

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 12266 of 2011
with
SPECIAL CIVIL APPLICATION No. 12267 of 2011
with
SPECIAL CIVIL APPLICATION No. 13562 to 13564 of 2011
with
SPECIAL CIVIL APPLICATION No. 13653 and 13654 of 2011
with
SPECIAL CIVIL APPLICATION No. 14614 of 2011
with
SPECIAL CIVIL APPLICATION No. 14650 of 2011
with
SPECIAL CIVIL APPLICATION No. 14712 to 14715 of 2011
with
SPECIAL CIVIL APPLICATION No. 14662 to 14668 of 2011
with
SPECIAL CIVIL APPLICATION No. 14689 and 14690 of 2011
with
SPECIAL CIVIL APPLICATION No. 14578 of 2011
with
SPECIAL CIVIL APPLICATION No. 14581 of 2011
with
SPECIAL CIVIL APPLICATION No. 13426 of 2011
with
SPECIAL CIVIL APPLICATION No. 13652 of 2011
with
SPECIAL CIVIL APPLICATION No. 13657 of 2011
with
SPECIAL CIVIL APPLICATION No. 14003 of 2011
with
SPECIAL CIVIL APPLICATION No. 14262 of 2011
with
SPECIAL CIVIL APPLICATION No. 13443 of 2011
with
SPECIAL CIVIL APPLICATION No. 15106 to 15113 of 2011
with
SPECIAL CIVIL APPLICATION No. 15121 to 15136 of 2011
with
SPECIAL CIVIL APPLICATION No. 15143 to 15169 of 2011
with
SPECIAL CIVIL APPLICATION No. 15176 of 2011
with
SPECIAL CIVIL APPLICATION No. 14674 and 14675 of 2011
with
SPECIAL CIVIL APPLICATION No. 15350 of 2011
with
SPECIAL CIVIL APPLICATION No. 15370 of 2011

with
SPECIAL CIVIL APPLICATION No. 12324 of 2011
 with
SPECIAL CIVIL APPLICATION No. 12330 of 2011
 with
SPECIAL CIVIL APPLICATION No. 14440 of 2011
 with
SPECIAL CIVIL APPLICATION No. 13555 and 13556 of 2011
 with
SPECIAL CIVIL APPLICATION No. 13558 to 13560 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE ANANT S. DAVE

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1 Whether Reporters of Local Papers may be allowed to see
the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the
judgment ?

4 Whether this case involves a substantial question of law
as to the interpretation of the constitution of India, 1950
or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MEENABEN NANJIBHAI CHAUHAN & and others

Versus

**CHAIRMAN, GUJARAT STATE PRIMARY EDUCATION SELECTION
COMMITTEE & others**

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Appearance :

Mr. J.V. Japee, Mr. K.B. Pujara, Mr. D.P. Joshi, Ms. Kruti M. Shah, Mr. N.K. Majmudar, for the petitioners

Ms. Jirga Jhaveri, Ms. Megha Chitaliya and Mr. Nirag Pathak Assistant Government Pleaders for the State.

Mr. Bhargav Karia, Mr. C.B. Upadhyaya, Mr. V.D. Parghi, Mr. J.K. Parmar, Mr. Shalin Mehta with Ms. Vidhi J. Bhatt, Mr.PS. Chaudhary, Mr. Vijay Patel, Mr. Jayraj Chauhan, Mr. S.K. Patel, for respondents.

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CORAM : HONOURABLE MR.JUSTICE ANANT S. DAVE

Date : 31/08/2012

CAV JUDGMENT

1 All these writ petitions raise common grievance about denying benefits of reservation in the matter of public employment based on Article 16(4) and (5) of the Constitution of India that *nothing in these articles shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens and the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State*, as interpreted by the Apex Court in the case of **Indra Sawhney vs. Union of India**, reported in AIR 1993 SC 477 [=1992 Supp. 3 SCC 217], vis-à-vis selection procedure undertaken by the respondents-State Authorities while operating general merit list for the posts of vidhya sahayak for the year 2011-2012 in upper primary section under the Gujarat Primary Education Act, 1947 as amended vide the Gujarat Educational Laws (Amendment) Act, 2010, pursuant to Right to Education Act, 2009.

2 For the sake of convenience, Special Civil Application Nos. 12266 of 2011 and 12267 of 2001 are treated as 'lead matter' and, as such, the facts and other details are taken therefrom. In Special Civil Application Nos. 14674 of 2011, 15176 of 2011, 15143 of 2011 to 15169 of 2011, 15121 of 2011 to 15136 of 2011, 15106 of 2011 to 15113 of 2011, 13443 of 2011 and 14440 of 2001, Rule is issued and learned counsels appearing for respective respondents waive service of Rule. With the consent of the learned counsels for the parties, all these matters are taken for final disposal.

3 The basic grievance of the petitioners and alike, who hail from the reserved category and applied pursuant to the advertisement dated 15th July 2011 for recruitment of about 13000 Vidya Sahayaks for upper primary schools, is that they are deprived of selection in the quota and category meant for reserved caste due to unjust, unreasonable, arbitrary and discriminatory policy and procedure of recruitment, which includes selection and appointment, for the post of Vidya Sahayaks by the respondent-Authorities.

4 The case of the petitioners is that large number of candidates from Scheduled Caste and Scheduled Tribe Categories for the post of Vidya Sahayaks [language teachers and maths and science teachers] are deprived of selection and appointment for the post of Vidya Sahayaks by allowing Meritorious Reserved Category Candidates [hereinafter referred to as “MRC”] from the open merit to migrate to the vacancies/seats reserved for Scheduled Caste and Scheduled Tribe Categories by giving them preference of the District/City of their choice for the appointment. Consequently, the substantial vacancies of reserved category are reduced for accommodating MRC from the open merit category, ultimately, resulting into deprivation of selection/appointment of large number of less meritorious candidates from Scheduled Caste, Scheduled Tribe and SEBC Categories.

