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Court No. - 36
Case :- WRIT - A No. - 40695 of 2005
Petitioner :- Ajay Kumar
Respondent :- State Of U.P. And Others
Counsel for Petitioner :- Anil Tiwari
Counsel for Respondent :- C.S.C.,Ashok Khare,Hitesh Pachori,M.A. Qadeer,Nisheeth Yadav,R.B.Saxena,Rohit Upadhyay

Hon'ble Mrs. Sunita Agarwal,J.

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

Heard Sri Anil Tiwari learned counsel for the petitioner, Sri Neeraj Tripathi learned Additional Advocate General representing the State of U.P. and Sri Ashok Khare learned Senior Advocate assisted by Sri Kamlesh Kumar Yadav, learned counsel appearing for the private respondents.

This Larger Bench has been constituted on a reference made by the Division Bench in Writ-A No.40695 of 2005 doubting the correctness of the judgement of the Division Bench in the case of **Rajeev Kumar Vs. State of U.P**.[1], noticing that there are contrary judgements in the matter of adopting mechanism for application of horizontal reservation in respect of various categories such as women, dependents of freedom fighters, physically handicapped, Ex-servicemen in the State of U.P.

The Division Bench in the referral order has noticed that in **Rajeev Kumar (supra)** it has been observed that the "reservation for women has to be spread evenly for the representation of female category candidates to the extent of minimum 20% in each category". Taking note of the observations in **Anil Kumar Gupta Vs. State of U.P.**[2] as noted in **Rajesh**

1.2010 (7) ADJ 608
2.1995 (5) SCC 173

Kumar Daria Vs. Rajasthan Public Service Commission & others,[3], and the conditions of the advertisement therein, it was held therein that the horizontal reservation for women has to be given category wise. Whereas, in **Sheo Shankar Singh Vs. Public Service Commission,**[4] the Division Bench while dealing with the method of application of horizontal reservation of Ex-servicemen under the U.P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters & Ex-servicemen) Act' 1993 (hereinafter referred to as Act' 1993)' noticing the observations of the Apex Court in **Indra Sawhney Vs. Union of India,**[5], has held as under:-

> *"Considerations and the basis of reservation under Article 16(1) different from what is contained in Article 16 (1) different from what is contained in Article 16(4), posts reserved for Ex-servicemen cannot be distributed, divided or allocated on the basis of the castes of the Ex-servicemen. Dividing vacancies reserved for Ex-servicemen and allocating them to Scheduled Castes, Scheduled Tribes, Backward Classes and general candidate is therefore, without jurisdiction. All Ex-servicemen, who applied against their reserved quota have to be treated as persons belonging to the one and the same class and all of them are to be considered against all the vacancies reserved for them strictly on the basis of the merit irrespective of the caste/class to which they belong. Claim of the petitioner is, therefore, liable to be considered on merit against all three vacancies reserved for Ex-servicemen."*

In **Bijendra Deo Mishra Vs. Public Service Commission, U.P. Allahabad**[6]**,** the question that fell for consideration was whether quota for dependents of freedom fighters, physically handicapped and Ex-servicemen are to be calculated as a percentage of total vacancies in a particular service

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3. 2007 (8) SCC 785
4. 1996 AWC 1501
5. AIR 1993 SC 477
6. 1997 (1) AWC 84

or as a percentage of the vacancies in the respective categories (i.e. SC, S.T. & OBC or General) to which the candidate belongs. Taking note of the provisions of sub section (1) of Section 3 of the Act' 1993, it was held therein as under:-

> "*A combined reading of sub-section (1) and (3) makes it clear that the quotas of the vacancies for physically handicapped, DFF and Ex-servicemen are to be as a percentage of total number of vacancies and it is after the persons are selected against the vacancies reserved under sub-section (1), they have to be placed in the respective caste category by making necessary adjustments.*"

The above observations made by the three Benches of this Court have been taken note of in the reference order dated 01.10.2015 to refer the following questions for consideration by the Larger Bench:-

> *"(a) Whether the judgment and order of the Division Bench in the case of Rajeev Kumar (supra) insofar as it lays down that "the reservation has to be spread evenly for the representation of female category candidates to the extent of minimum of 20 percent each category", is the correct principle of law in the matter of application of horizontal reservation with reference to the provisions applicable in the State of U.P. or not?*
>
> *(b) Whether the application of horizontal reservation has to be affected in terms of the Division Bench judgment of this Court in the case of Sheo Shankar Singh (supra) and Brijendra Deo Mishra (supra), referred to above, or the reservation has to be applied compartmentalized, as has been suggested in the case of Rajeev Kumar (supra)?*
>
> *(c) What should be the mechanism for application of horizontal reservation in respect of various categories provided therein namely women, dependents of freedom fighter, physical handicapped etc. in the State of U.P.?"*

A. Stand of the State:-

When the hearing began, Sri Neeraj Tripathi, learned Additional Advocate General was asked to clarify the stand of the State Government in the method of application of horizontal reservation for women, dependents of freedom fighters, physically handicapped and Ex-servicemen in the State of U.P.

Sri Neeraj Tripathi, by placing an instruction dated 11.04.2009 submits that the reservation for women in the State of U.P. is a horizontal reservation and has to be applied "Overall". The selected women is to be adjusted in the category to which she belongs i.e. if a selected woman belongs to a Scheduled Caste category she will be placed in that category only. The women selected on their merit, however, shall be counted against the vacancies reserved for women candidates i.e. 20%, quota.

B. Submissions of the Counsels:-

(a) This contention has been repelled by Sri Anil Tiwari learned counsel for the petitioner by making the following submissions:-

i. He submits that the Government order dated 26.02.1999 providing for reservation for women in public services in the State of U.P. itself contemplates “compartmentalized horizontal reservation”, as the Apex Court in **Anil Kumar Gupta (supra)** has observed that in future, it would be better that the horizontal reservation be made compartmentalized. The same issue again came up in **Rajesh Kumar Daria (supra)** wherein while dealing with the horizontal reservation after considering

previous judgement in **Swati Gupta Vs. State of U.P.,**[7], it was held that the women reservation should be compartmentalized i.e. the women shall be adjusted proportionately in the respective category to which the women candidates belong.

(ii) He contends that in **Anil Kumar Gupta (supra)** the issue of women reservation in the State of U.P. in the matter of admission to medical courses, which was made applicable by the Government order dated 17.05.1994 and revised notification dated 17.12.1994, came for consideration. The issue before the Apex Court was whether the reservation of 20% of seats for women was ""Overall"" horizontal reservation or Compartmentalized". It was held that the language of revised notification dated 17.12.1994 was ambiguous and hence it was not possible to give a definite answer to the question whether the horizontal reservation was ""Overall"" reservation or "Compartmentalized" reservation. However, the aforesaid ambiguity which was found in the earlier Government orders dated 17.05.1994 and 17.12.1994 by the Apex Court has been removed by the State Government in the Government order dated 26.02.1999 by providing for horizontal reservation for women in a compartmentalized manner. It is contended that the paragraph (2) of the previous Government order dated 17.12.1994 which provided for category wise horizontal reservation has been retained being in the line with the observations of the Apex Court in **Anil Kumar Gupta (supra).**

ii. Further the Division Bench of this Court in **Rajeev Kumar (supra)** relying on **Anil Gupta's** judgement has held that the horizontal reservation for women should be

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7. 1995 (2) SCC 560

compartmentalized i.e. category wise and not "Overall" reservation. The said observation came in the light of the specific clause of the advertisement, subject matter of consideration, which was same as is mentioned in paragraph no.(2) of the Government order dated 26.02.1999.

The Special Leave Petition (in short 'SLP') against the Division Bench judgement in **Rajeev Kumar (supra)** has been dismissed with the observation that the view taken by the Division Bench was in accord with the decision of the Apex Court in **Anil Kumar Gupta (supra)** and hence did not call for any interference. The submission is that the said observation of the Apex Court being a declaration of law is binding on this Court under Article 141 of the Constitution of India as well as on the law of merger.

Reference has been made to the judgements of the Apex Court in **Abbai Maligai partnership Firm Vs. K Santhakumaran**,[8], **Kunhayemmed Vs. State of Kerala**,[9], **K. Rajamauli Vs. A.V.K.N Swamy**[10], **S. Shanmugavel Nadir Vs. State of Tamilnadu**,[11], **S.Nagraj Vs. B.R. Vasudeva**,[12], **Gangadhara Palo Vs. Revenue Divisional Officer**,[13], **Khode Distilleries Limited Vs. Mahadeswara S.S.K. Ltd**,[14] & **Delhi Development Authority Vs. Kapil Mehara**,[15] to submit that it is not legally permissible for the Full Bench to answer the reference.

8.1998 (7) SCC 386
9.2000 (6) SCC 359
102001 (5) SCC 37
11 2002 (8) SCC 361
12.2010 (3) SCC 35
13.2011 (4) SCC 602
14 2012 (12) SCC 262

15 2015 (2) SCC 289

(iv) It is further contended that the Government order dated 26.02.1999 was again considered by this Court in **Sunaina Tripathi Vs. State of U.P**.,[16] wherein the Division Bench after considering the language of the Government order dated 26.02.1999 has held that the clause (2) of the Government order has made the reservation for women applicable in that category itself and, thus, in the crux, it was held that the horizontal reservation in favour of women was compartmentalized.

It is pointed out that the Special Leave to Appeal No.16247 of 2012 against Sunaina Tripathi's judgment is pending before the Apex Court. A perusal of the order dated 16.09.2014 in the said Special Leave to Appeal shows that the question that has arisen for consideration before the Apex Court is as to whether there was consultation with the High Court with regard to the application of 20 % reservation for women before selection to the U.P. Judicial Service Civil Judge (J.D.), as it has been held in **Manjula Sircar and others vs. Harendra Bahadur Singh and others**,[17] that consultation with the High Court is necessary and reservation without consultation for women candidates was not permissible.

(v) It is urged that the matter came up again for consideration before the Division Bench of this Court in **Narendra Kumar Rai Vs. State of U.P. & others),**[18] wherein the issue of women reservation was decided on 23.09.2014 in terms of the judgement in **Rajev Kumar (supra)**. The Review Application was also rejected on 26.08.2014. The judgement in **Narendra Kumar Rai (Supra)** was challenged in SLP No.18640 of 2015 which was dismissed

16 2012 (3) ADJ 463
17. 2007 (7) SCC 488
18.(Writ Petition No.41409 of 2010)

on 16.10.2015 by the Apex Court both on the ground of delay as well as on merit.

It is, thus, contended that the consistent view taken by the Division Benches of this Court have been upheld by the Apex Court while dismissing Special Leave Petitions with the declaration of legal position with regard to the method of application of women reservation. It is, thus, not open for the Larger Bench to answer the reference. In fact, nothing has been left to be stated by us.

(vi) The next argument is that the issue of application of horizontal reservation in respect of various categories provided for women, dependents of freedom fighters, physically handicapped etc. in the State of U.P. came up before the learned Single Judge of this Court in **Ashish Kumar Pandey Vs. State of U.P. & others,**[19], wherein it was held that the selection board had applied horizontal reservation in social category wise i.e. in compartmentalized manner and hence it was not permissible to adjust the short fall of women candidates in OBC, SC and ST category by making selection of only women candidates of open category. The said view taken by the learned Single judge has been upheld by the Special Appellate Court in its judgement and order dated 29.07.2016.

(vii) After the aforesaid judgement, in Writ Petition No.18442 of 2018 (**Pramod Kumar Singh & others Vs State of U.P. & others**), the State took the stand before this Court that the State has always comprehended horizontal reservation in the recruitment exercise to be compartmentalized and that they are bound and shall ensure the implementation of

19 .2016 (4) ADJ 163

horizontal reservation strictly in accordance with the principles laid down in **Ashish Kumar Pandey (supra)**. Learned Additional Advocate General had submitted therein that the implementation of horizontal reservation was conceived as being compartmentalized in the S.C., S.T., O.B.C and General categories under the scheme of the Government order dated 26.02.1999. It is, thus, urged that the aforesaid stand of the State Government being in line with the observation of the Apex Court in **Anil Kumar Gupta (supra),** no controversy survives.

