

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 5451 of 2015****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS JUSTICE SONIA GOKANI**

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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 or any order made thereunder ?	

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PATEL MANOJKUMAR KANTIBHAI**Versus****STATE OF GUJARAT & 2 other(s)**

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Appearance:**MR KB PUJARA for the Petitioner(s) No. 1****MS MANISHA LAVKUMAR SHAH, SR. ADV. & GOVERNMENT PLEADER
for the Respondent(s) No. 1,3****NOTICE SERVED BY DS for the Respondent(s) No. 2**

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI**Date : 03/07/2017****CAV JUDGMENT**

1 Petition involves issues of implementation
of reservation for physically handicapped

candidates. In a petition under Article 226 of the Constitution of India with a following capsulized facts:-

1.1 The petitioner is physically handicapped suffering from visual impairment belonging to Open category and is born on 14.09.1985. He has passed B.A.(Hindi) and B.Ed.(Hindi) and also passed Teachers' Eligibility Test (TET-II) and has averred in the petition that he is eligible and qualified to be appointed as teacher for the post of Vidhya Sahayak for Upper Primary School in Standards VI to VIII for the subject of language. His merit for such recruitment is 69.39%.

2 It is the say of the petitioner that respondents issued advertisement for recruitment of 4351 Vidhya Sahayaks, out of which 548 vacancies were for language subject. The vacancies have been distributed amongst different Districts and categories and four vacancies each has been earmarked for Physically Handicapped category (" the PH Category" for

short) of English, Gujarati, Hindi and Sanskrit languages. The petitioner was called on 24.3.2015 for selection as per the call letter issued on-line. According to him, he has the highest merit in the State with 69.39%. However, he was declined selection of District and appointment, on the ground that, all four vacancies of the PH category candidates having Low Vision for the subject of Hindi, were meant for reserved categories and not a single vacancy is provided for Open category. It is the grievance of the petitioner, that, therefore, candidate, who has less merit, would be given appointment on the said vacancies meant for 100% reservation for PH candidates.

3 It is the say of the petitioner that 100% reservation for reserved category candidates is *ex facie* arbitrary and discriminatory as per the decision of the Constitution Bench in case of **Indra Sawhney vs. Union of India and others**, **AIR 1993 SC 447**. There are mandatory provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full

Participation) Act, 1995 ("the Disabilities Act" for short) and the Office Memorandum ("the OM" for short) dated 29.12.2005 being consolidated instructions of Department of Personnel and Training on 3% reservation issued by the Government of India, Ministry of Personnel Public Grievances and Pensions. The process of recruitment conducted by the respondents is non-transparent and the merit of other candidates is not being disclosed by the respondents. The petitioner, therefore, has sought the following reliefs:-

"9. The petitioner therefore humbly prays that YOUR LORDSHIPS BE PLEASED to issue a writ of or in the nature of mandamus and/or certiorari or any other appropriate writ, order or direction:-

(a) to direct the respondents to forthwith give selection of District and appointment to the petitioner as Vidhya-Sahayak for Upper Primary Schools (Std.6 to 8) for the subject of Language as candidate of Hindi Language pursuant to the advertisement dtd.2011-2014 as per Annexure-B as he Physically Handicapped candidate suffering from Low Vision, with all the consequential benefits as if the petitioner was given selection of District and appointment along with all other candidates on 24-3-2015;

(b) to quash and set aside the impugned illegal action/inaction of the respondents in denying the selection of District and appointment as Vidhya-Sahayak as candidate of Hindi Language pursuant to the Advertisement

dated 20-11-2014 despite his very high merit of 60.39% as the Physically Handicapped candidate suffering from Low Vision;

(c) PENDING THE HEARING AND FINAL DISPOSAL OF THIS PETITION, BE PLEASED TO direct the respondents to forthwith give selection of District and appointment to the petitioner as Vidhya Sahayak for Upper Primary Schools (Std.6 to 8) for the subject of Language as candidate of Hindi Language pursuant to the Advertisement dtd.20-11-2014 as per Annexure-B;

(d) PENDING THE HEARING AND FINAL DISPOSAL OF THIS PETITION, BE PLEASED to direct the respondent to keep one post vacant for the petitioner while giving any appointments on the post of Vidhyasahayaks pursuant to the Advertisement dtd.20-11-2014 as per Annexure-B;

(e) to grant any other appropriate and just relief/s:"

4 Affidavit-in-reply on behalf of respondent No.2 Directorate of Primary Education, Gandhinagar has come on record, wherein all allegations and averments in the memo of petition have been denied. It is contended, particularly, that the petition is not maintainable in law inasmuch as the petitioner has not been selected for being appointed along with other candidates. It is the say of the respondent that the petitioner is the PH candidate suffering from visual impairment and he belongs to Open category. It has given the

details of vacancies meant for reserved category candidate.

