after Step 3.3, if available. If required of ST still remains unfilled then number of shortage posts should be shown separately.

Step 3.6 In this way four lists of candidates will be prepared as follows:

List-1-A	List-1-B	List-1-C	List-1-D
(OC)	(OBC)	(SC)	(ST)
19158 (will include GEN, OBC, ST of any state)	10345 (Only OBC, domicile of U.P.)	8046 (Only SC, domicile of U.P.)	766 (Only ST, domicile of U.P.)

Step 4 prepare a separate list of remaining candidates from List-1 who are not included in List-1-A, 1-B, 1-C and 1-D. Let us call this list as List-1.

Step 4.1 Now count the number of DFF candidates belonging to General Category (having domicile of U.P.) from the List-1-A. The candidates should not be OBC/SC/ST category. If number of candidates is 383 or more, then nothing needs to be done, otherwise select the shortfall of candidates of general category belonging to DFF on merit from the List-2 (Only candidates not belonging to OBC, SC & ST category) and adjust/insert them in after removing equal number of candidates from the bottom of List-1-A except General Category DFF, Ex-Servicemen, female and home guard candidates (any candidate who is eligible for horizontal reservation)".

The High Court then directed as under:-

"These writ petitions are therefore disposed of with a direction to the State respondents to proceed forward with expedition and conclude the selection process strictly in accordance with the procedure detailed in the Note filed along with the personal affidavit of the Secretary. This Court while passing this order has not considered the individual grievances or objections of the petitioners and has only considered the principal submissions noticed above. In view thereof, all individual claims as raised by the petitioners may be raised after declaration of final results and all contentions on merits in that respect are kept open."

13. Appearing for the Applicants, Ms. Vibha Datta Makhija and Mr. Gopal Sankaranarayanan, learned Senior Advocates, have submitted that the stand taken by the State is completely opposed to the principles laid down by this Court and that the conclusions drawn in the Orders of the High

Court which are relied upon, were also incorrect.

14. Mr. Vinod Diwakar, learned Additional Advocate General, appearing for the State, has submitted that the Order dated 16.03.2016 was recognised by this Court in its decision in Alok Kumar Singh and others vs. State of Uttar Pradesh and others⁹ and the State being bound by the observations of the High Court as quoted above, did not consider the claim of 'OBC Female Category' candidates against the posts meant for 'General Female Category'.

9 (2019) 14 SCC 692

15. At this stage, the stand taken by the State Government in its written submissions must also be adverted to:-

“10. That in compliance of the order dated 16.03.2016 passed by the Hon'ble High Court in Writ Petition No. 37599 of 2015 titled as Ashish Kumar Pandey & Another 3 and order dated 20.02.2019 passed in Writ Petition No. 18442 of 2018 titled as Pramod Kumar Singh & Ors 8, a separate select list of 2052 General Female Candidates were declared on 10.06.2019 for fulfilling the 20% Horizontal Reservation embarked for women's and entire select list was redrawn. The OBC and SC Women Candidates were not considered in the select list as their horizontal quota were already exhausted in the previous list.”

16. Thus, the facts which stand accepted or admitted on record are as under:-

a) In pursuance of the directions issued by this Court in its Order dated 24.07.2019, selection to the 3295 10 posts in accordance with merit and consistent with reservation policy of the Government was undertaken by the State Government.

b) According to the results declared on 11.11.2019, 188 posts in 'General Female Category' were filled up.

c) While filling up said 188 posts, the claim of 'OBC Female Candidates' was not considered or taken into account.

10 Though the Order dated 24.07.2019 mentioned the figure to be 3294 (2312+982), according to the State, the actual figure is 3295.

d) The last candidate appointed in the category of 'General Female' had secured 274.8298 marks.

e) Applicant no.1 Ms. Sonam Tomar had secured 276.5949 marks i.e. greater than the candidate with 274.8298 marks but her claim was not considered.

f) 21 such applicants who come from the category of 'OBC Female' are before this Court who had secured more than 274.8928 marks.

In the backdrop of these admitted facts, the action on part of the State Government in refusing to consider the claim of 'OBC Female Category' candidates in respect of 'General Female Category' seats is in question in the present matter. It must be mentioned that no 'SC Female Category' candidates who were not selected, had secured more marks than 274.8928. Therefore, the claim of Applicant no.2 and other similarly situated 'SC Female Category' candidates does not stand on the same footing.

17. At the outset, it needs to be considered whether the decision in Alok Kumar Singh⁹ had recognized the Order dated 16.03.2016 as contended. The observations in the decision of this Court were:-

“9. It may be mentioned here that in terms of the decision 3 of a Single Judge of the High Court of Allahabad rendered on 16-3-2016 which was confirmed by the Division Bench by its judgment and order dated 29-7-2016⁷, in connection with horizontal reservation to be adopted while finalising the result, another revised final result was published on 29-11-2016. Since no grievance is made on this count, we have refrained from going into the details in respect of such challenge and the consequences as a result of such directions.” The narration of events was only to note the effect of the order dated 16.03.2016 and the affirmation thereof in appeal, as a result of which revised final list was published on 29.11.2016. As the observations indicate, this Court had not gone into the details in respect of challenge entertained by the High Court as no occasion had arisen for such consideration. We, therefore, reject the submission that the Order dated 16.03.2016 stood approved by this Court.

18. As a first step while considering the validity and correctness of the actions on part of the State Government, we may note some of the decisions of this Court touching upon the issue of horizontal reservation:

A) Jeevan Reddy, J. speaking for himself and on behalf of three Judges of this Court in Indra Sawhney and Others vs. Union of India and others¹¹ observed as under:-

“812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the 11 (1992) Supp (3) SCC 217 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 reservations in favour of backward class of citizens remains — and should remain — the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.” B) In *Swati Gupta (Ms.) vs. State of U.P. and others* 12, the effect of para 2 of G.O. dated 17.05.1994 was considered by a bench of two Judges of this Court and it was stated:-

“3. Similarly, the other defect in the circular reserving 35% seats for general category has been removed. The vertical reservation is now 50% for general category and 50% for Scheduled Castes, Scheduled Tribes and Backward Classes. Reservation of 15% for various categories mentioned in the earlier circular which reduced the general category to 35% due to vertical reservation has now been made horizontal in the amended circular extending it to all seats. The reservation is no more in general category. The amended circular divides all the seats in CPMT into two categories— one, general and other reserved. Both have been allocated 50%. Para 2 of the circular explains that candidates who are selected on merit and happen to be of the category mentioned in para 12 (1995) 2 SCC 560 1 would be liable to be adjusted in general or reserved category depending on to which category they belong, such reservation is not contrary to what was said by this Court in *Indra Sawhney*¹¹. Whether the reservation for such persons should have been made or not was not challenged, therefore, this Court is not required to examine it.” C) In *Anil Kumar Gupta and others vs. State of U.P. and others*¹³, a bench of two Judges of this Court explained the concept of overall reservation as against compartmentalized reservation and detailed the steps to be undertaken while filling up seats for vertical and horizontal reservation as under:-

“15. On a careful consideration of the revised notification of 17-12-1994 and the aforementioned corrigendum issued by the Lucknow University, we are of the opinion that in view of the ambiguous language employed therein, it is not possible to give a definite answer to the question whether the horizontal reservations are overall reservations or compartmentalised reservations. We may explain these two expressions. Where the seats reserved for horizontal reservations are proportionately divided among the vertical (social) reservations and are not intertransferable, it would be a case of compartmentalised reservations. We may illustrate what we say: Take this very case; out of the total 746 seats, 112 seats (representing fifteen per cent) should be filled by special reservation candidates; at the same time, the social reservation in favour of Other Backward Classes is 27% which means 201 seats for OBCs; if the 112 special reservation seats are also divided proportionately as between OC, OBC, SC and ST, 30 seats would be allocated to the OBC category; in other words, thirty special category students can be accommodated in the OBC category; but say only ten special reservation candidates belonging to OBC are available, then these ten candidates will, of course, be allocated among OBC quota but the remaining

twenty seats cannot be transferred to OC category (they will be available for OBC candidates only) 13 (1995) 5 SCC 173 or for that matter, to any other category; this would be so whether requisite number of special reservation candidates (56 out of 373) are available in OC category or not; the special reservation would be a watertight compartment in each of the vertical reservation classes (OC, OBC, SC and ST). As against this, what happens in the overall reservation is that while allocating the special reservation students to their respective social reservation category, the overall reservation in favour of special reservation categories has yet to be honoured. This means that in the above illustration, the twenty remaining seats would be transferred to OC category which means that the number of special reservation candidates in OC category would be $56+20=76$. Further, if no special reservation candidate belonging to SC and ST is available then the proportionate number of seats meant for special reservation candidates in SC and ST also get transferred to OC category. The result would be that 102 special reservation candidates have to be accommodated in the OC category to complete their quota of 112. 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.

