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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

M.R. SHAH; B.V. NAGARATHNA, JJ.

CIVIL APPEAL NO. 8717 OF 2015; APRIL 28, 2022

Bharat Sanchar Nigam Limited & Anr. *Versus* Sandeep Choudhary & Ors.

Reservation - The reserved category candidates securing higher marks than the last of the general category candidates are entitled to get seat/post in unreserved categories - Even while applying horizontal reservation, merit must be given precedence and if the candidates, who belong to SCs, STs and OBCs have secured higher marks or are more meritorious, they must be considered against the seats meant for unreserved candidates - Candidates belonging to reserved categories can as well stake claim to seats in unreserved categories if their merit and position in the merit list entitles them to do so. (Para 8-9)

Dr. Rajeev Dhavan, Sr. Adv. (Amicus Curiae) Mr. Gaurav Agrawal, Adv.

For Appellant(s) Mr. Pradeep Kumar Mathur, AOR Mr. Chiranjeev Johri, Adv.

For Respondent(s) Mr. Puneet Jain, Adv. Mr. Christi Jain, Adv. Mr. Umang Mehta, Adv. Ms. Shruti Singh, Adv. Mr. Yogit Kamat, Adv. Ms. Pratibha Jain, AOR

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 04.08.2014 passed by the High Court of Rajasthan at Jodhpur in DBCWP No. 14714/2013, by which the High Court has dismissed the said writ petition preferred by the appellants herein – Bharat Sanchar Nigam Limited (hereinafter referred to as “BSNL”) and has confirmed the judgment and order passed by the Central Administrative Tribunal, Jodhpur Bench, Jodhpur (hereinafter referred to as the “Tribunal”) in O.A. No. 159 of 2009 by which the learned Tribunal allowed the said application preferred by the respondent No.1 herein – original applicant and directed the appellant herein – BSNL to consider his candidature if sufficient vacancies exist for placement of the candidates of Other Backward Class and his candidature shall be considered against the present or future vacancies on the OBC category after determining the vacancies as per rules, the appellant – BSNL has preferred the present appeal.

2. The facts leading to the present appeal in nutshell are as under:

2.1 That the private respondent No.1 herein – original applicant applied for the post of Telecom Technical Assistants (TTAs) in pursuance to the notification dated 06.10.2008 issued by BSNL for filling up of TTA posts. The appointment was to be made by way of direct recruitment by open competitive examination in the Rajasthan Telecom Circle. The said advertisement further provided that the unit of recruitment

shall be the respective Secondary Switching Area (SSA). The dispute in the present case is relating to the Ajmer SSA. In the Ajmer SSA, the vacancies were as follows:-

Sr. No.	Name of SS rect. Units	No. of Posts	No. UR posts	OBC	SC	ST	PH	Exservice
1	Ajmer	12	5	4	2	1	0	1

The recruitment was to be made by conducting a competitive examination of eligible candidates in an objective type paper of 200 marks. Clause 13 of the advertisement provided that:-

- (i) The minimum Qualifying marks in the paper would be 40% for the candidates of unreserved category candidate, and
- (ii) 33% for candidates of reserved category.

It so happened that in the exam which was conducted no person from general category candidate got more than 40% marks. However, four candidates from OBC category obtained more than 33% marks. The marks obtained by four OBC category candidates are as under:

OBC selected candidates

	Name	Marks (out of 200)	Percentage
1.	Alok Kumar Yadav	79.75	39.87
2.	Dinesh Kumar	77	38.5
3.	Alka Saini	72.5	36.25
4.	Ved Prakash	68.5	34.25

The original applicant – respondent No.1 herein, who got 68.25 marks was placed at Waiting List No.1 in the OBC category.

2.2 On 01.06.2009, BSNL issued a circular/letter to all heads of telecom circles, inter alia, stating that there has been poor pass percentage of candidates in the TTA examination and number of vacancies had remained unfilled. There was acute shortage of manpower and hence it was decided to relax the qualifying marks by 10 % for all candidates. Accordingly, the qualifying marks were refixed at 30 % for general category and 23% for reserved category. Clauses (iii) & (v) of the said letter provides as follows:-

(iii) Successful candidates, qualifying through normal standards in aggregate will rank enblock senior to those qualifying through relaxed standard in the merit list. However, the provisions of the Recruitment Rules will determine their inter-se seniority in the cadre.

(v) The Circles who have already announced the result but have not got adequate number of successful candidates, may further extend the merit/waiting list as per above instructions.