5 As per 3% reservation for the PH candidates, total number of 04 posts are reserved for Vidhya Sahayak and in these conditions of totally 09 Scheduled Caste ("SC candidates" for short), one post of PH candidate for Vidhya Sahayak in Hindi language is kept reserved. At Panchmahals District, a Low Vision Scheduled Tribe ("the ST candidate" for short) candidate is appointed. At Valsad, out of 05 Socially & Economically Backward Classes ('SEBC' for short) candidates, one Low Vision SEBC candidate is appointed. At Jamnagar, out of 13 General category candidates, one Orthopedic handicap General category candidate is appointed. At Banaskantha, out of 17 General category candidates and 04 SEBC candidates, 01 Orthopedic handicapped SEBC candidate is appointed. As per the notification dated 12.2.2013 of Education Department, first vacancy has to be filled up by Low Vision candidate. There are in all 04 seats reserved for the PH

candidate. Thus, all the four seats have been filled up as per the Government Resolution dated 4.5.2002. It is true that the petitioner has obtained 60.39%, but the present petitioner falls under the General Category, therefore, according to the respondents, such a benefit of reservation cannot be given to the petitioner. It has been contended that no right of the petitioner is violated because, as per the Government Resolution dated 4.5.2002, the vacancy of PH candidate is filled up, as per the concerned category.

6 Rejoinder affidavit is filed for and on behalf of the petitioner, wherein he has reiterated averments set out in the memo of petition. Reliance is, therefore, placed on the decision of **Indra Sawhney**(supra) on paragraphs 36 and 37 with a further request that respondents are, in particular, required to select the highest meritorious visually impaired candidates for filling up the post. The respondents, thus, are required to select the two highest meritorious visually impaired

candidates for filling up the two vacancies and they are required to be placed in the category to which they belong.

7 The petitioner further has averred that he being the most meritorious visually impaired candidate, is entitled to the appointment. The respondents are wrongly denying appointment to the petitioner on the ground that he belonged to Open category. The respondents have denied appointment on the ground that he belonged to Open category and 02 seats are given to ST candidates and 02 to SEBC candidates, who admittedly have scored less than the petitioner's merit. Thus, giving appointment to the less meritorious candidates would mean appointing the persons dehors, the ratio laid down by the Supreme Court and the Government Resolution issued on 4.5.2002. Moreover, according to the petitioner, the respondents have committed one more illegality by providing for more than 50% reservation in filling up 137 vacancies for Hindi language as only 67 vacancies are earmarked for Open category

candidates, 09 for SC, 26 for ST and 35 for SEBC candidates. Thus, 70 vacancies are for reserved category, which is unconstitutional and violative of Articles 14 and 16 of the Constitution of India. The respondents are duty bound to fill up at least 69 vacancies by Open category candidates out of 137 candidates, as provided in the decision of **State of U.P. vs. Pawan Kumar Tiwari** reported in **AIR 2005 SC 658**.

8 Following are the decisions put forth by learned advocates for the parties:-

1) **Naresh Kumar Sharma and others vs. State of Rajasthan and another**, decided by the Rajasthan High Court in **S.B. Civil Writ Petition No.3414 of 2009** and allied matters on **20.09.2011**.

2) **Union of India and another vs. National Federation of the Blind and others**, (2013) 10 SCC 772.

3) **Rajesh Kumar Daria vs. Rajasthan Public Service Commission and others**, (2007) 8 SCC 785.

4) **Public Service Commission, Uttranchal vs. Mamta Bisht and others**, (2010) 12 SCC 204.