(viii) It is contended that the present reference has been made in view of the observations in **Sheo Kumar Singh (supra)** and **Bijendra Dev Mishra (supra)** which pertain to the scheme of the Act of 1993, relating to reservation for physically handicapped, dependents of freedom fighters and Ex-servicemen category and not with regard to the scheme of the Government order dated 26.02.1999 relating to reservation for women. Moreover, both the judgements did not take note of the Apex Court judgement in **Anil Kumar Gupta (supra)**. In a recent judgement in **Abhinav Agnihotri Vs. Mahamaya Technical University**,[20] decided on 04.11.2011, this Court has held that once seats in question have been earmarked by compartmentalization and the candidates from the vertical reserved sub-category are not available, in such a situation applying the principle of compartmentalized horizontal reservation, seats in question are not changeable.

(b) In reply to the aforesaid submissions, Sri Neeraj Tripathi, learned Additional Advocate General has, however, insisted the stand of the State that the reservation for women in the State of U.P. to the extent of 20% of vacancies in direct

20. 2011 (10) ADJ 656

recruitment examinations is "Overall". He submits that the statement of the learned Additional Advocate General in **Pramod Kumar Singh** (supra), as aforesaid, does not bind the State, in as much as, the said case was of compartmentalized implementation of horizontal reservation. Moreover, the statement therein was own view of the learned Additional Advocate General appearing therein in the matter of horizontal reservation.

(c). Sri Ashok Khare learned Senior Advocate for the private respondents, on the other hand, submits that the controversy in the writ petition, wherefrom the present reference arises, pertains to the method of implementation of horizontal reservation in the State of U.P. to the context of 20% reservation quota for women. The only issue is of correct method of implementation of different categories of horizontal reservations including women.

Learned Senior Advocate for the private respondent further submits that both the methods of implementation of horizontal reservations are permissible whether "Overall" reservation on the total posts or “Compartmentalized” or category wise in S.C., S.T. O.B.C or General category. He asserted that both the methods of implementation of horizontal reservation are equally valid. He contends that the only controversy herein is as to which of the two methods of implementation of horizontal reservation is applicable in the State of U.P. under the scheme of the Government order dated 26.02.1999. As per the stand of the private respondents, there exists no provision mandating implementation of horizontal reservation category-wise in the State of U.P. and the method of implementation of horizontal reservation is only an "Overall" reservation. The category wise

implementation of horizontal reservation by distributing the vacancies between S.C., S.T, OBC and open category has been held to be an incorrect method in two Division Bench judgements in **Sheo Shankar Singh (supra)** and **Bijendra Dev Mishra (supra)**. The judgement of the Apex Court in **Rajesh Kumar Daria (supra)** relates to the interpretation of a statutory rule governing recruitment which required implementation of horizontal reservation category-wise. In **Anil Kumar Gupta (supra)** both methods of implementation of reservation i.e. "Overall" and “Compartmentalized” have been recognized.

It is contended that the decisions in **Rajeev kumar (supra)** and **Ashish Kumar pandey** (supra) have been rendered without appreciating difference between the implementation of horizontal reservation as an "Overall" reservation and another approved method of its application as category-wise. The issue, therefore, has been referred to the Full Bench for authoritative pronouncement on the said aspect.

The attention of the Court is invited to the decision of this Court in **Chandra Krishan Pandey Vs. State of U.P. & others,**[21]. It is pointed out that in **Chandra Krishan Pandey (supra),** the learned Single Judge has correctly found that the horizontal reservation employed therein was "Overall" and not Category-wise reservation. The percentage of reservation for Ex-servicemen quota had to be worked out on the total number of posts advertised. It was held therein that the horizontal reservation under the scheme of Act' 1993 is neither on the entire strength of cadre nor it was to be determined category-wise. Counting 5% of total 14 posts, it was held that the percentage of reservation comes to 0.7, which on being rounded off, becomes

21. 2018 (3) ADJ 488

one post for Ex-servicemen quota. The respondent was, thus, directed to appoint the petitioner therein on the one post found available under the Ex-servicemen quota of horizontal reservation.

In this background, we proceed to answer the questions of reference one by one.

C. First Question:-

The answer to the first question of reference takes us to examine the contention of Sri Anil Tiwari learned counsel for the petitioner that the Special Leave to Appeal filed against the judgement of the Division Bench in **Rajeev Kumar** had been dismissed and hence the Larger Bench cannot examine the correctness of the principle of law stated therein.

To deal with the said submission, it is necessary to go through the legal position pertaining to the impact of an order rejecting a petition seeking grant of Special Leave to Appeal under Article 136 of the Constitution of India. The authoritative pronouncement of the Apex Court in **Kunhayammed (supra)** deals with the doctrine of merger and the right of review. It was held therein that if the judgement of the High Court has been challenged to the Apex Court by way of Special Leave petition and the special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of the Apex Court. In that event, it is not permissible to move the High Court seeking review because the judgement of the High Court has merged with the judgement of the Apex Court.

But where the petition seeking grant of special leave to

appeal is rejected whether by speaking order or a non-speaking order, the doctrine of merger is not attracted. As the dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are merits of the special leave petition only. Mere rejection of the special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject matter of petition for special leave, to review its own order if grounds for exercise of review jurisdiction are shown to exist.

It is held therein that the dismissal of the special leave petition by non-speaking order neither attracts doctrine of merger nor Article 141 of the Constitution of India. Where the special leave petition is dismissed by a speaking order, the reasons assigned therein remain the one rejecting the prayer for grant of leave to appeal. Meaning thereby that the petitioner has, thus, been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of the Apex Court. The doctrine of merger in such a case would not apply. But the law stated or declared by the Apex Court in such an order of dismissal of special leave petition by speaking order, shall attract applicability of Article 141 of the Constitution. (emphasis supplied).

The reasons assigned by the Apex Court in its order expressing its adjudication (expressly or by necessary implication) on the point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by the Apex Court because permitting to do so would be subversive of judicial discipline and an affront to the order of the Apex Court. However, this would be so not by reference to the doctrine of merger. It has, thus, been concluded that in a case if

the order refusing leave to appeal is a speaking order, following implication will arise:-

> *v). If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.*

Three judge's decision in **Kunhayammed's case** was considered in a subsequent judgement of the Bench of two judges of the Apex Court in **S. Shanmugavel Nadir (supra)**. In that case, the constitutional validity of the Madras City Tenants Protection (Amendment) Act, 1960 to amend certain provisions of the Madras City Tenant Protection Act' 1921 was challenged in a bunch of writ petition which were disposed of by the Madras High Court in the case of **M. Varadaraja Pillai Vs. Salem Municipal Council,**[22]. Against this decision of the Division Bench of the Madras High Court, Special Leave Petitions were filed before the Apex Court which were dismissed in the year 1988 on two grounds: (i) the State of Tamil Nadu was not party before the High Court. A challenge to the constitutional

22 .5 LW 760

validity of the Act cannot be considered or determined in absence of the State concerned. (ii) The prayer for impleadment of the State of Tamil Nadu in the appeals which were of the year 1973 cannot be allowed at the said distance of time.

Subsequently, the Madras City Tenant Protection (Amendment) Act' 1994 was enacted by the State legislature (Tamil Nadu Act No.2 of 1996). The constitutional validity of the same was challenged before the Madras High Court placing reliance on its earlier judgement in **M. Varadaraja Pillai** (**supra**). The Division Bench, while entertaining a doubt about the correctness of the law laid down by the earlier Division Bench in **M. Varadaraja Pillai** (**supra**), referred the matter to a Full Bench of three learned judges. The Full Bench, however, formed an opinion that since the appeal against the judgement of the Division Bench of the High Court in **M. Varadaraja Pillai** (**supra**), had been dismissed by the Apex Court, the judgement of the Division Bench merged with the decision of the Apex Court and, therefore, it was not open to the Full Bench to examine the correctness of the law laid down by the earlier Division Bench in **M. Varadaraja Pillai** (**supra**).

Dealing with the same, in paragraph no.14, the Apex Court has observed in **S. Shanmugavel Nadir (supra)** as follows:-

> "14. *that it is the speech, express or necessarily implied, which only is the declaration of law by this Court within the meaning of Article 141 of the Constitution."*

In this background, while dealing with the doctrine of merger, the Apex Court has concluded therein as under:-

> ".....By no stretch of imagination can it be said that the reasoning or view of the law contained in the decision of the Division of the High Court in M. Varadaraja Pillai 's case had stood merged in the order of this court dated 10.9.1986 in such sense as to amount to declaration of law under Article 141 by this Court or that the order of this Court had affirmed the statement of law contained in the decision of High Court."

While drawing the said conclusion, the Apex Court has dealt with the doctrine of merger in the following words:-

> *"10.Firstly, the doctrine of merger. Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part, i.e. the mandate or decree issued by the Court which may have been expressed in positive or negative forum.* ***For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction.*** *However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum."*

The Apex Court has considered its earlier three judge's judgement in **State of Madras Vs. Madurai Mills Co. Ltd**,[23] where it was held as follows:-

> *"the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two order irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. (**emphasis supplied**)*

The principle stated in **Kunhayammed (supra)** has been reiterated in the following words:-

> *"Recently a three-Judge Bench of this Court had an occasion to deal with doctrine of merger in Kunhayammed and Ors. v. State of Kerala and Anr., [2000] 6 SCC 359 and this Court reiterated that the doctrine of merger is not of universal or unlimited application; the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid, shall have to be kept in view, (emphasis supplied). In this view of the law, it cannot be said that the decision of this Court dated 10.9.1986 had the effect of resulting in merger into the order of this Court as regard the statement of law or the reasons recorded by the Division Bench of the High Court in its impugned order. The contents of the order of*

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this Court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor they could have been gone into."

It has further proceeded to say in paragraph no.'17' in **S. Shanmugavel's** case that inspite of the dismissal of appeals in other case on the ground of non-joinder of necessary party, though the operative part of the order of Division Bench stood merged in the decision of the Apex Court, the remaining part of the Division Bench of the High Court cannot be said to have merged in the order of the Apex Court nor did the order of the Apex Court make any declaration of law within the meaning of Article 141 of the Constitution either expressly or by necessary implication. The statement of law as contained in the Division Bench judgement of the High Court in **M. Varadaraja (supra)** would, therefore, continue to remain the decision of the High Court, binding as a precedent on a subsequent Benches of a coordinate or lesser strength, but open to re-consideration by any Bench of the same High Court with the coram of judges more than two (emphasis supplied). It was further held that the Full Bench was not dealing with the prayer for review of the earlier decision of the Division Bench in **M. Varadaraja (supra)** and for setting it aside.

The observations which have been made in paragraph no.'12', '13' & '14' of the judgement of the Apex Court in **S. Shanmugavel Nadir (supra)** from the perspective of Article 141 of the Constitution are relevant to be noted here under:-

"12. Thirdly, as we have already indicated, in the present round of litigation, the decision in Varadaraja Pillai 's case was cited only as a precedent and not as res judicata. The issue ought to

have been examined by the Full Bench in the light of Article 141 of the Constitution and not by applying the doctrine of merger. Article 141 speaks of declaration of law by the Supreme Court. For a declaration of law there should be a speech, i.e., a speaking order. In Krishen Kumar v. Union of India and Ors., [1990] 4 SCC 207, this Court has held that the doctrine of precedents, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. In State of U.P. and Anr. v. Synthetics and Chemicals U.P. and Anr., [1991] 4 SCC 139, R.M. Sahai, J. (vide para 41) dealt with the issue in the light of the rule of sub-silentio. The question posed was: can the decision of an Appellate Court be treated as a binding decision of the Appellate Court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule of sub-silentio, is an exception to the rule of precedents. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." A court is not bound by an earlier decision if it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. A decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues, cannot be deemed to be a law declared, to have a binding effect as is contemplated by Article 141. His Lordship quoted the observation from B. Shama Rao v. The Union Territory of Pondicherry, [1967] 2 SCR 650 "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". His Lordship tendered an advice of wisdom -"restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

13. M/s. Rup Diamonds and Ors. v. Union of India and Ors., AIR (1989) SC 674 is an authority for the proposition that apart altogether from the merits of the grounds for rejection, the mere rejection by a superior forum, resulting in refusal of exercise of its jurisdiction which was invoked, could not by itself be construed as the imprimatur of the superior forum on the correctness of the decisions sought to be appealed against. In Supreme Court Employees Welfare Association v. Union of India and Ors.. AIR (1990) SC 334 this Court observed that a summary dismissal, without laying down any law, is not a declaration of law envisaged by Article 141 of the Constitution. When reasons are given, the decision of the Supreme Court becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court

shall be binding on all the courts within the territory of India. When no reason are given, a dismissal simpliciter is not a declaration of law by the Supreme Court under Article 141 of the Constitution. In Indian Oil Corporation Ltd. v. State of Bihar and Ors., AIR (1986) SC 1780 this Court observed that the questions which can be said to have been decided by this Court expressly, implicitly or even constructively, cannot be re-opened in subsequent proceedings; but neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court bar the trial of identical issue in separate proceedings merely on the basis of an uncertain assumption that the issues must nave been decided by this Court at least by implication.

