

(2008) 01 AHC CK 0043
In the Allahabad High Court

Ashok Tewari and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 07-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 35, 36, 39

Citation : (2008) 5 AWC 5082

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Ashok Bhushan, J.—Heard Sri Manish Goyal, learned Counsel for the petitioner and Sri K.S. Kushwaha, learned Standing Counsel appearing for the State respondents and Sri P.K. Pandey, learned Counsel appearing for National Federation of Blinds respondent No. 13. Counter and rejoinder affidavits have been exchanged between the parties and with the consent of learned Counsel for the parties, the writ petition is being finally decided.

2. By means of present writ petition, the petitioner has prayed for quashing the merit list filed as Annexure 1-A to 1-K issued by the Principals of different Diets insofar as they deal with the category of handicapped persons. A writ of mandamus has also been sought for commanding the respondents to treat the reservation of handicapped persons as 3% in each and every class uniformly. A further mandamus has also been sought for commanding the respondents No. 2 to 12 to place handicapped persons in General Category where the marks fall within the cut of marks of General Category candidate.

3. The brief facts of the case as emerged from the pleading of the parties are; that all the petitioners are physically handicapped persons who have applied for getting admission in Special B.T.C Training Programme 200/. In pursuance of the Government Orders dated 10.7.2007 and 13.7.2007 advertisements were issued

by principals or different DIETs inviting applications for Special B.T.C. Training Programme 2007 from those candidates who had passed B.Ed. Clause 8 of the advertisement provides that there shall be a reservation for physically handicapped persons according to concerned Act and Government Orders. It further contemplates that they will be adjusted in their original category i.e., General Category. Scheduled Castes. Scheduled Tribes and Other Backward Classes. All the petitioners claim to have passed B.Ed. The petitioners claim to be suffering from different locomotor disabilities. The petitioners' case is that visual handicapped and audio handicapped are not eligible for Special B.T.C. Training Programme 2007. Petitioners' case further is that different merit lists have been issued for different category of handicaps from several DIETs. Petitioners' case is -further that in some districts merit index has been issued with regard to only one category i.e. physically handicapped, whereas in several other districts separate merit list has been issued for different categories i.e. visual handicapped, audio handicapped and candidates suffering from locomotor disability. The petitioners' case further is that in several districts the handicapped candidates have higher merit as compared to the General Category candidates but the handicapped candidates are not being treated to be General Category candidates to which they are entitled. The candidates who are visual and audio handicapped are not eligible for teaching at the primary level. The petitioners' case further is that for locomotor candidates only 1% seats are being provided whereas the candidates of two other categories i.e. audio handicapped and visual handicapped being not eligible, the candidates suffering from locomotor disability are entitled to be given 3% reservation. The petitioners have challenged the merit index issued from different DIETs. An application, supported by an affidavit has been filed by National Federation of Blinds U.P. Branch seeking impleadment in the writ petition in opposition to the writ petition which was allowed vide order of this Court dated 29/11.2007.

4. Learned Counsel for the petitioners in support of the writ petition submitted that persons who are visually handicapped or an audio handicapped are not eligible to teach primary classes hence, they are also not eligible to be admitted in Special B.T.C. Training Programme 2007. Learned Counsel submits that State of U.P. has identified the post of Teachers which are to be offered to the physically handicapped candidates vide Government Order dated 7.5.1999. in which the primary teachers are mentioned at serial Nos. 26 and 27, which posts have been categorized for the candidates suffering from locomotor disability and the candidates suffering from audio and visual disabilities have not been identified as fit for primary school teacher. Learned Counsel for the petitioner submits that other two categories not being eligible the 3% vacancies which are reserved for physically handicapped candidates should be filled up by the candidates suffering from locomotor disability. Learned Counsel for the petitioners submits that no uniform policy has been adopted by the Principal of DIETs as from several DIETs the merit index of all the three categories have been separately issued and from certain DIETs a common-merit index for physically

handicapped candidates have been issued. Learned Counsel for the petitioners contends that even though in certain DIETs the merit index of physically handicapped candidates are more than the General Category candidates but they are not being treated as General Category candidates so the benefit of reservation for specific handicapped persons may fall on next deserving candidate.

