

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	Case No.	Review Petition No.1572/2018
2	Parties Name	State of Madhya Pradesh & Anr. Vs. Uday Sisode and others
3	Date of Judgment	18/10/2019
4	Bench constituted of	Hon'ble Shri Justice Prakash Shrivastava & Hon'ble Shri Justice S.K. Awasthi
5	Judgment delivered by	Hon'ble Shri Justice Prakash Shrivastava
6	Whether approved for reporting	Yes
7	Name of counsels for parties.	Shri Amol Shrivastava, learned counsel for the petitioners. Shri L.C. Patne, learned counsel for respondents No.1 to 6. Shri Vikram Bhatnagar, learned counsel for respondent No.7.
8	Law laid down	(1) The reservation for police personnel in OBC category in this case is in the nature of horizontal compartmentalized reservation, hence the OBC police personnel cannot claim appointment against the general category post on the ground that he had obtained more marks. The migration of OBC police personnel to general category post is not permissible. (2) The proper procedure is to first fill up the quota for OBC in order of merit, then find out the number of candidates amongst them who belong to special reservation group of OBC police personnel. If the number of OBC police personnel in that list is equal to or more than the number of special reservation quota, then there is no need for further selection of OBC police personnel. (3) In case of vertical reservation, candidates belonging to SC/ST/OBC are allowed to compete and appointed against the non reserved post but that is not so in the case of horizontal reservation. (4) In the case of compartmentalized horizontal reservation process of verification and adjustment should be applied separately to each of the vertical reservation.
9	Significant paragraph numbers	9 to 22

(Prakash Shrivastava)
Judge

(S.K. Awasthi)
Judge

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(DIVISION BENCH: HON. MR. JUSTICE PRAKASH SHRIVASTAVA
& HON. MR. JUSTICE S.K. AWASTHI)

Review Petition No.1572/2018

State of M.P. & Another Petitioners

Versus

Uday Sisode and others Respondents

 Shri Amol Shrivastava, learned counsel for the petitioners.
 Shri L.C. Patne, learned counsel for respondents No.1 to 6.

Shri Vikram Bhatnagar, learned counsel for respondent No.7.

Whether approved for reporting :

ORDER

(Passed on 18/10/2019)

Per, Prakash Shrivastava, J :-

1/ By this petition the petitioner State Government is seeking review of the order dated 23.3.2018 passed in WA No.138/2018.

2/ Facts in nutshell are that the respondents No.1 to 6 (writ petitioners) are serving in the Police Department of the State as Assistant Sub Inspector, Constable etc. Advertisement was issued by the respondent No.7-M.P. Professional Examination Board for the post of Subedar, Sub Inspector, Platoon Commander etc. There was compartmentalised horizontal reservation of 15% of the posts for police personnel serving in the police department. These 15% posts were sprayed over in the unserved SC/ST & OBC category by way of

compartmentalised horizontal reservation. Respondents No.1 to 6 had applied under the OBC police personnel category and had accordingly participated in the selection process. They were not selected, hence they had filed the writ petition raising the grievance that they had secured more marks than the marks of the last candidate in the open general category, therefore, they were entitled to selection.

3/ Learned Single Judge by the order dated 24.10.2017 had noted that the respondents No.1 to 6 who fall under the OBC Police Personnel category, had obtained more marks than the cut off marks of general category candidate (Police Personnel), therefore, they were entitled to appointment. Hence while allowing the writ petition the Single Judge had directed the respondents to revise the result and to take all consequential steps keeping in view the marks obtained by petitioners and by ignoring the fact that they are members of OBC. The Division Bench by order dated 23.3.2018 had dismissed the Writ Appeal No.138/2018 and had affirmed the order of the learned Single Judge. Against the order of the Division Bench SLP (Civil) Diary No.26616/18 was preferred, which is dismissed as withdrawn by order dated 17.8.2018 passed by the Hon'ble Supreme Court with liberty to file the review petition by observing as under:-

“It was submitted by the learned counsel appearing on behalf of the State that relying upon the decision dated 3.6.2010 of this Court in C.A. No.5987/2007 titled as Public Service Commission Uttaranchal Vs. Mamta Bisht & others [2010(12) SCC 204] that for the category of police personnels, it was a horizontal reservation. High Court has failed to consider this vital aspect. Thus, the police personnel could not have claimed the post of general category, since it was horizontal reservation for them. This aspect has not been considered in the impugned order, as such, we

grant liberty to the petitioner to file review of the petition in accordance with law.