4.1 The above exercise of powers by the respondent-Authorities is contrary to the law laid down by the Apex Court in the cases of **Ritesh R. Sah vs. Y. L. Yamul** and others, reported in AIR 1996 SC 1378 and **Indra Sawhney** [supra].

5 As against the above, the stand of the respondent-Authorities is that recruitment undertaken for the posts of Vidya Sahayaks is in

accordance and in consonance with the provisions of the Gujarat Primary Education Act, 1947 as amended vide the Gujarat Educational Laws (Amendment) Act, 2010, Government Resolutions issued from time to time and to see that overall reservation in favour of reserved categories does not exceed 50% of the total posts/vacancies advertised and as per the law laid down in the case of **Indra Sawhney** [supra] and also in the case of **UOI vs Ramesh Ram**, reported in (2010) 7 SCC 234. In short, in the matter of recruitment of Vidya Sahayaks, the respondent-Authorities have not committed any breach or violation of constitutional or statutory provision, legal norms and/or the law laid down by the Apex Court with regard to the subject matter and the grievance raised by the petitioners.

6 By relying upon various data/statistics arising out of advertisement and procedure undertaken for selection in support of their submissions, both sides have tried to justify their respective stand.

7 It is necessary to refer to the basic facts about the controversy in these writ petitions so as to understand it in correct perspective.

8 On 15.7.2011, an advertisement in widely circulated vernacular newspapers was issued for recruitment of about 13000 Vidya Sahayaks [Std.VI to VIII upper primary section] in the primary schools run and managed by the District/Nagar Education Committees for the year 2011-2012 in the State of Gujarat, as per the requisition sent by them to the office of Director, Primary Education, State of Gujarat, having administrative and supervisory control over such committees. The above advertisement contained recruitment of Vidya Sahayaks for the subjects of languages and maths and science. That, different qualifications were prescribed for such posts of language Vidya Sahayaks and maths and

science Vidya Sahayaks. A candidate has to apply on-line on the notified website and a detailed procedure was prescribed to fill up such applications. That, reservation for the categories of Scheduled Caste, Scheduled Tribe, Socially and Educationally Backward Classes, Physically Challenged Persons, Ex-Serviceman and also for women was provided as per prevailing government policy so contained in Government Resolutions dated 19.2.2000, 15.2.2011, 15.12.2001 and 4.5.2002 issued by the General Administration Department, State of Gujarat. The above advertisement also prescribed for relaxation in age-limit for the above reserved category candidates other than the open category along with general instructions.

9 So far as the formula prescribed for giving due weightage to various educational qualifications of the candidates and determination thereof by the respondent-Authorities is concerned, as such, there is no dispute raised in these petitions for recruitment of Vidya Sahayaks for the year 2011-2012.

10 In furtherance of the above advertisement and selection procedure, a General Merit List was prepared which included Sr. No. Merit Number, reserved category merit number, centre, application form number, date of birth of the candidate, name of the candidate and respective percentage of different educational qualifications in column Nos. 7 to 11 including the percentage of merit in teachers eligibility test, PTC, Graduate, B.Ed. Post Graduate, etc and finally the column of total merit. It is to be noted that, for the merit list so determined, placement of a candidate belonging to open category and reserved categories, no discrepancy is alleged, but, while operating the above General Merit List at the time of oral interview, option given to Meritorious Reserve Category candidate to change his preference/choice for the District on

non-availability of such District in open category to reserved category in the same District or other District, has resulted into violation of non-appointment of reserved category candidates to their quota and depriving them of their constitutional rights guaranteed under Article 16(4) and (5) of the Constitution of India.

11 The say of the respondent-Authorities is that when MRC is accommodated against reserved category quota in a District of his subsequent choice, overall quota of percentage of reservation prescribed in advertisement is maintained. So, overall reserved category candidates, as per the Rules, Regulations and Government Resolutions, is adhered to and no injustice is meted out to Scheduled Caste and Scheduled Tribe Categories.

12 Mr. K.B. Pujara, learned counsel for the petitioners in Special Civil Application No. 12267 of 2011, has categorically referred to the merit of the petitioner having general category merit No. OP 006539 and reserved category merit No. SC 000910 and merit marks being 66.90, who received a call letter for the interview and to be present for district selection on 20.8.2011 at 5 p.m. as per the programme notified for the language Vidya Sahayak from 16.8.2011 to 26.8.2011 and, accordingly, he remained present on the day and time so scheduled. However, he was informed orally that other candidates of reserved category selected on their own merit in the open category are not considered against the open category but against their respective reserved category and, therefore, he was denied appointment. That, another reschedulement of selection/interview was advertised on 21.8.2011 with procedure for recruitment of Vidya Sahayaks undertaken on 20.8.2011 at about 14.00 hrs and also selection of the candidates of reserved category. That, the candidates of such categories were asked to obtain call letters afresh and

were directed to remain present in the interview programme from 24.8.2011 to 27.8.2011. It was also announced that the new programme was not applicable to the candidates of the open category and it was only for the candidates of the reserved category. However, in the new programme, the Scheduled Caste candidates having merit of 67.89 to 67.28 were only called and the petitioner having merit of 66.95 had not received any call letter. The above rescheduling of selection/oral interview created such an anomaly in as much as that 6500 vacancies were notified for language teachers in the advertisement dated 15.7.2011 and, out of that, 3566 vacancies were for the open category, 441 vacancies for Scheduled Caste, 834 vacancies for Scheduled Tribe and 1659 vacancies for SEBC category. As per the initial schedule of interview on 20.8.2011, the respondent-Authorities had considered those candidates of Scheduled Caste who were given on their own merit in the open category against the seats for the open category and 430 call letters were issued to the candidates of Scheduled Caste so as to fill up Scheduled Caste vacancies. If the above schedule was adhered to, all the candidates of Scheduled Caste beginning from merit 66.57 to 66.69 who were called for appointment, and reserved category Scheduled Caste merit No.540 to 969, including the petitioner having merit of 66.95% and merit No.910 for reserved category of Scheduled Caste, would have been selected for District selection and appointment. However, it is pertinent to note that, at that point of time, about 232 vacancies were available for candidates of Scheduled Caste in view of the statement of District wise available seats on 21.8.2011 published by the respondent-Authorities. But, in the revised programme, the respondent-Authorities had called 142 Scheduled Caste candidates for filling Scheduled Caste vacancies and the merit list had gone up i.e. 67.89 to 67.28 only. This has happened because the respondent-Authorities have treated majority of Scheduled Caste seats having been already filled up by those

candidates of reserved category who were otherwise figuring in the open category on their own merit [MRC] by wrongly treating them against reserved seats for Scheduled Caste candidates, which, otherwise, would have gone to lesser meritorious candidates of reserved category like the petitioners who were eligible as per the initial and original interview/selection programme.

