

Before Jaswant Singh & Meenakshi I. Mehta, JJ.

BALWAN SINGH AND ANOTHER—Petitioners

versus

STATE OF HARYANA AND OTHERS—Respondents

CWP No.9508 of 2021

May 06, 2021

Constitution of India, 1950—Art. 226—Reservation for ex-servicemen in Group A & B posts in State of Haryana converted from vertical to horizontal by sub-divisions—Held, horizontal reservation may be overall reservation or compartmentalized reservation and nothing arbitrary in impugned instructions providing for sub-division of 5% reservation for Ex-Servicemen in Group A & B posts between reserved categories—Reservation is mechanism provided under Constitution to ensure equality and not to claim some privileges or benefits over and above or at par with other oppressed classes—Therefore, horizontal reservation to Ex-servicemen held to be in consonance with provisions of Articles 14 and 16 of Constitution.

Held that, the horizontal reservation may be overall reservation or compartmentalized reservation and there is nothing arbitrary in the impugned Instructions providing for sub-division of 5% reservation for Ex- Servicemen in Group A & B posts between the reserved categories. Infact, in view of the observations made by the Supreme Court in *Anil Kumar's case*, the challenge made to compartmentalized reservation by the Petitioners who belong to General category, is not only counter-productive but is prejudicial to their own cause.

(Para 17.3)

Further held that, the Constitution empowers the State to identify the backward classes of citizens or other disadvantaged or weaker sections of society which require preferential treatment for their socioeconomic advancement through its affirmative action in the form of reservation, concessions, weightage or relaxations. The extent of this affirmative action for various downtrodden sections of society is based on a number of determinants such as historical oppression or discrimination, social, economic or educational backwardness. Reservation is a mechanism provided under the Constitution to ensure equality and not to claim some privileges or benefits over and above or at par with the other oppressed classes.

(Para 19)

Vivek Khatri, Advocate
for the petitioners.

Shruti Jain Goyal, Deputy Advocate General, Haryana.

JASWANT SINGH, J.

(1) The instant Writ Petition filed by two petitioners is directed against the Instructions dated 23.01.2018 (P-12) as well as 30.04.2018 (P13) issued by the Chief Secretary, Haryana. The sole ground of challenge is that vide the impugned Instructions, the reservation for Ex-servicemen in Group A & B posts in State of Haryana has been converted from vertical to horizontal one by sub-division of that specific category without appreciating the fact that a person belonging to a specific category has been granted the benefit of reservation within reservation which is violative of Art 14 & 16 of the Constitution. A Writ of mandamus has also been sought for directing the Respondent No. 2, Haryana Public Service Commission to re-advertise the posts qua Ex-Servicemen category by applying 5% prescribed quota reserved for Ex-Servicemen as vertical reservation in direct recruitment to Class-I & II posts.

(2) The petitioners herein are the Ex-Servicemen belonging to General Category. They are the applicants for the post of Civil Judge (Junior Division) in Haryana Civil Services (Judicial Branch) advertised by Respondent No. 2 Haryana Public Service Commission vide advertisement No. 01/2021 dated 13.01.2021 (P-14). Their grouse in the present petition is that by converting the reservation for Ex-Servicemen from vertical to horizontal and by further sub-dividing the same amongst various categories i.e. unreserved, Scheduled Castes and Backward Class (A&B), the State Government has granted benefit of reservation within reservation i.e. the double reservation to Ex-Servicemen candidates belonging to reserved category falling under vertical reservation whereas, on the contrary, the benefit earlier available to Ex-Servicemen candidates belonging to unreserved category candidates like the petitioners has been considerably curtailed.

(3) Mr. Vivek Khatri, learned Counsel for the petitioners has argued that in the State of Haryana, initially, the reservation for Ex-Servicemen was a vertical reservation for all Classes of posts. In view of the Judgment of the Supreme Court in *Indra Sawhney* versus *Union Of India*¹, the State Government reviewed its existing policy of

¹ 1993(1) SCT 448: 1993 AIR SC 477

reservation of Class-III & IV posts for Scheduled Castes, Backward Classes, Ex-Servicemen and the Physically Handicapped in the Government jobs and issued revised Instructions dated 20.07.1995 (P-7). Vide the said Instructions, the reservation for Ex-Servicemen and Physically disabled in Government jobs in Class III & IV was made horizontal reservation and the same was further sub-divided into Unreserved category and Block 'A' and 'B' of Backward Classes. However, no such conversion or change was carried out in reservation for Ex-Servicemen in Class I & II posts and the same continued to be vertical reservation till the issuance of the impugned Instructions.