The Special Leave Petition is dismissed as withdrawn with the aforesaid liberty. Liberty is also granted to assail impugned order after decision of review petition in this Court in case necessity arises.”

4/ In view of the above order and liberty granted by the Hon'ble Court, the issue is required to be decided keeping in view the fact that reservation for police personnel was horizontal reservation.

5/ Learned counsel appearing for the petitioner submits that the reservation for OBC (Police Personnel) was horizontal compartmentalised reservation, therefore, the persons belonging to the said category are not entitled for consideration under the open general category. He further submits that this Court while deciding writ appeal has committed an error in treating it to be a case of vertical reservation, whereas it is a case of horizontal reservation and respondents No.1 to 6 are not entitled to migrate to the open general category.

6/ As against this, learned counsel for the respondents No.1 to 6 has submitted that it is not a case of horizontal reservation but it is a case of vertical reservation and therefore, the respondents are entitled to appointment against the general category posts on the basis of their merit. He has further submitted that respondents No.1 to 6 have not claimed the benefit of any age relaxation, marks relaxation etc., therefore, they have rightly been considered by this Court against the general category posts. He has also placed reliance upon Section 4(4) of the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994 in support of his submission

that the migration of the reserved category candidate on the basis of merit against the general category posts is permissible.

7/ Having heard the learned counsel for the parties and on perusal of the record, it is noticed that in the advertisement inviting applications (Annexure P/1 to the writ petition) itself the nature of reservation for OBC Police Personnel was disclosed. It was specifically mentioned that 15% posts would be reserved for police personnel and that the reservation for women police personnel, Ex Army Man would be in the nature of horizontal and compartment wise in terms of the judgment of the Supreme Court in the case of **Anil Kumar Gupta and others Vs. State of U.P. and others reported in (1995) 5 SCC 173**. The advertisement in clear terms provides the distribution of the seats and the nature of reservation as under:-

S. No.	Post	Unreserved				ST				SC				OBC				total				
		Total	Nil		ExS	Police	Total	Nil		ExS	Police	Total	Nil		ExS	Police	Total		Nil		ExS	Police
			Open	Women				Open	Open				Open	Women					Open	Open		
1	सुबेदार	31	13	10	03	05	13	06	04	01	02	10	04	03	01	02	09	04	03	01	01	63
2	उप.नि.(जि.बल)	335	140	111	34	50	134	57	44	13	20	107	45	35	11	16	94	40	31	09	14	670
3	उप.नि. (विशा)	25	07	05	01	02	03	02	01	00	00	04	02	01	00	01	00	00	00	00	00	22
4	उप.नि. (क्यू.डी.)	02	01	01	00	00	00	00	00	00	00	00	00	00	00	00	00	00	00	00	00	02
5	उप.नि. (रेडियो)	11	04	04	01	02	06	02	02	01	01	03	02	01	00	00	05	01	02	01	01	25
6	उप.नि. (अ.चि.)	03	02	01	00	00	01	01	00	00	00	01	01	00	00	00	00	00	00	00	00	05
7	प्लाटून कमान्डर	27	20	00	03	04	11	08	00	01	02	08	06	00	01	01	07	05	00	01	01	53
8	उप.नि. (आयुध)	11	04	04	01	02	05	01	02	01	01	04	02	01	00	01	03	02	01	00	00	23
	योग	435	191	136	43	65	173	77	53	17	26	137	62	41	13	21	118	52	37	12	17	863