2.3 After relaxation of minimum marks with 30% of general category candidates, the following five candidates in general category became eligible for appointment:-

OC selected candidates

	Name	Marks
1.	Neelima Sharma	79.75
2.	Deepika Chauhan	78
3.	Ankit Goyal	76.75
4.	Tapin Sharma	76.50
5.	Tarun Jain	75.25

2.4 However, it so happened that one Alok Kumar Yadav and Alka Saini, who were found to be more meritorious than the general category candidates subsequently were found eligible to be appointed against the reserved category – OBC. Therefore, the respondent No.1 herein – original applicant, who was wait listed No.1 in OBC category, approached the Tribunal by way of application being O.A. No. 159 of 2009 for a direction to prepare a fresh list for all candidates based on relaxed standard and act on the said combined merit list. It was, inter alia, pleaded that there cannot be two cut-off marks for a single selection. It was submitted that there was an unreasonable classification by providing another set of cut-off marks and the action was discriminatory and violative of Articles 14 and 16 of the Constitution of India.

2.5 It was the case on behalf of the original applicant that those two candidates belonging to OBC category, who were having more merit were required to be adjusted against the general category seats and consequently the seats reserved for OBC category were required to be filled in from remaining reserved category candidates on merit.

2.6 The Tribunal, after noticing the judgment of the Rajasthan High Court dated 09.02.2011 in S.B. Civil Writ Petition No.4948 of 2009, disposed of the O.A. and directed BSNL to consider the candidature of the original applicant – respondent No.1 herein, if sufficient vacancies exist for placement of the candidates of OBC and further his candidature shall be considered against the present and future vacancies on OBC category.

2.7 Feeling aggrieved and dissatisfied with the judgment and order passed by the Tribunal, BSNL preferred the writ petition before the High Court and by the impugned judgment and order and by relying upon the decisions of this Court in the case of

Indra Sawhney Vs. Union of India, 1992 Supp (3) SCC 217; R.K. Sabharwal Vs. State of Punjab, (2007) 8 SCC 785; and Rajesh Kumar Daria Vs. Rajasthan Public Service Commission, (2007) 8 SCC 785 has dismissed the said writ petition by observing that the BSNL should have given appointment to Mr. Alok Kumar Yadav and Mr. Dinesh Kumar (candidates belonging to OBC category) against the vacancies which were not reserved vertically in the event of shuffling the said two persons to general category (admittedly both the aforesaid candidates have secured and/or have more merit than the general category candidates, who were appointed). The High Court has further observed that consequently the original applicant could have been selected against the vacancies reserved for the OBC. By observing so, the High Court has dismissed the writ petition. Hence, BSNL has preferred the present appeal.

3. We have heard Dr. Rajeev Dhavan alongwith Shri Gaurav Agrawal, learned Amicus Curiae, Shri Pradeep Kumar Mathur, learned counsel appearing on behalf of the BSNL and Shri Puneet Jain, learned counsel appearing on behalf of respondent No.1.

4. Learned counsel appearing on behalf of BSNL has heavily relied upon the decision of this Court in the case of **Union of India Vs. Ramesh Ram, (2010) 7 SCC 234** and submitted that as observed and held by this Court, in a case, where reserved category candidates are selected on merit and placed in the list of general category candidates, they can be adjusted against reserved category vacancies in order to get a service of higher choice at the time of service allocation. Learned counsel appearing on behalf of BSNL has heavily relied upon paragraph 42 of the aforesaid decision.

4.1 Relying upon the above decision, it is vehemently submitted by the learned counsel appearing on behalf of the BSNL that the aforesaid two candidates namely Mr. Alok Kumar Yadav and Mr. Dinesh Kumar were rightly considered in the reserved category pool.

4.2 It is submitted that if the view taken by the High Court is accepted, in that case, the two OBC candidates, who secured more marks than the relaxed cut-off marks of general category candidates are adjusted in general category and thereby vacancies so created in the OBC category would have to be filled in by respondent No.1 herein – original applicant which would result in shuffling of the candidates and would unsettle the entire selection process. It is further submitted by learned counsel appearing on behalf of BSNL that the High Court has failed to take note of the fact that vacancies in the general category were only five and they were already filled in and therefore, insertion of two OBC candidates into the general category select list would expel two already selected candidates of general category who had secured undisputedly more marks than the original claimant thereby unsettling the entire selection process.