5. Sri K.S. Kushwaha, learned Counsel appearing for the respondents has supported the merit lists issued by different DIETs. Learned Standing Counsel submits that reservation has been provided in accordance with the provisions of The U.P. Public Services (Reservation for Physically Handicapped. Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 (hereinafter referred to as U.P. Act No. 4 of 1993). He also referred a Central Act namely; The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. A supplementary counter affidavit has also been filed by learned Standing Counsel in pursuance of direction of this Court to explain the stand of the State Government on various issues raised in the writ petition. Learned Standing Counsel has also referred to a Committee constituted by the State by Government Order dated 22.1.2007 in pursuance of the certain directions issued by the Lucknow Bench of this Court in writ petition No. 4592 (MB) of 2006 filed by National Federation of Blinds in which writ petition, the petitioners had claimed appointment on group "C" and "D" posts. Learned Standing Counsel has submitted that the report of the said committee has not yet been received and appointment shall be given on different posts or accordance with the recommendation of the report of the said Committee. It has been further stated by learned Standing Counsel that selection is for Special B.T.C. Training Course and is not for any appointment with regard to the candidates suffering from visual and audio handicapped. It has been stated in paragraphs 8 and 9 of the supplementary counter affidavit that those category of candidates would be trained in selected DIETs by providing special training through special equipments and appropriate necessary arrangements will be made for their training.

6. Sri P.K. Pandey, learned Counsel appearing for National Federation of Blinds has submitted that the persons suffering from blindness or partial blindness are eligible for appointment even as primary teachers and there is no error in imparting Special B.T.C. Training Programme 2007 to the blinds or partially blinds. Reliance has been placed on the Government Order dated 7.5.1999 which has been filed as Annexure-2 to the affidavit filed in support of the impleadment application. Sri Pandey has referred to the Government Order categorizing certain posts at item No. 8 under the Heading "Administrative Jobs in group "C "D"-Blind" Sri Pandey has also referred to the writ petition filed by blinds being writ petition No. 4592 (M/B) of 2006. Sri Pandey submits that persons suffering from blindness are fully eligible to be appointed as Primary teachers and there is no error in selecting the candidates suffering from visual handicapped in Special B.T.C. Training Programme 2007 and the petitioners cannot have any right to

claim the posts which are meant for physically handicapped category of visual handicapped. Learned Counsel for the parties have referred to and relied on various judgments of this Court which shall be referred to while considering the said submissions.

7. I have considered the submissions raised by learned Counsel for the parties and have perused the record. Special B.T.C. Training Programme 2007 has been started by the State Government with the object of imparting Special B.T.C. Training Course in order to aid the candidates who have passed B.Ed and other training qualifications so as to fill up more than 61.000 posts of primary teachers falling vacant in the State of U.P. The advertisement which has been issued, copy of one such advertisement has been filed as Annexure-2 to the present writ petition contains a provisions for providing reservation to candidates belonging to Physically Handicapped Category. The cut of marks have been issued by different District Institutes of Education and Training referring to various category of Physically Handicapped Category.

8. The issues raised in the writ petition are with regard to method of implementation of reservation by different DIETs. The first issue to be considered is as to whether the visual handicapped and audio handicapped are not eligible to be admitted in the Special B.T.C. Training Programme 2007 and as to whether it is only the candidates suffering from locomotor disability who alone are entitled to be admitted in the Special B.T.C. Training Programme 2007. Before proceeding to consider the above issues, it is necessary to refer to relevant provisions of U.P. Act No. 4 of 1993 and Central Act No. 1 of 1996. The U.P. Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 was enacted by the State Legislature to provide for the reservation of posts in favour of Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen and for the matters connected therewith or incidental thereto. The Act of 1993 has been amended by U.P. Act No. 6 of 1997 and U.P. Act No. 29 of 1999. Section 3 as amended of Act No. 1993 which is relevant for the present case is being quoted herein below:

3. Amendment of Section 3 In Section 3 of the Principal Act,-

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

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

(i) in public services and post two per cent of vacancies (or dependent of freedom fighters and one per cent of vacancies for ex-servicemen;

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

(a) blindness or low vision;

(b) hearing impairment; and

(c) locomotor disability or cerebral palsy.

