

**(2022) 04 GUJ CK 0063**

**In the Gujarat High Court**

**Case No : R/Special Civil Application No. 6196 Of 2021**

Padma Babubhai Patni

APPELLANT

Vs

State Of Gujarat

RESPONDENT

**Date of Decision : 19-04-2022**

**Acts Referred:**

Constitution Of India, 1950 — Article 14, 16

**Citation : (2022) 04 GUJ CK 0063**

**Hon'ble Judges : Biren Vaishnav, J**

**Bench : Single Bench**

**Advocate : KB Pujara, Pareshkumar B Trivedi, DG Shukla**

**Final Decision : ?Dismissed**

## **Judgement**

Biren Vaishnav, J

1. Rule, returnable forthwith. Mr. Krutik Parikh, learned Assistant Government Pleader waives service of notice of Rule for the respondents.
2. With the consent of the learned advocates appearing for the respective parties, the petition was taken up for its final disposal.
3. The petitioner, a Socially and Educationally Backward Class (hereon after referred to as 'SEBC') category candidate has prayed for a direction to complete the process of filling up all 285 vacancies of Staff Nurse, Class-III notified vide advertisement dated 28.8.2018. She has further prayed that the remaining 47 vacancies which have remained unfilled on 22.10.2020 be also so filled. Further direction is prayed that the respondents give appointment to the petitioner as Staff Nurse, Class-III as per her merit marks 39.900.
4. Facts in brief would indicate that the petitioner belongs to the SEBC category. Pursuant to an advertisement dated 8.8.2018 for recruitment of 285 staff nurse Class III, she applied for appointment. 73 vacancies were notified for SEBC category. After having cleared her selection process, according to the petitioner

she was placed at Sr. No.326 in the provisional merit list of 521 candidates published on 10.1.2019. When the final list was published of 285 candidates on 8.2.2019, the petitioner did not find her name in it.

5. It is the case of the petitioner that an additional final selection list was published and on 12.10.2020, additional 90 vacancies were notified of which 28 were for SEBC. Only 43 vacancies were filled in and out of 28 vacancies of SEBC, only 11 SEBC candidates were appointed. One SEBC candidate with a similar merit mark at Sr. No.324 was given appointment. Hence, the petition.

6. Mr. K.B. Pujara, learned advocate for the petitioner would submit 285 vacancies were notified for Staff Nurse, Class-III. 73 of them were for the SEBC category, to which the petitioner would belong. Drawing the attention to the provisional merit list of 521 candidates prepared by the Gujarat Panchayat Service Selection Board, Mr. Pujara would submit that the name of the petitioner in the provisional merit list dated 10.1.2019 appeared at Sr. No.326 in the category of SEBC female. Name of one Rubinabanu Abdulrazak Mansuri appeared at 324, also a female SEBC candidate, who had 39.900 marks, same as that of the petitioner.

6.1. Mr. Pujara would further submit that a final merit list was prepared of 285 candidates on 13.2.2019 wherein neither the petitioner's name or that of said Rubinabanu Abdulrazak Mansuri at Sr. No.324 figured.

6.2. Mr. Pujara would submit that the Board asked for an additional final select list of total 90 vacancies of which 28 was for the SEBC category. He would submit that reading the advertisement or requisition would indicate that it was the second additional final selection list of 12.10.2020. Pursuant to the additional requisition on 22.10.2020, a list of district allotment was prepared wherein the name of Rubinabanu Abdulrazak Mansuri figured at Sr. No.28. Of the 90 vacancies notified, only 43 were filled in. Of 43, 28 were notified for SEBC of which only 11 were filled in and 17 vacancies of SEBC category remained unfilled.

6.3. Mr. Pujara, learned counsel for the petitioner would submit that reliance placed on the GR dated 23.7.2020 which provided for preparing the waiting list to the extent of 35% of notified vacancies as if the petitioner was on the waiting list was wrong. Relying on the decision in the case of State of Jammu and Kashmir v. Sat Pal reported in 2013(11) SCC, 737, he would submit reading out paras 10 and 11 thereof that waiting list would start to operate when the offers of appointment have been issued to those emerging on the top of the merit list. It operates after the vacancies for which the recruitment process has been conducted have been filled up. He would submit that the aforesaid decision has been followed by this Court in a decision rendered on 24.2.2015 in SCA No.17288 of 2013 which was confirmed by a Division Bench, by its Oral Judgment dated 15.10.2018 in Letters Patent Appeal No.1306 of 2015.