16. Now coming to the revised notification of 17-12-1994, it says that “horizontal reservation be granted in all medical colleges on total seats of all the courses...”. These words are being interpreted in two different ways by the parties; one says it is overall reservation while the other says it is compartmentalised. Para 2 says that the candidates selected under the aforesaid special categories “would be kept under the categories of Scheduled Castes/Scheduled Tribes/Other Backward Classes/General to which they belong. For example, if a candidate dependent on a freedom fighter selected on the basis of reservation belongs to a Scheduled Caste, he will be adjusted against the seat reserved for Scheduled Castes”. This is sought to be read by the petitioners as affirming that it is a case of compartmentalised reservation. May be or may not be. It appears that while issuing the said notification, the Government was not conscious of the distinction between overall horizontal reservation and compartmentalised horizontal reservation. At any rate, it may not have had in its contemplation the situation like the one which has arisen now. This is probably the reason that this aspect has not been stated in clear terms.

17. It would have been better — and the respondents may note this for their future guidance — that while providing horizontal reservations, they should specify whether the horizontal reservation is a compartmental one or an overall one. As a matter of fact, it may not be totally correct to presume that the Uttar Pradesh Government was not aware of this distinction between “overall horizontal reservation” and “compartmentalised horizontal reservation”, since it appears from the judgment in Swati Gupta¹² that in the first notification issued by the Government of Uttar Pradesh on 17-5-1994, the thirty per cent reservation for ladies was split up into each of the other reservations. For example, it was stated against backward classes that the percentage of reservation in their favour was twenty-seven per cent but at the same time it was stated that thirty per cent of those seats were reserved for ladies. Against every vertical reservation, a similar provision was made, which meant that the said horizontal reservation in favour of ladies was to be a “compartmentalised horizontal reservation”. We are of the opinion that in the interest of avoiding any complications and intractable

problems, it would be better that in future the horizontal reservations are compartmentalised in the sense explained above. In other words, the notification inviting applications should itself state not only the percentage of horizontal reservation(s) but should also specify the number of seats reserved for them in each of the social reservation categories, viz., ST, SC, OBC and OC. If this is not done there is always a possibility of one or the other vertical reservation category suffering prejudice as has happened in this case. As pointed out hereinabove, 110 seats out of 112 seats meant for special reservations have been taken away from the OC category alone — and none from the OBC or for that matter, from SC or ST. It can well happen the other way also in a given year.

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.” (emphasis supplied) D) In *Rajesh Kumar Daria etc. vs. Rajasthan Public Service Commission and others*¹⁴, a bench of three judges of this Court considered the difference between vertical and horizontal reservations as under:-

“8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be: “For SC: 30 posts, of which 9 posts are for women.” We find that many a time this is wrongly described thus: “For SC: 21 posts for men and 9 posts for women, in all 30 posts.” Obviously, there is, and there can be, no reservation category of “male” or “men”.

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are “vertical reservations”. Special reservations in favour of physically handicapped, women, etc., under 14 (2007) 8 SCC 785 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*¹¹, *R.K. Sabharwal v. State of Punjab*¹⁵, *Union of India v. Virpal Singh Chauhan*¹⁶ and *Ritesh R. Sah v. Dr. Y.L. Yamul*¹⁷.) 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 further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC woman candidates, then there is no need to disturb the list by including any further 15 (1995) 2 SCC 745 16 (1995) 6 SCC 684 17 (1996) 3 SCC 253 SC woman candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four woman SC candidates.

(But if the list of 19 SC candidates contains more than four woman candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess woman candidates on the ground that “SC women” have been selected in excess of the prescribed internal quota of four.)

10. In this case, the number of candidates to be selected under general category (open competition), were 59, out of which 11 were earmarked for women. When the first 59 from among the 261 successful candidates were taken and listed as per merit, it contained 11 woman candidates, which was equal to the quota for “general category women”. There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that

among 59 general category candidates in all 22 women have been selected consisting of eleven woman candidates selected on their own merit (candidates at Sl. Nos. 2, 3, 4, 5, 9, 19, 21, 25, 31, 35 and 41 of the selection list) and another eleven (candidates at Sl. Nos. 54, 61, 62, 63, 66, 74, 75, 77, 78, 79 and 80 of the selection list) included under reservation quota for “general category women”. This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.

11. Similarly, we find that in regard to 24 posts for OBC, 19 candidates were selected by RPSC in accordance with merit from among OBC candidates which included three woman candidates. Thereafter, another five women were selected under the category of “OBC women”, instead of adding only two which was the shortfall. Thus there were in all 8 women candidates among the 24 OBC candidates found in the selection list. The proper course was to list 24 OBC candidates as per the merit and then find out number of woman candidates among them, and only fill the shortfall to make up the quota of five for women.” (emphasis supplied) E) In *K. Krishna Murthy (Dr.) and others vs. Union of India* and another¹⁸, a Constitution Bench of this Court observed that seats earmarked for women belonging to the General Category are not accounted for, if one has to gauge whether the upper ceiling of 50% has been breached. The observations were as under:-

“44. With respect to the State legislations under challenge, it was argued that the 50% ceiling would not be crossed under most of them since it is only the vertical reservations (i.e. on communal lines in favour of SCs/STs/OBCs) that are taken into consideration for this purpose. Even though there is a 33% reservation in favour of women in elected local bodies, the same is in the nature of a horizontal reservation which intersects with the vertical reservations in favour of SCs/STs/OBCs. In such a scenario, the seats occupied by women belonging to the general category cannot be computed for the purpose of ascertaining whether the 50% upper ceiling has been breached.

... ..

64. In the absence of explicit constitutional guidance as to the quantum of reservation in favour of backward classes in local self-government, the rule of thumb is that of proportionate reservation. However, we must lay stress on the fact that the upper ceiling of 50% (quantitative limitation) with respect to vertical reservations in favour of SCs/STs/OBCs should not be breached. On the question of breaching this upper ceiling, the arguments made by the petitioners were a little misconceived since they had accounted for vertical reservations in favour of SCs/STs/OBCs as well as horizontal reservations in favour of women to assert that the 50% ceiling had been breached ¹⁸ (2010) 7 SCC 202 in some of the States. This was clearly a misunderstanding of the position since the horizontal reservations in favour of women are meant to intersect with the vertical reservations in favour of SCs/STs/OBCs, since one-third of the seats reserved for the latter categories are to be reserved for women belonging to the same. This means that seats earmarked for

women belonging to the general category are not accounted for if one has to gauge whether the upper ceiling of 50% has been breached.” F) In Public Service Commission, Uttaranchal etc. vs. Mamta Bisht and others¹⁹, the view taken by the High Court that one Neetu Joshi, on her own merit, was entitled to be considered in General category and as such she could not be counted against seats reserved for “Uttaranchal Mahila” category; was under challenge. A bench of two Judges of this Court set aside the view taken by the High Court with following observations:-

“3. Out of 42 posts, 26 were filled up by general category and 16 by reserved category candidates. Some women candidates stood selected in the general category while others had been given the benefit of horizontal reservation being residents of Uttaranchal. Respondent 1, being aggrieved preferred Writ Petition No. 780 of 2003 (M/B) in the High Court of Uttaranchal seeking quashment of select list dated 31-7-2003 mainly on the ground that women candidates belonging to Uttaranchal had secured marks making them eligible to be selected in the general category and had it been done so, Respondent 1 could have been selected in the reserved category being a woman of Uttaranchal. It had also been pleaded in the petition that some of the women candidates who not only claimed the benefit of horizontal reservation but have been selected giving the said benefit, did not submit their respective certificate of domicile at the time of filling up the application forms but they produced the said certificate at a later stage and it was accepted.