(4) Ms. Shruti Jain Goyal, Ld. Deputy Advocate General, Haryana has appeared for the respondents on having received an advance copy of the petition. She has relied upon the judgments of the Supreme Court in *Anil Kumar Gupta* versus *State of Haryana*²; *Rajesh Kumar Daria* versus *Rajasthan Public Service Commission*³; *Saurav Yadav and Ors.* versus *State of Uttar Pradesh & Ors.*, MA No. 2641 of 2019 in SLP (Civil) No. 23223 of 2018 dated 18.12.2020 and of this Court in *Ajit Singh* versus *State of Haryana*⁴ and *Ashwani Kumar Kaushik & Anr.* versus *Haryana Public Service Commission*⁵, to assert that the under the Constitutional scheme of reservation, the reservation for Ex-Servicemen is a special reservation provided under Article 16(1) which is horizontal in nature. She further submitted that it is a well recognized principle that a horizontal reservation can be overall reservation i.e. without any sub-division between reserved categories under open competition category and vertical reservation; or compartmentalized reservation which is prescribing of specific percentage between open and other reserved categories. She further contended that infact, by converting the reservation for Ex-Servicemen in Group I & II posts from vertical to horizontal and by sub-dividing it between reserved categories, the State Government has cured the defect in the previous Instructions and has brought the reservation for Ex-Servicemen in Haryana in line with the law settled by the Supreme Court and this Court in the judgments mentioned above and therefore, the impugned Instructions cannot be said to be arbitrary or violative of Article 14 & 16 of the Constitution.

² 1995(4) SCT 403: 1995(5) SCC 173

³ (2007)8 SCC 785

⁴ 2011(20) SCT 243

⁵ 2011(1) SCT 803

(5) First of all, we must express our anguish at the quality of pleadings in Constitutional matters such as reservation. The writ petitions challenging the Rules, Instructions or circulars issued by the State Government providing reservation are being challenged on the ground of violation of Constitutional provisions in a very casual manner. The present writ petition too is completely bereft of any pleading with regard to the nature of reservation for Ex-Servicemen, its source in the Constitution and the implementation thereof, so as to lay a valid challenge to the impugned Instructions dated 23.01.2018 (P-12) as well as 30.04.2018 (P-13), whereby horizontal reservation for Ex-Servicemen and its further sub-division between open and reserve category has been provided in Group A & B services in direct recruitment, apart from already available horizontal reservation for Ex-Servicemen and its further sub-division in Group C & D services. Be it noted that there is no reservation for Ex-Servicemen in appointments by way of promotion in any category of services in State of Haryana.

(6) We, therefore at first, deem it necessary to briefly discuss the scheme of reservation as envisaged in the Constitution and the relevant case law. Article 14 of the Constitution of India prohibits the State to deny equality before the law or the equal protection of the laws. Article 15 ensures that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 of the Constitution provides for equality of opportunities in matters of public employment. Article 14 admits reasonable classification for the purpose of implementing the right to equality guaranteed by it, Subclause (3) of Article 15 permits the State to make any special provision for Women and children, whereas sub-clause (4) of Article 15 to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 16(4) enables the State to make provisions for the reservation in 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. Under Article 16(1) reservation can be provided for the classes not covered under Article 16(4) as preferential treatment for disadvantaged groups.

(7) The State in terms of Article 16 of the Constitution provides two types of reservation; vertical or social reservation as provided for in Article 16 (4) and horizontal or special reservation relatable to Article 16 (1).Whereas the reservation for Scheduled Castes, Scheduled

Tribes and other Backward Classes is provided under Article 16(4), the special reservation for physically handicapped, Ex-servicemen, Outstanding or Eligible Sportspersons is provided by the State under Article 16(1). Another instance of horizontal reservation is reservation for women under Article 15(3) of the Constitution.