14. It follows from a review of several decisions of this Court that it is the speech, express or necessarily implied, which only is the declaration of law by this Court within the meaning of Article 141 of the Constitution. (emphasis supplied)."

It was finally concluded with reference to the order of the Apex Court that order of the dismissal of Special Leave Petition clearly reveals that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor they could have been gone into.

In **S. Nagraj (supra)** following **Kunhayammed case** it was held in paragraph no.56 as under:-

"56. Hence, an order refusing special leave to appeal does not stand substituted in place of order under challenge and all that it means is that this Court was not inclined to exercise its discretion so as to allow the appeal being filed. The aforesaid law laid down by this Court however makes it clear that if the order refusing leave to appeal makes a statement of law, such statement of law is declaration of law by this Court within the meaning of Article 141 of the Constitution of India and if the order records some finding other than the declaration of law such finding would bind the parties thereto and also the Court, Tribunal or Authority in any proceeding subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country."

In **Gangadhara Palo (supra)**, the question arises with regard to the maintainability of the review petition before

the High Court after dismissal of the Special Leave Petition by the Apex Court. It was held in paragraph no.6 as under:-

> *"6. When this Court dismisses a special leave petition by giving some reasons, however meagre (it can be even of just one sentence), there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition. According to the doctrine of merger, the judgment of the lower court merges CIVIL APPEAL NO.5280 OF 2006 into the judgment of the higher court. Hence, if some reasons, however meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist."*

However, a distinction has been drawn with regard to the cases where a Special Leave Petition is dismissed without giving any reason. The Apex Court held that where the Special Leave Petition is dismissed without giving any reasons, there is no merger of the judgement of the High Court in the order of the Apex Court. The judgement which continues to exists can be reviewed within the scope of review, it cannot be said that the review petition is not maintainable.

Whereas, in a previous decision in **K. Rajamouli (supra)**, following decision in **Kunhayammed case,** it was held that the review if filed prior to dismissal of the Special Leave Petition, pending before the High Court can be decided even after the dismissal of Special Leave Petition by a non speaking order. However, the review petition filed with delay after dismissal of the Special Leave Petition would be an abuse of the process of the law.

Noticing conflict in **K. Rajamouli (supra)** and **Gangadhara Palo (supra),** two Judge's Bench of the Apex

Court in **Khoday Distilleries (supra)**, has referred the matter to the Larger Bench to examine the extent to which the principle of *res-judicata* and merger would apply in respect of the decision rendered by the Apex Court in the light of the fact that the jurisdiction under Article 136 of the Constitution of India is extraordinary discretionary power conferred on the Apex Court.

From the above, the fact remains that the law laid down by the Apex Court in **Kunhayammed (supra)** reiterated in the subsequent decisions in **S. Shanmugavel Nadir (supra)** and **S. Nagraj (supra)** is that where the leave to appeal under Article 136 of the Constitution of India has been refused making a statement of law, such statement of law is declaration of law within the meaning of Article 141 of the Constitution of India and finding therein, if any, other than the declaration of law, such finding would bind the parties therein and also the court below.

All other decisions placed by Sri Anil Tiwari learned counsel for the petitioner on the point of doctrine of merger and implication of Article 141 of the Constitution of India are decisions in the facts of those cases and, therefore, need no reference here.

In the light of the said principles culled out, the content of the order of the Apex Court dated 12.07.2013 in Special Leave to Appeal No.32344 of 2010 against the judgement of the Division Bench in **Rajeev Kumar (Supra)** is to be noted herein under:-

> "*We have heard learned counsel for the petitioners and learned counsel for the respondent.*
>
> *The view taken by the High Court is in accord with the decision of this Court in "Anil Kumar Gupta & others*

Vs. State of U.P. & others", (1995) 5 SCC 173.

The impugned judgment thus does not call for any interference.

Special leave petition is dismissed.

Interim order stands discharged."

The reading of the said order indicates that the reasons recorded by the Division Bench in **Rajeev Kumar (supra)** that the special reservation for women in that case was compartmentalized and had to be spread evenly for the representation of female category candidates to the extent of minimum 20% in each category, was found to be in accord with the decision of the Apex Court in **Anil Kumar Gupta (supra).** The said statement of law made by the Apex Court while dismissing the Special Leave Petition is binding on this Court being a declaration of law within the meaning of Article 141 of the Constitution of India as also on the doctrine of merger. The first question referred to the Larger Bench to examine the correctness of the principle of law stated by the Division Bench in **Rajeev Kumar (supra),** therefore, need not to be answered by us. It appears that the order of dismissal of Special Leave Petition dated 12.07.2013 had not been placed before the Division Bench which had referred the said question.

At the same time, it is relevant to note that the **Rajeev Kumar's case** had been decided in the facts of that case. The issue there was about application of the criteria of reservation in the advertisement. The Division Bench therein noticing the recital in clause (2) of the advertisement held that as per the conditions of the advertisement, in the light of the decision of the Apex Court in **Anil Kumar Gupta (supra)** noted in **Rajesh Kumar Daria (supra)**, the horizontal reservation in that case

was compartmentalized. The conclusion of the Division Bench in paragraph no.'9', '10', '11', '12' & '13' are relevant to noted herein under:-

> *"9. The aforesaid clause No.2 clearly recites that, for horizontal reservation, the candidates, who have been selected according to the vertical reservation, shall be placed in their respective categories, meaning thereby, the horizontal reservation of 20 percent would be given category-wise. The quota of female category candidates of 20 percent in a particular category cannot be enhanced by clubbing together the total number of posts of 35000.*
>
> *10. The decision of the Apex Court, coupled with the conditions of advertisement, clearly demonstrate that horizontal reservation has to be given category-wise. Not only this, the manner of implementing the rule of reservation vertically and then horizontally has been very succinctly explained in paragraph 9 of the judgment in Rajesh Kumar Daria's case (supra). The relevant part of the judgment has been highlighted by us in bold, which leaves no room for doubt that only if there is any shortfall, the requisite number of reserved category females candidates shall have to be taken by deleting the corresponding number of candidates from bottom of the list relating to such category.*
>
> *11. The rule, therefore, does not allow the respondent State Government to extend the benefit of reservation even beyond 20 percent in the respective categories, as a special reservation for women. It cannot be a tool or device to recruit candidates of the female category, even if they are less meritorious, in order to complete such horizontal reservation for which candidates are not available in other categories. There cannot be a pooling of female category candidates in excess of 20 percent against the strength of a category, as horizontal reservation in the instant case is compartmentalized.*
>
> *12.It is, however, something different that if the female category candidates are more meritorious than the male category candidates, then they would be entitled to be accommodated in their respective categories according to their merit, but again their merit will have to be higher than the male category candidates. Women can compete with men for the balance of 80 percent seats within their category on merit but not with the aid of the logic of saturating the unfilled seats of 20 percent horizontal reservation in other categories. The reservation has to be spread evenly for the representation of female category candidates to the extent of minimum of 20 percent in each*

category.

13.In the event the selections as held by the respondents are maintained, this would amount to transfer of the horizontal slot of other categories in excess of 20 percent for females in the Other Backward Class category which, according to us, in the present case, is contrary to the terms and conditions of the advertisement that does not allow enforcement of an "Overall" horizontal reservation. The advertisement clearly provides for horizontal reservation category-wise."

The observation in the above noted paragraph no.12 that the "reservation has to be spread evenly for the representation of female category candidates to the extent of minimum 20% in each category", therefore, has to be taken as being affirmed by the Apex Court for the principle stated in that case. The said statement of law, thus, would not be an impediment to the Larger Bench to answer other two questions of reference as the question of implementation of women reservation under the Scheme of the Government order dated 26.02.1999 could not be said to have been gone into therein.

The judgement in **Narendra Kumar Rai (supra)** was based on the decision in **Rajeev Kumar (supra)** and the dispute therein was decided in terms of the aforesaid judgement. The Special Leave Petitions Nos.18640 and 18641 of 2015 were dismissed on 16.10.2015 both on the ground of delay as well as on merits. Meaning thereby, that the Apex Court had refused to condone the delay in filing the Special Leave Petition and did not find merit in the statements of the appellant to grant appeal. The decision of the Apex Court in dismissal of Special Leave Petition, therefore, does not preclude this Bench from looking to the matter at hand.

Another decision of the Apex Court in Civil Appeal No.11370 of 2018 arising out of SLP (Civil) No.12538 of 2016

(**Alok Kumar Singh Vs. State of U.P. & others**) decided on 26.11.2018 has been placed before us to contend that the principle laid down in **Ashish Kumar Pandey (supra)** in the matter of horizontal reservation in the State of U.P. has been quoted with approval therein by the Apex Court. The principle laid down in **Ashish Kumar Pandey (supra)** for horizontal reservation in the State of U.P. being compartmentalized was also admitted by the State before the learned Single Judge in **Pramod Kumar Singh (supra)**. After the said statement of the learned Additional Advocate General, it is not possible for the State to take a U-turn to say that the horizontal reservation in the State of U.P. is implemented "Overall".

It is, thus, contended by Sri Anil Tiwari learned counsel for the petitioner that nothing remains for examination by the Larger Bench as answer to each question referred to the Larger Bench can be made on the said decisions of this Court affirmed by the Apex Court.

We are not convinced with the said arguments having noted the observation of the Apex Court in **Alok Kumar Singh (supra)** and the statement of learned Additional Advocate General in **Pramod Kumar Singh (supra)**, the relevant extract of which are quoted as under:-

The observations of the Apex Court in Alok Kumar Singh (supra):-

> *"It may be mentioned here that in terms of the decision of a Single Judge of the High Court of Allahabad rendered on 16.03.2016 which was confirmed by the Division Bench by its Judgment and Order dated 29.07.2016, in connection with horizontal reservation to be adopted while finalizing the result, another revised final result was published on 29.11.2016. Since no grievance is made on this count, we have refrained from going into the details in respect of such challenge and the consequences as a result of such directions."*

The statement of learned AGA recorded in Pramod Kumar Singh (supra):-

> *"On being confronted with this contention, Sri Manish Goyal the learned AAG, categorically stated that the State has always comprehended the horizontal reservation in the recruitment exercise to be compartmentalized. It was further stated that the State respondents are bound and shall ensure the implementation of horizontal reservation strictly in accordance with the principles laid down in Ashish Kumar Pandey"*

D. History of Litigation:-

Moreover, the history of litigation in the matter of implementation of horizontal reservation in the State of U.P. is to be seen to find out whether there is a conflict or consensus on the issue at hand and the reference may then be answered, accordingly.