19 (2010) 12 SCC 204

4. The High Court accepted the first submission of Respondent 1 after examining the record of selection and came to the conclusion that the last selected woman candidate who was given the benefit of horizontal reservation for Uttaranchal women had secured marks higher than the last selected candidate in the general category. Thus, the said candidate ought to have been appointed against the general category vacancy and Respondent 1 ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal women. Hence, these appeals.

... ..

13. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:

“In view of the above, Neetu Joshi (Sl. No. 9, Roll No. 12320) has wrongly been counted by Respondent 3/Commission against five seats reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as the fifth candidate the petitioner should have been counted for Uttaranchal Women General Category seats.” Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for

impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications stood rejected by this Court.

14. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in *Rajesh Kumar Daria v. Rajasthan Public Service Commission*¹⁴, wherein dealing with a similar issue this Court held as under: (SCC pp. 790-91, para 9) “9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SCs, STs and OBCs 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*¹¹, *R.K. Sabharwal v. State of Punjab*¹⁵, *Union of India v. Virpal Singh Chauhan*¹⁶ and *Ritesh R. Sah v. Dr. Y.L. Yamul*¹⁷.) 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 further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.” (emphasis added)

15. In view of the above, it is evident that the judgment and order of the High Court is not in consonance with the law laid down by this Court in *Rajesh Kumar Daria*¹⁴. The judgment and order impugned herein is liable to be set aside and all the consequential orders become unenforceable and inconsequential. Thus, the appeals succeed and are allowed. The judgment and order of the High Court dated 26-10-2005 passed in Writ Petition No. 780 of 2003 (M/B) is hereby set aside. No costs.”

19. Paragraph 9 of *Rajesh Kumar Daria etc. vs. Rajasthan Public Service Commission and others*¹⁴ referred to the well-established principle that a candidate belonging to any of the vertical reservation categories, on the basis of his own merit, is entitled to be selected in the Open or General

Category and in such eventuality his selection is not to be counted against the quota reserved for such vertical reservation category. We may for the sake of clarity reproduce the following extract from the decision in Ritesh R. Sah vs. Dr. Y.L. Yamul and Others¹⁷ which noted the larger Bench decisions in Indra Sawhney vs. Union of India¹¹ and R. K. Sabharwal vs. State of Punjab¹⁵ and stated:-

“13. There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the constitutional mandate enshrined in Article 16(4).

14. In a case Indra Sawhney v. Union of India¹¹ commonly known as Mandal case, this Court held thus: (SCC p. 735, para 811) “In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.”

15. In R.K. Sabharwal v. State of Punjab¹⁵ the Constitution Bench of this Court considered the question of appointment and promotion and roster points vis-à-vis reservation and held thus: (SCC p. 750, para 4) “When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts.

On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats.

As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition.”

16. In Union of India v. Virpal Singh Chauhan¹⁶ (SCC at p.

705) it has been held that while determining the number of posts reserved for Scheduled Castes and Scheduled Tribes, the candidates belonging to reserved category but selected/promoted on the rule of merit (and not by virtue of rule of reservation) shall not be counted as reserved category candidates.”

20. None of the decisions referred to hereinabove however had an occasion to consider whether the principle as stated in decisions referred to in the preceding paragraph also apply to cases of horizontal reservation.

We may, at this stage, consider some of the decisions by High Courts, which dealt with this question:-

A) In Megha Shetty vs. State of Rajasthan ²⁰, following observations were made by the High Court of Rajasthan:-

20 2013 (4) RLW 3227 (Raj.) “21. ...Once the horizontal reservation in favour of woman in general/open category is to be applied, the candidates belonging to all categories, including SC, ST and OBC, are also entitled to be considered against the said posts reserved for General Category (Woman).

23. In the present case, it is evident from a bare look at the part of Advertisement (Annexure-3) that 13 posts were reserved for OBC category. From the result-sheet (Annexure-4) it is seen that out of 42 unserved seats, 4 women candidates found place and, therefore, they were counted against the horizontal reservation provided for woman and thereafter, 9 more women candidates in order of their merit were selected which included candidates belonging to General as well as OBC Category. It is also noticed that in the main list, 3 women candidates belonging to OBC (Woman) found place on their own merits and after taking 9 candidates against General (Woman) Category which included OBC (Woman) also, further reservation has not been provided qua 2 posts despite the fact that 5 posts were reserved for OBC (Woman), which clearly shows that the horizontal reservation was correctly applied.

24. The plea sought to be raised by the appellant regarding impermissibility for migration from OBC (Woman) to General (Woman) in case of special reservation under Article 15(3) of the Constitution of India also apparently has no applicability in the present case, inasmuch as, once the candidate belonging to OBC (Woman) category has obtained more marks than a candidate belonging to the General (Woman) category and, therefore, finds place in the select list meant for General (Woman), the same cannot even be termed as migration and, therefore, the plea raised in this regard is without any substance ...” A-1) The aforesaid decision was followed in *Neelam Sharma vs. State of Rajasthan* and Ors.²¹ by the same High Court as under:-

“6. The Division Bench of this High Court at Jodhpur in *Smt. Megha Shetty vs. State of Rajasthan* 2014 Volume (1) WLC (Rajasthan) 761 has already dealt with exactly the same issue raised in the present bunch of appeals. The Division Bench relying upon the above-referred decisions of the Supreme Court has held that in the event of woman candidate belonging to OBC category on securing more

21 2015 SCC OnLine Raj 1391 marks than the woman candidate of general category finds a position in the select list of candidates of general category, the same cannot be treated as migration. And this decision of the Division Bench is binding on us with which we also fully agree. It is also to be noted that none of the writ petitioners/respondents herein who are women of general category has secured more marks than the women candidate of OBC category selected in open category. The select list of women candidates prepared by the Rajasthan Public Service Commission is strictly in accordance with the law explained by the Supreme Court....” Special Leave Petition No. 4312 of 2016 arising therefrom was dismissed by this Court on 13.05.2016 with following observations:-

“Application seeking exemption from filing official translation is allowed. We find no infirmity in the order impugned herein. The Special Leave Petition is dismissed.” B) In *Asha Ramnath Gholap vs. The President, District Selection Committee/Collector*²², the High Court of Bombay considered the issue as under:-

“30. We find the argument advanced as above to be fallacious. Once it is held that general category or open category takes in its sweep all candidates belonging to all categories irrespective of their caste, class or community or tribe, it is irrelevant whether the reservation provided is vertical or horizontal. There cannot be two interpretations of the words ‘open category’; one applicable for vertical reservation and other for horizontal reservation. Reservation prescribed may be ‘vertical’ or ‘horizontal’ if it relates to open category, the candidate belonging to backward class cannot be precluded from competing for the said posts on their own merit with rest of the candidates.

22 2016 SCC OnLine Bom 1623

... ..

32. ... It is thus evident that when three posts were notified to be filled in by the female candidates belonging to open category, it was open for the petitioner to compete for the said post irrespective of the fact that she belongs to the reserved category and when she had secured meritorious position amongst the female candidates and had secured 2nd highest marks, her selection could not have been denied by the respondents on the ground that she belongs to scheduled caste and does not fall in the open category.... ” B-1) In *Kanchan Vishwanath Jagtap vs. Maharashtra Administrative Tribunal, Nagpur and others*²³, the High Court held:-

“We are of the view that if the view of the learned Tribunal is accepted, then it would result in a situation to exist, which is not permissible in view of the law laid down by the Constitution Bench of the Apex Court in the case of *Indra Sawhney*¹¹. Merely because all the meritorious candidates in the women category belonged to the reserved categories like OBC, SC and ST, in our view cannot be a ground to deny them the benefit of their meritorious position. We find that if the view as accepted by the learned Tribunal is accepted, it will defeat constitutional mandate as explained in the judgment in the case of *Indra Sawhney*¹¹ by the Constitution Bench of the Apex Court. A situation would exist that a male candidate belonging to a reserved category would be entitled to be selected against an open category post if he is entitled on his own merit. However, a female candidate belonging to a reserved category, even though she is much more meritorious than a candidate belonging to open category women, would not be entitled to be selected against the said post. The said situation in effect would result in permitting a discriminatory treatment to the women reserved candidates as against the male reserved candidates. We find that such a situation is not permissible under the Constitutional scheme as interpreted by the Constitution Bench of the Apex Court in the case of *Indra Sawhney*¹¹.” ²³ (2016) 1 Mah. L.J. 934 B-2) In *Tejaswini Raghunath Galande vs. Chariman, Maharashtra Public Service Commission, Mumbai and others* ²⁴, the High Court set out the facts as under:-

“The learned Tribunal relying on the judgement of the Hon’ble Apex Court in case of *Rajesh Kumar Daria vs. Rajasthan Public Service Commission and ors.*¹⁴, held that the action of the respondent No.1-MPSC in respect of the applicant, who belong to N.T.(C.) category, in not permitting the applicant to apply from the quota against ‘Open Women Category’ could not be faulted with and as such the learned Tribunal had rejected the Original Application. Being aggrieved by the said order, the present petition is filed.” Following the view taken in *Asha Ramnath Gholap*²² and *Kanchan Vishwanath Jagtap*²³, the High Court allowed the petition and set aside the order of the Tribunal.