12.1 This procedure, according to Mr. K.B. Pujara, learned counsel for the petitioners, is contrary to the law. Necessary details based on statistical data are placed on record.

Notified vacancies as per the Advertisement at page No.15-16 of the Paper-book of SCA No.12267 of 2011						
	Open	SC	ST	SEBC	Total	PH
District Education Committees	3249	400	755	1510	59140	164
Municipal School Boards	317	41	79	149	586	18
Total	3566	441	834	1659	6500	182

Total number of candidates called for selection and appointments and their Merit.

As per Original Programme [Page Nos.21-22 of the Paper Book of SCA No.12267/2011

Category	Merit Numbers	Merit	Total number of Candidates Called	Selection List	Waiting List
Open	1 to 4000	83.35 to 68.58	4000	3566	434
SC	540 to 969	68.57 to 66.69	430	391	39
ST	79 to 986	68.58 to 61.54	908	826	82
SEBC	1452 to 3110	68.58 to 65.88	1659	1509	150
PH			365	365	

As per Revised Program [Page Nos.26 of the Paper Book of SCA No.12267/2011

Category	Merit Numbers	Merit	Total number of Candidates Called	Selection List	Waiting List
Open	4001 to 5010	68.58 to 67.90	1010	374	636
SC	684 to 825	67.89 to 67.28	142	91	51
ST	116 to 986	67.88 to 61.54	871	785	86
SEBC	1808 to 3110	67.89 to 65.88	1303	993	310
PH			114	82	31

12.2 In view of the above, it is submitted that discontinuing the

selection as notified by revising it to accommodate open category candidates and counting MRC against reserved category is unjust, unreasonable, arbitrary, discriminatory and violative of Articles 14 and 16(4) and (5) of the Constitution of India as it negates constitutional mandate in favour of reserved category candidates and, therefore, such procedure of selection be quashed and set aside and prayers be granted as prayed for.

13 Mr. Digant Joshi and Ms. K.M. Shah, learned counsels appearing for reserved category candidates seeking similar relief as prayed for in Special Civil Application No. 12266 of 2011, have supported and adopted the submissions made by Mr. K.B. Pujara, learned counsel for the petitioners, representing reserved category candidates.

14 Mr. J.V. Japee, learned advocate appearing for the petitioners, has placed reliance on the object of reservation and that better opportunities are to be given to reserved category candidates who have comparatively lesser merits on account of their socio-economic conditions and candidates who are less meritorious on account of their socio-economic condition have lost opportunity of selection on account of preferential treatment given to MRC permitting them to migrate to reserved category seats and it would defeat and frustrate the very object of reservation. According to the learned counsel, if MRCs of open merit are allowed to migrate to reserved category and they are continued in the open merit, the reservation would not exceed 50% and reserved category candidates are given open merit number as well as reserved merit number and, therefore, if MRCs are treated as part of open merit quota and reserved vacancies are filled up from reserved category candidates as per their merit, no violation will occur of ruling of the Apex Court exceeding quota of reservation to 50%. He has also placed reliance in the case of

R.K. Sabarwal vs. State of Punjab, reported in AIR 1995 SC 1371.

15 Ms. Jirga Jhaveri, learned Assistant Government Pleader appearing for the State, has basically relied on the affidavit-in-reply filed by the Deputy Secretary, Department of Education, State of Gujarat, at various stages of hearing and contended that the cadre of teacher/vidya sahayak is not a State cadre and it is a district cadre as far as the schools of rural areas are concerned and Nagar Shikshan Samiti cadre for the school within the jurisdiction of some cities/Municipal Corporations and 13 Nagarpalikas which operate independently of District Education Committee. In all, there are 47 Education Committees who are employers and appointing authorities for vidya sahayak/teachers. Each of the Committees operates its own separate roster register and maintains the ratio of reservation as per the percentage of reservation of various categories and, further, determines the percentage of reserved seats as per the Rules governing the subject. Accordingly, requirement of each of the Committees of vidya sahayak in each category, namely, open, SC, ST, SEBC and aggregate of requisitions sent by such Committees to the Central Recruiting Agency after following the Rules for recruitment of vidya sahayak in this regard, the procedure is undertaken. Earlier, in view of the selection procedure undertaken by each of the Committees in the District and City, the State has come across various anomalies for which a decision is taken to centralize the process of selection. Now, a single advertisement is issued by the Directorate of Primary Education after receiving requisition from all the Committees, a common/general merit list is prepared so as to allot candidates to different Districts or Cities or Towns as per their position in the merit list and also as per availability of seats in various categories in the District. The above general merit list is not select list of the State, but select lists of various Committees as above.