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

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

(d) Sub-section (4) shall be omitted;

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

(5) Where, due to non-availability of suitable candidates any of the vacancies reserved under Sub-section (1) remains unfilled it shall be carried over to the next recruitment.

Section 3(1) of the Act provides that at the stage of direct recruitment there shall be 1% vacancies in public services each shall be reserved for persons suffering from blindness or low vision; hearing impairment; and locomotor disability or cerebral palsy. The Parliament has enacted The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific Region. Sections 32 33 35 and 36 are relevant for the present case are being quoted herein below:

32. Appropriate Government shall-

(a) identify post, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for the persons, or class of persons with disability of which one per cent each shall be reserved for person suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy;

in the posts identified for each disability:

Provided, that the appropriate Government may, having regard to the type or work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

35. Any person authorised by the Social Employment Exchange in writing, shall

have access to any relevant record or document in the possession of any establishment and may enter at any reasonable time and premises where he believes such record or document to be, and inspect or take copies of relevant records of documents or ask any question necessary for obtaining any information.

36. Where in any recruitment year any vacancy u/s 33, can not be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

9. Both Section 3 of U.P. Act No. 4 of 1993 and Section 3 of 1996 "Act provides for reservation of not less than 3% of which 1% each should be for persons suffering from blindness or low vision, hearing impairment, locomotor disabilities or cerebral palsy. The State Government has identified the posts for different physically disabled persons by Government Order dated T Mary. 1999. a copy of which has been filed as Annexure-2 to the affidavit filed in support of Impleadment Application. The relevant entries pertaining to primary school teachers are at item No. 21, 24, 26 and 27 which are as follows:

Sl. Title Physical Categories of Requirements disabled suitable for the jobs 21- Language Teacher Higher SE. H.S.F. OL. BL. MW Secondary & Secondary School OA. PBB. 24- Language Teacher Middle SE.H.F.S. OL. BL. MW. School OA. PBB. 26- Primary School Teacher SE.H.F. SOL. BL. MW OA 27-Primary School Teacher Other SE.H.F.SOL. BL. MW. OA.

Another set of entries under the heading of "Administrative Jobs in Group C "D"- Blind" is at serial No. 8 which is as follows:

8-Teacher (Primary) (T & A) Note T-With Training A-With aids

The categories of disabled persons which are suitable for the jobs have been classified, relevant of such classification is as follows:

-----	Code	Function
-----	BL	(i) Both legs affected but not arms. (ii)
Both arms affected. BA	(a)	impaired (b) Weakness of grip
-----	BLA	(iii) Both legs and both arm affected.
-----	OL	(iv) One leg affected (R and/or L)
-----	OA	(v) One arm affected (R & L) (a)