9 It is not in dispute that the petitioner is

a physically handicapped visually impaired candidate belonging to Open Category, who has passed TET-II and has secured 69.39%. it is also not in dispute that for the post of Vidhya Sahayak on 20.11.2014, nearly 4351 Vidhya Sahayak candidates appeared. Total vacancies for any category were 548 and they were divided into 04 languages. The present petitioner is a Low Vision handicapped candidate. The distribution of post for Hindi language for PH candidate as per the say of the respondents is as follows:-

PLACE	TOTAL	ST	SEBC	PH
Panchmahals	9	9	0	1(LV) ST Candidate
Valsad	5	0	5	1(LV) SEBC Candidate
PLACES FOR ORTHOPEDIC PHYSICALLY HANDICAP				
Jamnagar	13	0	0	1(OH) Open Candidate
Banaskantha	21	0	4	1(OH) SEBC Candidate

9.1 Thus, it is clear that total 09 posts are reserved for ST candidates. One PH candidate in Low Vision category from ST category has been appointed at Panchmahals

district. In Valsad district there are 05 vacancies, where all five vacancies are reserved for SEBC category candidates and one candidate of Low Vision, who belongs to SEBC category is already given appointment. In Jamnagar district, out of total number of 13 seats for the candidates, one has been given to Orthopedics PH candidate belonging to Open category. In Banaskantha district, there are 21 seats where four seats belong to SEBC category candidates and one seat is meant for Orthopedic handicapped candidate in SEBC category. It is also not in dispute that the petitioner has the highest merit in the District having 69.39%. He is a PH candidate in visually impaired classification.

10 Therefore, the question that would beg attention of this Court is as to whether his claim to be appointed on the post of physically handicapped candidate can be entertained. According to the respondents, for the aforementioned vacancies, which were meant for SEBC and ST category candidates, the petitioner

could not have been selected and appointed, as he admittedly belongs to Open category and the vacancies are meant for reserved category candidates.

11 Learned advocate Mr. Pujara for the petitioner has strenuously urged before this Court that is is out-rightly erroneous and wrong interpretation of the decision of **Indra Sawhney**(supra) which speaks of horizontal reservation for the candidates, who belong to the PH category. He also urged that the seats, which were otherwise meant for physically handicapped candidates, there cannot be reservations within the reservation. The merit amongst physically handicapped candidate, if would have been seen, according to him, the petitioner alone would have been given the appointment, particularly, when no challenge is made to the merit of the petitioner.

12 Ms. Manisha Lavkumar Shah, learned Senior Advocate and Government Pleader for the respondents has strenuously challenged this version by holding that the seats, which were

meant for the reserved category candidate, ought to have gone to the candidates belonging to those categories. She agreed that obviously can not dispute with '**Indra Sawhney**' case, which speaks of horizontal reservation for candidates belonging to physically handicapped candidates but that, according to her, would not take away the angle of reservation.

13 In the case of **Naresh Kumar Sharma and other** (supra), the Rajasthan High Court was dealing with the case of vertical reservation to the females, who were settled for horizontal reservation. It was a case where, on account of application of vertical reservation, excess appointment had been given to the female candidates towards reservation.

13.1 It was a case of appointment on the post of Teacher Grade-III. The petitioners were allowed to appear in the selection made by the Rajasthan Public Service Commission ("RPSC" for short). The petitioners were surprised to notice that while preparing merit list of General category, female candidates

found place in the merit list on account of their merit without counting them towards reservation meant for them. This, they found as providing social reservation to the female, which is otherwise meant for SC, ST and OBC category. Social reservation, according to the Court, is vertical in nature, and thereby the candidates who find place in the merit of General Category/ other category were to be counted towards reservation, but the same analogy cannot be adopted for female candidates, as they were entitled to horizontal reservation. The principle of horizontal reservation is to count even those candidates, who find place in general list on account of their merit and if there exist shortfall, then to make up reserved seat meant for them and thus, appointment only to the extent of shortfall shall have to be given from the female candidates left out in order of merit. For deciding the issue of horizontal reservation the Court relied on decisions of **Rajesh Kumar Daria** (supra) and that of **Anil**

Kumar Gupta vs. State of U.P. And others
reported in (1995) 5 SCC 173.

