

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 3rd OF SEPTEMBER, 2022

WRIT PETITION No.997 of 2017

Between:-

**MISS LOVELY NIRANJAN, D/O
SHRI SHYAM SUNDER NIRANJAN,
AGED 26 YEARS, OCCUPATION:
GUEST FACULTY IN ITI (WOMEN)
BIRLANAGAR, GWALIOR, R/O E-
1/16, HANUMAN NAGAR, GOLE KA
MANDIR, GWALIOR (MADHYA
PRADESH).**

.....PETITIONER

***(BY SHRI D.S. RAGHUVANSHI AND SHRI ISHAN PANDIT-
ADVOCATES)***

AND

**RAJMATA VIJAYARAJE SCINDIA
KRISHI VISHWAVIDHYALAYA,
RACE COURSE ROAD, GWALIOR
THROUGH ITS REGISTRAR.**

.....RESPONDENTS

(BY SHRI NAKUL KHEDKAR – ADVOCATE)

This petition coming on for hearing this day, the Court passed the

following:

ORDER

This writ petition under Article 226 of the Constitution of India has been filed seeking the following reliefs:-

- “(i) That, the present petition filed by the petitioner may kindly be allowed;
- (ii) That, the order dated 20.1.2017 Annexure P/1 passed by the respondent-Registrar may kindly be directed to be set aside.
- (iii) That, the respondent may kindly be directed to appoint the petitioner against the post of Sub Engineer (Civil) in Open Category on the basis of her merit and to grant her all consequential benefits from the date 9.8.2016 the other persons have been granted benefit.
- (iv) That, any other just, suitable and proper relief, which this Hon'ble Court deems fit, may also kindly be granted to the petitioner. Costs be also awarded in favour of the petitioner.”

2. It is the case of the petitioner that she is holding the degree of Bachelor of Engineering (Civil). The respondent University advertised certain posts of Sub Engineer (Civil) by issuing an advertisement on 11/1/2012. As per this advertisement, four posts of Sub Engineer (Civil) were kept in unreserved category, whereas two posts were reserved for ST category and one post was reserved for SC category and one post was reserved for OBC category. As per the advertisement, 30% reservation for women was prescribed. The petitioner also participated in the aforesaid advertisement against women unreserved category. The result was declared, according to which, Ku. Aarti Kaithwas was placed at serial No.1 in SC category, whereas the petitioner had obtained 49 marks and she was placed at serial no.1 in the women unreserved category.

However, thereafter the final select list was issued and out of 8 posts, only 7 posts were filled. Although the petitioner was at serial no.1 in the women unreserved category, but still she was not given the appointment.

3. The respondents filed their return and submitted that the reservation was horizontal in nature. It is well established principle of law that if a candidate belonging to reserved category succeeds in getting more marks than the cut off marks of general category, then he or she shall be treated as a general category candidate. Furthermore, the petitioner could not score minimum cut off marks fixed by the selection committee.

4. In reply, it is submitted by the counsel for the petitioner that in the case of horizontal reservation, migration of a candidate from one category to another category is not permissible. There was no provision for providing minimum cut off marks and the selection committee on its own cannot make such provision.

5. Heard learned counsel for the parties.

6. The question for consideration is that “in case of horizontal reservation whether the candidate belonging to a reserved category can be given appointment against unreserved quota on the ground that he or she is more meritorious or not?”

7. The counsel for the petitioner has relied upon the order dated 30/11/2017 passed by the Division Bench of this Court in the case of **Surendra Singh Yadav Vs. State of M.P. and others (Writ Appeal No.414/2017)** and the order dated 30/11/2017 passed in the case of **Madhya Pradesh Public Service Commission Vs. Dr. Nabhikishor Chaudari and others (Writ Appeal No.940/2017)** and submitted that in

case of horizontal reservation, migration from one category to another category is not permissible.

8. The first question for consideration is “as to whether in case of horizontal reservation, migration from one category to another category is permissible or not?”

9. Unreserved category is not a quota and cannot be treated as a separate independent category reserved for those candidates only who does not belong to other reserved category. Unreserved category is an open category available to all the candidates, even to those who are belonging to other reserved categories. Therefore, if a candidate belonging to a reserved class is given appointment against the unreserved quota for having secured more marks, then it would not amount to migration of a candidate from one category to another. Even otherwise, the question in hand has been decided by the Supreme Court in the case of **Sadhana Singh Dangi and others Vs. Pinki Asati and others by judgment dated 16/12/2021 passed in Civil Appeal No.7781/2021 (2021 SCC OnLine SC 1329)** and has held as under:-

11. It must be noted that the matters from the decision of the High Court of Judicature at Allahabad have since then been disposed of by this Court by its judgment and order dated 18.12.2020 in Saurav Yadav & Others v. State of Uttar Pradesh & Others, (2021) 4 SCC 542.

11.1 Some of the relevant paragraphs from the leading judgment in Saurav Yadav & Others (supra) are as under:

“26. 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*² and *R.K. Sabharwal*³ the observations by the Constitution Bench of this Court in *V.V. Giri v. D. Susi Dora*⁴, though in the context of election law, are quite noteworthy: (AIR pp. 1326-27, paras 21-22)

“21. ... In our opinion, the true position is that a member of a Scheduled Caste or Tribe does not forego his right to 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.”

27. 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 para 18 of the decision in Anil Kumar Gupta⁵ 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 vertical reservation concerned and not against the “Open or General Category”.

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

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

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

Such exercise would be premised on following postulates:

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

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

(C) In other words, at the stage of horizontal reservation, Open General Category is to be construed as category meant for candidates other than those coming from any of the categories for whom vertical reservation is provided.