15.1 Learned AGP has placed reliance on the provisions of the Gujarat Educational Laws (Amendment) Bill, 2010, and, correspondingly, amendment to Section 23 of the Bombay Primary Education Act, 1947, empowering formation of State Level Staff Selection Committee constituted by the State Government for all District Education Committees and authorizing Municipalities as such; selection of candidates to be undertaken as per the instruction issued by the State Government and Government Resolution dated 21.1.1986 issued by the General Administration Department, State of Gujarat, about percentage of reservation for reserved category; Government Resolution dated 25.5.2010 about constitution of State Level Committee [Gujarat State Primary Education Selection Committee] and procedure of recruitment and preparation of wait-list prescribed thereunder, as also Government Resolution dated 27.4.2011 issued by the General Administration Department, State of Gujarat, providing in detail requisite qualification for Vidya Sahayaks for respective categories and other general instructions, programmes of selection of Vidya Sahayaks and the details contained therein and combined general merit list prepared at the end of the selection procedure. In addition to the above, Government Resolutions dated 29.1.2000 and 23.7.2004 issued by the General Administration Department, State of Gujarat, were relied upon in support of her submission about MRC taking benefits of either age-relaxation or any relaxation is to be placed in reserved category. Therefore, it is submitted that benefit of choice of district, as opted by meritorious reserved category candidate, is not available and allowing such MRC to migrate to reserved category in the district/city of his choice amounts to taking benefits and such candidate is to be treated as reserved category candidate.

15.2 So far as the change of initial programme for selection as advertised and displayed on-line is concerned, the Centralized Recruitment Agency noticed certain anomalies about injustice caused to reserved category candidates by the method followed by the Agency and it was decided that the exercise was required to be undertaken afresh by canceling the earlier procedure. Initially, call letters were issued for the open category candidates upto open merit list 4000 (including reserved category candidates figuring in open merit list upto the above number) from 16.8.2011 to 20.8.2011. Because of selection of reserved category seats by some reserved category candidates and absentism, the estimate had gone wrong and 417 seats remained vacant in the open category. As Scheduled Caste candidates had already been called in the afternoon for filling SC reserved category seats, they were allowed to fill in reserved category seats. However, the above action was wrong and selection on reserved category seats should have been started only after all open category seats in all districts were filled in. Therefore, a decision was taken to cancel all actions and first selection list for SC reserved category which was prepared on 20.8.2011 afternoon was immediately cancelled on 21.8.2011 and new programme was disclosed to all candidates and, accordingly, further selection of reserved category was commenced from 24.8.2011 to 27.8.2011. It is submitted that no reserved category candidate appearing in the open merit list was allowed to opt for reserved category seat in the district of his choice if open category seat was still available in that district. The learned AGP has heavily relied upon the information annexed at Annexure R/IV and R/V of the reply which would reveal that filling up reserved category quota beyond 50% ceiling limit is impermissible by law. For example, for the category of Maths/Science Vidya Sahayaks, the total seats in the open category was 3567, out of which, 2845 were filled in from the open category [unreserved candidates], 181 MRC (SC), 59 MRC (ST), 482 MRC

(SEBC) all were selected in the open category, while SC, ST and SEBC category candidates belonging to respective reserved category were appointed against their quota. Barring non-availability of vacant posts in the ST category and SEBC, all SC candidates were appointed. So is the case in language category where almost all reserved category candidates were selected against the notified posts and wherever MRCs were found eligible, they were placed in the open category only. Thus, both the above Charts would go to show that the respondent-Authorities have strictly adhered to reservation prescribed for reserved categories, namely, SC, ST and SEBC and no injustice is done to any reserved category candidates.

15.3 Learned AGP has referred to Annexure X & XI about option form to be filled in by the candidates and, on non-availability of choice of district in the open category, willingness is shown by MRC to forego his claim in the open category and seeking appointment against reserved post of preference of his district and also call letter issued to such candidate.

15.4 The learned AGP has placed reliance on the decision of the Apex Court in the case of **Ramesh Ram** [supra] and submitted that a candidate belonging to SC and getting selected in the open category on the basis of his own merit will not be counted against the quota reserved for SC and/or ST as the case may be and be counted as open category candidate which operates at the each District Education Committee/Nagar Education Committee level and not at the State level. The above procedure is strictly followed and there is no departure or deviation from the law laid down by the Apex Court in the case of **Indra Sawhney** (supra) also. Once after all seats in the open category have been filled up, that a reserved category candidate is allowed to opt for a seat in his reservation category. Therefore, such a candidate can also opt

seat in the open category in such District/Nagar Education Committee where open category seat is still available. It is open to a particular reserved class candidate to choose and opt for reserved category in District/town where only reserved category seats are available or opt for a seat in the District/town where open category seats are still available. Exercise of option is entirely at the discretion of the reserved category candidate and the respondents have neither the authority to compel nor pressurize a candidate to opt for a particular option. Allowing such a reserved category candidate to select a district where open category seats have all been filled up and still count him against open category would have been possible if the respondents had any authority to reduce one open category seat from any other district and increase one open category seat in this particular district. But, the cadre of vidya sahayak being a district cadre and not a State cadre, the above exercise is not possible and if MRC is placed in the general merit list who opted for reserved seat in a District due to non-availability of preference of his district, such MRC gets a benefit of a reserved category candidate and, if other reserved category candidate is permitted to be considered for appointment, the total and overall reservation would exceed 50% of total posts so advertised and will be violative of Articles 14 and 16 of the Constitution of India and the law laid down by the Apex Court in the case of **Indra Sawhney** [supra]. The learned AGP has distinguished the decision of the Apex Court in the case of **Ritesh R. Sah vs. Y.L. Yamul**, reported in AIR 1996 SC 1378, and submitted that reserved category candidates, who are selected on merit and placed in the list of general/unreserved category candidate, can choose to migrate to their respective reserved category at the time of allocation of service. According to the learned AGP, exercise undertaken by the respondents-authorities allowing MRC to opt for a district of his choice on the seat belonging to reserved category on non-availability of such preference of

district in the open category, would not be contrary to the law laid down in the above case.

15.5 Learned AGP has heavily relied upon the decision of the Apex Court in the case of **Ramesh Ram** (supra), and submitted that, while interpreting Rule 16(2) of Civil Services Examination Rules, the Apex Court held that MRCs, who availed benefit of Rule 16(2) and are eventually adjusted in reserved category, should be counted as part of reserved pool for the purpose of computing aggregate reserved quotas. It is, therefore, submitted that the procedure followed by the respondent-Authorities for selection of Vidya Sahayaks is not contrary to law and would, ultimately, maintain reservation within the ceiling of 50% for reserved category.