13.2 In **Anil Kumar Gupta's** case, the issue was clarified as to how horizontal reservation is to be applied.

13.3 It was a case of the petitioner before the Rajasthan High Court that respondents have given reservation to female candidates on account of wrong application of reservation policy and the petitioners were deprived to get appointment despite their merit position. It is also their case that though the issue was clarified by the Apex Court in **Rajesh Kumar Daria's** case and the same was reiterated in the case of **Jitendra Kumar Singh and another vs. State of Uttar Pradesh and others** reported in (2010)3 SCC 119, benefit was not given.

13.4 The Court held that so far as issue of female reservation is concerned, it was to be applied keeping in view the decision of the Apex Court in the case of **Rajesh Kumar Daria** (supra) and the Apex Court has directed the

same to be applied horizontally. If any female candidates finds place in the merit list of general category on account of their merit, they are counted towards reservation and after counting their number, if shortfall exists, then to make up the reservation, to the extent of shortfall, the candidates are required to be given benefit of appointment to complete the reservation quota of female.

14 It would be worthwhile to quote the relevant difference between the nature of vertical reservation and horizontal reservation as explained by the Apex Court in the case of **Rajesh Kumar Daria** (supra) as under:-

"7.A special provision for women made under [Article 15\(3\)](#), in respect of employment, is a special reservation as contrasted from the social reservation under [Article 16\(4\)](#). The method of implementing special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by this Court in [Anil Kumar Gupta vs. State of U.P.](#) [1995 (5) SCC 173] thus :

" The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal

reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.) [Emphasis supplied]

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 numbers will not be

counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), Union of India vs. Virpal Singh Chauhan (1995 (6) SCC 684 and Ritesh R. Sah vs. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. 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 women candidates, then there is no need to disturb the list by including any further SC women 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 women SC candidates. But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four."

15 The High Court of Rajasthan found that the respondent State had given appointment to female candidates by applying reservation vertically and not horizontally, and therefore, it was an action contrary to the judgment of the Apex Court rendered in the case of **Rajesh Kumar Daria** (supra).

16 In the case of **National Federation of the Blind and others** (supra), the Apex Court was dealing with the reservation of post for persons with disability under sections 32 and 33 of the Disabilities Act. It held and observed that computation of three reservations is based on

total number of vacancies in cadre strength and not on the basis of vacancies available in identified posts. The Court held, in unequivocal terms, that reservation policy stipulated under the Disabilities Act is a vacancy based reservation. The scope of identification, according to the Apex Court, comes into picture only at the time of appointment on the post identified for disabled person and is not necessarily relevant at the time of computing 3% reservation under section 33 of the Disabilities Act.

17 The Court has also held that the ceiling of 50% of reservation applies only to vertical reservation under Article 16(4) of the Constitution of India, whereas reservation in favour of persons with disabilities is horizontal and is under Article 16(1) of the Constitution of India. (emphasis supplied). The Apex Court has concluded that the computation of reservation for persons with disabilities has to be computed in case of Group A,B, C and D posts in an identical manner viz. "computing 3%

reservation on total number of vacancies in the cadre strength", which is the intention of the legislature. According to certain clauses in OM dated 29.12.2005, which are contrary to the above reasoning are struck down and the appropriate Government is directed to issue new OM consistent with the decision rendered by the Supreme Court and to compute the number of vacancies available in all "establishments" and further identify posts for disabled persons within the period of three months from the date by this judgment and implement the same without default. The appellant Union of India has been directed to instruct all the departments/ public sector undertakings/Government companies declaring that non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and the Nodal Officer in the department/public sector undertakings/Government companies responsible for the proper strict implementation of reservation for persons with disabilities be departmentally proceeded against for the

default. In this judgment, the Court has referred to the OM dated 29.12.2005 of the Government of India, Department of Personnel and Training, whereby it issued certain instructions with regard to reservations for the persons with disabilities (physically handicapped person) in posts and services. This memorandum specifically provided that it supersedes previous instructions issued on the subject so far. One of the relevant clauses of the said OM deserves reproduction which is as follows"-

"19. HORIZONTALITY OF RESERVATION FOR PERSONS WITH DISABILITIES:

Reservation for backward classes of citizens (SCs, STs and OBCs) is called vertical reservation and the reservation for categories such as persons with disabilities and ex-servicemen is called horizontal reservation. Horizontal reservation cuts across vertical reservation (in what is called interlocking reservation) and person selected against the quota for persons with disabilities have to be placed in the appropriate category viz. SC/ST/OBC/General candidates depending upon the category to which they belong in the roster meant for reservation of SCs/STs/OBCs. To illustrate, if in a given year there are two vacancies reserved for the persons with disabilities appointed, one belongs to a Scheduled Caste and the other to general category then the disabled SC candidate shall be adjusted against the SC point in the reservation roster and the general candidate against unreserved point in the relevant reservation roster. In case none of the vacancies falls on

point reserved for the SCs, the disabled candidate belonging to SC shall be adjusted in future against the next available reserved for Scs."