B-3) In *Charushila vs. State of Maharashtra*²⁵, the submissions of the Advocate General for the State were recorded as under :-

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

14. According to him, a reserved category candidate, irrespective of whether he/she claims such reservation, as 24 (2019) 4 Mah L.J. 527 25 2019 SCC OnLine Bom 1519 and by way of vertical or horizontal, is always entitled to claim seat from open category on the basis of his/her merit. This is particularly because, the open category or quota as such, is meant for being allotted only and only on merit and, therefore, in such an allotment, the caste, creed or sex or any other criteria, relating to any candidate, does not at all matter.

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

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

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

... ..

41. Even in case of compartmentalized horizontal reservations, the seats that are allotted to open category or quota, can be claimed by anybody and everybody, who is entitled to claim a seat or post on the basis of merit, which will include candidates even belonging to open category i.e. all candidates even belonging to any reserved

category whichever, horizontal or vertical. However, the only exception can be carved out, as has been stipulated in the judgment of the Hon'ble Supreme Court that if the applicable rule or the advertisement specifically provide to the contrary, such migration shall not be permitted from the reserved category to the open category for claiming compartmentalized reservation provided for open category. Those candidates belonging to reserved category, who have already enjoyed the benefits during the process of selection, such as concession in fees, relaxation of age, relaxation in the merit criteria, would not be eligible to claim benefits of migration from reserved category to open category for claiming a seat or post.” B-4) In *Shantabai Laxman Doiphode vs. State of Maharashtra*²⁶, the High Court held:-

“.....However, in view of the law laid down by the Apex Court in various judicial pronouncements and discussed in aforesaid cases, it is clear that 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 26 (2020) SCC OnLine Bom 1659 for open category while the petitioner had not. This ground is not tenable in law as we have seen from the judgments discussed earlier.” C) In *Uttarakhand Subordinate Service Selection Commission and Another vs. Ranjita Rana and Another* ²⁷, the High Court of Uttarakhand relied upon its earlier decision in *Sudhir Kumar vs. State of Uttarakhand and others*²⁸ and observed:-

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

12. The converse, however, is not true. All women, irrespective of whether they belong, or do not belong, to the reserved category are entitled to compete for posts earmarked in favour of women under the General Category. There is no reservation for posts in the General Category, and horizontal reservation in favour of women in

the General Category is available to be filled up from amongst all women irrespective of their caste status. Posts, reserved in favour of General Category (Women), are available for all women from the State of Uttarakhand, and that would include women belonging to the reserved categories such as OBCs, SCs and STs, and women who do not. Holding otherwise, would result in surreptitious introduction of reservation in favour of those who do not belong to the socially and educationally backward classes, and a disguised attempt at communal reservation frowned 27 2019 SCC OnLine Utt 481 28 Writ Petition (S/B) No.392 of 2017 dated 11.12.2018 upon by the Supreme Court in The State of Madras Vs. Sm. Champakam Dorairajan and another : AIR 1951 SC

226. This question is no longer res integra and has, in fact, been answered by a Division Bench of this Court in Sudhir Kumar Vs. State of Uttarakhand and others (order in Writ Petition (S/B) No. 392 of 2017 dated 11.12.2018), which order was affirmed by the Supreme Court in its order in Special Leave to Appeal (C) No. 7801 of 2019 dated 15.04.2019.” D) In Tamannaben Ashokbhai Desai vs. Shital Amrutlal Nishar²⁹, the High Court of Gujarat considered the decisions on the point including some of those rendered by the High Courts of Rajasthan, Bombay and Uttarakhand as stated above and observed as under:-

“45. The above referred case law can be better explained by way of the following illustration based on the factual position obtaining in the present case.

46. There are 115 posts of Police Inspector (unarmed), out of which 55 posts are reserved for the SC, ST and SEBC and remaining 60 posts for open/general category. Out of the said posts, 33% are reserved for women under each category, meaning thereby, out of 60 posts in the open category, 20 posts are reserved for women. Thus, the first step would be that of preparing the entire list on the basis of merit and out of the same, selecting first 60 candidates, irrespective of their caste and sex, in open category. The second step would be then of evaluating as to whether 20 women, irrespective of their caste, are there within those 60 candidates, so as to meet with the requirement of horizontal reservation. If 20 women are already there, then there is no need to select any more woman in that category, but if not, then in the third step, the remaining number of women have to be included on the basis of the merit from the aforesaid list, irrespective of their caste, 29 R/LPA No.1910 of 2019 in R/Special Civil Application No.18968 of 2018 etc. decided on 05.08.2020 while deleting the corresponding number of male candidates from the bottom of the list of first 60 candidates. Thereafter, identical exercise is required to be undertaken for implementing vertical reservation, followed by horizontal reservation, with respect to the posts belonging to the SEBC, SC and ST categories.

... ..

49. It is pertinent to note that Rule 2(d) seeks to carve out a fourth category of posts, not being posts reserved in favour of the Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes. In other words, this fourth category is nothing but an Open category of posts, excluding the posts reserved in favour of the above referred classes i.e. the posts reserved for women in open category would be over and above the posts reserved for women in SC, ST and SEBC quota, as referred to in Rule 2(a), 2(b) and 2(c) of the said Rules.

Thus, all the meritorious candidates, whether belonging to the reserved category or unreserved category, will be covered by the category, irrespective of their caste, community or tribe where merit alone will be taken into account, while implementing vertical reservation as well as horizontal reservation within the same. It may be noted that by virtue of the Gujarat Civil Services (Reservation of Posts for Women) (Amendment) Rules, 2014, the requirement of reservation in favour of women came to be enhanced from 30% to 33%.

50. In view of the aforesaid discussion, we have no hesitation in arriving to the conclusion that the Government Resolution dated 01.08.2018 of the GAD deserves to be quashed and set aside, and is hereby quashed and set aside.” 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
IMPLEMETING 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 SC
....04 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 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."

57. The State Government as well as the GPSC shall, for all times to come, bear in mind that the effect of horizontal reservation, being provided under each category, is that it is only women, who belong to the Other Backward Classes, who can compete for the posts reserved for Other Backward Classes (Women) and not women who belong to the Scheduled Castes, the Scheduled Tribes and the unreserved category. Likewise, it is only women belonging to the Scheduled Castes and the Scheduled Tribes who can compete for the posts horizontally reserved in favour of Scheduled Castes (Women) and Scheduled Tribes (Women). A woman, not belonging to the reserved category (OBC, SC and ST), is not entitled to compete for posts reserved in favour of Other Backward Classes

(Women), Scheduled Castes (Women) and Scheduled Tribes (Women).

58. The converse, however, is not true. All women, irrespective of whether they belong, or do not belong, to the reserved category are entitled to compete for posts earmarked in favour of women under the General Category. There is no reservation for posts in the General Category, and horizontal reservation in favour of women in the General Category is available to be filled up from amongst all women irrespective of their caste status. The posts, reserved in favour of General Category (Women), are available for all women from the State of Gujarat, and that would include women belonging to the reserved categories such as OBCs, SCs and STs, and women who do not. Holding otherwise, would result in surreptitious introduction of reservation in favour of those who do not belong to the socially and educationally backward classes, and a disguised attempt at communal reservation has been frowned upon by the Supreme Court in *The State of Madras Vs. Sm. Champakam Dorairajan* and another :

AIR 1951 SC 226.”