Impaired reach (b)	Weakness of grip (c)	ataxie
-----	BH (vi) stiff back and hips (cannot sit or stoop)	-----
-----	FT (vii) Limited exercise to tolerance early fatigue	-----
Muscular weakness	and	limited physical
-----	IC (ix) General in coordination of movement.	-----
-----	B (x) The "blind.	-----
-----	PB (xi) partially blind	-----
-----	D (xii) The deaf.	-----
-----	PD (xiii) Partially deaf.	-----
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10. From perusal of the above mentioned table, it is clear that for Primary School Teachers as referred to at item No. 26 and 27. persons with locomotor disability alone has been identified as suitable for the job whereas administrative job in group "C" and "D" Teacher Primary (T and A) has been identified for blinds. Although the post of language teacher has been identified for the blinds but the blinds have been identified for administrative job at item No. 8 as mentioned above. The Section 32 of the Central Act No. 1 of 1995 also provides for identification of posts by appropriate Government. The Government Order dated 7.5.1999 refers to both Central Act No. 1 of 1996 and U.P. Act No. 4 of 1993. Thus identification of the posts are for the purpose and object of both the Acts. The Apex Court in the case of All Kerala Parents Association Hearing Impairment & another v. State of Kerala and Ors. reported in (2005) PDD 106 has laid down that Chapter VI Section 39 provides for reservation of seats for persons with disabilities in all Government Educational Institutions and other educational institution receiving aid from the Government. By virtue of Section 39, 3% seats are required to be reserved for persons with disabilities.

11. Thus by virtue of Section 39 of the Central Act No. 1 of 1 State was obliged to reserve atleast 3% seats for physically handicapped persons. Thus, insofar as reservation of 3% of seats by different DIETs for physically handicapped category is concerned, the same is unquestionable. The submission of learned Counsel for the petitioners that out of the said 3% seats, none should be given admission from the category of visually handicapped and audio handicapped, is to be tested. Although the Special B.T.C. Training Course 2007 is with the object to impart basic teachers training but the said imparting of the training is not akin to appointment to a post. The State Government if it has not identified the post of primary teachers for audio handicapped or some category of post to visual handicapped, appointment cannot be offered to such candidates but for imparting training course to visual handicapped cannot be said to be impermissible specially in view of the fact that certain category of posts in group "C and group "D" under the Heading "Administrative Jobs in Group "C "D"-Blind" primary teacher with training and aids have been envisaged. Thus, this imply that even for administrative post of primary teachers only those visually handicapped persons are eligible who are trained. In the supplementary counter

affidavit in paragraph 9, the State has come up with the plea that the appointment shall be made for visual handicapped or audio handicapped by special training by special equipments. It is useful to quote paragraphs 8 and 9 of the supplementary counter affidavit.

8. That the Hon"ble Court by order dated 30.11.07 directed the State Government to disclose the stand as to how the selected candidate under blind and deaf category would be trained in training centre.

9. That in response to the aforesaid query made by this Hon"ble Court, it is necessary to submit here that the candidates belonging to the said category would be trained in selected DIETs by providing special training by special equipment. An appropriate and necessary arrangement will be made for their training.

12. However, in view of the Government order dated 7.5.1999. having not identified any post of primary teachers for the audio and visual Handicapped Category, what purpose and object would be served in imparting training to such category of candidates, has not yet been explained. Although this Court passed an order directing the State to explain its stand on various issues. The object of imparting special training course is to make available the qualified teachers for appointment for more than 61,000 vacant posts of primary teachers. The supplementary counter affidavit has also not explained that whether in different DIETs there are sufficient trained persons or equipments to impart basic teachers' training to audio and visual handicapped. Special B.T.C. Training Course which has been approved by National Council for Teachers Education is a course designed for imparting Special B.T.C. Training and it has not been explained as to whether for imparting Special B.T.C. Training Course, appropriate methodology or manner for audio and visual handicaps have been laid down or gone into. No appropriate details have been brought before the Court in spite of clear direction hence, the State is required to look into the said matter and issue necessary order in that regard. Section 39 of the Act No. 1 of 1995 having provided 3% reservation of seats in educational institutions, no fault can be found in providing reservation of 3%.