(i) In the State of U.P. for the first time, the reservation policy for women in the matter of admission to medical courses was announced by the Government on 17.05.1994. The reservation position as provided therein was such that out of total seats being filled through CPMT 1994, 35% seats remained for the candidates belonging to General (open) category as the remaining 65% was contemplated for reserved category both vertical and horizontal in the following manner:-

Sl No.	Reserved Categories	Percentage of the reserved seats
1.	Backward Classes	27 (of them 30% reserved per cent for ladies.)
2.	Hilly area	3 per (of them 30 per cent cent reserved for ladies.)
3.	Uttrakhand Area	3 % (30% reserved for ladies.)
4.	Scheduled Caste	21 % (30% for ladies)

5.	Schedule Tribes	2 % (30% reserved for ladies.)
6.	Actual dependents of the freedom fighters	5 % (30% percent reserved for ladies)
7.	Daughter/sons of soldiers who became handicapped or killed in action/war.	2 % (30% percent reserved for ladies)
8.	For handicapped candidates	2 % (30% reserved for ladies.)
9.		65 percent

For each category, including General category 30% reservation was meant, separately, for female candidates. The said notification was challenged before the Apex Court under Article 32 of the Constitution in **Swati Gupta Vs State of U.P.**,[24] on the ground that the reservation of 65% of seats was contrary to the decision of the Apex Court in Indra Sawhney (supra)

(ii) Pending said writ petition, the Government had issued a notification on 17.12.1994 modifying the reservation policy in the notification of 17.05.1994. The position as set out in the notification dated 17.12.1994 for ready reference is to be extracted as under:-

> *"Sir, In continuation of G.O.No. 2697/Sec-14/V- 94/111/93 dated 17.5.94, on the above subject, I am directed to say clarifying the Govt. policy that horizontal reservation be granted in all medical colleges on total seats of all the courses to be filled through combined Pre-Medical Test (CPMT) 1994 as given below:*
>
> *1. Real dependents of freedom fighters 5%*
>
> *2. Sons/daughters of deceased/disabled soldiers 2%*
>
> *3. Physically handicapped candidates 2%*

24. 1995 (2) SCC 560

4. Candidates belonging to hill areas 3%

5. Candidates belong to Uttaranchal areas 3%

2. The above reservation would be horizontal and the candidates of the above categories, selected on the basis of merit, would be kept under the categories of Scheduled Castes/Scheduled Tribes/Other Backward Classes/ General to which they belong. For example, if a candidate dependent on a Freedom Fighter selected on the basis of reservation belongs to reserved for scheduled caste, (he will be adjusted against the seat reserved for S.C.?) Similarly, if a physically handicapped candidate selected on the basis of reservation belongs to other backward class or general category, he would be adjusted against the seats reserved for other backward classes or general category.

3. I am also directed to say that vertical reservation shall be granted in all medical colleges on total seats of all courses to be filled through C.P.M.T. 1994 as given below:

a) Scheduled Caste Candidates-21%} 30 seats

b) Scheduled Tribe Candidates-21%} in each

c) Other Backward Class category candidates -27%} reserved for ladies "

The writ petition in **Swati Gupta (supra)** was, then disposed of in view of the modified scheme vide circular dated 17.12.1994 on the ground that the grievances of the petitioners therein did not survive.

(iv) The subsequent notification dated 17.12.1994, as aforesaid, in the matter of medical admission for the year 1994-95 was brought under challenge before the Apex Court in **Anil Kumar Gupta (supra)** in a Writ Petition under Article 32 of the Constitution. Hon. Justice B.P. Jeevan Reddy (as His Lordship then was) noticed from the statement made in the counter affidavit filed by the respondent that the authorities In-charge of making admission first took up the special category reservation and filled them up. Of the 112 candidates, 101 were from unreserved category while 9 candidates belonged to OBC

category had secured equal marks with the General candidates and were, accordingly, selected on merits in the open category or unreserved category. The result was that out of 112 seats reserved for special categories (horizontal reservation), 110 seats were taken away by the open category candidates, thus, leaving only 263 seats for the general candidates, i.e. open category candidates not belonging to any of the special reservation category. It is the above method of filling of seats which was subject matter of challenge before the Apex Court. It is in the said facts and circumstances of the case, the language in the revised notification dated 17.12.1994 was considered by the Apex Court to hold that in view of the ambiguous language employed therein, it was not possible to give a definite answer to the question whether the horizontal reservation was "Overall" reservation or “Compartmentalized” reservation. It was further observed that for future guidance, while providing horizontal reservation, the State should specify whether the horizontal reservation is a “Compartmental” or "Overall" reservation. The Apex Court has further expressed its opinion that in the interest of avoiding any complication and intractable problem, it would be better that in future horizontal reservation are compartmentalized in the sense as explained therein.

The impact of the aforesaid two principles of implementation of horizontal reservation as laid down therein would be seen in the later part of this judgement at an appropriate place.

(v) The reservation for women in all public employment or services was introduced in the State of U.P. by the Government order dated 26.02.1999. The said Government order provides that the State shall grant 20% reservation to women in public posts

and services in direct recruitment. This reservation was conceived to be of horizontal nature i.e. the selected women would have to be adjusted in the socially reserved category to which they belong. The Government order further states that the women selected on their own merit would be counted against the post reserved for them. In absence of requisite number of women candidates i.e. in case of their unavailability, the reserved posts shall be filled by male candidates and were not to be carried forward. All other eligibility qualifications etc. for selection in direct recruitment for the posts or services in question shall remain the same and there shall be no relaxation.

(vi) The question of application of women reservation in a selection in relation to the post of police constable in U.P. Police came up for consideration before the Division Bench in **Rajeev kumar (supra).** In the said case, having noticed the chart placed before the Court disclosing the vertical and horizontal reservation, it was found that the short fall in the permissible limit of 20% of horizontal reservation for female category candidate was applied only in one category, by placing/adjustment of 2744 candidates in OBC category alone whereas 854 female candidate, women of OBC category, had already been selected on their merit.

Noticing the method of implementation of women reservation (horizontal reservation) as explained in **Anil Kumar Gupta (supra)** relied upon in **Rajesh Kumar Daria (supra)**, it was held that the horizontal reservation as per the criteria provided in the advertisement-in-question was to be implemented in compartmentalized manner. As has been noted herein above, the said judgement was rendered in the facts of that case.

(vii) In **Sunaina Tripathi (supra),** the reservation for women applied in the selection and appointment of Civil Judge, (J.D.) under the Government order dated 26.02.1999 came up for scrutiny. The question framed by the Division Bench, relevant for this matter is as under:-

"Whether the horizontal reservation for women provided under the Government order dated 26.02.1999 is restricted to each of the categories or is general in nature.?"

The Division Bench has considered **Indra Sawhney (supra)** (paragraph no.812), **Anil Kumar Gupta (supra)** as noted in **Rajesh Kumar Daria (supra)** and the Division Bench of this Court in **Rajveev Kumar (supra)** and culled out the principles as follows:-

> *"(ii) Provision for reservation made for woman is a horizontal reservation.*
>
> *(iii) The proper and correct course is to fill up the General category quota on the basis of merit and then fill up each of the reserved category quotas of Scheduled Castes, Scheduled Tribes, Other Backward Classes and thereafter find out how many candidates belong to special reservations i.e. horizontal reservations have been selected on the above basis. If the quota fixed for horizontal reservation is already satisfied, in case it is an "Overall" horizontal reservation, no further question arises and if it is not satisfied, the requisite number of special reservation candidates under the horizontal reservation have to be taken and adjusted/accommodated against their respective categories by deleting the corresponding number of candidates therefrom.*
>
> *(iv) If it is a case of compartmentalised horizontal reservation, then this is to apply separately to each of the vertical reservation. In this way entire reservation quota will be intact and available to all concerned.*
>
> *(v) While determining the over all percentage of horizontal reservation candidates selected on merits in the respective categories have to be included and the minimum percentage of horizontal reservation granted to a particular category like*

20% for women in this case has to ensured. If the number of women candidates exceed 20% and they have been selected on their own merit then their number shall not be reduced."

The answer to the aforesaid question has been given by the Division Bench in the following words:-

Point No.3

"37.Applying the principles laid down in the aforementioned cases regarding horizontal reservation to the facts of the present case, we find that from a reading of the Government Order dated 26th February, 1999 already reproduced herein before, 20% reservation to woman candidates have been given horizontally. Clause (1) of the said Government Order provides for reservation in the initial appointment and not in the case of post to be filled up by way of promotion. Clause (2) of the said Government Order provides that reservation shall be horizontal in nature and the reservation provided for women candidates shall be adjusted in the category to which they belong. Clause (3) of the said Government Order provides that if a woman candidate has been selected on merit in that case she will be counted and adjusted in the reservation provided for that post. Clause (4) of the said Government Order provides that in any direct recruitment if requisite number of women are not available then it will be filled up by eligible male candidates and shall not be carried forward. Clause (5) of the said Government Order provides that a woman candidate should fulfill the requisite qualification and eligibility under the relevant service rules.

38. Therefore from a conjoint reading of the various clauses of the aforementioned Government Order dated 26th February, 1999 it is clear that even though in the opening part of the Government Order the State Government has provided 20% reservation for women but by Clause (2) of the Government Order the reservation for woman has been made applicable in that category itself and if a woman candidate is selected on her own merit, her selection would be counted in the number of selected women candidates."

(viii) The subsequent decision of the Division Bench in **Narendra Kumar Rai (supra)** proceeded on the principle laid down in **Rajeev Kumar (supra).**

(ix) In **Ashish Kumar Pandey (supra)**, the question as

posed to it by the Court was answered first noticing that the State had not disputed that the quota prescribed for respective classes of horizontal reservation was calculated on the total number of vacancies, and thereafter, was applied compartmentalized amongst the respective categories as per their social quota percentage. Then in the light of the principle enunciated in **Anil Kumar Gupta (supra)** and the Government order dated 26.02.1999, the method of implementation of women reservation was scrutinized. The compartmentalized break-up of horizontal reservation provided for, in each social category, as worked out by the Selection Board was noted by the learned Single Judge therein and it was found that 19 women candidates having obtained marks above cut off marks for the open category were selected on merits. No women candidates were selected in any other category i.e. OBC, SC & ST. Likewise, candidates who belong to dependents of freedom fighters and Ex-servicemen were to be adjusted horizontally, as none could make it to the select list on their own merit.

Out of total posts advertised, 20% reservation for women came to a figure of 740. But only 261 women candidates were available, of which 19 women, (9 open category and 10 OBC) could make it to the select list on their own merits. The question was, thus, for adjustment of remaining 242 women candidates. Learned Single Judge having gone through the judgement of the Apex Court in **Indra Sawhney (supra)**, **Anil Kumar Gupta (supra)** and the Division Bench in **Rajeev Kumar (supra)** and **Sunaina Tripathi (supra)** has reached to the conclusion that the candidates of Special categories would necessarily have to be adjusted in their respective social category to which he or she belongs. In making

adjustment in any other manner would be applying the principle of vertical reservation, which is impermissible and illegal. The Board having adjusted all candidates of horizontal reservation category in the open category has raised the vertical reservation to 77% which is in addition to the permissible limit of 50% and, therefore, is illegal and void.

The select list seeking adjustment of the social category candidates vis. women, Ex-servicemen and dependents of freedom fighters in the open category was, thus, set aside and quashed and it was directed that all such candidates shall be shifted and adjusted in their respective social categories i.e. OBC, SC, S.T. to which they belong. The candidate of special category pertaining to open category shall only be adjusted/accommodated in the open category. The said adjustment was directed to be made looking to availability of 261 women candidates of socially reserved category. It was found that 78 in total were women candidates of open category and 9 were selected on merit. In OBC, total 173 women candidates were available and 10 selected on merits. In S.C. Quota, 10 women were available. All of them were directed to be adjusted in their social category by removing requisite equal number of selected candidates from the bottom of the merit list of the said category. The matter was, thus, decided in the peculiar facts and circumstances of that case.

(x) In another judgement of this Court in **Abhinav Agnihotri (supra)**, the issue was for consideration of candidature of the petitioner therein in the category of freedom fighter which is 2% in the State of U.P. The argument of the petitioner was that out of total number of seats, 2% i.e. total 9 seats were to be filled from the amongst the dependents of freedom of fighters in the State of U.P. As per the chart provided

to the Court, only 7 candidates from dependents of freedom fighters category had been accorded admission and as such the requisite number of vacancies of dependents of freedom fighters were lying vacant.

