

**THE HIGH COURT OF MADHYA PRADESH**

**W.P. No.15147/2019**

Sachin Pathak

**Vs.**

State of Madhya Pradesh and others

**&**

**W.P. No.20289/2019**

Chhaya Dubey

**Vs.**

State of Madhya Pradesh and others

Date of Order	05.08.2021
Bench Constituted	Single Bench
Order delivered by	Hon'ble Shri Justice Sanjay Dwivedi, J.
Whether approved for reporting	<b>YES</b>
Name of counsels for the parties	For Petitioners : Smt. Janhvi Pandit, Advocate in W.P. No.15147/2019 & Shri Rohit Pegwar, Advocate in W.P. No.20289/2019.  For respondents/State : Smt Shraddha Tiwari, Panel Lawyer.
Law laid down	Granting reservation to a woman is a special provision of reservation and would be implemented in the manner in which a horizontal reservation is implemented. 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.
Significant Para Nos.	14, 15, 16 and 17

**Reserved on : 27.07.2021**

**Delivered on : 05.08.2021**

**( O R D E R )**

Pleading are complete. Learned counsel for the

parties are ready to argue the matter finally and it is accordingly finally heard.

Both the petitions are interconnected and decision in one petition would directly affect the decision of another petition, therefore, both the petitions are heard analogously. For the purpose of convenience, the facts of W.P. No.15147/2019 are being taken up.

**2.** This petition is filed under Article 226 and 227 of the Constitution of India asking following relief:-

- “(i) That the impugned order dated 19.07.2019 (Annexure P-6) passed by the Chief Executive Officer/Dean of Netaji Subhash Chandra Bose Medical College, Jabalpur be quashed.
- (ii) That the Respondent authority be directed to restore the final merit list issued on 02.07.2019.
- (iii) That the Respondent authority be directed to issue appointment order in favour of the petitioner for the post of Assistant Grade-3.
- (iv) Any other relief which the Hon’ble Court deems fit in the interest of justice may kindly be granted.”

**3.** The order dated 19.07.2019 (Annexure-P/6) is a final merit list cancelling earlier merit list dated 02.07.2019, therefore, same is being challenged asking its quashing.

**4.** The facts of the case in a nutshell are that the Medical Education Department and the Commissioner, Medical Education issued an advertisement inviting applications for filling up various sanctioned posts in the Super Specialty Hospital. The advertisement is Annexure-P/2 dated 15.11.2018 showing various posts for which selection was to be made and applications were invited. As per the said advertisement, there were 9 posts

of Assistant Grade-3, out of which, 5 posts (one female) for unreserved category and remaining 4 posts were for reserved category i.e. 1 for SC, 2 for ST and 1 for OBC. The petitioner applied for the post of Assistant Grade-3 having all requisite qualifications in his credit. After receiving applications of intending candidates, a provisional merit list was published inviting objections. The provisional merit list is Annexure-P/3. In the said merit list, the petitioner secured 5<sup>th</sup> rank. After considering the objections, final merit list was published. The position as secured by the candidates for the post of Assistant Grade-3 in the provisional list, remained same in final merit list. On the date of verification of the documents, the candidates secured 1<sup>st</sup> and 2<sup>nd</sup> position, namely, Raja Babju Snehi and Rupal Verma remained absent and, therefore, the petitioner should have been appointed as he secured 3<sup>rd</sup> position. But, the respondents issued an amended merit list, in which, the petitioner was placed at serial No.6 adding two new candidates, namely, Madhur Jain and Dharmendra Shukla. According to the petitioner, the names of two candidates were included in the final merit list and, therefore, Annexure-P/6 amended merit list, said to be illegal and representation in this regard Annexure-P/7 has been filed by the petitioner.

**5.** The respondents have filed reply stating therein that after considering the objections and also at the time of verification of documents, it is noticed that some of the candidates were eligible to get some additional marks, but the same were not granted to them and accordingly the Committee considering the said fact, awarded additional marks and prepared the amended final merit

list i.e. Annexure-R/6, in which, the name of petitioner, namely, Sachin Pathak is shown at serial No.6. Madhur Jain securing maximum marks placed at serial No.1, Rupal Verma at serial No.2, Poonam Sahu at serial No.3, Dharmendra Shukla at serial No.4, Deepak Thakur at serial No.5 and Sachin Pathak (present petitioner) at serial No.6.