13. The, present is a case of admission in Special B.T.C. Training Course 2007 in the institutes run by the State of U.P. The provision of Section 39 of 1995 Act are also applicable. Section 39 of the Act provides that all educational institutions to reserve the seats for persons with disabilities not less than 3% seats for persons with disabilities. The categories of the people under the disabilities as classified under 1996 Act are visual handicapped, suffering from hearing impairment and physically handicapped with locomotor disorders. It is true that in case any category is ineligible for a particular post or training it cannot be said that the respondents are not obliged to fill up all 3% seats, in event of any category being ineligible the obligation of filling up of 3% post is not diluted. In the event of any ineligibility of any category still the respondents are under an obligation to fill up all 3% seats from disabled candidates belonging to other categories. Delhi High

Court in *Dr. Raman Khanna v. State of Delhi University and Ors.* reported in 2005 (1) P.D.D. 305 had an occasion to consider Section 39 of 1995 Act. The Delhi High Court held that minimum 3% seats must be reserved to the Physically Handicapped Category to any of the category as the case may be. Following was laid down in paragraph 11:

11. The next question to be addressed is whether the University is justified in allocating only one percent reservation for the physically handicapped. Here also there appears to be no room for controversy. The language of Section 39 is explicit. It brooks no interpretation other than mandating that at least three per cent reservation should be made for the physically handicapped. Section 39 must be given effect to independent of any other provision in the Disabilities Act. Its inclusion in Chapter VI is an unhappy error. If Section 33 is to tamper the implementation of Section 39, although the two provisions are disparate in scope (the earlier deals with employment and the later with seats in educational institutions) there is every reason to also similarly apply Section 36. This argument of Mr. Rungta cannot be countered. The Disability quota cannot be extinguished even partially and cannot lapse in favour of any other category. As has been advocated by the Commissioner for Persons with Disabilities Ministry of Social Justice & Empowerment, the reservation should be three per cent regardless of the fact that persons suffering from blindness or low vision, and those suffering from hearing impairment are not entitled to reservation for admissions to medical colleges. In its Memorandum dated 5.7.2001, in the final paragraph this is also how the Medical Council of India understood the position since it had recommended that "in case there are not enough seats should be merged with the respective category of existing reservation. "The Medical Council of India is in fact giving effect to Section 36. It has been contended that reference is made to the other reserved categories such as Scheduled Castes and Schedule Tribes, but I failed to find any justification for this interpretation since the Medical Council of India was not concerned or dealing with any category other than the disabled. Unless this interpretation is given, there would inexorably be a palpable violation of the statutory imperative contained in Section 39 of the Disabilities Act. I hold that a minimum three per cent of the seats must be reserved for the physically handicapped to be distributed among any or all of the sub-categories as the case may be. I direct accordingly.

The learned Counsel for the petitioners thus, are right in his submission that in case of any category of Physically Handicapped Category not being eligible to be imparted the training, the 3% seats are to be filled up from other available Physically Handicapped Category candidate. It is thus observed that in the event the State of U.P. decides that any Physically Handicapped Category is not eligible for imparting Special B.T.C. Training Course 2007 those seats are also required to be filled up by other Physically Handicapped Category candidates available belonging to other categories.

14. In view of the fact that the post of primary teacher having not been identified

for audio and visual handicapped and only administrative post of primary teacher (T & A) having been identified for blinds, the petitioners have made out a case for issuing a direction to the State Government to consider whether audio and visual handicapped are eligible for appointment as Primary teacher/ for imparting Special B.T.C. Training Course 2007 in view of the Government order dated 7.5.1999 and in case any category is found eligible to issue necessary directions to all the DIETs with regard to admission on such candidates and the nature and manner of training to be imparted to above handicapped category candidates. It is also relevant to note that according to Section 36 of U.P. Central Act No. 1 of 1995 even if the nature of vacancy in an establishment is such that in a given category of such persons cannot be employed, the vacancy may be interchanged in three categories with the prior approval of the appropriate Government. In the event the State decides that looking to the nature of training or nature of employment to be offered to such candidates, it is not possible to admit a particular category of handicapped, it may also take a decision for interchanging the filling of seats by a particularly category. Until such decision is taken the seats reserved in different DIETs for audio and visual handicapped be not filled up. It is however, made clear that the vacancy earmarked for locomotor category of handicapped be filled up according to their merit. The second arguments raised by learned Counsel for the petitioners is that those physically handicapped candidates whose merit index is more than the last candidates of General Category should be treated as General Category candidate and be not treated in Physically Handicapped Category so that the candidates who are lower in merit in Physically Handicapped Category may be benefited. The learned Counsel for the petitioners submits that this benefit is available to reserved category candidate belonging to Scheduled Castes, Schedule Tribes and Other Backward Classes since in an open competition if they come in merit, they are not adjusted in the reserved category candidate and the next person in the reserved category candidate is benefited.