Learned counsel for the respondent therein, however, had argued that 9 seats available in the category in question i.e. dependents of freedom fighters had been compartmentalized social category wise and, accordingly, 4 seats of General category, 2 for OBC, one for SC and one for ST category candidate had been earmarked and, therefore, the same was not inter-changeable. Learned Single Judge having considered the judgement of Apex Court in **Indra Sawhney (supra)** on the principle of horizontal reservation, **Anil Kumar Gupta (supra)**, **Rajesh Kumar Daria (supra)**, and **Public Service Commission Uttarnchal Vs. Mamta Bisht & others**,[25] had held that the information brochure published with the advertisement containing the details of the procedure provided percentage of reservation in each category (vertical as well as horizontal reservation) and has further specified that each candidate can be given only one type of horizontal reservation except for female students (emphasis supplied), who can opt for vertical reservation category code meant for S.C./S.T. & O.B.C in this scheme. It was, thus, held that it was a case of compartmentalized reservation qua horizontal reservation. The total number of 9 seats for dependents of freedom fighters category having been compartmentalized in General, OBC, S.C. & S.T. Categories, vacant seat was not available to the petitioner therein. The petitioner's plea that he was entitled to admission on the ground that 9 incumbents from the freedom fighter category had not been accorded admission, was turned down.

25 .AIR 2010 SC 2613

(xi) Now we are left with two Division Benches judgements in **Sheo Shankar Singh (supra**) and **Brijendra Dev Mishra (supra)** both decided in the year 1996.

In **Sheo Shankar Singh** decided on 08.07.1996, the question was of reservation quota for Ex-servicemen category. The petitioner therein had applied in the said category but remained unsuccessful in the pre-examination. He approached this Court seeking a writ of mandamus to issue a direction to the Commission to admit him in the main examination with consequential and incidental process. Under the Act' 1993, three out of total advertised vacancies had been reserved for the Ex-servicemen. These three vacancies had further been reserved/divided by the respondent as:- One vacancy for General Ex-servicemen, one vacancy for S.C. Ex-servicemen and one vacancy for backward class Ex-servicemen.

The Division Bench noticing observations of **Indra Sawhney (supra)** (in paragraph no.812) had held that the reservation in favour of Ex-servicemen falls under Article 16(1) and Article 16(4) of the Constitution is not applicable to it. The consideration and the basis of reservation under Article 16(1) differs from what is contained in Article 16(4). The posts reserved for Ex-servicemen, thus, could not be divided or allocated on the basis of caste of the Ex-servicemen. Dividing vacancy reserved for Ex-servicemen and allocating them to S.C, S.T, Backward and General class was, therefore, held without jurisdiction. It was thus, concluded as under:-

> *"All Ex-servicemen, who applied against their reserved quota have to be treated as persons belonging to the one and the same class and all of them are to be considered against all the vacancies reserved for them strictly on the basis of the merit irrespective of the caste/class to which they belong. Claim of*

the petitioner is, therefore, liable to be considered on merit against all three vacancies reserved for Ex-service men."

(xii) In **Bijendra Dev Mishra (supra)** the question for consideration was whether quota for dependents of freedom fighters, physically handicapped and Ex-servicemen are to be calculated as per the percentage of total vacancy in a particular service or as a percentage of the vacancy in the respective category i.e. (SC, S.T, OBC or General) to which the candidate belongs.

In that case, the commission took the stand that the total number of vacancies advertised were firstly to be divided in three reserved categories i.e. SC, ST and OBC and one General category and, thereafter, the reserved posts for dependents of freedom fighters, physically handicapped and Ex-servicemen were to be calculated in the respective category. The Division Bench noted that for illustration that if there were 34 posts of Deputy S.P.; (7 SC) (1 S.T) (9 OBC) and (17 General) as per the percentage of quota in each vertical category, if calculated, then there would be no reservation for dependents of freedom fighters candidates in the General category, since 2 % of 17 posts came to 0.34%, (less than 0.50%). The Commission had further contended that, in case, reservation for dependents of freedom fighters, physically handicapped and Ex-servicemen was not calculated in the above manner, the reservation quota would exceed 50%.

Sub section (1) and Sub Section (3) of Section 3 of Act' 1993 was read together by the Division Bench to state as follows:-

"The main question that falls for decision is whether quotas for DFF, physically handicapped and Ex-

servicemen are to be calculated as a percentage of total vacancies in a particular service or as a percentage of the vacancies in the respective category, (i.e. Scheduled Castes, Scheduled Tribues and Other Backward Classes or General) to which the candidate belongs. Sub-section (1) of Section 3 of 1993 Act provides reservation for the physically handicapped, DFF and Ex-servicemen at 5% of the vacancies in other words as a percentage of the total vacancies. After the persons are selected against the vacancies reserved under sub-section (3) of Section 3 to be placed in appropriate category to which they belong for example, if a selected person belongs to Scheduled caste category, he is to be placed in that quota by making necessary adjustments. Similarly, if he belongs to open competition category, he is to be placed in that category by making necessary adjustments. A combined reading of sub-section (1) and (3) makes it clear that the quotas of the vacancies for physically handicapped, DFF and Ex-servicemen are to be calculated as a percentage of total number of vacancies and it is after the persons are selected against the vacancies reserved under sub-section (1), they have to be placed in the respective caste category by making necessary adjustments."

The observations of the Apex Court in **Indra Sawhney (supra)** (para 812) was considered to turn down the stand of the Commission that if quota of reserved vacancies stipulated under Section 3(1) and the notification issued under Section 3(2) of the Act' 1993 was calculated, as a percentage of the total number of vacancies, and if after the persons against the vacancies referred under Sub Section (1) were placed in the appropriate category to which they belong, reservation will exceed 50% of the total vacancies. The Commission was then directed to grant admission to the petitioner therein in the category of the dependents of freedom fighters by calculating the number of vacancies reserved for the said category at 2% of the total number of vacancies in each service i.e. for vacancies in each type of post advertised by the Commission.

As seen from the history of litigation and the stand of the State before us that the horizontal reservation for physically handicapped, dependents of freedom fighters and Ex-servicemen as also for women in the State of U.P. is "Overall" horizontal reservation, (which is termed as somersault by the learned counsel for the petitioner), it is clear that the stand of the State in the matter of implementation of horizontal reservation in the State of U.P. under the scheme of the Act' 1993 and the Government order dated 26.02.1999 for the categories of dependents of freedom of fighters, Ex-servicemen, physically handicapped and women, has never been consistent. Each time, in a series of litigation, to assert the correct method of implementation of horizontal reservation in the State of U.P., this Court had to intervene which had resulted in delaying the selection process. The State Government took different stand in different selection. The Division Bench in the referral order took note of this fact and has made the reference with a view to resolve the controversy finally in order to avoid further litigation, by authoritative pronouncement of the Larger Bench of this Court.

In the light of the aforesaid, to render quietus to the entire controversy and for a speedy conclusion of recruitment process, we deem it fit and proper to examine the remaining two questions of reference.

E. Constitutional Provisions:-

At this stage, we wish to first go through the constitutional provisions enabling the horizontal reservations. Article 16 says that all citizens shall be equal in matters relating to employment or appointment to any office under the State. In

Indra Sawhney (supra) (reference paragraph no.'733'), Justice B.P. Jeevan Reddy speaking for the majority of Judges has clarified that Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats. The argument that clause (1) of Article 16 permits only extending of preferences, concessions and exemptions, but does not permit reservation of appointments/posts has not been accepted. The question whether clause (1) of Article 16 does not permit any reservation has been answered in negative and it was observed:-

> *"741. .....Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in Thomas is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality.....*
>
> *745. For the reasons given in the preceding paragraphs, we must reject the argument that clause (1) of Article 16 permits only extending of preference, concessions and exemptions, but does not permit reservation of appointments/posts....."*.

The observations in paragraph no.812 of Indra Sawhney (supra) is relevant for our purposes and is extracted herein below:-

> *"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."

It can, thus, be seen that the reservation in favour of physically handicapped, dependents of freedom fighters and Ex-servicemen is relatable to Article 16 (1) and can be referred to as horizontal reservation. Such reservation has been granted on the principle of reasonable classification embraced in Article 16(1) for ensuring attainment of the equality of opportunity assured by it. It is just the same as Article 14 permits reasonable classification on the doctrine of equality enshrined in it.

As has been held in **Indra Sawhney (supra)** noted above, the persons selected against quota of physically handicapped, dependents of freedom fighters and Ex-servicemen are to be placed in the appropriate category to which they belong by making necessary adjustment so that the rule of 50% (percentage of reservation) is adhered. The horizontal reservation, thus, cuts across the vertical reservation.

Reservation for women is, however, relatable to Article 15 (3) of the Constitution. The question as to whether reservation for women in public employment would be valid in the constitutional scheme had been examined by the Apex Court

in **Government of Andra Pradesh Vs. P.P. Vijyakumar & another**,[26]. The argument therein that the State cannot make any reservation in favour of women in relation to appointments or posts under the State as this would amount to discrimination on the ground of sex in public employment and would violate Article 16(2), has been repelled. It was held that Article 15(3) permits special provisions for women. Article 15(1) controls every sphere of activity of the State. Both Article 15(1) and 15(3) go together. Article 16(1) relates to specific area of State activity vis. employment under the State. The inter-relation between Article 14, 15 & 16 has been considered in a number of cases by the Apex Court. The prohibition against discrimination as stood out in Article 16(2) is qualified by clauses (3), (4) and (5) of Article 16. Article 15 is a general provision whereas Article 16 is more specific about employment. Since Article 16 does not touch upon any special provisions for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). The power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State. It was thus, concluded in paragraph no.11 as under:-

> *"11. We do not, however, find any reason to hold that this rule is not within the ambit of Article 15(3), nor do we find it in any manner violative of Article 16(2) or 16(4) which have to be read harmoniously with Articles 15(1) and 15(3). Both reservation and affirmative action are permissible under Article 15(3) in connection with employment or posts under the State. Both Articles 15 and 16 are designed for the same purpose of creating an egalitarian society. As Thommen, J. has observed in Indra Sawhney's case (supra) (although his judgment is a minority judgment), "Equality is one of the magnificient cornerstones of Indian democracy". We have, however, yet to turn that corner. For that purpose it is necessary that Article 15(3) be read harmoniously with Article 16 to achieve the*

26. 1995 (4) SCC 520

purpose for which these Articles have been framed."

The concept of women reservation as explained by Justice Sujata V. Manohar (as Hon'ble Judge then was) is based on the concept of gender equality, to create job opportunities for women. The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result of it, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. In Article 15(3) where the State may make "Special provision" to improve women's participation in all activities under the supervision and control of the State, that can be in the form of either affirmative action or reservation.

In a recent decision of the Apex Court Justice Dr. D.Y. Chandrachud speaking for the bench in **B K Pavitra and Ors Vs. Union of India & others**[27] has said in paragraph Nos.'111' that the constitution is a transformative document, intended by its draftspersons to be a significant instrument of bringing about social change, founded on the evolution of equality away from its formal underpinnings to its substantive potential.

The observations in **State of Kerala vs N M Thomas,**[28], has been quoted to state in paragraph no.113 therein

27 .M.A No. 1151 of 2018 in Civil Appeal No.2368 of 2011
28 . 1976 (2) SCC 310

that the Constitution Bench adopted an interpretation of Article 15 and 16 which recognized these provisions as but a facet of the doctrine of equality under Article 14. The observations of Justice Krishna Iyer noted therein reads as follows:-

> *"139. It is platitudinous constitutional law that Articles 14 to 16 are a common code of guaranteed equality, the first laying down the broad doctrine, the other two applying it to sensitive areas historically important and politically polemical in a climate of communalism and jobbery."*

Thus, it can be seen that the policy of women reservation in the line of Article 15(3) of the Constitution is with the objective to see that the representation of women is increased in public employment so as to bridge the socio-economic gaps created on account of gender bias, and to increase participation of women at all level of State activities. It is further with the object and need to empower women by economic means to increase their participation at all level of decision making, in and outside of their domestic environment.