16 Learned advocates for private respondents, who are allowed to join subsequently as party-respondents in the proceedings, and opposed to grant of relief in the petition filed by reserved category candidates challenging the procedure of selection, have, by and large, relied upon and adopted the submissions made by the learned Assistant Government Pleader.

17 Mr. Bhargav Karia, learned advocate appearing for one of the respondents, has heavily relied upon preparation of general merit-list and respective merit shown of different categories of candidates, namely, open, SC, ST and SEBC. According to the learned counsel, during the selection process, each candidate is first given option to select available post in a district/city of his choice in the open category irrespective whether the candidate has chosen open or reserved category and, if open seat is not available in the district/city of his choice and if candidate belongs to reserved category as per separate list of reserved category

then an option is given to him to select post in district/city of his choice for respective post of SC/ST or SEBC as per his merit number in respective merit list of reserved categories prepared and culled out from the general merit list. This was in consonance with the law laid down by the Apex Court in the case of **Ramesh Ram** [supra] to the extent that MRC has an option to choose the district and the respondent-Authorities have maintained the quota of respective reserved categories and, therefore, in absence of any illegality in the selection process of Vidya Sahayaks, the petitions deserve to be rejected.

18 Mr. S.K. Patel, learned counsel for similarly situated candidates now stand selected, has contended on behalf of the selected candidates that the petitioners and the similarly situated candidates who have filed writ petitions have participated in the process of selection and now they cannot be permitted to challenge the very selection process. It is also submitted that, without joining the affected appointees, the writ petitions are not maintainable and sine candidates are selected in accordance with law and already serving on the post without any fault on their part, now the clock cannot be put back by disturbing the above selection process.

19 In order to appreciate the rival contentions of the parties, it is necessary to refer to the case-law related to the subject.

19.1 In the case of **State of Madras vs. Champakam Dorairajan**, reported in AIR 1951 SC 226, the Apex Court considered the Chapter of Fundamental Rights as sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate Article in Part III and that the directive principles of State policy cannot override the provisions found in Part III but have to

conform to and run as subsidiary to the Chapter of Fundamental Rights. Accordingly, classification based on religion in the government order referred to therein as Communal G.O. which proceeded on the basis of religion, race and caste and is opposed to the Constitution, was held to be in clear violation of fundamental rights guaranteed to the citizen under Article 29(2).

19.2 In the case of **M.R. Balaji vs. the State of Mysore and others**, reported in AIR 1963 SC 649, the Apex Court had an occasion to consider Articles 15, 15(4) and 340 of the Constitution of India in a case where the order of Mysore Government dated 31.7.1962 reserving seats in technical institutions for back ward classes to the extent of 68% was held to be consistent with Article 15(4) of the Constitution of India. It was further held that Article 15(4) is an enabling provision which does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to take suitable action, if necessary.

19.3 The issue of backwardness and the concept of backwardness in the context of social and education backwardness was reconsidered in **Chitralekha vs. State of Mysore**, reported in AIR 1964 SC 1823. In the case of **Minor A. Periakaruppan vs. State of Tamil Nadu and another**, reported in AIR 1971 SC 2303, the method adopted for admission to medical colleges on the basis of unit-wise distribution of seats in medical colleges in Tamil Nadu was declared violative of Articles 14 and 15 since the object of selecting best candidates on state-wise basis was not satisfactorily achieved by the above method. It was also observed that the classification of backward class on the basis of castes is within purview of Article 15(4) if those castes are shown to be socially and educationally backward. It was further observed that the Government should always keep under review the question of reservation of seats and

only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. However, the decision of the Government in this regard was held to be open to judicial review.

19.4 The case of **K.C. Vasanth Kumar vs. State of Karnataka**, reported in AIR 1985 SC 1495, was a case where the Apex Court was to consider Article 16 along with Articles 14,15(4) and 340 of the Constitution of India and in the matter of reservation in favour of SC/ST and OBC, guidelines were indicated including review of policy of reservation every five years or so and review criteria for identifying socially and educationally backward classes ignoring caste leveled and many other issues including whether caste should be made basis for such identification or economically backwardness or both and that whether the doctrine of protective discrimination embodied in Articles 15(4) and 16(4) can be stretched beyond a particular limit or not.

19.5 In the case of **Indra Sawhney vs. Union of India**, [AIR 1993 SC 477] (supra), a Bench consisting of nine judges, the majority view, noticed that the caste can be a consideration for identifying the backward classes. It is further held that clause (4) of Article 16 is not an exception to Article 16(1) and (2), but it is an enabling provision and permissible in character overriding Article 16(1) and (2); it is a source of reservation for appointments or posts in the services so far as the backward class citizen is concerned and under clause (1) of Article 16 reservation for appointments or posts can be made to other sections of the society such as physically handicapped etc. It would be reasonable to restrict reservation under Article 16(4) and shall not exceed 50% of the appointments or posts.

19.6 In **M. Nagaraj vs. Union of India**, reported in (2006) 8 SCC 212, (1) the ceiling limit of a maximum of 50% reservation; (2) the principle of creamy layer; (3) the compelling reasons for exercise of power under backwardness and inadequacy of representation, as required by Article 335, were held to be incomplete concept vis-à-vis Article 16(4-A) & (4-B) in the matter of reservation in promotions and it was further held that these provisions are enabling in nature and it is to be left to the appropriate Government to provide reservation under this Article.

19.7 In **Ashoka Kumar Thakur vs. Union of India and others**, reported in (2008) 6 SCC 1, the Constitution Bench of the Apex Court held that reservation of 27% seats for OBCs in State-aided institutions defined as 'Central Educational Institutions' in Section 2(d) of the Central Educational Institutions (Reservation in Admission) Act, 2006 as valid with a rider of excluding the creamy layer.