**6.** The counsel for the petitioner filed rejoinder and also an application for taking documents on record mentioning therein that out of those 6 candidates shown in the final merit list, Rupal Verma, Dharmendra Shukla and Deepak Thakur have joined elsewhere and not interested to get appointment on the post of Assistant Grade-3 in pursuance to the advertisement Annexure-P/1, therefore, the petitioner is claiming that in the existing circumstance, he should have been given appointment.

**7.** However, in the additional return submitted by the respondents, they have clarified that the posts shown in the advertisement have been reduced by the State Government vide order dated 24.04.2019 (Annexure-AR-2) wherein it is clarified that the post of Assistant Grade-3 has been reduced from 9 to 6 and only 3 posts were for unreserved category out of which one is for women and remaining 3 posts were for reserved category. Accepting that position, the petitioner confined his argument to the extent that out of final merit list since 3 candidates have joined elsewhere, therefore, he should be given appointment.

**8.** Considering the aforesaid factual position, it is clear that at serial No.1 Madhur Jain and at serial No.2

Poonam Sahu were given appointment as per their own merits and the third one was Sachin Pathak (present petitioner), who is claiming appointment. Simultaneously, the petitioner of W.P. No.20289/2019, namely, Chhaya Dubey who was at serial No.9 in the final merit list is also claiming her appointment out of three posts of General Category, in which, one seat was reserved for woman candidate. She is also claiming that since Poonam Sahu secured her appointment on the basis of her own merit competing in open category, therefore, next woman candidate i.e. Chhaya Dubey securing 86.54 marks has to be given appointment against the reserved candidate of women in general category. However, by way of interim measure, one post was kept vacant and according to the parties said post still exists, therefore, out of these two petitioners one has to be given appointment on the post of Assistant Grade-3.

**9.** The counsel of W.P. No.15147/2019 has placed reliance upon a decision of the Supreme Court reported in **(2007) 8 SCC 785** parties being **Rejesh Kumar Daria Vs. Rajasthan Public Service Commission and others** and contended that since a woman candidate secured her position against three posts of unreserved category, in which, one post was kept reserved for women candidate, therefore, no other woman candidate was required to be included in the said list and as such, the petitioner, namely, Sachin Pathak since secured his position at serial No.3 according to his own merit, therefore, he is entitled to be appointed.

**10.** Smt. Janhvi Pandit, learned counsel appearing

for the petitioner submits that the Supreme Court in case of **Rajesh Kumar Daria** (supra) has observed and prescribed the manner as to how reservation to women candidates will be given.

**11.** Considering the existing facts of the instant petition, initially 9 posts were advertised for Assistant Grade-3, but later on the State Government has reduced it to 6 posts, out of which, 3 posts were for unreserved category, in which, one post was kept for women candidates. As per the merit list prepared, one woman candidate, namely, Poonam Sahu has already secured her position and, therefore, the petitioner has claimed that since he secured 3<sup>rd</sup> position in the merit list as other persons securing their positions placed above to the petitioner had decided not to join the services, the appointment should be made in favour of the petitioner.

**12.** In the connected petition, the petitioner, namely, Chhaya Dubey has also claimed that since one seat out of three posts of unreserved category was kept reserved for women candidates, but Poonam Sahu secured her position on the basis of her own merit, therefore, her appointment cannot be considered against the reserved post of women in open category and, therefore, Chhaya Dubey, the next meritorious candidate in women category shall be given appointment against one reserved post of women in open category (unreserved category).

**13.** Considering the law laid down by the Supreme Court in case of **Rajesh Kumar Daria** (supra) and also the decision of the Division Bench of this Court reported

in [2020(1) M.P.L.J. 359] parties being **State of M.P. and another vs. Uday Sisode and others** wherein the Division Bench relying upon various judgments of the Supreme Court including the judgment of **Rajesh Kumar Daria** (supra) has followed the same procedure as was followed in case of **Rajesh Kumar Daria** (supra), it is clear that the reservation granting to a woman is a special reservation as per the provisions of Article 15(4) of the Constitution and said reservation is implemented as horizontal reservation, but it cannot be implemented in a manner in which vertical reservation is implemented which has been provided under Article 16(4) of the Constitution. The vertical reservation is a social reservation in favour of ST, ST and OBC categories and if a candidate comes under social reservation clause secured his/her position in the merit list as per his/her own merit competing with open category candidates, then he/she is placed under the general category candidates and is not included in a respective category under which he/she falls.