F. Legal Provisions:-

We may then look to the legal provisions made by the State providing for both types of horizontal reservation:-

(i) The U.P. Act No.4 of 1993 namely U.P. Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen) Act' 1993 came into force on December 11, 1993. It had received assent of the President on December 29, 1993 and published in the Official gazette dated 30.12.1993. Relevant Section 3 of the Principal Act' 1993 is reproduced as under:-

3.Reservation of Posts in favour of physically handicapped etc. *(1) In public services and posts in connection with the affairs of the State there shall be reserved the following percentage of posts at the stage of direct recruitment in favour of_*

(i) Physically handicapped

(ii) Dependents of freedom-fighters, and :-Five percent

(iii) Ex-servicemen

(2) The respective percentage of the categories specified in sub-section (1) shall be such, as the State Government may fix from time to time by a notified order.

(3) The persons selected against the posts reserved under sub-section (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments if he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustment; if he belongs to Backward Classes category, he will be placed in that category by making necessary adjustments.

(4) For the purposes of sub-section (1) an year of recruitment shall be taken as the unit and not the entire strength of the cadre or service, as the case may be.

Provided that at no point of time the reservation shall, in the entire strength cadre, or service, as the case may be, exceed the quota determined for respective categories.

(5) The posts reserved under sub-section (1) shall not be carried over to the next year of recruitment."

This was amended by the Amendment Act of 1997 (U.P. Act No.6 of 1997), the amendment of Section 3 reads as under:-

*"**Amendment of Section 3.** In Section 3 of the principal Act,-*

(a) for sub-section (1) the following sub-section shall be substituted, namely:-

"(1) There shall be reserved at the stage of direct recruitment,-

(I) in public services and post two percent of vacancies for dependents of freedom fighters and one percent of vacancies of Ex-servicemen;

(ii) in such public services and posts as the State Government may, by notification, identify one percent of vacancies each for the persons suffering from,-

(a) blindness or low vision;

(b) hearing impairment; and

(c) locomoter disability or cerebral palsy."

(b) sub-section (2) shall be omitted;

(c) in sub-section (3) for the words "Backward Classes", the words "Other Backward Classes of citizens" shall be substituted;

(d) in sub-section (4) shall be omitted;

(e) for sub-section (5), the following sub-section shall be substituted, namely-

"(5) Where, due to non-availability of suitable candidates any of the vacancies reserved under sub-section (1)

remains unfilled it shall be carried over to the next recruitment."

Further amendment in the Principal Act No.4 of Act' 1993 are made by the U.P. Act No.6 of 2015, whereby in Section 2 (b) of the Act; clause (ii) has been inserted in view of the judgement of this Court in Isha Tyagi Vs. State of U.P. Writ petition No.41279 of 2014.

The last amendment in Section 3 by U.P. Act No.12 of 2016 is for omission of sub section (5) of Section 3 of the Act' 1993. A reading of the sub section (1) of Section 3 of the Principal Act, 1993 indicates that the reservations were provided in public services and posts in the State of U.P. to the extent of 5% of vacancies at the stage of direct recruitment.

Sub section (3) of Section 3 provides that the persons selected against the reserved vacancies shall be placed in the appropriate social category to which they belong by making necessary adjustments. Sub section (4) of Section 3 provides that an year of recruitment shall be taken as the unit and not the entire strength of the cadre or service, for the purpose of sub section (1). Proviso to sub section (4) says that at no point of time, the reservation shall in the entire strength of the cadre or service exceed the quota determined for respective categories which means the categories provided in sub section (1) of Section 3.

Sub section (5) of Section 3 of the Principal Act contemplated that the vacancies reserved in horizontal categories under sub section (1) shall not be carried forward. By Amendment Act of 1997 carry-forward provision had been inserted by substitution of sub section (5), but the same has again been omitted by U.P. Act No.12 of 2016.

(ii) For the first time, reservation for women in the State of U.P. was provided in the matters of admission to medical courses by the Government order dated 17.05.1994 as noted hereinabove. The said Government order was further modified by the Government order dated 17.12.1994, which provided the reservation for horizontal categories as extracted above.

The procedure for filling up vacancies in CPMT 1994 pursuant to the said Government order, was subject matter of challenge before the Apex Court in **Anil Kumar Gupta (supra),** wherein the Apex Court pointing out the errors in the rule of reservation and its implementation, provided appropriate relief to 34 students belonging to general category who had been deprived of admission on account of faulty action of the respondent.

Thereafter, on 26.02.1999, the Government order providing for women reservation in, all public services and posts in connection with the affairs of the State as defined in Section 2-C of U.P. Act No.4 of 1994, came into being. The same is extracted as under:-

"प्रेषक,

श्री सुधीर कुमार,
सचिव
उ०प्र० शासन।

सेवा में,

1. समस्त प्रमुख सचिव/ सचिव, उ०प्र० शासन।
2. समस्त विभागाध्यक्ष/ कार्यालयाध्यक्ष, उ०प्र०।
3. समस्त मण्डलायुक्त/जिलाधिकारी, उ०प्र०।

कार्मिक अनुभाग-2

लखनऊः दिनांकः 26 फरवरी, 1999

विषयः- राज्याधीन लोक सेवाओं और पदअॅ पर सीधी भर्ती के प्रक्रम पर महिलाओं के लिए आरक्षण।

महोदय,

मुझे यह कहने का निदेश हुआ है कि निम्नलिखित शर्तों एवं

उपबन्धअॅ के अधीन राज्याधीन लोक सेवाओं और पदअॅ पर सीधी भर्ती के प्रक्रम पर महिलाओं के लिए 20 प्रतिशत आरक्षण प्रदान करने का शासन द्वारा निर्णय लिया गया है:-

1. आरक्षण राज्याधीन लोक सेवाओं और पदअॅ पर केवल सीधी भर्ती के प्रक्रम पर होगा। पदोन्नति के पदअॅ पर नहीं होगा।
2. आरक्षण हारजेन्टल प्रकृति का होगा अर्थात् किसी राज्याधीन लोक सेवा और पद पर महिला आरक्षण के अधीन चयनित महिला जिस श्रेणी की होगी उसे उस श्रेणी के प्रति समायोजित किया जायेगा।
3. यदि कोई महिला, किसी राज्याधीन लोक सेवा और पद पर मेरिट के आधार पर चयनित होती है तो उसकी गणना उस पद पर महिलाओं के लिए आरक्षित रिक्ति के प्रति की जावेगी।
4. राज्याधीन लोक सेवाओं पर पदअॅ में सीधी भर्ती के लिए किसी चयन में महिलाओं के लिए आरक्षित पद यदि महिला अभ्यर्थियअॅ के उपलब्ध न होने के कारण नहीं भरा जा सके तो वह पद उपयुक्त पुरुष अभ्यर्थियअॅ से भरा जावेगा व भविष्य के लिए अग्रेनीत नहीं किया जावेगा।
5. राज्याधीन लोक सेवाओं और पदअॅ पर सीधी भर्ती के लिए महिलाओं के सम्बन्ध में वांछित सभी अर्हतायें, पद संबंधी सुसंगत सेवा नियामवली में उल्लिखित पूर्ववत् अर्हताओं के अनुरूप रहेगी व उनमें इस शासनादेश से कोई परिवर्तन नहीं होगा।
6. यह आदेश तत्काल प्रभाव से लागू होगे लेकिन जिन रिक्तियअॅ को भरने के लिए विज्ञापन जारी किये जा चुके है या जिन रिक्तियअॅ के लिए चयन की प्रक्रियां प्रारम्भ होने का आश्य भर्ती का आधार केवल लिखित परीक्षा या साक्षात्कार होने की स्थिति में ऐसी परीक्षा/ साक्षात्कार प्रारम्भ हो जाने से है। जिन – पदअॅ पर भर्ती का आधार लिखित परीक्षा और साक्षात्कार दोनअॅ है उनके सम्बन्ध में चयन प्रक्रिया प्रारम्भ होने का आश्य लिखित परीक्षा प्रारम्भ हो जाने से है।
7. लोक सेवाओं एवं पदअॅ का तात्पर्य उ०प्र० लोग सेवा (अनुसूचित जातियअॅ अनुसूचित जनजातियअॅ और अन्य पिछड़े वर्ग के लिए आरक्षण) अधिनियम 1994 में परिभाषित लोक सेवाओं और पदअॅ से है।

कृप्या शासन के उपरोक्त आदोशअॅ का अनुपालन सुनिश्चित करने का कष्ट करें। यह भी अनुरोध है कि शासनादेश से अपने अधीनस्थ सभी अधिकारियअॅ को भी अवगत करा देंवे।

भवदीय,
ह०- सुधीर कुमार
सचिव।"

G. Difference/Comparison of the two provisions:-

We may first record that there is no challenge to the scheme of the Government order dated 26.02.1999. The bone of contention before us is interpretation of the clause (2) of the

Government order dated 26.02.1999 i.e. the method of implementation of women reservation in the State of U.P.

The submission of Sri Anil Tiwari learned Advocate is that the scheme of horizontal reservation for the categories provided in U.P. Act No.4 of Act' 1993 and the Government order dated 26.02.1999 are radically different. He submits that the Government order dated 17.12.1994, implementation of which was challenged before the Apex Court provided for horizontal reservation in five categories (inclusive of 3 categories provided in Act' 1993) and 30% seats reserved for women candidates in socially reserved categories (S.C., S.T. & OBC), it provided that the horizontal reservation was to be granted on total seats. Sub section (1) of Section 3 of Act' 1993 also contemplates determination of percentage of reserved seats as against the total vacancies at the stage of direct recruitment. Such is not the scheme under the Government order dated 26.02.1999, which, according to him, in the opening paragraph though states that 20% seats would be reserved for women in direct recruitment process for public service and posts in the affairs of the State of U.P., but does not provide that the percentage of reserved post shall be counted against the total vacancies at the stage of direct recruitment.

He has urged that the Government order dated 26.02.1999 came into being after the judgement of the Apex Court in **Anil Kumar Gupta** (supra) wherein it was observed that in future the horizontal reservation should be compartmentalized i.e. the seats reserved for horizontal reservations should be proportionately divided among vertical (social) reservation category and shall not be inter-transferrable. The contention is that the language of clause (2) of the

Government order dated 26.02.1999 is in-confirmity with the observations of the Apex Court in **Anil Kumar Gupta (supra)** and the same has been interpreted repeatedly in the same manner by this Court in **Sunaina Tripathi** (Division Bench) (supra) and **Ashish Kumar Pandey** (Single Judge). In **Pramod Kumar Singh** (supra) learned Additional Advocate General made a categorical statement that the State has always comprehended the horizontal reservation in the recruitment exercise to be compartmentalized and that the State-respondents are bound and shall ensure the implementation of horizontal reservation strictly in accordance with the principle laid down in **Ashish Kumar Pandey (supra)**. The submission, thus, is that in view of the binding decisions in the aforesaid cases, it is not permissible for the State Government to change its stand before this Larger Bench.

Sri Neeraj Tripathi learned Additional Advocate General, on the other hand, has asserted that clause (2) of the Government order dated 26.02.1999 only provides the method of adjustment of the selected candidates as the reservation for Women is horizontal, which cut across vertical reservation. The Schemes of clause (2) of the aforesaid Government order and Section 3 of the Act of 1993 are same. These two provisions cannot be read in a manner to provide two different meaning. Sub Section (3) of the Act 1993 also provides for the method of adjustment of the selected horizontal reservation category candidates in their respective social reservation category. The same scheme can be read in the clause (2) of the Government order dated 26.02.1999.