21. The view taken by the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is thus contrary to the one that weighed with the High Court of Allahabad. Apart from the Orders referred to in paragraphs 9 to 11 hereinabove, the Full Bench of the High Court of Allahabad in *Ajay Kumar vs. State of U.P. and others*³⁰ held:-

30 (2019) 5 ALJ 466 “For the aforesaid, to our mind, inter-se merit of women has no role to play in the implementation of horizontal reservation as the socially reserved candidate (SC, ST, & OBC) seeking benefit of reservation of special category (women) cannot claim adjustment in open category.” The High Court of Madhya Pradesh has also adopted a view similar to that taken by the High Court of Allahabad. In *State of Madhya Pradesh and another vs. Uday Sisode and others* ³¹, the High Court referred to the decision of this Court in *Public Service Commission, Uttaranchal vs. Mamta Bisht*¹⁹ and observed:-

“18. In the above judgment the High Court had held that since the last selected candidate receiving the benefit of horizontal reservation had secured more marks than the last selected general category candidate, therefore, she ought to have been appointed against the vacancy in general category. The Hon'ble Supreme Court has found this view of the High Court contrary to the law laid down in the case of *Rajesh Kumar Daria*.¹⁴ Same is the position in the present case wherein OBC police personnel receiving the benefit of horizontal compartmentalised reservation is claiming the appointment on the ground that he has secured more marks than the last selected general category candidate, but this can not be accepted in view of above judgment.

19. The issue relating to the appointment of physically handicapped persons [horizontal (social) reservation] against the seat of Open General Category on the basis of higher marks had earlier come up before the Division Bench of this Court at

Gwalior in WA No. 414/2017 and the Division Bench had held it to be impermissible by holding that the concept of migration from one category to another on the basis of merit may hold good in vertical reservation, but in horizontal reservation the same is not applicable. In this regard the Division Bench has held as under:— 31 (2019) SCC OnLine MP 5750 “9. The question is whether a candidate who opts to take up a competitive examination not as a General Category/Unreserved category but as a reserved category candidate belonging to SC/ST/OBC, as the case may be, thus competing amongst the candidates of his category, if obtains marks higher than obtained by the candidates of a General Category can be permitted to incur in the General Category.

In other words, whether a candidate having opted to participate in a competitive examination as a reserved category candidate can be permitted to migrate to General Category?

10. In *Indra Swahney v. Union of India*, 1992 Supp (3) SCC 217 (Paragraph 812), it has been observed — “812. xxxxxxxxxxxxxxxxxxxx

11. Thus, when a reservation is horizontal, then the candidate selected on the basis of reservation in any category has to be fixed in said category and cannot be allowed to migrate to other category. The concept of migrating from one category to another on the basis of merit may hold good in vertical reservation but in horizontal reservation the same is not applicable.

12. In *Rajesh Kumar Daria v. Rajasthan Public Service Commission*, (2007) 8 SCC 785 : AIR 2007 SC 3127, it has been held— “7-8. xxxxxxxxxxxxxxxxxxxxxxxxxxxx

13. The impugned judgment when tested on the anvil of the above analysis cannot be faulted with as would warrant any interference. However, we are of the considered opinion, in the given facts of the case that there being no malafides on the part of the Commission in causing migration, no case is made out by the petitioners (respondents no. 1, 2 and 3) for imposing cost of Rs. 25,000/- payable in favour of each of the petitioners therein. We therefore set aside the cost imposed.”

20. In the present case the aforesaid judgment of the Division Bench was not brought to the notice when Writ Appeal was decided by judgment under review, and a different view has been taken which renders the judgment under review per incurium.

21. In the present case learned Single Judge has placed reliance upon the judgment in the case of *Jitendra Kumar Singh v. State of U.P.*³² and in the matter of *Deepa E.V. v. Union of India*³³ but these judgments relate to migration of SC, ST, OBC candidates to open category in case of vertical reservation. These are not the cases where horizontal reservation candidate has been permitted to take appointment against open category seat on the basis of their marks.”

22. The principle that candidates belonging to any of the vertical reservation categories are entitled to be selected in “Open or General Category” is well settled. It is also well accepted that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own

merit, their selection cannot be counted against the quota reserved for the categories for vertical reservation that they belong.

Apart from the extracts from the decisions of this Court in *Indra Sawhney*¹¹ and *R. K. Sabharwal*¹⁵ the observations by the Constitution Bench of this Court in *Shri V.V. Giri vs. Dippala Suri Dora and Others*³⁴, though in the context of election law, are quite noteworthy.

“21. ... In our opinion, the true position is that a member of a Scheduled Caste or Tribe does not forego his right to 32 (2010) 3 SCC 119 33 (2017) 12 SCC 680 34 (1960) 1 SCR 426 seek election to the general seat merely because he avails himself of the additional concession of the reserved seat by making the prescribed declaration for that purpose. The claim of eligibility for the reserved seat does not exclude the claim for the general seat; it is an additional claim; and both the claims have to be decided on the basis that there is one election from the double-member constituency.

22. In this connection we may refer by way of analogy to the provisions made in some educational institutions and universities whereby in addition to the prizes and scholarships awarded on general competition amongst all the candidates, some prizes and scholarships are reserved for candidates belonging to backward communities. In such cases, though the backward candidates may try for the reserved prizes and scholarships, they are not precluded from claiming the general prizes and scholarships by competition with the rest of the candidates.”

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 Others*¹³ 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”.

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.

25. The second view may lead to a situation where, while making adjustment for horizontal reservation in Open or General Category seats, less meritorious candidates may be adjusted, as has happened in the present matter. Admittedly, the last selected candidates in Open General female category while making adjustment of horizontal reservation had secured lesser marks than the Applicants. The claim of the Applicants was disregarded on the ground that they could claim only and only if there was a vacancy or chance for them to be accommodated in their respective column of vertical reservation.

26. Both the views can be compared and the issues involved in this matter can be considered in the light of a hypothetical illustration with following assumptions: -

(i) The total seats available are 100; comprising of 50 seats for 'Open/General Category'. The reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes is at 20%, 10% and 20% respectively and all candidates from these reserved categories are otherwise eligible to be considered against Open General Category.

(ii) The percentage of seats available for 'Women' by way of compartmentalized horizontal reservation is 30%.

(iii) Out of all qualified candidates, when first 50 meritorious candidates are picked up to fill up the seats for 'Open/General Category':-

(a) There are only 11 women in first 50 candidates in 'Open/General Category'; and

(b) the last five persons in the 'Open/General Category' viz., the candidates at Serial Nos.46, 47, 48, 49 and 50 are- Sl. No. 46 - Open Category - Male Sl. No 47 - Open Category - Male Sl. No. 48 - Scheduled Caste - Male Sl. No. 49 - Scheduled Caste - Male Sl. No. 50 - Scheduled Caste - Female

(c) first four female candidates in the waiting list, who do not belong to any of the reserved categories, are having overall merit position at Serial Nos. 52, 64, 87 and 88.

(d) Going by the steps indicated in paragraph 18 of the decision in Anil Kumar Gupta and Others¹³, at the stage of filling up seats for Scheduled Castes Category, there are 7 females among 20 candidates with last 2 candidates being females whose overall ranking in the merit list is at Serial Nos. 80 and 86.

(e) Similarly, the seats for Scheduled Tribes and Other Backward Categories are filled up.

(f) Out of 20 candidates selected in Other Backward Category there are 09 females.

The basic features of this illustration can be put in the following tabular format.

CATEGORIES	TOTAL SEATS : 100			
	OPEN/ GENERAL	SCHEDULED CASTES	SCHEDULED TRIBES	OTHER BACKWARD CLASSES
AVAILABLE				
SEATS FOR WOMEN				
OCCUPIED BY WOMEN BEFORE APPLICATION OF HORIZONTAL RESERVATION				
SHORTFALL, IF ANY	4	NIL	NIL	NIL

27. Having allocated first 50 seats in Open General Category and filled up other vertical column of reservation, the next step is to effect horizontal reservation for women. If the reservation for women was to be “overall horizontal reservation”, there are 30 women (11+07+03+09) and nothing further is required to be done.