**14.** But here in this case, giving reservation to a woman is a horizontal reservation and if any woman candidate secures her position on the basis of her merit and fulfills the quota of reservation, then next woman candidate cannot be given place in the said list ignoring the merit of other candidates merely because reservation to women has been provided. In this case, undisputedly three posts are to be filled up from the candidates of unreserved category, out of which, one is kept reserved for women and in the merit list, second position has been secured by Poonam Sahu and after her, Sachin Pathak,

the petitioner in W.P. No.15147/2019, has been placed and in the merit list the next woman, namely, Chhaya Dubey, the petitioner in W.P. No.20289/2019 has secured her position. In unreserved category one seat is given to a woman as special reservation and the same is to be implemented in the manner, in which, horizontal reservation is implemented. Therefore, the claim of Chhaya Dubey against said reserved post is not tenable because Poonam Sahu has already secured her position on the basis of her own merit. The next woman cannot be given weightage ignoring the merit of the petitioner of W.P. No.15147/2019, namely, Sachin Pathak. Had it been a case in which, Chhaya Dubey the petitioner of W.P. No.20289/2019, would have secured the next position than Poonam Sahu, she could have been given appointment as 3<sup>rd</sup> candidate of open category, but she come up at serial No.6 in the merit list below to Sachin Pathak, therefore, the appointment on the third post has to be given to Sachin Pathak. Therefore, the petitioner, namely, Sachin Pathak has right to be appointed on the post of Assistant Grade-3, who was placed in the 6<sup>th</sup> position in the final merit list out of which three have declined to join and two candidates, namely, Madhur Jain and Poonam Sahu have been already given appointment. This is the manner in which horizontal reservation is implemented. The Supreme Court has laid down a manner in case of **Rajesh Kumar Daria** (supra) which is as follows:-

“7. A provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4). The method of implementing



special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by this Court in *Anil Kumar Gupta v. State of U.P. (1995) 5 SCC 173* thus: (SCC p.185, para 18)

“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 OBC; 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.) (emphasis supplied)”

8. x x x

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 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 v. 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 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 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 contain 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.”

**15.** The Division Bench of this Court in case of **Uday Sisode** (supra) has also in paragraphs- 18 and 19 observed as under:-

“**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 the above judgment.

**19.** The issue relating 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 vs. Rajasthan Public Service Commission, AIR 207 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 mala fides 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 ₹25,000/- payable in favour of each of the petitioners therein. We therefore set aside the cost imposed.

**16.** Thus, it is clear that the claim of the petitioner, namely, Sachin Pathak survives as reservation to a woman is a horizontal reservation and after securing position by Poonam Sahu, out of three posts of unreserved category, the petitioner, namely, Chhaya Dubey in W.P. No.20289/2019 cannot be given weightage

considering her position against the reserved post of woman because Poonam Sahu has already included as a candidate of women reserved category, even though, she secured her position on the basis of her own merit competing with candidates of open category.

**17.** Once again it is made clear that manner applicable to vertical (social) reservation will not apply to horizontal (special) reservation. Where a special reservation for women is provided within the social reservation for Scheduled Castes, Scheduled Tribes and Other Backward Class category, the proper procedure is first to fill up the quota for respective category of reserved class in order of merit and then find out the number of candidates among them who belong to the special reservation group of women of respective category. 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 women of that category shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to the said reserved category. 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. 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.

Thus, when a reservation is horizontal, then the

candidate selected on the basis of reservation in any category has to fixed in the said category and cannot be allowed to migrate to other category.

**18.** *Ex consequentia*, the petition filed by Sachin Pathak, i.e. W.P. No.15147/2019 is therefore, **allowed**. Respondents are directed to make appointment of Sachin Pathak against the post of Assistant Grade-3.

**19.** The W.P. No.20289/2019 filed by Chhaya Dubey, is dismissed.

**(Sanjay Dwivedi)  
Judge**

ac/-