4.3 Making above submissions and relying upon the above decisions, it is prayed to allow the present appeal.

5. Dr. Rajeev Dhavan, learned Senior counsel, assisted by Shri Gaurav Agrawal, learned Amicus Curiae and Shri Puneet Jain, learned counsel appearing on behalf of respondent No.1 have vehemently submitted that as such the controversy in the matter is squarely covered by the decision of this Court in the case of **Indra Sawhney (supra)**. It is submitted that the reserved category candidates having obtained more marks than the last candidate in general category candidates will have to be adjusted against the general category quota and they were required to be considered in the general category pool, thereby the remaining candidates belonging to the reserved category were required to be appointed against the quota meant for reserved category. It is submitted that in the present case, those two candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar, secured more marks than the last of the general category candidates selected and appointed and therefore those two candidates were required to be adjusted and/or considered against the general category pool. The BSNL considered the appointment of the aforesaid two candidates in the reserved category and thereby caused a loss to the reserved category candidates, who could have been appointed if the aforesaid two candidates belonging to the reserved category would have been adjusted and/or appointed in the general pool. It is submitted therefore that the High Court has rightly directed to consider the candidature of respondent No.1 herein – original applicant, being a wait listed candidate in the reserved category.

6. Heard the learned counsel for the respective parties at length.

7. The short question which is posed for the consideration of this Court is:-

“Whether in a case where the reserved category candidates secured more marks than the general category candidates, such reserved category candidates will have to be first adjusted in the general category pool and they shall be considered for appointment in the general category pool or against the vacancies meant for reserved category candidates?”

8. While considering the aforesaid issue, few decisions of this Court on the above point are required to be referred to.

8.1 In the case of **Indra Sawhney (supra)** in paragraph 812, it is observed and held as under:-

“812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture : all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as “vertical reservations” and “horizontal reservations”. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations — what is called interlocking 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 SC category he will be

placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) 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.”

8.2 In *Rajesh Kumar Daria (supra)*, in paragraphs 8 to 11, it is observed and held as under:-

“8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be: “For SC : 30 posts, of which 9 posts are for women.” We find that many a time this is wrongly described thus: “For SC : 21 posts for men and 9 posts for women, in all 30 posts.” Obviously, there is, and there can be, no reservation category of “male” or “men”.

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are “vertical reservations”. Special reservations in favour of physically handicapped, women, etc. under Articles 16(1) or 15(3) are “horizontal reservations”. Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney* [*Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217], *R.K. Sabharwal v. State of Punjab* [(1995) 2 SCC 745], *Union of India v. Virpal Singh Chauhan* [(1995) 6 SCC 684] and *Ritesh R. Sah v. Y.L. Yamul* [(1996) 3 SCC 253]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of “Scheduled Caste women”. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC woman candidates, then there is no need to disturb the list by including any further SC woman candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four woman SC candidates. (But if the list of 19 SC candidates contains more than four woman candidates, selected on own merit, all of them will continue in the list and there is no question of

deleting the excess woman candidates on the ground that “SC women” have been selected in excess of the prescribed internal quota of four.)

10. In this case, the number of candidates to be selected under general category (open competition), were 59 , out of which 11 were earmarked for women. When the first 59 from among the 261 successful candidates were taken and listed as per merit, it contained 11 woman candidates, which was equal to the quota for “general category women”. There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven woman candidates selected on their own merit (candidates at Sl. Nos. 2, 3, 4, 5, 9, 19, 21, 25, 31, 35 and 41 of the selection list) and another eleven (candidates at Sl. Nos. 54, 61, 62, 63, 66, 74, 75, 77, 78, 79 and 80 of the selection list) included under reservation quota for “general category women”. This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.

11. Similarly, we find that in regard to 24 posts for OBC, 19 candidates were selected by RPSC in accordance with merit from among OBC candidates which included three woman candidates. Thereafter, another five women were selected under the category of “OBC women”, instead of adding only two which was the shortfall. Thus there were in all 8 women candidates among the 24 OBC candidates found in the selection list. The proper course was to list 24 OBC candidates as per the merit and then find out number of woman candidates among them, and only fill the shortfall to make up the quota of five for women.”

(emphasis supplied)”

8.3 In the case of **Uttaranchal Public Service Commission Vs. Mamta Bisht, (2010) 12 SCC 204**, the High Court took the view that the reserved category candidate, on her own merit was entitled to be considered in the general category and she could not have been counted against the reserved category. While upholding the judgment of the High Court, this Court observed and held in paragraphs 3, 4, 13 and 15 as under:-

“3. Out of 42 posts, 26 were filled up by general category and 16 by reserved category candidates. Some women candidates stood selected in the general category while others had been given the benefit of horizontal reservation being residents of Uttaranchal. Respondent 1, being aggrieved preferred Writ Petition No. 780 of 2003 (M/B) in the High Court of Uttaranchal seeking quashment of select list dated 31-7-2003 mainly on the ground that women candidates belonging to Uttaranchal had secured marks making them eligible to be selected in the general category and had it been done so, Respondent 1 could have been selected in the reserved category being a woman of Uttaranchal. It had also been pleaded in the petition that some of the women candidates who not only claimed the benefit of horizontal reservation but have been selected giving the said benefit, did not submit their respective certificate of domicile at the time of filling up the application forms but they produced the said certificate at a later stage and it was accepted.