However, if the horizontal reservation for women is to be taken as “compartmentalized”, as we are concerned in the present matter and the instant illustration, the appropriate steps must comprise of following:-

(A) Since the shortfall for women is of four seats in Open / General Category, last four male candidates namely those at Serial Nos. 46, 47, 48 and 49 initially allocated to Open/General Category, will have to be displaced. The candidate at Serial No. 50, being a woman, cannot be displaced.

(B) The male candidates at Serial Nos.46 and 47 being from Open/General Category, after such displacement will be completely out of reckoning as they cannot go to any reserved category.

(C) The candidates at Serial Nos.48 and 49 being more meritorious than the candidates originally placed in the vertical column of reservation for Scheduled Castes, must go back to their own vertical column. This will cause resultant displacement of two candidates in that vertical column of reservation. The 20th candidate, whose overall merit position is at Serial No.86, though a female, but being in excess of quota for Scheduled Castes females and a male candidate immediately above the 19th candidate will thus get displaced.

27.1 If we go by the second view, the female candidates at Serial Nos.52, 64, 87 and 88 must be accommodated against Open General Category seats whereas the candidate at Serial No.86, though more meritorious than those at Serial Nos.87 and 88, must be left without any seat.

On the other hand, if we go by the first view, the claim of reserved category candidates if they are more meritorious, has to be considered, in which case the candidate at Serial No.86 will be required to be accommodated. Resultantly, the candidate at Serial No.88 must give way.

There can be various such permutations and combinations and in a given case, the concerned female candidates from reserved category in the Waiting List for their respective vertical columns of reservation, may be more meritorious than the female candidates in the Waiting List for Open / General Category seats. The instant illustration is given to highlight the situation that can possibly emerge if the second view is adopted.

28. The second view, based on adoption of a different principle at the stage of horizontal reservation as against one accepted to be a settled principle for vertical reservation, may thus lead to situations where a less meritorious candidate, not belonging to any of the reserved categories, may get selected in preference to a more meritorious candidate coming from a reserved category. This incongruity, according to the second view, must be accepted because of certain observations of this Court in Anil Kumar Gupta and Others¹³ and Rajesh Kumar Daria¹⁴. The following sentences from these two decisions are relied upon in support of the second view:-

“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.” [from paragraph 18 of Anil Kumar Gupta¹³] “But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special)

reservations.” [from paragraph 9 of Rajesh Kumar Daria¹⁴]

29. These sentences are taken to be a mandate that at the stage of horizontal reservation the candidates must be adjusted /accommodated against their respective categories by deleting corresponding number of candidates from such categories and that the principle applicable for vertical (social reservation) will not apply to horizontal (special reservation). In our view, these sentences cannot be taken as a declaration supporting the second view and are certainly being picked out of context.

The observations in paragraph 18 in Anil Kumar Gupta and Others¹³ contemplated a situation where if “special reservation candidates” entitled to horizontal reservation are to be adjusted in a vertical column meant for “social reservation”, the corresponding number of candidates from such “social reservation category” ought to be deleted.

It did not postulate that at the stage of making “special or horizontal reservation” a candidate belonging to any of the “social reservation categories” cannot be considered in Open/General Category. It is true that if the consideration for accommodation at horizontal reservation stage is only with regard to the concerned vertical reservation or social reservation category, the candidates belonging to that category alone must be considered. For example, if horizontal reservation is to be applied with regard to any of the categories of Scheduled Castes, Scheduled Tribes or Other Backward Classes, only those candidates answering that description alone can be considered at the stage of horizontal reservation. But it is completely different thing to say that if at the stage of horizontal reservation, accommodation is to be considered against Open/General seats, the candidates coming from any of the reserved categories who are more meritorious must be side-lined. That was never the intent of the observations sought to be relied upon in support of the second view.

Similarly, the observations in Rajesh Kumar Daria¹⁴ were in the context of emphasizing a distinguishing feature between vertical and horizontal reservations; in that:-

- (a) At the stage of vertical reservation, the reserved category candidates selected in Open/General category are not to be counted while filling up seats earmarked for the corresponding reserved categories.
- (b) But the same principle of not counting the concerned selected candidates is not to apply for horizontal reservation.

Adopting principle (a) at the stage of horizontal reservation, the respondents in Rajesh Kumar Daria¹⁴ had separately allocated 11 seats for women in General Category as part of special or horizontal reservation, though another set of 11 women candidates had got selected, according to their own merit, in General Category quota. The quota of 11 seats for women having been already satisfied, this Court negated the theory that their number be disregarded while making horizontal reservation for women. It was in that context that the distinction between vertical and horizontal reservations was highlighted by this Court in paragraph 9 of the decision. The subsequent sentence

“thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women” in the very same paragraph and the illustration given thereafter are absolutely clear on the point.

30. The decision of this Court in *Public Service Commission, Uttaranchal vs. Mamta Bisht*¹⁹ was also completely misunderstood. In that case one Neetu Joshi had secured a seat in General Category on her own merit and she also answered the category of horizontal reservation earmarked for “Uttaranchal Mahila”. The attempt on part of Mamta Bisht, the original writ petitioner, was to submit that said Neetu Joshi having been appointed on her own merit in General Category, the seat meant for “Uttaranchal Mahila” category had to be filled up by other candidates. In essence, what was projected was the same stand taken by the respondents in *Rajesh Kumar Daria*¹⁴, which was expressly rejected in that case. It is for this reason that para 15 of the decision in *Public Service Commission, Uttaranchal vs. Mamta Bisht* ¹⁹ expressly returned a finding that the judgment rendered by the High Court in accepting the claim of Mamta Bisht was not in consonance with law laid down in *Rajesh Kumar Daria*¹⁴ and the appeal was allowed. This decision is thus not of any help or assistance in support of the second view.

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.

34. It must be stated here that the submissions advanced by the Advocate General for Uttar Pradesh as recorded in the order dated 16.03.2016 before the Single Judge of the High Court (quoted in paragraph 9 hereinabove) were absolutely correct. The Single Judge and the Division Bench of the High Court completely erred in rejecting the stand taken on behalf of the State. It appears that after such rejection, the Procedure laid down for completing the recruitment exercise as referred to in the

order dated 22.02.2019 passed by the Division Bench of the High Court (quoted hereinabove in paragraph 11) had stated in step 4.1 that candidate not belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes category alone would be considered against general category. Said Procedure and especially step 4.1 was erroneous but was perhaps guided by the declaration issued by the High Court earlier. On the other hand, the stand taken by the Advocate General for Maharashtra as recorded by the High Court of Bombay in Charushila vs. State of Maharashtra²⁵ was correct.

35. We must also clarify at this stage that it is not disputed that the Applicant no.1 and other similarly situated candidates are otherwise entitled and eligible to be appointed in 'Open/General Category' and that they have not taken or availed of any special benefit which may disentitle them from being considered against 'Open/General Category' seat. The entire discussion and analysis in the present case is, therefore, from said perspective.

36. Finally, we must say that the steps indicated by the High Court of Gujarat in para 56 of its judgment in Tamannaben Ashokbhai Desai²⁹ 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.

37. Having come to the conclusion that the Appellant No.1 and similarly situated candidates had secured more marks than the last candidates selected in 'Open/General Category', the logical consequence must be to annul said selection and direct the authorities to do the exercise de novo in the light of conclusions arrived at by us. However, considering the facts that those selected candidates have actually undergone training and are presently in employment and that there are adequate number of vacancies available, we mould the relief and direct as under:-

- a) All candidates coming from 'OBC Female Category' who had secured more marks than 274.8928, i.e. the marks secured by the last candidate appointed in 'General Category–Female' must be offered employment as Constables in Uttar Pradesh Police.
- b) Appropriate letters in that behalf shall be sent to the concerned candidates within four weeks.

c) If the concerned candidates exercise their option and accept the offer of employment, communications in that behalf shall be sent by the concerned candidates within two weeks.

d) On receipt of such acceptance, the codal and other formalities shall be completed within three weeks.

e) Letters of appointment shall thereafter be issued within a week and the concerned candidates shall be given appropriate postings.

f) For all purposes, including seniority, pay fixation and other issues, the employment of such candidates shall be reckoned from the date the appointment orders are issued.

g) The employment of General Category Females with cut off at 274.8928 as indicated by the State Government in its affidavits referred to in paragraphs 5 and 8 hereinabove are not to be affected in any manner merely because of this judgment.