नोट-(1) मध्यप्रदेश शासन सामान्य प्रशासन विभाग की अधिसूचना क्रमांक-सी-3-8-2015-एक-3 दिनांक 17 नवम्बर 2015 के द्वारा महिलाओं के लिए 33 प्रतिशत आरक्षण 'हारीजोन्टल एवं कम्पार्टमेन्ट वार्डज' निर्धारित किया गया है। 10 प्रतिशत पद भूतपूर्व सैनिकों के लिए आरक्षित है, तथा म.प्र. शासन गृह विभाग के राजपत्र क्रं एफ-2(अ) 96-2015-बी-4-दो दिनांक 05 मार्च 2016 द्वारा 15 प्रतिशत पद मध्यप्रदेश पुलिस कर्मियों के लिए आरक्षित है। ये तीनों ही हारीजोन्टल आरक्षण है। योग्य उम्मीदवार उपलब्ध न होने पर इनके लिये आरक्षित पद कैरीफारवर्ड नहीं होंगे। ऐसी स्थिति में यह पद उसी श्रेणी के अन्य उपलब्ध योग्य उम्मीदवारों से भरे जावेंगे। यदि चयन सूची में पहले से

ही 33 प्रतिशत महिलाये, 15 प्रतिशत पुलिस कर्मी या 10 प्रतिशत भूतपूर्व सैनिक मेरिट के आधार पर उपलब्ध होंगे तो पृथक से आरक्षण और नहीं दिया जायेगा।

यहां यह उल्लेखनीय है कि कुल पदों के 15 प्रतिशत पद पुलिस विभाग के उन कर्मचारियों के लिये आरक्षित रखे जाएंगे जिन्होंने कम से कम 6 वर्ष का सेवाकाल पूर्ण कर लिया हो तथा सम्पूर्ण सेवाकाल के दौरान उन्हें कोई भी बड़ी सजा नहीं मिली हो। इस हेतु आरक्षण के पात्र पुलिस कर्मियों को इकाई प्रमुख द्वारा जारी तदाशय का प्रमाण पत्र प्रस्तुत करना होगा।

भारत सरकार: कार्मिक एवं प्रशिक्षण मंत्रालय के परिपत्र No-36034/1/2014-Estt/Res दिनांक 14.08.14 में निहित प्रावधान अनुसार ऐसे भूतपूर्व सैनिक उम्मीदवार जो पूर्व में भूतपूर्व सैनिकों को प्रदाय आरक्षण का लाभ प्राप्त कर चुके हैं उन्हें पुनः भूतपूर्व सैनिक आरक्षण का लाभ नहीं दिया जायेगा।

यहां स्पष्ट करना आवश्यक है कि सामाजिक वर्ग पर आधारित आरक्षण अर्थात् अनुसूचित जाति, अनु. जनजाति एवं अन्य पिछड़ा वर्ग के लिए निर्धारित आरक्षण 'वर्टिकल' स्वरूप का है। जबकि महिलाओं, पुलिस कर्मियों तथा भूतपूर्व सैनिकों के लिए आरक्षण "हारीजोन्टल एवं कम्पाटमेंट वाईज" स्वरूप का है। इन दो आरक्षणों में अन्तर मान. उच्चतम न्यायालय द्वारा इन्द्रा साहनी विरुद्ध भारत संघ (1992 Supp (3) SCC-217) में स्पष्ट किया गया है। हारीजोन्टल एवं कम्पाटमेंट वाईज आरक्षण लागू करने की प्रक्रिया जो मान. उच्चतम न्यायालय द्वारा अनिल कुमार गुप्ता विरुद्ध उत्तर प्रदेश राज्य के प्रकरण में निर्धारित की गई है। (संदर्भ 1995(2) Supp, SCR-396 1995(5) SCC-173) का अनुसरण किया जाता है।"

8/ The above clauses in the advertisement leave no iota of doubt that the number of posts reserved for OBC Police Personnel for each category of post such as Subedar, Sub Inspector, Platoon Commander etc. were clearly specified and that the reservation for OBC Police Personnel was horizontal compartmentalised reservation.