15. Article 16 of the Constitution of India which is a species of equality clause of the Constitution of India provides for equality of opportunity for all citizens in matters of public employment. The reservation of appointment or posts in favour of any backward class of citizens is provided under Article 16(4) of the Constitution of India. The reservation for Physically Handicapped Category. Dependants of Freedom Fighters and Ex-service men are the measures taken by the State for achieving the concept of equality of opportunity enshrined under Article 16(1) of the Constitution of India. The Apex Court in *Indira Sawhney and Ors. v. Union of India* and Ors. reported in 1992 SCC 217 had occasion to consider the entire concept of reservation under Articles 14 and 16 of the Constitution of India. The preference referable to Articles 16(4) of the Constitution of India as well as reservation for Physically Handicapped Category and another category referable to Article 16(1) of the Constitution of India were considered by the Apex Court in the said judgment. Hon'ble Mr. Justice B.P. Jeevan Reddy delivering the majority opinion in *Indira Sawhney*'s case has held

that Article 16(4) is not exhaustive of the concept of reservation. It was held that in exceptional situations further reservation should be provided under clause of Article 16. A note of caution was sounded in paragraph 744 to the following effect:

If reservations are made both under Clause (4) as well as under Clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do.

The apex Court explained both kinds of reservation i.e. one preferential provided under Article 16(1) that was referred to as horizontal reservation and reservation preferable under Article 16(4) of the Constitution of India which was referred as vertical reservation. Following was laid down in paragraph 812

...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, Schedule Tribes and other backward classes under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped under Clause (1) of Article 16 can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to v. 1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

State Legislature has enacted an Act namely: U.P. Public Services (Reservation for Scheduled Castes, Schedule Tribes and Other Backward Classes) Act, 1994. Section 3 of the Act provides 21% of vacancies for Schedule Castes, 2% vacancies for Schedule Tribes and 27% vacancies for Other Backward Class shall be reserved at the stage of direct recruitment. The Sub-section (6) of Section 3 provides that if a person belongs to any of the reserved category mentioned in Sub-section (1) i.e. Scheduled Castes, Schedule Tribes and Other Backward Classes get selected on the basis of merit in an open competition with General Category candidates, he shall not be adjusted against the vacancies reserved for such category under Sub-section (1). In view of the above provision, if a reserved category candidate get selected in an open competition with General candidates and comes in the merit he is not adjusted in the reserved category candidate and is treated to be General Category candidate.

16. For giving reservation to Physically Handicapped Category. Dependents of

Freedom Fighters and Ex-servicemen, State Legislature has enacted the Act namely The U.P. Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993. Section 3 of the said Act provides for reservation at the stage of direct recruitment under such public services and post as the State Government may by notification identify. 1% of vacancies each for person suffering from blindness, low vision, hearing impairment, locomotor and cerebral palsy disabilities. Sub-section (3) of Section 3 provides that persons selected against vacancies reserved in Sub-section (1) shall be placed in the appropriate category to which they belong. Section 3(3) is quoted below:

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

The advertisement which has been issued for inviting application for Special B.T.C. Training Course, Clause 8 provides that candidates who are selected in the above reserved category shall be placed in their respective categories. In the writ petition, learned Counsel for the petitioner has pleaded that in some districts the merit index of Physically Handicapped Category candidates is higher than the last General Category candidate hence, they should not have been adjusted in the Physically Handicapped Category candidate and should be treated as General Category candidate.