Having considered the submissions of learned Advocates, we proceed to make a comparison of two provisions,

both of which provide scheme of horizontal reservation in the State of U.P. Before proceeding to make a comparison, we may remind ourselves of the observation of the Apex Court in paragraph no.812 of **Indra Sawhney's** case (as extracted above). There is no dispute about the settled position that all the reservations of different categories other than socially reserved categories, S.C., S.T & O.B.C such as physically handicapped, dependents of freedom fighters and Ex-servicemen as also for Women are horizontal reservations. Horizontal reservations cut across the vertical reservations and have been referred as "inter-locking reservation" in **Indra Sawhney** (supra). Under the scheme, the person selected against the reserved quota of horizontal category will be placed in his social category i.e. if he belongs to S.C. Category, he will be placed in that quota by making necessary adjustment. Similarly, if he belongs to open category, he will be placed in that category by making necessary adjustment. The necessary adjustment would mean displacement of the last selected candidate in the merit list of the social category, to give way to the selected candidates in horizontal category, to fill the quota of that category. The said adjustment is necessary as the percentage of reservation in favour of social reserved category (S.C., S.T. & O.B.C.) has to remain the same i.e. the reserved seats cannot exceed 50% of the total vacancies. The rule of 50% reservation has been provided in **Indra Sawhney (supra)**.

In the light of the said observation, when we read sub section (3) of Section 3 of the Act' 1993 and clause (2) of the Government order dated 26.02.1999 together, we do not find any difference. For ready reference both the clauses are again extracted herein below:-

"Sub-section (3). The persons selected against the posts reserved under sub-section (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments if he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustment; if he belongs to Backward Classes category, he will be placed in that category by making necessary adjustments.

2.आरक्षण हारजेन्टल प्रकृति का होगा अर्थात् किसी राज्याधीन लोक सेवा और पद पर महिला आरक्षण के अधीन चयनित महिला जिस श्रेणी की होगी उसे उस श्रेणी के प्रति समायोजित किया जायेगा।"

Both speak of adjustment in accordance with the principles laid down in Indra Sawhney's case being inter-locking reservation.

The difference which we find is only of clause (3) and (4) of the Government order dated 26.02.1999, which provide that the women selected on their own merit would be counted against the reserved vacancies and in case of non availability of women candidates, the vacancies reserved for them will be filled by male candidates and shall not be carried forward.

It is further noteworthy that in the Principal Act No.4 of Act' 1993, sub section (5) provide the same scheme as provided in clause (4) of the Government order dated 26.02.1999. The reserved vacancies under the Principal Act' 1993 were not to be carried forward. Sub section (5) of the Principal Act' 1993 had seen legislative changes and now in the Act of 2016, the said provision has been omitted. The result being the vacancies of reserved categories of all horizontal categories in the State of U.P. would not be carried forward as there is no question of

displacement in the merit list of the social category candidates, in case of non availability of the reserved horizontal category candidate. The merit list of social categories (S.C, S.T., O.B.C. & General) will be kept as it is.

We are, thus, convinced with the argument of the learned Additional Advocate General that the scheme of sub section (3) of Section 3 of Act' 1993 and clause (2) of the Government order dated 26.02.1999 both contemplates only the method of displacement or adjustment i.e. the displacement of candidates of respective social category to give way to the horizontal category candidates and it cannot be interpreted to provide proportionate division of horizontal reserved seats among the (vertical) social reserved category.

The only difference in the aforesaid two schemes of horizontal reservation for physically handicapped etc. under the Act' 1993 and women, thus, remains is of clause (3) of the Government order dated 26.02.1999, which provides that the women selected on their own merit would be counted against the vacancies reserved (20%) for them. If we read conjointly both clause (2) and clause (3) of the Government order dated 26.02.1999 with the opening paragraphs, it is crystal clear that the scheme of the Government order is:- (i) out of total vacancies notified for direct recruitment, 20% are to be reserved for women candidates; (ii) the women who could make it to the merit list, (on their own merit), would be counted against the vacancies reserved to the extent of 20%; for illustration; in case, in a given selection, 20 women out of 100 vacancies notified for selection are found to be selected in the merit list, (on their own merit), it would be taken as the quota for women stood satisfied and there would be no question of moving further in that case.

Whereas, such is not the position in the 1993' Act as clause (3) of the Act' 1993 only provides for adjustment of the persons selected against their respective social category to which they belong. Section 3 of the Act' 1993 does not provide that the selected candidates on their own merit, if belong to horizontally reserved category, i.e. dependents of freedom fighters, physically handicapped, Ex-servicemen would be counted against the reserved vacancy for the said category. The scheme as appears is that in case, a candidate belonging to horizontal reserved category under the Act' 1993 is selected on his/her own merit on preparation of the lists of socially reserved categories, he would not be counted as being selected against the vacancies reserved for horizontal quota in his category. The said difference, to our mind, may be because of the less percentage of vacancies reserved for the said categories, [5% for Ex-servicemen, 2% for dependents of freedom fighters and 3% for physically challenged (one for three categories)]. **May or may not be**. But in any case, the person selected against the said horizontal reserved quota in the categories provided under the Act' 1993, will have to be adjusted in his/her respective social reserved category in accordance with the scheme of sub section (3) of Section 3 of the Act' 1993.

Whether the reservation for such categories should have been made in the aforesaid manner or not, is not asserted before us. No-one has extended any contrary argument to the position as noted above. **We are, therefore, not called upon to answer the method of implementation of horizontal reservation for the categories provided under the Act' 1993.** The only bone of contention before us is of the method of implementation of Women reservation in the State of U.P.

H. Second question:-

Having found difference in two schemes of horizontal reservation in the State of U.P., as abovenoted, we are of the considered opinion that the decisions in **Sheo Shankar Singh (supra) & Bijendra Dev Mishra (supra)**, rendered in the year 1996, before implementation of women reservation by the Government order dated 26.02.1999 in the State of U.P., have no relevance for the issue at hands.

The second question of reference, thus, stands answered.

The only question, thus, left before us to answer is what would be the correct method of implementation of women reservation in the State of U.P. so as to render quietus to the controversy in the matter of method of application/implementation of women reservation.

In view of the above discussion, the third question referred to us is re-framed as under:-

I. Third Question:-

"What should be the correct method of implementation of women reservation in the State of U.P.?"

Taking guidance from the decision of the Apex Court in Anil Kumar Gupta (supra), it is seen that there are two methods of implementation of horizontal reservation as recognized therein:-

(i) **Overall reservation:-** Where the seats reserved for horizontal reservation, if not specified being in proportion of the

seats reserved for open category, SC, ST & OBC, the requisite number of horizontal reservation candidates shall have to be kept in and adjusted/accommodated against their respective social reserved categories by deleting the corresponding number of candidates from their list.

(ii) **Compartmentalized reservation:-** If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above has to be applied separately to each of the vertical reservation. In such a case, the percentage of quota reserved in favour of the horizontal categories, Overall, may or may not be satisfied.

In **Anil Gupta (supra)**, taking note of the fact that large number of social reserved category candidates were adjusted/accommodated only in one category, it was observed as under:-

> *"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 comparmentalised 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....."

This observation of the Apex Court in **Anil Kumar Gupta (supra)** has been termed to be "*obiter dicta*" and not having binding effect on the High Court under Article 141 of the Constitution of India by the learned Senior Advocate for the private respondents. We do not propose to express any opinion on the said statement. But we cannot ignore that the said observation

was made by the Apex Court in the light of what has been said in **Indra Sawhney (supra).** A word of caution administered by the Apex Court in Paragraph no.'744' of Indra **Sawhney's** case has been noted therein which reads as under:-

> *".....On a fuller consideration of the matter, we are of the opinion that Clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely bacause, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in Clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, and not for all and sundry reasons - that any further reservations, of whatever kind, should be provided under Clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of Clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simply. If reservations are made both under Clause (4) as well as under Clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do."*

We may then look at what should be the correct step for preparation of the select list for applying both vertical and horizontal reservation in the scheme of the Government order dated 26.02.1999:-

(i) First step shall be to fill the vacancies of open category (50%) on the basis of merit;

(ii) Second step shall be to fill each of the social reservation quotas i.e. S.C., ST & O.B.C.

(iii) the third step shall be to find out how many candidates belonging to the special reservation quota (women) have been selected on the above basis.

If the fixed women quota is already satisfied, no further question shall arise of implementation of women reservation. To repeat the illustration given above, if 20 out of 100 (20%) women make it to the merit list, (on their own merit), the women quota (20%) will be taken as stood satisfied.

Only in the event of short fall in the said “Overall” position at the end of the third step i.e. after preparation of all four merit lists of social categories i.e. General, S.C., S.T. & O.B.C, the question of application of women reservation will arise, i.e. steps will have to be taken to fill “the Short-fall” by implementation of women reservation. There is a consensus upto this stage i.e. that under the scheme of the Government order, if adequate number of women are selected on their merit, there is no question of implementation of women reservation.

Now the dispute remains is of the method to fill the short fall:-

To fill the short-fall, we may analyze the impact of both the methods as below:-

Overall method:-

a. In case, it is "Overall" reservation, women candidates from their inter-se merit shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of male candidates therefrom i.e.:- women of the category available in their inter-se merit from the top will be adjusted. Suppose, the short fall is of 5, then 5 women from the top of their inter-se merit list will be adjusted in the category to which they belong, if they all are of open category, 5 male candidates from the bottom

of the open category list will have to go to bring the selected women candidates in.

Compartmentalized implementation:-

(a) If, however, it is a case of compartmentalized horizontal reservation, then the proportionate representation of women in each social reserved category has to be seen i.e. if 20% (of 50%) in open category women have found place on merit, there will be no displacement of male candidates from the merit list of open category. In the similar way, the lists of S.C./S.T. & OBC categories have to be scrutinized and the process of the verification and adjustment/accommodation as stated above will have to be applied separately to each of the vertical reservation category.

As in case of compartmentalized reservation, the short fall in women quota is proportionately divided among the vertical/social reservation categories, it is not transferable. The women of any of the social category, if are not available, the short fall cannot be filled by bringing in women of other social categories i.e. the short fall cannot be shifted to another social category. In that case the reservation quota of 20%, "Overall", may or may not be satisfied.

It is argued before us that the observations in **Anil Kumar Gupta** (supra) were 'obiter' and do not constitute a decision so as to have the effect of binding statement of law under Article 141 of the Constitution. It is also argued that both 'Overall' and 'Compartmentalization' method of filling the short fall have been approved even in **Anil Kumar Gupta (supra).** None of them is against the constitutional scheme. One cannot be given preference over the other.

We must, however, point out that Article 15(3) speaks of special provisions. The Apex Court in **P.B. Vijayakumar** (supra) while examining the scope of the words "any special provision for women" used in Article 15(3) has said that there shall be limits in implementation of women reservation. The word of caution added by the Apex Court in **Indra Sawhney (supra)** has been noted therein to state as under:-

> *…....This Court has, therefore, clearly considered the scope of Article 15(4) as wider than Article 16(4) covering within it several kinds of positive action programmes in addition to reservations. It has, however, added a word of caution by reiterating M.R.Balaji (supra) to the effect that a special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4), must be within reasonable limits. These limits of reservation have been broadly fixed at 50% at the maximum. The same reasoning would apply to Article 15(3) which is worded similarly.....*

From the above, the irresistible conclusion that follows is that the reservation contemplated in clause (3) of Article 15 should be implemented in a fair and within reasonable limits.

As seen from the history of litigation and the result of various selections noted above, women of one social category were adjusted to make good the short fall, resulting in displacement of large number of their male counterparts, thus, chocking the open competition channel altogether. It needs no emphasis that the principal aim of Article 14, 15 & 16 is equality and equality of opportunity and that clause (3) of Article 15 is but a means of achieving the same objective. The "special provision" concieved in Article 15 (3) in the interest of women, should be balanced against the guarantee and equality enshrined in clause

(1) of Article 16 which is a guarantee to every citizen and to the entire society. We may also profitably note the following observations of the Apex Court in **Indra Sawhney (supra)** while fixing limits of reservation broadly at 50% at the maximum:-

> *"804. In Balaji, a Constitution Bench of this Court rejected the argument that in the absence of a limitation contained in Article 15(4), no limitation can be prescribed by the court on the extent of reservation. It observed that a provision under Article 15(4) being a "special provision" must be within reasonable limits.....*
>
> *808. .....It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.....*

In view of the guarantee of equality enshrined in clause (1) of Article 16 to each individual citizen of the country, "Special provisions" contemplated under clause (3) of Article 15 have to be harmonized. Both must be balanced against each other. Neither should be allowed to eclipse the other. Both Article 15 and 16 are designed for the same purpose of creating an egalitarian society as observed in **Government of A.P. Vs. P.B. Vijaykumar (supra)** in paragraph '11' extracted above.