9/ The sole issue involved in this case is if in the case of horizontal compartmentalised reservation the petitioners who have participated in selection process under OBC Police Personnel category are entitled to claim appointment on the basis of their marks against the posts for open general category.

10/ In the case of **Indra Sawhney and others Vs. Union of India and others reported in 1992 Supp(3) SCC 217** in Paragraph 812 the distinction between vertical and horizontal reservation has been drawn and horizontal reservation cutting across the vertical reservation is termed as “interlocking reservations”, by holding 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 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 that is called inter-locking 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 S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) 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.”

11/ In the matter of **Anil Kumar Gupta and others Vs. State of U.P. and others reported in (1995) 5 SCC 173** a distinction between horizontal and vertical reservation has been drawn and it has been clarified as to when the horizontal reservation is overall reservation or compartmentalised

reservation. Compartmentalised reservation is one where the seat reserved for horizontal reservations are proportionately divided among the vertical (social) reservations and are not inter-transferable. In compartmentalised reservation, social reservation is watertight compartment in each of the vertical reservation class (OC, OBC, SC and ST). In this regard in the case of **Anil Kumar (supra)** it has been held 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 inter-transferable, 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 percent) 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 O.B.Cs.; if the 112 special reservation seats are also divided proportionately as between O.C., O.B.C., S.C. and S.T., 30 seats would be allocated to the O.B.C. category; in other words, thirty special category students can be accommodated in the O.B.C. category; but say only ten special reservation candidates belonging to O.B.C. are available, then these ten candidates will, of course, be allocated among O.B.C. quota but the remaining twenty seats cannot be transferred to O.C. category (they will be available for O.B.C. candidates only) 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 O.C. category or not; the special reservation would be a water tight compartment in each of the vertical reservation classes (O.C., O.B.C., S.C. and S.T.). As against this, what happens in the over-all reservation is that while allocating the special reservation students to their respective social reservation category, the over-all

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 O.C. category which means that the number of special reservation candidates in O.C. category would be $56+20=76$. Further, if no special reservation candidate belonging to S.C. and S.T. is available then the proportionate number of seats meant for special reservation candidates in S.C. and S.T. also get transferred to O.C. category. The result would be that 102 special reservation candidates have to be accommodated in the O.C. 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 O.C., O.B.C., S.C. and S.T. will not be altered.”

12/ In the above case it has been clearly held that the Government should specifically provide if the horizontal reservation is overall horizontal reservation or compartmentalised reservation, by holding as under:-

“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", since it appears from the judgment in Swati Gupta that in the first notification issued by the Government of Uttar Pradesh on 17-5-1994, the thirty percent 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 percent but at the same time it was stated that thirty percent 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., S.T., S.C., O.B.C. and O.C. 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 O.C. category alone - and none from the O.B.C. or for that matter, from S.C. or S.T. It can well happen the other way also in a given year.”

13/ In the above judgment the procedure for filling up the open and reserved category seats has been provided as under:-

“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 percent special reservation seats to be filled up first and then take up the O.C. (merit) quota (followed by filling of O.B.C., S.C. and S.T. quotas). The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit: then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; 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 over-all 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 percent 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 O.C. quota.”

14/ In the above judgment it has been clarified that in case of compartmentalised horizontal reservation, process of verification and adjustment should be applied separately to each of the vertical reservation.

15/ In the case of **Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and others reported in (2007) 8 SCC 785** it has been made clear that in case of vertical reservations candidate of SC, ST, OBC are allowed to compete and appointed against the non reserved post, but that is not so in the case of horizontal reservation. Taking the example of women seats it has been held that proper procedure is to fill up the quota for SC in order of merit and then find out the number of candidate among them who belong to special reservation group of Scheduled Caste Woman and then meet the shortfall. In this regard it has been held 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 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 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* (1992 Supp(3) SCC 217, *R. K. Sabharwal vs. State of Punjab* (1995 (2) SCC 745), *Union of India vs. Virpal Singh Chauhan* (1995 (6) SCC 684 and *Ritesh R. Sah vs. Dr. Y. L. Yamul* (1996 (3) SCC 253)]. 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. 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 women candidates, then there is no need to disturb the list by including any further SC women 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 women SC candidates.