18 Thus, the Apex Court, after detailed discussion of various provisions has held thus:-

"37. Admittedly, the Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfill its objective. Besides, it is a settled rule of interpretation that if the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision. In the present case, the plain and unambiguous meaning of Section 33 is that every appropriate Government has to appoint a minimum of 3% vacancies in an establishment out of which 1% each shall be reserved for persons suffering from blindness and low vision, persons suffering from hearing impairment and persons suffering from locomotor or cerebral palsy.

38. To illustrate, if there are 100 vacancies of 100 posts in an establishment, the concerned establishment will have to reserve a minimum of 3% for persons with disabilities out of which at least 1% has to be reserved separately for each of the following disabilities: persons suffering from blindness or low vision, persons suffering from hearing impairment and the persons suffering from locomotor disability or cerebral palsy. Appointment of 1 blind person against 1 against a vacancy in an identified post for instance, the post of peon, which is identified for him in group D. Similarly, one hearing impaired will be appointed against one reserved vacancy for that category in the post of store attendant in group D post. Likewise, one person suffering from locomotor disability or cerebral palsy will be appointed against

the post of "Farash" group D post identified for that category of disability. It was argued on behalf of Union of India with reference to the post of driver that since the said post is not suitable to be named by a person suffering from blindness, the above interpretation of the Section would be against the administrative exigencies. Such an argument is wholly misconceived. A given post may not be identified as suitable for one category of disability, the same could be identified as suitable for another category or categories of disability entitled to the benefit of reservation. In fact, the second part of the Section has clarified this situation by providing that the number of vacancies equivalent to 1% for each of the aforementioned three categories will be filled up by the respective category by using vacancies in identified posts for each of them for the purposes of appointment.

39. It has also been submitted on behalf of the appellants herein that since reservation of persons with disabilities in Group C and D has been in force prior to the enactment and is being made against the total number of vacancies in the cadre strength according to the OM dated 29.12.2005 but the actual import of Section 33 is that it has to be computed against identified posts only. This argument is also completely misconceived in view of the plain language of the said Section, as deliberated above. Even, for the sake of arguments, if we accept that the computation of reservation in respect of Group C and D posts is against the total vacancy in the cadre strength because of the applicability of the scheme of reservation in Group C and D posts prior to enactment, Section 33 does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively. As such, one statutory provision cannot be interpreted and applied differently for the same subject matter.³⁹⁾ Further, if we accept the interpretation contended by the appellants

that computation of reservation has to be against the identified posts only, it would result into uncertainty of the application of the scheme of reservation because experience has shown that identification has never been uniform between the Centre and States and even between the Departments of any Government. For example, while a post of middle school teacher has been notified as identified as suitable for the blind and low vision by the Central Government, it has not been identified as suitable for the blind and low vision in some States such as Gujarat and J&K etc. This has led to a series of litigations which have been pending in various High Courts. In addition, Para 4 of the OM dated 29.12.2005 dealing with the issue of identification of jobs/posts in sub clause (b) states that list of the jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive which further makes the computation of reservation uncertain and arbitrary in the event of acceptance of the contention raised by the appellants.

40) Another contention raised by the appellants is that the computation of reservation against the total vacancies in the cadre strength in Group A & B will violate the rule of 50% ceiling of reservation in favour of SC, ST and OBC as laid down by this Court in Indra Sawhney vs. Union of India and others AIR 1993 SC 477. This contention is also not tenable and is against the abovesaid judgment. It is difficult to understand as to how the computation of reservation against total vacancies in the cadre strength in Group A and B will violate 50% ceiling when its computation on that basis in Group C and D will not violate the said ceiling. There is no rationale of distinguishing between the manner of computation of reservation with regard to Group A and B posts on the one hand and manner of computation of reservation with regard to Group C and D posts on the other on this ground.