Our above view also finds support from the stand of the Additional Advocate General who submits that the women reservation is "Overall". What he says "Overall", to our understanding, refers to the first two stages of preparation of the

merit list i.e. the first stage of preparation of list of open category (50%) and then the vertical or social reserved categories (S.C., S.T. & O.B.C.) (50%). The reason is that the women candidates selected on their merit in the first and second stage of preparation of the aforesaid list will be counted in the horizontal reservation quota of 20% for them, irrespective of the social category to which they belong. There cannot be an identification of posts in proportion to the social category, reserved for women, at the inception of the selection or advertisement as no-one can predict the result of selection. There may a case where women may outnumber men and are selected in large numbers on their own merit. In such a situation the "Overall" representation of women would be adequate or more than adequate and there would be no need to move further i.e. for application of women reservation.

II. Women: a homogeneous group

It is argued both by the State and the learned Senior Advocate for the private-respondents that women is a homogeneous group. Application of reservation to the group cannot be based on any criteria such as caste of women. They cannot be categorized in social categories. There has to be one inter-se merit list of women of all social categories and their placement or adjustment has to be made as per their merit. This argument though appealed to us at the first blush but when examined in the context of the concept of horizontal reservation for women, on a closure scrutiny of the two provisions, the legislative intent is clearly discernable. We find that:-

(i) It has to be kept in mind that the women reservation is horizontal which cuts across vertical category so that the total percentage of position of vertical reservation remains unchanged.

No separate list of women candidates for appointment to the horizontal post is to be drawn at the first two stages. They compete on all equal terms with their male counterparts in all vertical categories. If they are able to find place in the said merit lists to the extent of 20% ("Overall"), their representation is complete or reservation quota is fulfilled. The question of preparation of separate list for women to fill their quota will arise only in case of short fall or in other words, only in case where women are lagging behind their male counterpart or are not adequately represented or their quota 20% (overall) is not fulfilled.

(ii) Once the occasion has arisen for application of women reservation, then the question of preparation of merit list of women, qualified in all other areas will arise, to fill the short fall. The women who find place in the said merit list have to be placed in their respective vertical reserved category; Open, SC, ST or O.B.C, to which they belong. A male candidate of the respective social category who is last in the merit list has to give way to the women of his category. The men will go and the women will be in. The difficulty arose at this stage only.

As has been noticed by the Apex Court in **Anil Kumar Gupta (supra)**, and in our analysis also, the method of proportionate division of short fall among the vertical (social) categories i.e. compartmentalization method of filling the short fall is the most preferred method.

The reason to our mind for the said view is that the women reservation is a “special provision” made by the State to improve women's participation in the activities under the supervision and control of the State in the form of affirmative

action under Article 15 (3) of the Constitution of India. The very purpose of women reservation is to remove the gender barriers by bridging the gender gaps and to empower women to participate in the nation building activities. The dominant object of women reservation is to encourage participation of women in all activities of the State such as framing of Government policy and implementation thereof and for upliftment of women by providing them economic independence and to enable them to contribute in the family income. The object is to enable them to become part of the main work force and to empower them to meet any emergent situation they may face at times for being dependent economically on the male members of their family.

(iv) The women reservation does not imply on separate quota which is reserved for a special category of persons, where appointments to the reserved posts within that category have to be made in order of merit. It is not such category of reservation, where those to whom benefit is provided are not required to compete on equal terms with the unreserved (open category). Their selection and appointment to the reserved post is not independent on their inter-se merit and is not such that they do not have to compete on equal terms with their male counterparts.

(v) Women are special class but not a separate class to whom benefit of reservation is to be given as an independent class or category. In contrast to the vertical reservation categories, women selected on their merit are to be counted as against the seats reserved for them (to the extent of 20%).

For the aforesaid, to our mind, inter-se merit of women has no role to play in the implementation of horizontal reservation as the socially reserved candidate (SC, ST, & OBC)

seeking benefit of reservation of special category (women) cannot claim adjustment in open category. She has to be adjusted in her respective social category only by displacement of the last selected candidate of that category. Preparation of one merit list or inter-se merit of special category (women) candidates is only a matter of convenience for the selection agency or body. The Government order dated 26.02.1999 is a rule of limited affirmative action. It contemplates a situation where women in a selection are not adequately represented. This kind of preference has nothing to do with inter-se merit of women who compete with men of their category, all other things being equal (reference clause (5) of the Government order dated 26.02.1999). We are concerned with the question if the State makes such a categorization, whether it would be invalid or improper? We think not.

Nonetheless, another facet of the matter is that the women as a class include women of all social reserved categories. No one can deny that a women of socially reserved categories (S.C., S.T. & O.B.C.) belong to a less advantaged group of the society than a women of Open category. The short fall of vacancies, if filled, from each social reserved category by adopting the method of proportionate division of short fall or compartmentalization, women of socially reserved category who may be much below in the inter-se merit list of women would get a chance for selection.

The question is, how to go about it? How to apply reservation to fill the short fall under the compartmentalization method?

Our solution is that instead of one merit lists, if four

lists are prepared to fill the short fall, by keeping women of four social reserved categories (Open, SC/ST, & OBC), separately, the process of adjustment/placement would be much more simpler and transparent. Where there is less representation of women 'Overall', the selection agency has to turn to the aforesaid lists to fill the short fall. Then the proportionate representation of women in each social category (S.C., S.T., OBC & Open) list prepared at the first two stages of selection, as aforesaid, has to be seen. If woman in the list of open category prepared at the first stage are represented to the extent of 20%, there will be no further question of adjustment or displacement of their male counterpart to fill the short fall. Similarly, in the list of OBC, SC, & ST, prepared at the second stage of selection, where there is less representation of women than 20% (in proportion of the percentage of their reservation), the placement/adjustment can be made up to that extent. The short-fall has to be divided in that case proportionately, as per the quota for vertical reserved category i.e. 50% for Open category, 21% for S.C., 27% for O.B.C. & 2% for S.T. (total 50%). But in any case, "Overall" adjustment even by the said method cannot be more than the seats reserved for women to the extent of 20% of the total seats notified for selection i.e. such adjustment/placement should not result in breach of limit of 20% 'Overall' as the question would be only to fill the short fall.

We are conscious that there may be a case where it is not possible to get representation of women in any one or two of the social categories i.e. SC, ST., OBC & Open category in a particular selection and in compartmentalized method it is not possible to transfer the remaining seats to another category, as the special reservation in such a case shall be in a water-tight

compartment in each of the vertical categories (Open, OBC, SC & S.T.) and the "Overall" reservation of 20% of the total seats in favour of women may yet to be honoured. But such a situation, in our opinion, will not make much difference or prejudice the women (special category) candidates as women reservation is more on the principle of gender equality to encourage their participation in socio-economic activities of the nation on the footing of equality. The representation of women may be more than adequate in another selection as they may take a sweep to displace their male counterparts in the merit lists prepared at the first and second stages itself, by competing them on merit.

There is no constitutional or legal bar on the State in categorizing women in social categories. Such a categorization rather will be a balancing act which will address the interest of both genders and prevent a situation where the entire list of a particular social category is replaced by displacing meritorious male candidates to give place to women in that category. If the "Overall" adjustment method to fill the short fall by preparation of one inter-se merit list of women is adopted, their representation or adjustment may be possible only in one social category. Whereas, if compartmentalization (proportionate division of seats in social category) method is adopted women of all social categories will get a fair chance for selection, though may be lower in the common inter-se merit of women. Thus, by applying reservation proportionately in the social categories to fill up the short fall, minimum damages is done to the merit and maximum representation of women is secured. The view taken by us is in the line of the need for women empowerment by economic means and will also help the marginalized women or women of economically and socially less empowered group of

SC, ST & OBC categories to make their way to the select list.

For the analysis made above, keeping in view the object and purpose of women reservation, we hold that the method of compartmentalization (in watertight compartment) or proportionate division of seats reserved for women (horizontal reservation category) to the extent of 20% in the social reserved categories is the most preferred method and shall be applied uniformly as a rule in all selections in the State of U.P. under the scheme of the Government order dated 26.02.1999.

While compartmentalization shall be the rule, it is not necessary to put out of consideration certain extraordinary situation where the State Government, after an appropriate survey finds that there is a need for selection of women in large numbers, looking to the nature of services and posts and need of the State. In such a situation, the State Government can provide for the application of "Overall" reservation at the stage of short fall, irrespective of the limit of 20% to the vertical or social reserved category. But that decision, if taken, will be restricted to the particular selection or services to the number of vacancies advertised for direct recruitment in that case, and it shall have to be specifically stated in the advertisement that the reservation will be "Overall" at the stage of short-fall. Otherwise, method of application of women reservation "Overall" and not “Compartmentalized”, at the last stage of preparation of the merit list by displacement of male candidates of a particular category, will be illegal.

At the cost of repetition, it is clarified that even in above eventuality, the position of reservation being "Overall" at the first two stages i.e. at the time of preparation of merit list of

vertical or social categories (General, SC, ST & OBC) will not change. In other words, if 20% women "Overall" are selected in the merit list, no further exercise is needed in view of the clear language of Clause (3) of the Government order dated 26.02.1999.

The last point for consideration remains to the extent of judicial review or scope of interference in the matter of State policy providing method of application of women reservation. Though we are not called upon to answer this question in detail as none of the counsels for the parties raised any dispute regarding the scope of scrutiny made by this Court. But to remind ourselves of our power to interpret a provision or to issue guidelines for future in the matter of implementation of State policies, we may profitably note the observations of the majority of Judges in **Indra Sawhney (supra)**, a Bible in the matter of implementation of reservation. Paragraph no.'842' of the said judgement, relevant for our purpose be quoted as under:-

> *"842. It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the Executive - a co-equal wing - in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed."*

We may also profitably note the observation of the

Apex Court in **Independent Though Vs. Union of India & another**,[29]wherein it has been stated that the Court has option to read down the law in such a manner that it does not violate the Constitution. The observations in paragraph nos.'168' & '170' of the said report are quoted as:-

> *"168.....While the Courts must show restraint while dealing with such issues, the Court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the Court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution.*
>
> *170. "The law is an ass" said Mr. Bumble51. That may be so. The law, however, cannot be arbitrary or discriminatory. Merely because a law is asinine, it cannot be set aside. However, if the law is arbitrary, discriminatory and violates the fundamental rights guaranteed to the citizens of the country, then the law can either be struck down or can be read down to make it in consonance with the Constitution of India."*

Conclusion:-

Our answer to the question of implementation of women reservation in the State of U.P. under the Scheme of the Government order dated 26.02.1999 referred to this Bench is thus, as under:-

(i) The observations in **Anil Kumar Gupta (supra)** in paragraph no.'17' & '18' are followed and reiterated to hold that the method of implementation of horizontal reservation in favour of women in the State of U.P. shall be a "compartmentalized horizontal reservation" in the manner stated above, so as to avoid any complication and intractable problems in future.

(ii) The method of compartmentalization or proportionate

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representation by dividing seats reserved for women candidates amongst the vertical (social) categories being in watertight compartment and not inter-transferable, shall be the rule and "Overall" method of implementation at the last stage of filling the short fall shall be the exception, which can be applied in a particular selection, after taking a conscious decision by the State by notifying for application of the said method, being "Overall", in the advertisement itself.

(iii) At the first and second stages of preparation of the merit lists of social categories, there will be one method only which is "Overall" calculation of seats secured by women candidates, (to the extent of 20% of the total vacancies), irrespective of their social categories. As occasion to apply women reservation, by displacement of male candidates in a selection will arise only after the said two stages are over and in the event there is short fall.

The reference to the Larger Bench, accordingly, stands answered.

The writ petition shall now be placed before the regular Bench according to the roster for disposal in light of the question so answered.

We hope and trust that the State-respondents will implement the policy of women reservation in the manner as stated above for the ensuing selections. A copy of this judgement shall be communicated to the Chief Secretary, Government of U.P. for his attention and implementation.

Order date:-16.07.2019

HimanShu