38. Since it has been accepted that none of the candidates coming from 'SC Female Category' had secured more marks than 274.8298, the claims of the Applicant no.2 and all similarly situated candidates are rejected.

39. Miscellaneous Application No. 2641 of 2019 and IA No.25611 of 2019 are allowed to the aforesaid extent.

Writ Petition (Civil)No. 237 of 2020

40. This Writ Petition under Article 32 has been filed by 14 female candidates pertaining to the same selection praying for following principal relief:-

“A. Issue an appropriate writ, order or direction in the nature of mandamus directing the Respondents to absorb/select the petitioners as against the 375 unfilled vacancies.”

41. None of these petitioners had secured marks more than 274.8298 and as such, their case cannot be considered at par with that of Applicant no.1 – Ms. Sonam Tomar and other similarly situated candidates as discussed hereinabove.

42. If there are unfilled vacancies, it is upto the authorities to act purely in terms of the concerned statutory provisions. Neither any case for issuance of mandamus, as prayed for, has been made out nor do we think it appropriate to pass any orders directing the concerned authorities to absorb the petitioners against unfilled vacancies.

43. This Writ Petition is, therefore, without any merit and is dismissed.

.....J. [Uday Umesh Lalit]J. [S. Ravindra Bhat]J.
[Hrishikesh Roy] New Delhi;

December 18, 2020.

REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION
MISCELLANEOUS APPLICATION NO. 2641 OF 2019 IN SPECIAL LEAVE PETITION (CIVIL) NO.
23223 OF 2018 SAURAV YADAV & ORS. ...PETITIONER (S) VERSUS STATE OF UTTAR
PRADESH & ORS. ...RESPONDENT(S) WITH W.P.(C) NO. 237 OF 2020 JUDGMENT S.
RAVINDRA BHAT, J.

1. I am in agreement with the judgment and conclusions of Justice Lalit, and endorse them fully. I am also of the opinion that the views expressed by the Rajasthan High Court (Megha Shetty v State of Rajasthan¹, Neelam Sharma v State of Rajasthan²); Gujarat High Court (in Tamannaben Ashokbhai Desai v Shital Amrutlal Nishar³), the Bombay High Court (in Asha Ramnath Gholap v The President, District Selection Commission/Collector, 4 Kanchan Vishwanath Jagtap & Anr v Maharashtra Administrative Tribunal & Ors,⁵ Tejaswini Raghunath Golande v Chairman, Maharashtra Public Services Commission 2013 (4) RLW 2015 SCC (Online) Raj 139 R/LPA NO. 1910 in R/Special Civil. App No. 18968/2018 decided on 5.8.2020 2016 SCC Online Bom 1623 2016 Mah. LJ 934 Mumbai & Ors⁶, Charushila v State of Maharashtra,⁷ Shantabai Laxman Doiphode v State of Maharashtra⁸) and Uttarakhand High Court (in Uttarakhand Subordinate Service Selection Commission v Ranjita Rana⁹) - termed as “the first view” in Lalit, J’s judgment, is the correct one, and should be endorsed, and that the view expressed by the Allahabad and Madhya Pradesh (in Ajay Kumar v. State of UP & Ors.¹⁰ and State of Madhya Pradesh & Anr. v. Uday Sisode & Ors.¹¹) – called by Justice Lalit as the “second view” about the nature of the horizontal reservation for women, and the mechanism spelt out (by those judgments) to fill them, are not in accord with the previous judgments of this Court. I propose to, however, add a few reasons of my own and are in no way opposed to the views expressed by Justice Lalit.

2. This judgment is the third in sequence, and deals with a recruitment, for the post of Constable (Civil) and Provincial Armed Constable (PAC). The first one was delivered on 19.01.2016.¹² It dealt with the results and exclusion of candidates who had used whiteners and blades, while attempting the selection test. This court had in that judgment, held that such applicants’ candidature could not have been rejected. The second judgment, dated 27.11.2018¹³ this court directed as follows:

“Therefore, total number of candidates who could be selected in the selection relatable to the year 2011 in any case ought not to be less than 4010+1022. Status and identity of the candidates who form the group of 1022 candidates is very clear. In this context it is to be noted that the vacancies notified are only approximate and there is nothing wrong if the number increases in the exigencies of service.

2019 Mah. LJ 527 2019 SCC Online Bom 1519 2020 SCC Online Bom 1639 2019 SCC Online Utt. 481 (2019) 5 ALJ 466.

(2019) SCC OnLine MP 5750 In Hanumant Dutt Shukla v State of UP 2018 (16) SCC 447 CA No.11370/2018 (Alok Kr. Singh & Others v. State of U.P. & Others)

29. We now come to the issue as to what should be the approach in respect of vacant posts on two counts. The tabular chart then states that 226 posts remained unfilled as a result of non-

availability of candidates in the category of dependents of freedom fighters etc. and 607 posts are lying vacant as a result of candidates who discontinued training or did not qualify in medical examination/character verification. Theoretically, 226 unfilled posts ought to be carried forward for further selection as those posts were earmarked for dependents of freedom fighters.”

3. The controversy that arises in the present round of litigation is the correct method of filling the quota reserved for women candidates (“horizontal quota”). It is the complaint of the applicants, who are largely women, belonging to the Other Backward Class categories, that the state has not correctly applied the rule of reservation, and denied such OBC women candidates the benefit of “migration”, i.e. adjustment in the general category vacancies.

4. The U.P. Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 (hereafter “the 1993 Act”) provided for reservations to persons with disability, ex-servicemen and dependents of freedom fighters. The U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 is the comprehensive law, enacted by the state of UP providing for reservation for social categories (SC/ST/OBCs). The provisions of the 1993 Act (for persons with disabilities, ex-servicemen and dependents of freedom fighters [“DFF” hereafter]) clearly stated by Section 3 (3) that “(3) The persons selected against the vacancies reserved under subsection (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments; if he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustments; if he belongs to Other Backward Class of Citizens, category, he will be placed in that quota by making necessary adjustments. Similarly, if he belongs to open competition category, he will be placed in that category by making necessary adjustments.” It is thus apparent that the reservations under the 1993 Act were “horizontal” in nature.

5. The quota provided for women, as well as dependents of freedom fighters (DFF) and ex-servicemen, in the present case are characterized as ‘horizontal’ whereas the quotas for social groups (SCs, STs, OBCs) are characterized as ‘vertical’. The coining of this differential terminology is underscored by the fact that the latter is sanctioned explicitly in Article 16(4), whereas the former is evolved through a process of permissible classification (Articles 14, 16(1)), although such horizontal reservations have been located additionally in Article 15(3)14.

6. In the State of UP, there is no law or rule (framed under proviso to Article 309 of the Constitution) that mandates reservation for women. However, a Government Order was issued, applicable to all posts, on 26.2.1999. The government order (GO) issued by the government of Uttar

Pradesh (UP) order providing for horizontal reservation for women, dated 26.02.1999, is extracted below.¹⁵ “No-14/1/9/Ka-2/4 Personnel Section-2 Lucknow, dated 26 February 1999 From, Shri. Sudhir Kumar, Secretary, Government of Uttar Pradesh.

To, 1 - All Principal Secretaries / Secretaries, Government of Uttar Pradesh. 2- All Head of the Department / Head of Office, Uttar Pradesh. 3- All Divisional / District Magistrate, Uttar Pradesh.

See Government of Andhra Pradesh v P.B. Vijay Kumar 1995 (4) SCC 520 (this court held that “Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15 (3). This power conferred under Article 15 (3), is not whittled down in any manner by Article 16.” Extracted from Sunaina Tripathi v. State of UP &Ors., (2012) 3 ADJ 463.

Subject: Reservation for women on the process of direct recruitment to public services and posts under the state.