(8) The concept of Vertical and horizontal reservation has been explained by the nine judges Constitution Bench in *Indra Sawhney* versus *Union of India*, 1993(1) SCT 448; 1993 AIR SC 477 in the following words:

“832. 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 --- what is called inter-lock 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. (Emphasis supplied)

(9) The State of Uttar Pradesh vide letter dated 17th May 1994, provided 15% vertical reservation to dependents of freedom fighters, deceased or disabled soldiers, physically handicapped candidates and the candidates belonging to hilly areas and Uttranchal areas. The

reservation given by Lucknow University for admission in medical colleges on the basis of said letter was challenged before the Court in *Swati Gupta* versus *State of Uttar Pradesh*⁶, on the ground that reservation of 65% general seats in the medical colleges was violative of the constitutional guarantee under Articles 16, 14, 19 and 21 of the Constitution and the ratio laid down by the Court in *Indira Sawhney*'s case. During the pendency of the case, the State of Uttar Pradesh issued another office order making the 15% reservation to be horizontal. The Court held thus:

“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 caste, 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 C.P.M.T. into two categories one, general and other reserved. Both have been allocated 50%. Paragraph 2 of the circular explains that candidates who are selected on merit and happen to be of the category mentioned in Paragraph 1 would be liable to be adjusted in general or re- served category depending on to which category they belong, such reservation is not contrary to what was said by this Court in *Indira Sawhney* (supra)....”

(Emphasis Supplied)

(10) In *Anil Kumar Gupta*'s case (supra), the Court considered the issue with regard to reservation of seats for candidates belonging to hill areas and Uttranchal areas for admission in medical courses in State of Uttar Pradesh. Relying upon the judgment in *State of Uttar Pradesh* versus *Pradeep Tandon*⁷, it was held that the reservation of seats in favour of candidates belonging to hill areas and Uttarakhand areas are reservations within the meaning of Article 15(4) of the Constitution, i.e., they are reservations in favour of socially and educationally backward classes of citizens though the same has wrongly been treated to be a reservation under Article 15(1). In *Rajesh Kumar Daria*, the

⁶ (1995)2 SCC 56

⁷ (1975) (1) S.C.C.267

Supreme Court considered the issue of implementation of 20% reservation for women. It was contended before the Court that though the reservation for women is horizontal in nature the Rajasthan Public Service Commission has applied the principles of vertical reservation. While deliberating upon the said issue, the court succinctly explained the distinction between the vertical and horizontal reservation and the procedure for their implementation:

“ 7. 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 (Supra)*, *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.”

(Emphasis Supplied)

(11) The issue with regard to the nature of reservation for Ex-Servicemen came up for the consideration of the Division Bench of this High Court in *Ajit Singh* versus *State of Haryana* 2011(20) SCT 243, on a reference being made by the Single Judge on following two issues: (i) What would be the nature of reservation provided for Ex-servicemen i.e. would they be social reservations or would they be special reservations contemplated by Article 16(3) & 16(4) of the Constitution of India; and (ii) Whether the posts which are reserved for Ex-servicemen category should be filled up by following the course as prescribed by law applicable to vertical reservations or by the course adopted in the cases of horizontal reservations? The Division Bench referred to the Judgments in *Indra Sawhney; Swati Gupta, Anil Kumar Gupta; Rajesh Kumar Daria and Andhra Pradesh Public Service Commission* versus *Baloji Badhavath and others*⁸, in extenso and culled out the following principles:

“In view of the judgments referred to above, the following principles can be culled down: (i) The reservations for Physically Handicapped, Ex-servicemen, dependants of freedom fighters and women etc. are the horizontal reservations. (ii) The candidates belonging to horizontal reservations will cut across the vertical reservations in the following manner:

(a) Firstly the seats for Open Category candidates will be filled up on the basis of merit;

(b) Secondly, the seats meant for vertical reserved categories will be filled up on the basis of merit in their own quota;

(c) Thirdly, the seats equal to the number of the candidates belonging to horizontal reserved category and also falling

⁸ (2009) 5 SCC 1

within vertical reserved category, shall stands consumed in the vertical reserved category. The candidate lower in vertical reserved category will make way for him;

(d) Fourthly, if a candidate belonging to horizontal reserved category does not belong to any of categories of reservations, a candidate in the open category will make way for such reserved category so as to satisfy quota of the seats meant for the horizontal reserved category.

(e) Lastly, in case of women candidates, who also fall within any one of special reservations or social reservations, such candidate shall be taken into consideration for determining the quota for both women and social reservations.