20 Having heard the learned counsels appearing for the parties respectively, on perusal of the record of the case, relevant Rules governing recruitment of Vidya Sahayaks and the decisions of the Apex Court in the context of the subject matter, it is not in dispute that recruitment for the post of Vidya Sahayaks is undertaken by the Director, Primary Education, State of Gujarat, upon requisitions of posts of Vidya Sahayaks for respective categories, general, SC, ST, SEBC, sent by various Districts/Nagar Education Committees as the case may be. Amendment to Section 23 of the Bombay Primary Education Act, 1947, empowers formation of State Level Staff Selection Committee for primary teachers and, accordingly, Government Resolution dated 25.5.2010 and Government Resolution dated 27.4.2011 issued by the General Administration Department, State of Gujarat, prescribe constitution of State Level Committee, namely, Gujarat State Primary Education

Selection Committee and detailed requisite qualification for Vidya Sahayaks for respective categories and other general instructions. Other Government Resolutions dated 29.1.2000 and 23.7.2004 issued by the General Administration Department, State of Gujarat, are pertaining to benefits of relaxation availed by MRCs including that competitive examination and instructions contained in public advertisement providing category-wise posts of Vidya Sahayaks to be filled in and general instructions contained therein. In addition to the above, on-line applications are to be submitted on the official web-site which provided other details. The advertisement provided reservation for SC, ST and SEBC depending on the population of such reserved category in a district of the State, reservation for women, physically challenged persons and children of ex-service men.

21 If the above broad features pertaining to legal provisions for recruitment of Vidya Sahayaks are considered, no where statutory rule is available for permitting the State Level Selection Committee of Vidya Sahayaks to take a decision in the midst of selection which may affect and upset the quota fixed for reserved categories, namely, SC, ST or SEBC.

22 In the decision **Ritesh R. Sah vs. Y.L. Yamul** [AIR 1996 SC 1379] (supra), while considering admission to MBBS and BDS Courses vis-à-vis the mode for filling up reserved seats, the Apex Court held that, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as open category candidate and not as reserved category candidate. The Apex Court relied upon decision of nine-judge

bench in the case of **Indra Sahwny vs. Union of India** [supra] and decision of the Constitution Bench in the case of **R.K.Sabharwal vs. State of Punjab** [supra] 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 Caste; they will be treated as open competition candidates. The Apex Court also relied upon the decision in the case of **R.K.Sabharwal vs. State of Punjab** [supra] in the context of promotion vis-à-vis roster point which is reserved for backward class and it was held that 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 backward class and 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. The Apex Court has, extensively, relied upon the discussed the issue as above.

23 It is, therefore, clear that Government Resolution dated 25.1.1986 based on the recommendations of Sadhwani Committee and census of 1981, percentage of reservation was fixed for the districts of the State based on the population of the SC/ST. Ordinarily, quota of reserved category is not to exceed 50% of total reserved categories [7% SC; 14%

ST; 29% SEBC]. Accordingly, as per Annexure “R-II” of the affidavit-in-reply dated 30.8.2011 filed by the respondent-Authorities, posts of Vidya Sahayaks were reserved and earmarked for respective categories including reserved categories for each district. So is the case for the City and Nagar Education Committees as per Annexure “R-III”

24 So far as Government Resolutions dated 28.1.2000 and 23.7.2004 referred to and relied upon by the learned Assistant Government Pleader about grant of benefits and concession to reserved categories are concerned, the above Government Resolutions are not applicable in the case of selection/appointment of Vidya Sahayaks since none of reserved category candidates seeks relaxation or concession in the matter of marks, age, examination fee, or any other qualification. In absence of factors prescribed in the above Government Resolutions, for which relaxation is sought for by reserved category candidates, the same cannot be applied to the facts of the present case.

25 The decision of the Constitution Bench of the Apex Court in **Union of India vs. Ramesh Ram**, [AIR 2010 SC 2691] (supra) was pertaining to interpretation of Rule 16(2) of Civil Service Examinations Rules, allowing reserved category candidates who were selected on merit (MRC) and placed on the list of general category candidates to be considered as reserved category candidates at the time of ‘service allocation’. The Apex Court interpreted the above Rule 16(2) as per notification dated 4.12.2004 by which the earlier/old Civil Service Examinations Rules, Rule 16(2) was amended. While considering the above Rule, in the earlier decisions in the cases of **Ritesh R. Sah vs. Y.L. Yamul** (supra), and **R.K.Sabharwal vs. State of Punjab** [supra], the Apex Court noticed and justified on the basis of amended Rule 16(2) which recognized inter-se merit between two classes of candidates for

the purpose of allocation to various civil services with due regard for the preference indicated by candidates while making a distinction between meritorious reserved category candidates and relatively lower ranked reserved category candidates. Rule 16(2) was interpreted keeping in mind a better service option in a coveted post of civil service which protected interest of reserved category candidates, which interpretation cannot be made applicable in the present case where MRC is given option to forego his claim in the open category due to non-availability of preference of district for appointment and allowed to opt and migrate to reserved category only because place of appointment is not as per preference and convenience of MRC. The Apex Court found that, however, MRC candidates who retain their reserved status and avail of the benefit of Rule 16(2) to occupy a reserved post are counted against the reservation quota. When MRC candidates do not choose to accept the general category slot available to them on account of their merit, but opt to occupy a slot reserved for reservation category candidates, **because the post is more attractive**, then counting him/her against reservation quota will not violate the law laid down in *Indra Sawhney* (supra). In the facts of the present case, better service option of civil services post to MRC cannot be equated with preference of district by MRC permitting the respondent-Authorities to violate the law laid down by the Apex Court in the cases of **Ritesh R. Sah vs. Y.L. Yamul** (supra), **R.K.Sabharwal vs. State of Punjab** [supra], and **Union of India vs. Satya Prakash** (supra). The decision of the Apex Court in **Ramesh Ram** (supra) was in the back-drop of the special provisions made in Rule 16(2) vide notification dated 4.12.2004, which is not available in the matter of recruitment/selection of Vidya Sahayaks undertaken by the respondent-Authorities. Therefore, reliance placed by the learned AGP on the above decision for consideration of MRC against reserved quota cannot be accepted.