41) A perusal of *Indra Sawhney* (supra) would reveal that the ceiling of 50% reservation applies only to reservation in favour of other Backward classes under [Article 16\(4\)](#) of the Constitution of India whereas the reservation in favour of persons with disabilities is horizontal, which is under [Article 16\(1\)](#) of the Constitution. In fact, this Court in the said pronouncement has used the example of 3% reservation in favour of persons with disabilities while dealing with the rule of 50% ceiling. Para 95 of the judgment clearly brings out that after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%. Para 95 is reproduced as follows:-

"95.all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [[under Article 16\(4\)](#)] may be called vertical reservations whereas reservations in favour of physically handicapped [[under Clause \(1\) of Article 16](#)] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of [Article 16](#). The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C.

category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category,

he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same....."

42) Yet another contention raised by the appellants is that the reservation for persons with disabilities must be vacancy based reservation whereas Respondent No. 1 herein contended that it must be post based reservation as laid down by the High Court in the impugned judgment. Respondent No. 1 herein relied upon the heading of Section 33 of the Act, viz., 'Reservation of Posts', to propose the view that the reservation policy contemplated under Section 33 is post based reservation.

43) It is settled law that while interpreting any provision of a statute the plain meaning has to be given effect and if language therein is simple and unambiguous, there is no need to traverse beyond the same. Likewise, if the language of the relevant section gives a simple meaning and message, it should be interpreted in such a way and there is no need to give any weightage to headings of those paragraphs. This aspect has been clarified in Prakash Nath Khanna & Anr. vs. Commissioner of Income Tax & Anr., (2004) 9 SCC 686. Paragraph 13 of the said judgment is relevant which reads as under:

"13. It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself.

The question is not what may be supposed and has been intended but what has been said.

"Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage*. The view was reiterated in *Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama* and *Padma Sundara Rao v. State of T.N..*"

44) It is clear that when the provision is plainly worded and unambiguous, it has to be interpreted in such a way that the Court must avoid the danger of a prior determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. While interpreting the provisions, the Court only interprets the law and cannot legislate it. It is the function of the Legislature to amend, modify or repeal it, if deemed necessary.

45) The heading of a Section or marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. However, when the Section is clear and unambiguous, there is no need to traverse beyond those words, hence, the headings or marginal notes cannot control the meaning of the body of the section. Therefore, the contention of Respondent No. 1 herein that the heading of Section 33 of the Act is "Reservation of posts" will not play a crucial role, when the Section is clear and unambiguous.

46) Further, the respondents heavily relied on a decision of the Constitution Bench in *R.K. Sabharwal and others vs. State of Punjab and others* (1995) 2 SCC 745 to substantiate their contention. Para 6 reads as under:-

"6. The expressions "posts" and "vacancies", often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an appointment, job, office or employment. A

position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts, which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation."

47) Adhering to the decision laid by the Constitution Bench in *R.K Sabharwal (supra)*, the High Court held as follows:-

16. The Disabilities Act was enacted for protection of the rights of the disabled in various spheres like education, training, employment and to remove any discrimination against them in the sharing of development benefits vis-à-vis non-disabled persons. In the light of the legislative aim it is necessary to give purposive interpretation to [section 33](#) with a view to achieve the legislative intendment of attaining equalization of opportunities for persons with disabilities. The fact that the vacancy-based roster is to be maintained does not mean that 3% reservation has to be computed only on the basis of vacancy. The difference between the posts and vacancies has been succinctly pointed out in the Supreme Court decision in the case of *R.K Sabharwal and Others vs state of Punjab and others* AIR 1995 SC 1371 wherein it was held that the word "post" means an appointment, job, office or employment, a position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the vacancy to occur. The cadre-strength is always measured by the

number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre.

As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation. Therefore, in our opinion, 3 % reservation for disabled has to be computed on the basis of total strength of the cadre i.e. both identified as well as unidentified posts...."

48) However, the decision in R.K Sabharwal (supra) is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST & OBC, which is vertical reservation whereas reservation in favour of persons with disabilities is horizontal.

We harmonize with the stand taken by the Union of India, the appellant herein in this regard. Besides, the judgment in R.K Sabharwal (supra) was pronounced before the date on which the Act came into force, as a consequence, the intent of the Act must be given priority over the decision in the above said judgment. Thus, in unequivocal terms, the reservation policy stipulated in the Act is vacancy based reservation.