17. The horizontal reservation provided under 1993 Act came up for consideration before a Division Bench of this Court in the case of Dr. Rajesh Kumar Tewari v. State of U.P. and Ors. reported in 2006 (4) ESC 494. The Division Bench after noticing the provisions of Section 3 of 1993 Act held that person selected under the three categories of Physically Handicapped Category would be placed in their respective category of General, Scheduled Castes and Schedule Tribes. Explaining the working of 1993 Act. Following was laid down by the Division Bench in paragraphs 9,11 and 18 which are being quoted herein below:

9. From a perusal of Sub-section (3) of Section 3 of the U.P. Act No. 4 of 1993, it is clear that persons selected under the aforementioned three categories would be placed in their respective categories of General, OBC, SC and ST depending upon their status in each of the categories and accordingly, the vacancy in each of the four categories would be reduced by the number of the selected candidates under the U.P. Act No. 4 of 1993. Even the Government Order dated 22.10.2001 also in clear and specific terms lays down the same view. To be more explicit, supposing out of the total number of vacancies advertised, there were

two posts to be filled up from the dependents of freedom fighters category and if both the candidates selected under the said category belong to General Category, then they would occupy two positions in the total posts earmarked for the General Category and the remaining posts of the General Category would be filled up accordingly. However, in a situation where the two candidates selected under the dependents of freedom fighters category belong to different castes, that is, one General and one OBC, then one post from each of the two categories would be reduced by one and the remaining posts in each of the two categories would be

11. Further Sub-section (3) provides that after selection, the candidates are to be placed in their respective caste category thereby consuming post of that caste category leaving the balance to be filled up from amongst the candidates selected in that caste category. In case the stand of the respondents is to be accepted, the scheme of Section 3 of U.P. Act No. 4 of 1993 would fail. The Legislature, if it intended, what the respondents claim that for reservation to the three categories under U.P. Act No. 4 of 1993, the vacancies are to be calculated on the number of posts in each of the caste category, then the Legislature would have framed Section 3 differently. That being the position, it is difficult to uphold the contention of the respondents.

18. According to the reading of Section 3 of the U.P. Act No. 4 of 1993 and also Clause 6 of the Government Order dated 22.10.2001, it is clear that upon selection in the category of dependents of freedom fighters, the selected candidates are to be adjusted in their respective category of reservation based upon their caste, and consequently, they are to occupy a position in the vacancies advertised in their respective categories. From the aforesaid, it follows that there has to be a separate panel of the selected candidates in the category of dependents of freedom fighters and after making such selection, irrespective of the fact whether they have qualified in the category of their castes or not, they are to be placed in their respective categories of their castes and thereafter, the remaining positions of that caste category are to be filled up.

18. From the provisions of the 1993 Act and the decision of this Court in Dr. Rajesh Kumar Tewari (supra) as well as the judgment of the Apex Court in the case of Indra Sawhney (supra) it is clear that person selected under the Physically Handicapped Category shall be adjusted in their respective categories and corresponding number of posts in their respective category shall be reduced and consumed by the said candidate. For example, if in the Physically Handicapped Category, there are three seats and three candidates are selected against three vacancies one belonging to Scheduled Castes, one belonging to Other Backward Class and one General Category, the three selected persons will be adjusted in their reserved category i.e. General Category, Other Backward Class, Scheduled Castes irrespective of their individual merit. In case, the above three persons have less merit index than the last selected candidate in their respective category they have to be given a berth in their respective category