26 In the above context, if the statements of information regarding posts filled in for Vidya Sahayaks in Maths/Science and language produced at pages 70 and 71 of the compilation are seen, against the advertisement of total seats of 13000, namely, 6500 each for two different categories, the respondent-Authorities have considered MRC, namely, SC, ST and SEBC, though against the posts/seats filled in by them in the open category, but aggregate of reserved category candidates include MRCs. Thus, in the category of Maths/Science, 181, 59, 482 MRCs in SC, ST, and SEBC categories and in another group, 337, 83, 926 MRCs, namely, SC, ST and SEBC candidates are included and considered as reserved category candidates while arriving at total/aggregate posts of reserve category. Therefore, all the above MRCs having found their place in the open category on the basis of general merit list prepared ought not to have been considered as reserved category candidates and could have been excluded from the aggregate of reserved category candidates of respective categories.

27 When MRC is given choice of District for appointment at the stage of interview, he is not to be considered as reserved category but he is to be treated in the open category because he is higher in merit as per the General Merit List irrespective of shifting of his choice to same or another District in the reserved category quota. In short, MRC is permitted to opt or shift to reserved category with the choice of District at the time of interview but such MRC is not to be considered against the quota of Scheduled Caste and Scheduled Tribe Categories as the case may be at later point of time. The net result is that a candidate from the reserved category is deprived of employment whereas a candidate from general category is pushed up in the General Merit List due to the vacancy in the general category. Interest of the petitioners and other

candidates belonging to reserved category is jeopardized because of action of permitting the candidates belonging to reserved category, who are in the merit list in the open category, to opt the choice of placement against reserved category posts because it is convenient for such MRC to serve in a District of his choice.

28 Those MRCs who are permitted to migrate or opt for choice of their districts on the posts reserved for reserved categories are to be counted against only the open category and not to be included in total posts earmarked for reserved categories and to be placed accordingly making room for reserved category candidates next in the merit from their quota.

29 In **Ramesh Ram** (supra), the Apex Court was concerned with specific Rule framed for conducting civil service examination in accordance with the provisions of the Constitution of India whereas no such rule is framed in the State of Gujarat and is available in the matter of appointment of Vidya Sahayaks. The Apex Court gave benefit to migrate because it was high-ranking coveted service and better option of service was available to MRC, which is not the case of Vidya Sahayaks where consideration is only a convenient place of posting.

30 In the instant case, for example, two candidates from reserved category find place on the merit list, however, one in the open category as MRC and another in the reserved category. One reserved category candidate, MRC, wanted to migrate to get better allocation of district for employment. If he is denied the option to migrate, he will lose only the choice of district for employment, but not employment, whereas if he is permitted to migrate, relatively lower ranked reserved category candidate, who is at the respective merit in the list, will lose

appointment to the post of Vidya Sahayak, which is an entry level cadre to the downtrodden. Even applying the doctrine of law of equity, for the upliftment of relatively lower ranked reserved category candidates, MRC can be permitted to retain their rank in the merit list by allowing an MRC to migrate but not to be considered against reserved category, so as not to throw relatively lower ranked reserved category candidates out of zone of consideration. If a reserved category candidate on the basis of higher merit finds his place in the open category in the general merit list, such candidate is not to be considered against the reserved category. However, at the time of filling up application form for the post of Vidyasahayak as per the advertisement, a candidate is instructed to give choice/preference of the District in which he would like to be appointed if found successful in the selection procedure. While considering the case of MRC, for the preference of the District in which such candidate would like to be appointed is not available at the time of interview option is given to MRC to shift to the quota available to the reserved category, viz. SC and ST as the case may be where the vacancy is available in the choice of his District or even the District next in preference. In the above scenario and circumstances, appointment of MRC is considered against the post/vacancy earmarked for the reserved category. The resultant effect of the method and procedure adopted by the recruiting agency about allowing MRC to shift to the reserved category due to non-availability of post in the District of his preference and considering him against reserved category, deprives other reserved category candidates next in the merit list.

31 The action of the State to consider MRC against reserved quota in absence of any statutory provision cannot be sustained in the eye of law. Such consideration takes away the constitutional right of other reserved category candidates guaranteed under Article 16(4) and (5) of the

Constitution of India, and the decisions of the Apex Court for appointment in public service viz. for the post of vidya sahayak.

32 Thus, with the aid of **legal norms** indicated hereinbelow:

[a] Equality of opportunity in the matter of public employment is guaranteed under Articles 14 and 16 of the Constitution of India;

[b] In the matter of public employment, Government or any other Authority within the meaning of Article 12 of the Constitution of India has to undertake recruitment procedure for appointment in accordance with the statutory rules in this regard;

[c] A selectee, who has undergone a legal and valid selection procedure, has no indefeasible right to appointment, but, only for consideration for such appointment;

[d] No candidate selected can stake a claim of place of working or posting;

[e] Choice/option/preference for place of working is for administrative convenience of the appointing authority and, to some extent, of selectee also;

[f] Exercise of discretion, as above, if any, ordinarily, must flow from the statutory rules and, in absence of statutory rules, exercise of such discretion has to be reasonable and non-arbitrary and does not result into violation of right of other eligible candidates;

in the context of the facts of this case, the following **conclusions** are inevitable:

[i] On non-availability of district/city in the open category, allowing MRC to opt for post in reserved category in a district/city of his/her choice/preference on the post of reserved category, deprives other reserved category candidates having less merit than

MRC.

[ii] On the one hand, a group of MRCs get choice of place of service only and counting such MRCs against the reserved category post deprives other lesser meritorious reserved category candidates of right to be considered for appointment in their quota.

[iii] This is not only discriminatory as such, but results into arbitrary and unreasonable exercise of power by the recruitment authority, in as much as, treating MRC against reserved category quota while arriving at aggregate of number of reserved category posts filled in; inclusion of such MRCs in reserved quota results into anomaly, which has no nexus with the object sought to be achieved by the policy of reservation framed by the State Government under Article 16(4) & (5) of the Constitution of India and against the decision of the Apex Court in **Indra Sawhney** (supra) and **Ritesh R. Shah** (supra)

[iv] Therefore, the procedure of selection and counting of MRCs against reserved category posts by changing earlier method of selection by revised programme dated 21/22.8.2011 while calculating aggregate posts of reserved category, being discriminatory, unreasonable and arbitrary, is violative of Article 16(4) & (5) of the Constitution of India.