Conclusion:

49) Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and in deplorable conditions. They are denied the right to make a useful

contribution to their own lives and to the lives of their families and community."

19 It is, thus, concluded that reservations for disabled persons under section 33 of the said Act shall be vacancy based and shall need to be computed accordingly.

19.1 The decision of the Apex Court, in the case of **R.K.Sabharwal vs. State of Punjab** reported in (1995) 2 SCC 745, would have no applicability to the reservation for the persons with disabilities as in the earlier decisions, the question considered was for reservation for SC, ST and OBC, which is vertical reservation under Article 16(4) of the Constitution whereas reservation in favour of persons with disabilities would be horizontal. The Apex Court also held that the decision of **R.K.Sabharwal** (supra) was pronounced before the said Disability Act came into force and, hence, reservation policy stipulated under the Disabilities Act is vacancy based reservation. The cadre strength is always measured by the number of posts comprising the cadre. Thus, the

reservation policy stipulated in the Disabilities Act is post based reservation. It also held that section 32 is not precondition for computation of reservation of 3% vacancies for persons suffering from (i) blindness/Low Vision (ii) hearing impairment and (iii) locomotor and cerebral palsy disability. The scope of identification comes into picture only at the time of appointment on the posts identified for disabled person, which is not necessarily relevant at the time of computing 3% reservation under section 33 of the Disabilities Act. The Court further held that ceiling of 50% reservation applies only to vertical reservation under Article 16(4), whereas reservation in favour of persons with disabilities being horizontal and under Article 16(1) of the Constitution of India, this 50% ceiling would have no applicability to the said class of reservation.

20 In the case of **Mamta Bisht and other** (supra), the question of horizontal reservation had come up for consideration, where the Court

has held that special reservation in case of physically handicapped women etc. under Articles 16(1) or 15(3) are horizontal reservations and in case of vertical reservation, reserved category candidates may compute for non-reserved posts and if they are appointed to non-reserved post on their own merits, their number will not be counted against reserved quota. But, the aforesaid principle will not apply to horizontal (special) reservation. The Apex Court referred to various decision including that of '**Indra Sawhney**' case and also applied the case of '**Rajesh Kumar Daria** (supra).

21 It was the case of inviting applications for the post of 35 Civil Judge (Junior Division) with stipulation that number of vacancies may be increased or decreased, where it was clarified that reservation policy adopted by the State would be applicable vertically and horizontally.

21.1 Respondent No.1 applied in pursuance of the said advertisement seeking benefit of reservation in favour of Uttaranchal woman. She was qualified in the written examination and

faced the interview held by the Commission. The recommendations were made for filling up 42 vacancies instead of 35 vacancies, 26 were filled up by general category and 16 by reserved category candidates. Some other women candidates stood selected in general category, however, others were still given benefits of horizontal reservation.

21.2 The High Court accepted submission of respondent No.1 to conclude 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. Therefore, that candidate ought to have been appointed against general category vacancy and respondent No.1 ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal women.

21.3 The Apex Court reiterated the well laid down principle that vacancies, over and above, the number of vacancies advertised, cannot be filled up and once all the vacancies are filled

up, the selection process comes to an end. In case of selected candidates after joining, resigns or dies, the vacancies so occupied cannot be filled up from the penal which stood already exhausted. However, in the matter before the Apex Court, the advertisement itself had made it clear that the vacancies could be increased and decreased and before completion of selection process, the decision had been taken to fill up 42 vacancies. The Court also reiterated the application of horizontal reservation, as provided in case of **Rajesh Kumar Daria** (supra) at para 14, which deserves reproduction and had allowed the appeal, quashing and setting aside the judgment and order of the High Court, as being contrary to the decision of the Apex Court in the case of **Rajesh Kumar Daria** (supra). Paragraph No.14 of the said judgment is reproduced hereunder:-

"7. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under [Article 16\(4\)](#) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where

a vertical reservation is made in favour of a backward class under [Article 16\(4\)](#), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), [Union of India vs. Virpal Singh Chauhan](#) (1995 (6) SCC 684 and [Ritesh R. Sah vs. Dr. Y. L. Yamul](#) (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women."