29. 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.

34. The second view, based on adoption of a different principle at the stage of horizontal reservation as against the 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*⁵ and *Rajesh Kumar Daria*⁶. The following sentences from these two decisions are relied upon in support of the second view:

“18. ... 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 SCC p. 185, para 18 of *Anil Kumar Gupta*⁵] 9. ... But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations.” [from SCC p. 792, para 9 of *Rajesh Kumar Daria*⁶]

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.

35. The observations in para 18 in *Anil Kumar Gupta*¹⁷ 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 vertical reservation concerned 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 sidelined. That was never the intent of the observations sought to be relied upon in support of the second view.

36. Similarly, the observations in *Rajesh Kumar Daria*⁶ were in the context of emphasising 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 selected candidates concerned is not to apply for horizontal reservation.

Adopting principle (a) at the stage of horizontal reservation, the respondents in *Rajesh Kumar Daria*⁶ 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 para 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.

37. The decision of this Court in *Uttaranchal Public Service Commission v. Mamta Bisht*⁷ 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*⁶, which was expressly rejected in that case. It is for this reason that para 15 of the decision in *Uttaranchal Public Service Commission v. Mamta Bisht*⁷ 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*⁶ and the appeal was allowed. This decision is thus not of any help or assistance in support of the second view.

38. 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.

39. 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.

40. 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.

11.2 The concurring judgment authored by S. Ravindra Bhat, J. made following observations:-

“61. The open category is not a “quota”, but rather available to all women and men alike. Similarly, as held in *Rajesh Kumar Daria*⁶, 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 U.P.*⁸ and the Madhya Pradesh High Court in *State of M.P. v. Uday Sisode*⁹, referred to in paras 24 and 25 of *Lalit, J.’s* judgment], 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.

62. In my opinion, the second view collapses 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*⁸ and *Uday Sisode*⁹ thus penalises merit. The principle of mobility or migration, upheld by this Court in *Union of India v. Ramesh Ram*¹⁰ 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.”

12. This Court thus considered two views, one which was taken by the High Courts of Rajasthan, Bombay, Gujarat and Uttarakhand; and, the second, which had weighed with the High Courts of Allahabad and Madhya Pradesh. After considering the totality of the

circumstances as well as the rival submissions, the view taken by the High Courts of Rajasthan, Bombay, Gujarat and Uttarakhand was accepted to be the correct view and the one which was taken by the High Courts of Allahabad and Madhya Pradesh was not approved.

The decision of this Court in Sourav Yadav had considered all the cases on the point starting from Indra Sawhney (supra) up to Mamta Bisht (supra) as well as other decisions. It was finally concluded that the candidates belonging to the category of OBC (Female) or any other reserved category (Female) were entitled as a matter of right to have their candidature considered against the category meant for Unreserved Female Candidates if their merit position demanded so. It was further held that the category of Unreserved (Female) is not a specially allocated or reserved for those candidates who did not belong to any of the categories of SC, ST or OBCs and that by very nature “unreserved category” must mean and include every person who on the strength of merit could be entitled to be considered in that category.

18. We need not separately set-out the issues which arise for consideration in the instant matters and proceed to have a threadbare discussion as, in our view, the instant matters are 27 fully covered by the pronouncement of this Court in Saurav Yadav (supra).

It is true that the leading judgment in Saurav Yadav (supra) considered the matter from a general plane but the concurring judgment authored by S. Ravindra Bhat, J. did additionally consider the issue from the perspective of absence of any statutory Rules in the field. It is also true that in the instant case, there are Rules occupying the field and the case

would be a fortiori, but we need not enter into that arena as, in our view, the general propositions laid down in Saurav Yadav (supra) by themselves are sufficient to take care of the controversy which has arisen in the instant matters.

19. The law laid down in Saurav Yadav is very clear that even while applying horizontal reservation, the merit must be given precedence and that if the candidates who belong to SCs, STs and OBCs have secured higher marks or are more meritorious, they must be considered against the seats meant for unreserved candidates.

The observations made by the High Court in the instant case, in our view, do not lay down the correct law. The High Court failed to appreciate that conceptually there would be no distinction between vertical and horizontal reservations, when it comes to the basic idea that even the candidates belonging to reserved categories can as well stake a claim to seats in unreserved categories if their merit position entitles them to do so.

10. Thus, it is clear that while applying the horizontal reservation, merit is to be given preference. If a candidate belonging to Scheduled Caste, Scheduled Tribe or OBC has scored more marks, then he must be considered for the post meant for unreserved category.

11. If the facts of the present case are considered, then it is clear from the result filed by the respondent alongwith the return that, Ku. Aarti Kaithwas had secured 53 marks, i.e. more than the benchmark fixed by the selection committee, whereas the petitioner had secured 49 marks, i.e. less than the benchmark fixed by the selection committee. Even if the benchmark fixed by the selection committee is ignored, it is clear that Ku. Aarti Kaithwas has secured more marks and was more meritorious in

comparison to the petitioner. Therefore, she was rightly given appointment against the women unreserved category.

12. Since the seat reserved for Scheduled Caste candidates has remained unfilled and nobody has challenged the said aspect, therefore, it is not necessary to consider the aspect as to whether non-filling of post reserved for SC category was proper or not.

13. This Court is of the considered opinion that since Ku. Aarti Kaithwas, who was more meritorious and had secured more marks, was rightly given appointment in open unreserved women category and as no such post was left in the said category, accordingly, the respondents did not commit any mistake in not giving appointment to the petitioner. Since the petitioner was not eligible for her appointment, accordingly, whether the selection committee could have fixed the cut off marks or not is not being considered.

14. Accordingly, the petition fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

Arun*