[But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate 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 women 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 women candidates selected on their own merit (candidates at Sl.Nos.2, 3, 4, 5, 9, 19, 21, 25, 31, 35 & 41 of the Selection List) and another eleven (candidates at Sl.Nos.54, 61, 62, 63, 66, 74, 75, 77, 78, 79 & 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.”

16/ Having examined the present case in the light of the aforesaid pronouncements, it is clear that there are 9 posts for Subedar OBC category, out of which one post is reserved for

police personnel. Similarly for Sub Inspector (District Force) out of 94 posts of OBC, 14 posts are for police personnel and so on. In terms of the aforesaid judgment the proper procedure is to first fill up the quota for the OBC in order of merit, then find out the number of candidates among them who belong to the Special Reservation Group of "OBC Police Personnel". If the number of OBC Police Personnel in that list is equal to or more than the number of Special Reservation Quota, then there is no need for further selection towards OBC Police Personnel. Hence, in terms of the said judgment no migration of OBC Police Personnel to general category post is permissible.

17/ In the case of **Public Service Commission, Uttaranchal Vs. Mamta Bisht and others reported in (2010) 12 SCC 204**, High Court had taken the same view as has been taken by this Court in the judgment under review but the Hon'ble Supreme Court has not approved this view and has set it aside by holding as under:-

"12. The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in general category in view of the judgment of this Court in Indra Sawhney Vs. Union of India, AIR 1993 SC 477, and the Division Bench judgment of High Court of Uttaranchal in Sikha Agarwal Vs. State of Uttaranchal, WP No.816 of 2002 (M/B), decided on 16.4.2003, and respondent no.1 ought to have appointed giving benefit of reservation thus, allowed the writ petition filed by respondent No.1.

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 above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats

reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as 5th 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 Vs. Rajasthan Public Service Commission & Ors.* AIR 2007 SC 3127, 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 SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney*, *R.K. Sabharwal v. State of Punjab*, *Union of India v. Virpal Singh Chauhan* and *Ritesh R. Sah v. Dr. Y.L. Yamul.*) But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among

them who belong to the special reservation group of "Scheduled Caste women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for 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)"

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 (supra)**. 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:-

“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 obtain 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 vs. 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* 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 and Another Vs. State of U.P. and others** reported in (2010) 3 SCC 119 and in the matter of **Deepa E.V.**

Vs. Union of India and others reported in 2017(12) SCC 680

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/ Learned counsel for respondents No.1 to 6 has also placed reliance upon sub-section (4) of Section 4 of the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994, which provides as under:-

“4. Fixation of percentage for reservation of posts and standard of evaluation.-

(4) If a person belonging to any of the categories mentioned in sub-section (2) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (2).”

Sub-section (2) of Section 4 relates to vertical reservation, therefore, the above provision has no relevance for present controversy.

23/ The above position of law has escaped the attention of this Court while passing the order dated 23.3.2018 and dismissing the Writ Appeal No.138/2018 and affirming the judgment of the learned Single Judge. The difference in the concept of migration on the basis of merit in the case of vertical reservation and horizontal compartmentalised reservation has escaped attention of this Court, hence there is an error apparent on the face of record requiring review of the order

dated 23.3.2018 passed in WA No.138/2018. Accordingly the said order is reviewed.

24/ Having regard to the fact that the respondents No.1 to 6 being the OBC Police Personnels falling under the horizontal compartmentalised reservation are not entitled to appointment against open general category post on the basis of their claim that they had received more marks than the last candidate of open general category, therefore, no merit is found in the writ petition. Hence the order of the learned Single Judge is set aside and writ petition is dismissed. Review petition is accordingly allowed.

(Prakash Shrivastava)
Judge

(S.K. Awasthi)
Judge