22 Thus, from the ratio discussed above, it is clear that reservation when is under the vertical reservation quota, the same falls under Article 16(4) of the Constitution of India where reservation of SC, ST and SEBC of the fixed quota as contemplated whereas reservation of differently abled persons and of women would be under the horizontal reservation (also known as special reservation) covered under Article 16(1) or 15(3) of the Constitution of India. Horizontal reservation differs from the vertical reservation quota inasmuch, if the number of persons (women) in the select list is equal to or more than the number of special reservation quota, further selection of women would not be needed. Only in the event of shortfall, the needed number should be taken from the list of women, deleting corresponding numbers of candidates from the select list relating to scheduled caste or scheduled tribe. Thus, women in vertical reservation quota shall be regarded for the purpose of counting horizontal reservation but the vice versa is not permitted.

22.1 In the decision of **National Federation of the Blind and others**(supra) , it is made quite clear referring to the earlier decision of **Indira Sawhney** (supra), that in case of special reservation or horizontal reservation, the selection needs to be made and "after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities *per se* has nothing to do with the ceiling of 50%."

23 Reverting to the facts of the instant case, as referred to hereinbefore, the petitioner is suffering from visual impairment and belongs to open category. He has not only graduated in Arts stream (Hindi) as the main subject, but B.Ed. and passed TET-II. He applied for being appointed as Vidya Sahayak for upper primary school in standard VI to VIII for the subject of

language and he has got 69.39% out of 4351 of posts of Vidya Sahayaks, 548 vacancies were meant for language subjects and four vacancies from out of 548 vacant posts were reserved for physically challenged category of people in languages, namely, Gujarati, Hindi, English and Sanskrit on the ground that all the four vacancies in PH category were meant for reserved category candidates, though the petitioner is the highest in the State, he is not selected.

24 This can be said to be an irony and outrightly erroneous interpretation of the law of reservation, in relation to the PH candidates on the part of the respondent authority. Petitioner is right in urging that with his merit of 69.39%, he cannot be denied the appointment on the post of Vidhya Sahayak as there cannot be reservation within the reservation. Even if for all the PH candidates, reservation is horizontal and not vertical, as in case of other categories of reservation, reserving all the four seats meant for PH candidates for the reserved category candidates in wake of Government Resolution dated 04.05.2002 shall need interference.

25 Much reliance is placed on the government

resolution dated 4/5/2002 for filling of the vacancies of physically handicapped candidates, as per the say of the respondents. This resolution when examined, it speaks of notification of government of India dated 19.02.2000 to make horizontal reservation of 3% for the candidates having 1) low vision 2) hearing impairment 3) locomotor disability as also to follow roster point for the said purpose. It provides for the selected candidates for the concerned category to be adjusted against the vertical reservation of SC/ST and SEBC candidates.

26 Noticing the merit of the petitioner belonging to general category, he cannot be excluded to accommodate others. It is not to be interpreted in the manner that excluding meritorious person, vertical reservation under Article 16(4) of the Constitution of India and roster points as contemplated in the resolution dated 4th May, 2002 can be filled in. His adjustment against general category for having topped the list amongst the PH candidates, could have been done, excluding one Regular candidate of general category from the list.

26.1 Again, as held by the Apex Court while interpreting OM dated 29th December, 2015 of the Government of India in case of "none of the vacancies falls on point reserved for the SCs, the disabled candidates shall be adjusted in future against next available seat reserved for

Scs."

27 Moreover, out of 137 seats, as rightly contended by the petitioner, maximum vertical reservation permissible under the law is 50% and therefore at the best, reservation could be of 69 seats and not of 70 seats as has been done by the authority. Petitioner belongs to open category candidates and being meritorious, he would even otherwise entitled to be adjusted even on the post vacant for open category candidates and thus, in any which way, this petition needs to succeed, quashing and setting aside action of the Respondent.

28 Resultantly, this petition is allowed quashing and setting aside the action of the Respondent State. The respondents are directed to appoint the petitioner as Vidya Sahayak for upper primary school in the PH category of low vision with all consequential benefits as if he was selected with other candidates from 24.03.2015. It is also made permissible for the State to adjust in future such one seat against next available seat of open category candidate. Cost to be the cost in cause.

(MS. SONIA GOKANI, J.)

SUDHIR