(Emphasis Supplied)

(12) In a selection process initiated for recruitment of Constables for the Uttar Pradesh Police, the State Government refused to consider the claim of ‘OBC Female Category’ candidates in respect of ‘General Female Category’ seats which came to be challenged before the three judges bench of Supreme Court in *Saurav Yadav and Ors.* versus *State of Uttar Pradesh & Ors.*⁹. While clarifying the intersection between the Vertical (social) and Horizontal (special) reservations, the Court affirmed the view taken by the High Court of Gujarat, Rajasthan, Maharashtra and Uttrakhand that the reserved category candidates, irrespective of whether they claim such reservation, as and by way of vertical or horizontal, is always entitled to claim seat from the open category on the basis of their own merit provided that they have not taken or availed of any special benefit which may disentitle them from being considered in open/General category. The features of vertical and horizontal reservation and their interplay has been summed up in the following paras of the judgment:

“52. 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;

⁹ 2021(1) SCT 87

(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.

53. 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' reservations. 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."

(Emphasis Supplied)

(13) Thus, in view of the above, it is well settled that the reservation for Ex-Servicemen is a special reservation as contemplated under Article 16(1) of the Constitution and being a horizontal reservation, it is a reservation within reservation.

(14) The primary argument of Mr. Khatri, which according to us is the first issue raised in the instant petition that "by converting 5 % reservation for Ex-Servicemen in direct recruitment in Group A & B category from Vertical to horizontal, the State Government has wrongly granted the benefit of reservation within reservation i.e. double benefit to the reserved category employees thereby prejudicing the Ex-Servicemen belonging to General Category" is bound to be rejected because not only it runs counter to the very nature and concept of horizontal reservation as concluded hereinabove but is also inherently fallacious. The intent of reservation under scheme of horizontal reservation is not to confine the served category candidates to their respective categories but to effectively implement the vertical and horizontal reservation within the confines of 50% cap of maximum reservation mandated by Supreme Court in para 829 of Indra Sawhney. The relevant paras of the Judgment, as far as material, are reproduced as follows:

“829. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.

830. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

835. On the other hand is the approach adopted by Ray, C.J. in *Thomas*. While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, C.J. would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go, i.e., in a year or two. The position can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e., 270 by other backward classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are

not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by Clause (1) is to each individual citizen of the country while Clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% an year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.”

(Emphasis Supplied)

(15) In a recent Judgment rendered in *Dr. Jaishri Laxmanrao Patil* versus *The Chief Minister & Ors.*, Civil Appeal No.3123 of 2020, decided on 05.05.2021 (reported as 2021 ALL SCR 948), the Five Judges Constitutional Bench of the Supreme Court unanimously declared a 2018 Maharashtra law providing quota for Marathas in jobs and Education thereby increasing the vertical (social) reservation to 63% and 62% respectively, as unsustainable and affirmed that the 50% ceiling on total reservation was inviolable. It refused to refer Indra Sawhney to a Larger Bench for reconsideration of 50% ceiling holding that the ceiling limit on reservation fixed at 50 percent is to preserve equality and breach of the 50% limit will create a society based on caste rule. The relevant observations of the Court are as follows:

“164. To change the 50% limit is to have a society which is not founded on equality but based on caste rule. The democracy is an essential feature of our Constitution and part of our basic structure. If the reservation goes above 50% limit which is a reasonable, it will be slippery slope, the political pressure, make it hardly to reduce the same. Thus, answer to the question posed is that the percentage of 50% has been arrived at on the principle of reasonability and achieves equality as enshrined by Article 14 of which Articles 15 and 16 are facets.”

(Emphasis Supplied)

(16) An ancillary issue which is required to be noticed here is that 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

reserved categories. Further, the open category is not a 'reserved' category for those who do not belong to any other reserved category but is open to all. In *Saurav Yadav (supra)*, the Hon'ble Court reiterated its previously held view that candidates belonging to reserved categories like SCs, STs, and OBCs can be appointed under open or general category, if they qualified on their own merit, so that they are not counted under the reserved category. This principle has been summed up by his Lordship, Justice Bhat in para 58 of the judgment which reads as under:-

“58. I would conclude by saying that reservations, both vertical and horizontal, are methods 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,”

Therefore, the first argument is untenable and hence rejected.