Sir, I have been directed to inform that the Government has decided to provide 20 percent reservation for women on the process of direct recruitment to state public services and posts subject to the following conditions:

1. Reservation will be applicable to the process of direct recruitment to public services and posts under the state. There will be no promotion posts.
2. The reservation will be horizontal in nature i.e. to say that category for which a women has been selected under the aforesaid reservation policy for posts for women in Public Services and on the posts meant for direct recruitment under State Government, shall be adjusted in the same category only;
3. If a woman is selected on the basis of merit in any state public service and post, her selection will be against the vacancy reserved for women in that category.
4. If a suitable women candidate is not available for the post reserved for women in Public Services and on the posts meant for direct recruitment under State Government, then such a post shall be filled up from amongst a suitable male candidate and such a post shall not be carried forward for future;
5. The qualifications required for women for direct recruitment to the posts on the services under the state, will continue to be in accordance with the pre-existing requirements mentioned in the relevant recruitment rules and there will be no change in the position on account of this rule.
6. Public services and posts refer to public services and posts as defined in the Uttar Pradesh Public Service Reservation Act for Scheduled Castes, Scheduled Tribes and Other Backward Classes.

Please take steps to ensure compliance with the above orders of the Government. You are also requested to inform all the officers subordinate to the Government are made aware of this order.

Yours Sudhir Kumar Secretary”

7. As is apparent from a plain reading of the above government order, the only stipulation with respect to treatment of horizontal reservation for women, is that in case a woman candidate is selected, she would be adjusted against the appropriate social category she belongs to (SC/ST/OBC/OC). However, there is no rule, or direction which prohibits the adjustment of socially reserved categories of women in the general category or “open category”. The first indication of this is in *Indira Sawhney* 16 where B.P. Jeevan Reddy, J stated as follows:

“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 (1). 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 reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.”

8. This rule was affirmed and applied in *Anil Kumar Gupta v State of UP*¹⁷, *Swati Gupta v State of UP*¹⁸ and *Jitendra Kumar Singh v State of UP* ¹⁹ and *Rajesh Kumar Daria v Rajasthan Public Service Commission* ²⁰. The manner of filling the horizontal reservation category and the vertical, social categories, was explained in *Rajesh Kumar Daria* (supra) in the following terms:

“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) *Indira Sawhney v Union of India* 1992 Supp (3) SCC 766, @ para 812 (SCC Reports)] 1995 (5) SCC 173 1995 (2) SCC 560 2010 (3) SCC 119 2007 (8) SCC 785 are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16 (4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide *Indira Sawhney*, *R. K. Sabharwal vs. State of Punjab*, *Union of India v Virpal Singh Chauhan* and *Ritesh R. Shah 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 Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.”

9. The features of vertical reservations are:

- (i) They cannot be filled by the open category, or categories of candidates other than those specified and have to be filled by candidates of the concerned social category only (SC/ST/OBC);
- (ii) Mobility ('migration') from the reserved (specified category) to the unreserved (open category) slot is possible, based on meritorious performance;
- (iii) In case of migration from reserved to open category, the vacancy in the reserved category should be filled by another person from the same specified category, lower in rank,
- (iv) If the vacancies cannot be filled by the specified categories due to shortfall of candidates, the vacancies are to be 'carried forward' or dealt with appropriately by rules.

10. Horizontal reservations on the other hand, by their nature, are not inviolate pools or carved in stone. They are premised on their overlaps and are 'interlocking' reservations²¹. As a sequel, they are to be calculated concurrently and along with the inviolate 'vertical' (or "social") reservation quotas, by application of the various steps laid out with clarity in paragraph 11 of Justice Lalit's judgement. They cannot be carried forward. The first rule that applies to filling horizontal reservation quotas is one of adjustment, i.e. examining whether on merit any of the horizontal categories are adjusted in the merit list in the open category, and then, in the quota for such horizontal category within the particular specified/social reservation.

11. The open category is not a 'quota', but rather available to all women and men alike. Similarly, as held in *Rajesh Kumar Daria*²², there is no quota for men. If we are to accept the second view [as held by the Allahabad High Court in *Ajay Kumar v. State of UP*²³ and the Madhya Pradesh High Court in *State of Madhya Pradesh & Anr. v. Uday Sisode & Ors*²⁴, referred to in paragraph 20 of

Justice Lalit's judgement], the result would be confining the number of women candidates, irrespective of their performance, in their social reservation categories and therefore, destructive of logic and merit. The second view, therefore – perhaps unconsciously supports- but definitely results in confining the number of women in the select list to the overall numerical quota assured by the rule.

The expression used by B.P Jeevan Reddy, J, in Indira Sawhney (Supra) Supra n. 20 Supra n. 10 Supra n. 11

12. In my opinion, the second view collapse completely, when more than the stipulated percentage 20% (say, 40% or 50%) of women candidates figure in the most meritorious category. The said second view in Ajay Kumar 25 and Uday Sisode²⁶ thus penalizes merit. The principle of mobility or migration, upheld by this court in Union of India v. Ramesh Ram²⁷ and other cases, would then have discriminatory application, as it would apply for mobility of special category men, but would not apply to the case of women in such special categories (as glaringly evident from the facts of this case) to women who score equal to or more than their counterparts in the open/ general category.

13. The judgments in Anil Kumar Gupta v State of UP²⁸, Swati Gupta v State of UP²⁹, and Jitendra Kumar Singh v State of UP³⁰, were decisions which arose from recruitment cases concerning the state of UP. In fact in Jitendra Kumar Singh³¹, the court even considered the question of validity of the horizontal reservations in favour of women, as well as the Government Order of 26.2.1999. The latest in that series is a decision of this court in Anupal Singh v. State of U.P³² where the court had to consider, as one of the contentions raised, the question similar to the one which arises for consideration in this case, i.e. whether social category horizontal candidates can fill horizontal category vacancies. The court recorded the facts and noticed the contentions of the parties, in the following manner (para 62):

“62. The contention of the private respondents is that as per the statutory requirement, the horizontal reserved vacancies were Supra n. 10 Supra n. 11 (2009) 6 SCC 619, by a Constitution Bench of five judges, which took note of the judgment in Indira Sawhney, where it was held that “811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.” Supra n. 17 Supra n. 18 Supra n. 19 Supra n. 19 2020 (2) SCC 173 unfilled and those unfilled vacancies of horizontal category were filled by vertical reservation candidates/other category candidates, which is in violation of the statutory provisions vitiating the selection process. On behalf of the U.P. Public Service Commission, Mr Shrish Kumar Misra, learned counsel has furnished the details as to the number of vacancies reserved for horizontal category and the number of candidates found suitable and placed in the respective categories. The said details are as under:

Category	No. of vacancies	No. of selected
Indian Kanoon - http://indiankanoon.org/doc/27820739/		
43		

Ex-Servicemen

330

NIL

On behalf of the U.P. Public Service Commission, it was submitted that one of the policies of the State Government regarding horizontal reservation is that, if the suitable candidates for filling the vacancies reserved for such posts of horizontal reservation are not available and the same are not carried forward; they are filled up by other suitable candidates from amongst the candidates belonging to vertically reserved categories according to their merit. It was submitted that unfilled horizontal reservation vacancies were thus filled up by suitable candidates of respective vertical categories according to their merit which is as per the policy of the Government. The High Court was not right in finding fault with the filling up of vacancies reserved for horizontal reservation with other candidates of respective vertical reservation.” Thereafter the court recorded its conclusions, in the following terms:

“84.6. The filling up of the unfilled horizontal reservation by the candidates from the respective vertical reservation is in accordance with the policy of the Government and the same cannot be faulted with.”

14. In view of these clear decisions, it is too late in the day for the respondent state to contend that women candidates who are entitled to benefit of social category reservations, cannot fill open category vacancies. The said view is starkly exposed as misconceived, because it would result in such women candidates with less merit (in the open category) being selected, and those with more merit than such selected candidates, (in the social/vertical reservation category) being left out of selection.

15. I would conclude by saying that reservations, both vertical and horizontal, are method of ensuring representation in public services. These are not to be seen as rigid “slots”, where a candidate’s merit, which otherwise entitles her to be shown in the open general category, is foreclosed, as the consequence would be, if the state’s argument is accepted. Doing so, would result in a communal reservation, where each social category is confined within the extent of their reservation, thus negating merit. The open category is open to all, and the only condition for a candidate to be shown in it is merit, regardless of whether reservation benefit of either type is available to her or him.

16. I agree that all applications and WP 237/2020, pending before this court, are to be disposed of in terms of the operative directions in Lalit, J’s judgment.

.....J. [UDAY UMESH LALIT]J. [S. RAVINDRA
BHAT]J. [HRISHIKESH ROY] New Delhi, December 18, 2020.