displacing one candidate, if required. The question is that in case, their merit index is more than the last selected candidates in their respective categories whether they will be not treated to be selected in Physically Handicapped Category and other Physically Handicapped Category lower in merit be adjusted in the quota reserved for Physically Handicapped Category. The language of Section 3(3) of 1993 Act does not support the interpretation put by learned Counsel for the petitioners. The Physically Handicapped Category candidates are required to be adjusted in their respective category irrespective of their merit. They may have attained a lower merit than the last selected candidate or higher merit than the last selected category candidate in their merit. This can further be explained by taking an illustration. Supposing against three vacancies reserved for Physically Handicapped Category candidates, the candidates selected under Other Backward Classes of Physically Handicapped Category has higher merit index than the last selected candidates in the General Category candidate can it be said that he be adjusted as a General Category candidate and other Physically Handicapped Category lower in merit should be selected. In the event such Other Backward Classes candidate is treated as a General Category candidate and is adjusted in the merit list of General Category candidate this will be contrary to the clear language used in Section 3(3) of 1993 Act. Section 3(3) provides adjustment of Physically Handicapped Category in its respective category i.e. in their respective category of General Category, Scheduled castes and Schedule Tribes and Other Backward Classes.

19. It is also relevant to note that in 1994 Act, there is a clear provision of the Section 3(6) as quoted above that if a reserved category candidate is selected on his own merit in General Category, he shall not be treated as a reserved category candidate whereas the language of Section 3(3) of 1993 Act is to the effect that a person selected under the Physically Handicapped Category shall be adjusted in his respective category i.e. General Category, Scheduled Castes, Schedule Tribes and Other Backward Classes. The language used in Section 3(3) of 1993 is a clear departure to the concept as given in Section 3 (6) of the 1994 Act. Had the Legislature intended the same consequence as is contemplated u/s 3(6) of 1994 Act the language of Section 3(3) of 1993 Act would have been otherwise. At this stage, it is also relevant to clarify that it is always open for any candidate to apply as a General Category candidate even if he belongs to physically handicapped category. A Physically Handicapped Category if he does not claim benefit of Physically Handicapped Category and apply as a General Category, he can be adjusted in the merit of General Category if he gets selected on his own merit. Although learned Counsel for the petitioner contended that there was no column in the application form of any separate category of Physically Handicapped Category and Physically Handicapped Category can also be treated as General Category by the respondents. The said submission cannot be accepted in view of the fact that since in the proforma of the application there is specific Clause 8 for for Physically Handicapped Category and a candidate is required to mention his category code in the application form itself. Thus, any

candidate who has claimed the benefit and filled up the category code cannot be said to be treated as General Category candidate?

20. In view of the above discussions, the submission of the learned Counsel for the petitioner that Physically Handicapped Category candidates who has merit higher than the last candidate selected in the General Category should not be treated in the Physically Handicapped Category and be treated in the General Category giving benefit to next Physically Handicapped Category candidate in the merit, cannot be accepted.

21. In view of the foregoing discussions, this writ petition is disposed of with the following directions:

(i) The State of U.P. respondent No. 1 is directed to take a decision as to whether Physically Handicapped belonging to the category of blinds or low vision or suffering from hearing impairment are eligible for appointment as primary teachers or entitled to be admitted in Special B.T.C. Training Course 2007 keeping in view the identification of posts as made by the State of U.P. vide Government order dated 7.5.1999. The said decision shall be taken within a period of four weeks from today. Until such decision is taken, the seats reserved in different DIETs for audio and visual handicapped be not filled up.

(ii) In the event, if any of the categories i.e. blind/low vision or suffering from hearing impairment is found eligible for Special B.T.C. Training Course 2007, the necessary methodology and manner for imparting training to them be also spelt out with all necessary details.

(iii) In the event, any category of Physically Handicapped is not found eligible then the 3% seats reserved for Physically Handicapped Category be filled up from other eligible category of Physically Handicapped Category candidates.

(iv) Separate merit index be provided for different categories of Physically Handicapped Category in the event more than one category of Physically Handicapped Category is found to be eligible for imparting Special B.T.C. Training Course 2007.

Let a certified copy of this order be issued to the learned Counsel for the petitioners within 24 hours.