(v) The decision of **Ramesh Ram** (supra) where the Apex Court was concerned with interpretation of Rule 16(2) of Civil Service Examinations Rules, as amended by notification of 2004, cannot be pressed into service in a case of option/choice/preference of work place equating with better service posts/cadre of Civil Service, as interpreted in the above decision. No such rule on par with or para-materia exists in the recruitment of vidya sahayak. No

relaxation benefits are claimed by either MRC and RC qua Government Resolutions dated 28.1.2000 and 23.7.2001.

(vi) In view of the admitted position of the respondent-authorities that MRCs, who are allowed to shift in the reserved category, are treated against the reserved quota only, there is no further exercise necessary to analyze the data put forth.

(vii) The submission of learned counsel Mr. S.K. Patel about hearing to be given to the appointed candidates and affected parties is irrelevant, in as much as, a large number of appointed candidates and other candidates likely to be affected are permitted to be joined as parties and are heard extensively through their respective counsels. At the same time, when the issue is about change in the method of selection, having issued call letters to the candidates, in arbitrary manner by disrupting the programme of selection already notified, the candidates, who already participated in such selection and not offered posting, can always ventilate their grievances and the argument of the learned counsel that the candidate who had undergone the process of selection is not permitted to challenge the selection, is misconceived. Therefore, vidya-sahayak, being a district cadre, and allotment is only made by the Central Recruiting Agency, respondent herein, will not make any difference so far as the method of selection which is discriminatory and arbitrary in nature followed by them is concerned.

(viii) Ultimately, in a case like this, ideally, MRC placed in the open category would have to be satisfied if choice of posting in the district/city is available in the open category itself; that being not so, such MRCs could sacrifice their choice in the reserved category

for their brethren of reserved category, but, at the same time, if the above approach is taken, it would be disadvantageous to MRC who is also having rank ahead in the merit list of other reserved category candidates where the choice of posting in the district/city is available. Therefore, denial to allow MRC to migrate in reserved category quota/post in the above circumstances would be disadvantageous to his merit. So as to avoid the above anomaly, the only course open for the respondent-authorities is to follow the law laid down by the Apex Court in the case of **Ritesh R. Sah vs. Dr. Y.L. Yamul** [AIR 1996 SC 1378], as under:

“A student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as a open category candidate and not as a reserved category candidate.”

Therefore, no injustice would cause to MRCs. The respondent-

authorities shall have to take the above method of computing the percentage of reservation and MRCs will be deemed to have been admitted as open category candidate and not as a reserved category.

(ix) The above procedure is just and legal in view of different merit of MRCs in the open category as well as in the reserved quota. For example, a candidate at Sr. No.16 in the general merit is at Sr. No.1 in the SC category; Sr. No.20 in the general merit is at Sr. No.2 in the SC category; Sr. No.518 in the general merit is at Sr. No.57 in the SC category; Sr. No.107 in the general merit is at Sr. No.46 in the SEBC category; Sr. No.219 in the general merit is at Sr. No.83 in the SEBC category; and likewise. Therefore, question of keeping reserved category seats/posts by MRC and particularly when they are counted against the reserved quota, while considering and computing aggregate posts in reserved category by the respondents, quota/posts of reserved category in the respective category stands reduced and, therefore, the respondents will have to undertake the whole exercise of recruitment in light of law laid down by the Apex Court in the case of **Ritesh R. Sah vs. Dr. Y.L. Yamul** [AIR 1996 SC 1378] as quoted hereinabove.

(x) In case of allowing MRC to migrate to reserved category, candidate lower in the merit of reserved category can be pushed up and/or from the waiting list of reserved category, such candidates can be appointed by counting MRCs against open category only.

33 In the result, all the petitions are partly allowed with the following declaration and directions:

[i] The exercise undertaken by the respondent-authorities of recruitment/selection of vidya-sahayak for the year 2011-2012 pursuant to the advertisement dated 15.7.2011 and revised programme dated 21.8.2011 for the year 2011-2012 to the extent of counting MRCs against the reserved category and including and computing them in the aggregate of reserved category of posts is held unjust, unreasonable, arbitrary, discriminatory and violative of Articles 14, 16(4) & (5) of the Constitution of India and, therefore, illegal and unconstitutional.

[ii] In furtherance of the above, the respondents are directed to undertake fresh exercise of selection for the posts of vidya-sahayak for the year 2011-2012 by treating MRCs against the open category and while computing the percentage of reservation, MRC will be deemed to have been admitted as open category and not as a reserved category candidate as per the law laid down by the Apex Court in the case of **Ritesh R. Sah vs. Dr. Y.L. Yamul** [AIR 1996 SC 1378] and to operate general merit list containing open and respective reserved categories and allocate candidates accordingly, within four weeks from the date of receipt of writ of this order.

[iii] While undertaking the exercise directed as above of reshuffling and/or displacement of the candidates selected and appointed so far pursuant to the re-notified and revised programme of recruitment dated 20.8.2011 on the basis of initial advertisement dated 15.7.2011 for the post of vidya-sahayaks for the year 2011-2012, till fresh exercise of selection is completed, such selected and appointed candidates are not to be disturbed.

(iv) It is made clear that general merit list of vidya-sahayak for the year 2011-2012 containing rank of candidates in respective categories viz. Open, SC, ST, SEBC, PH etc. is not disturbed.

34 Rule is made absolute in each petition to the aforesaid extent, except Special Civil Application No.15370 of 2011. No costs.

35. In view of the directions issued hereinabove, no further direction is required to be issued in Special Civil Application No.15370 of 2011, as prayed for. Special Civil Application No.15370 of 2011 is disposed of accordingly.

(ANANT S. DAVE, J.)

(swamy)