(17) Now, we shall advert to the second issue which has fallen for our consideration i.e. whether the sub-division of horizontal reservation for Ex-Servicemen into other categories; Open Category and Reserved Categories under vertical reservation, is arbitrary and thus violative of Article 14 & 16 of the Constitution?

(17.1) The Horizontal Reservations can be an overall reservation or compartmentalized reservation. In case of overall reservation, the percentage of reservation is prescribed without any sub-classification and is provided on 'an overall' basis, for all categories including open and reserved. On the contrary, in Compartmentalized reservation, the seats reserved for horizontal reservations are proportionately divided among the vertical reservations providing each category of vertical reservation with a specific percentage and the same is not interchangeable or inter-transferable. The compartmentalized reservation not only avoids or reduces complications in implementation of the horizontal reservation but also obliterates chances of prejudice to any reserved category or to the candidate competing against open seats.

(17.2) In Anil Kumar Gupta's case, the Supreme Court explained the concept of compartmentalized reservation as against the overall reservation. The Court also explained with illustration as to why the horizontal reservation should be compartmentalized as under:

“17. On a careful consideration of the revised notification of December 17, 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 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 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 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 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.

18. Now coming to the revised notification of December 17, 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 other says it is compartmentalised. Paragraph 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 dependant on a freedom fighter selected on the basis of reservation belongs to Scheduled Castes, 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.

19. 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 Gupta that in the first notification

issued by the Government of Uttar Pradesh on May 17, 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 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., 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."

"20. 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 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 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 O.C. quota.”

(Emphasis Supplied)

(17.3) Thus, the horizontal reservation may be overall reservation or compartmentalized reservation and there is nothing arbitrary in the impugned Instructions providing for sub-division of 5% reservation for Ex-Servicemen in Group A & B posts between the reserved categories. Infact, in view of the observations made by the Supreme Court in Anil Kumar’s case, the challenge made to compartmentalized reservation by the Petitioners who belong to General category, is not only counter-productive but is prejudicial to their own cause.

(18) The third issue which has been raised in the present writ petition is that reservation for Ex-Servicemen is not being implemented in letter and spirit and to fullest extent as vide the impugned Instructions dated 30.04.2018 (P-13), it has been further provided that in case no Ex-Serviceman candidate with sub-category of vertical reservation is found suitable for appointment in Group A & B category, the vacancies reserved for ESM of that particular category will be filled from amongst the candidates of the concerned sub-category of vertical reservation. To illustrate, if suitable candidates belonging to Scheduled Caste of ESM category is not available, then the posts can be filled up from amongst the candidates of Scheduled Castes.

(18.1) The issue, whether the social category candidates (vertical reservation) can fill horizontal category vacancies has been considered by the Supreme Court in Anupal Singh Vs. State of Uttar Pradesh, 2020(2) SCC 173. It was contended before the Court that 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 UP 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. The Court recorded its conclusion in the following terms:

“84.6. The filling up of 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.”

(18.2) Thus, we do not find any fault with the instructions dated 30.04.2018 (P-13) as the State Government is well within its jurisdiction to fill up the posts from amongst the eligible candidates belonging to open/SC/BC category, in case suitable ESM category candidates are not available.

(19) Another aspect which we would like to touch upon is whether the nature and the extent of reservation can be challenged on the ground of discrimination vis-à-vis other reserved categories or whether there can be equality in the matters of reservation? To our mind, it cannot be, since discrimination is inherent in the very concept of reservation. It itself permits differential treatment of un-equals which is termed as positive or compensatory discrimination. The Constitution empowers the State to identify the backward classes of citizens or other disadvantaged or weaker sections of society which require preferential treatment for their socioeconomic advancement through its affirmative action in the form of reservation, concessions, weightage or relaxations. The extent of this affirmative action for various downtrodden sections of society is based on a number of determinants such as historical oppression or discrimination, social, economic or educational backwardness. Reservation is a mechanism provided under the Constitution to ensure equality and not to claim some privileges or benefits over and above or at par with the other oppressed classes.

(20) In the conspectus of afore-mentioned judgments and the discussion, we find that the impugned Instructions dated 23.01.2018 (P-12) & 30.04.2018 (P-13) providing horizontal reservation to Ex-Servicemen are absolutely in consonance with the provisions of Article 14 & 16 of the Constitution. Therefore, the present writ petition fails and is accordingly dismissed.