4. The High Court accepted the first submission of Respondent 1 after examining the record of selection and came to the conclusion that the last selected woman candidate who was given the benefit of horizontal reservation for Uttaranchal women had secured marks higher than the last selected candidate in the general category. Thus, the said candidate ought to have been appointed against the general category vacancy and Respondent 1 ought to have been offered the

appointment giving her the benefit of horizontal reservation for Uttaranchal women. Hence, these appeals.

13. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:

‘In view of the above, Neetu Joshi (Sl. No. 9, Roll No. 12320) has wrongly been counted by Respondent 3/Commission against five seats reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as the fifth candidate the petitioner should have been counted for Uttaranchal Women General Category seats.’

Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications stood rejected by this Court.

14. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in *Rajesh Kumar Daria v. Rajasthan Public Service Commission* [(2007) 8 SCC 785], wherein dealing with a similar issue this Court held as under : (SCC pp. 790-91 , para 9)

‘9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SCs, STs and OBCs under Article 16(4) are “vertical reservations”. Special reservations in favour of physically handicapped, women, etc. under Articles 16(1) or 15(3) are “horizontal reservations”. Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the nonreserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217], *R.K. Sabharwal v. State of Punjab* [(1995) 2 SCC 745], *Union of India v. Virpal Singh Chauhan* [(1995) 6 SCC 684] and *Ritesh R. Sah v. Y.L. Yamul* [(1996) 3 SCC 253].) But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of “Scheduled Caste women”. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.’

15. In view of the above, it is evident that the judgment and order of the High Court is not in consonance with the law laid down by this Court in *Rajesh Kumar Daria* [(2007) 8 SCC 785]. The judgment and order impugned herein is liable to be set aside and all the consequential orders become unenforceable and inconsequential. Thus, the appeals succeed and are allowed. The

judgment and order of the High Court dated 26-10-2005 passed in *Mamta Bisht v. State* [WPMB No. 780 of 2003, order dated 26-10- 2005 (Utt)] is hereby set aside. No costs.”

(emphasis in original)

8.4 In **Ritesh R. Sah v. Y.L. Yamul, (1996) 3 SCC 253** after noticing the Larger Bench decision of this Court in the case of **Indra Sawhney (supra)** and **R.K. Sabharwal (supra)**, it is observed in paragraph 13 to 16 as under :

“13. There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the constitutional mandate enshrined in Article 16(4).

14. In *Indra Sawhney v. Union of India* [1992 Supp (3) SCC 217] commonly known as *Mandal* case, this Court held thus : (SCC p. 735, para 811)

‘811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.’

15. In *R.K. Sabharwal v. State of Punjab* [(1995) 2 SCC 745] the Constitution Bench of this Court considered the question of appointment and promotion and roster points vis-à-vis reservation and held thus : (SCC p. 750, para 4)

‘4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserved categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserved category candidates can compete for the non-reserved posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition.’

16. In *Union of India v. Virpal Singh Chauhan* [(1995) 6 SCC 684] (SCC at p. 705) it has been held that while determining the number of posts reserved for Scheduled Castes and Scheduled Tribes, the candidates belonging to reserved category but selected/promoted on the rule of merit (and not by virtue of rule of reservation) shall not be counted as reserved category candidates.”

8.5 In a more recent decision this Court in the case of **Saurav Yadav Vs. State of U.P., (2021) 4 SCC 542** after referring to all the earlier judgments on vertical reservation has observed and held that it is well settled that candidates belonging to any of the vertical reservation categories are entitled to be selected in “open or general” category and it is also further observed that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories that they belong.

8.6 Similar view has been expressed by this Court in another recent decision of this Court in the case of **Sadhana Singh Dangi Vs. Pinki Asati, (2022) 1 SCALE 534**. By the said decision, it is reiterated that the reserved category candidates securing higher marks than the last of the general category candidates are entitled to get seat/post in unreserved categories. It is further observed and held that even while applying horizontal reservation, merit must be given precedence and if the candidates, who belong to SCs, STs and OBCs have secured higher marks or are more meritorious, they must be considered against the seats meant for unreserved candidates. It is further observed that the candidates belonging to reserved categories can as well stake claim to seats in unreserved categories if their merit and position in the merit list entitles them to do so.

9. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, it is noted that the aforesaid two candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar, belonging to OBC category, were required to be adjusted against the general category as admittedly they were more meritorious than the last of the general category candidates appointed and that their appointments could not have been considered against the seats meant for reserved category. Consequently, after considering their appointments in the general category, the seats meant for reserved category were required to be filled in from and amongst the other remaining reserved category candidates on merit such as respondent No.1 herein. If such a procedure would have been followed, the original applicant – respondent No.1 would have got appointed on merit in the reserved category seats in the vacancy caused due to the above procedure. Therefore, as such the High Court has not committed any error in observing and holding that the aforesaid two candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar, will have to be adjusted against the general category candidates and accordingly respondent No.1 being a reserved category candidate and being at Sr. No.1 in the waiting list of reserved category was to be appointed.

However, at the same time, it cannot be disputed that by reshuffling and on insertion of two OBC candidates into general category select list, two general category candidates already appointed shall have to be expelled and/or shall have to be removed, who are working since long and it may unsettle the entire selection process. Therefore, to strike a balance and to ensure that the two general category candidates, who are already appointed will not have to be removed and at the same time, respondent No.1 – original applicant being a reserved category candidate also gets accommodated, if he is so appointed, in exercise of the powers under Article 142 of the Constitution of India, we propose to pass an order that on reshuffling and on respondent No.1 – original applicant being appointed now against the reserved category seats and while the aforesaid two candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar, belonging to reserved category, to be treated in the general category seats, two candidates already appointed and belonging to general category shall not be removed. However, respondent No.1 shall get the seniority from the date the general category candidates were appointed, who were having lesser merit than the aforesaid two reserved category candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar.

10. Now, so far as the decision of this Court in the case of **Ramesh Ram (supra)** relied upon by learned counsel appearing on behalf of the BSNL is concerned, the aforesaid decision is not applicable to the facts of the case on hand. The said decision is distinguishable on facts. In the said case, this Court was considering Rule 16(2) of Civil Services Examination Rules relating to Civil Services Examination held by the Union Public Service Commission. Rule 16(2) of the Rules reads as under:-

“16(2) While making service allocation, the candidates belonging to the Scheduled Castes, the Scheduled Tribes or Other Backward Classes recommended against unreserved vacancies may be adjusted against reserved vacancies by the Government if by this process they get a service of higher choice in the order of their preference.”

The said case was a case of Civil Services, where the selected candidates were having different preferences and in a given case, it may happen that the general category candidates, who are less meritorious and the reserved category candidates having more marks than the general category candidates and consequently they are to be adjusted against the reserved category and they can possibly secure posts in a service of a higher preference. Therefore, option was given to such candidates belonging to reserved category to consider their candidature against the reserved category only despite having higher merit than General Category Candidates. However, in the present case, there is no question of any such preference. On interpretation of Rule 16(2) in paragraph 42, it was observed and held as under:-

“**42.** Therefore, we are of the firm opinion that MRC candidates who avail the benefit of Rule 16(2) and are eventually adjusted in the reserved category should be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the general pool will therefore be offered to general category candidates. This is the only viable solution since allotting these general category seats

(vacated by MRC candidates) to relatively lower-ranked reserved category candidates would result in aggregate reservations exceeding 50% of the total number of available seats. Hence, we see no hurdle to the migration of MRC candidates to the reserved category.”

We fail to appreciate how the said decision is applicable to facts of the case on hand and/or of any assistance to the BSNL faced with the decisions of this Court in the case of **Indra Sawhney (supra)** and other decisions referred to hereinabove.

11. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. The High Court has rightly observed and held that two reserved category candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar having more marks than the general category candidates appointed, were entitled to the appointment in the general category and the seats reserved for OBC category were required to be filled in from and amongst the remaining candidates belonging to the OBC category. Consequently, respondent No.1 – original applicant was entitled to the appointment on such post. However, at the same time in exercise of the powers under Article 142 of the Constitution of India, it is observed and directed that on reshuffling, the two candidates belonging to general category shall not be removed from service as they are working since long. However, at the same time, the respondent No.1 shall be entitled to the seniority from the date, the general category candidates having lesser marks than the aforesaid two reserved category candidates were appointed.

With this, the present appeal stands dismissed. However, in the facts and circumstances, there shall be no order as to costs.

12. Before parting, we would like to deeply appreciate the services rendered by Dr. Rajeev Dhavan, learned Senior Advocate and Shri Gaurav Agrawal, learned Advocate, who have assisted the Court as Amicus Curiae and we are thankful to both of them for their valuable assistance.