6.4. Reliance was also placed on a decision in the case of Jai Narain Ram v. State of Uttar Pradesh reported in 1996(1) SCC 322. Relying on this decision, Mr.

Pujara would submit that four posts of reserved quota had remained unfilled as is evident from reading the facts of the Judgment. Four posts had remained unfilled because the selected candidates did not join. The Hon'ble Supreme Court held that the denial of appointment to the next four qualified candidates on the ground that there was no requisition by the State was held to be bad. He would therefore submit that the facts of the case of the present petitioner are covered. A direction be given therefore that the petitioner be appointed.

7. Mr. D. G. Shukla, learned counsel for the respondent – Panchayat Services Selection Board would also rely on the affidavit in reply and the written submissions filed. He would submit that the Board issued an advertisement for 285 posts of Staff Nurse, Class-III, out of 285 posts, 73 were reserved for the SEBC category. The petitioner belonged to SEBC. She appeared in the written test on 25.11.2018. A provisional merit list of 521 candidates was prepared. He submitted that inclusion of the name in the provisional list should not be construed as inclusion in the final list. The petitioner had secured 39.900 marks. The name of the petitioner was not included in the list which was made final as in the order of merit, her name did not figure. An additional select list was prepared on 21.9.2019, in which 59 candidates of which 15 were SEBC, were included. Thereafter, on a request made by the State, a Government Resolution dated 23.7.2020 was issued to declare waiting list upto 35% of the total vacancies. As there were 73 vacancies of the Staff Nurse, the Board could fill in 26 vacancies; 35% of the 73 in number by further publishing an additional select list. As some of the candidates did not report for duty, of the 43 candidates, 11 were of SEBC category. In the final select list, the last selected candidate in the SEBC category was Rubinabanu Abdulrazak Mansuri, who was at Sr. No.433 on the provisional merit list, her Date of Birth being 1.2.1994. The petitioner whose name figured at Sr. No.438 on the provisional merit list could not be appointed as Rubinabanu Abdulrazak Mansuri was older in age and since just one post was available, she was appointed.

7.1. Mr. D. G. Shukla would further submit that as per the decisions of the Hon'ble Supreme Court in the case of K. Jayamohan v. State of Kerala and another reported in AIR 1997 SC 2619, it is a settled legal position that merely because candidate is selected and kept in the waiting list, such a candidate would not acquire an absolute right for appointment. Reliance was also placed on the decision in the case of Government of Orissa v. Haraprasad Das & another reported in AIR 1988 SC 375, paragraph No.8 thereof. He would submit that the Judgments relied upon by Mr.Pujara would not be applicable and the judgment of the case in Jai Narain Ram (Supra) will also not apply to the facts of the case as it deals with recruitment of the competitive examinations where waiting list is not prepared.

8. Having considered the submissions made by the respective parties, what appears from the facts as submitted by the learned advocates for the respective parties is that, initially, 285 posts were advertised for the Staff Nurse, Class-III.

Of the total advertised posts, 73 were for the SEBC category. In the provisional merit list, the name of the petitioner figured at 438, her Date of Birth was 17.12.1995. That of one Rubinabanu Abdulrazak Mansuri who also secured the same marks as the petitioner and was also female SEBC found her name at Sr. No.433 on the provisional merit list. The reliance placed on the table and showing the merit in Mr. Pujara's submission as 326 and 324 is not correct because when the provisional merit list and the appropriate table head is read, the provisional merit number of the petitioner is at 438 whereas that of Rubinabanu Abdulrazak Mansuri is at 433.

9. An additional final select list was called for and prepared on 22.10.2020 where Rubinabanu Abdulrazak Mansuri found her place on being selected. The case of the petitioner is that since 17 vacancies were remained unfilled, and had those 17 vacancies been filled the petitioner would have found her place in the select list for appointment and not operating the list to fill in all the vacancies violated Articles 14 and 16 of the Constitution of India. Great emphasis was laid by the learned counsel for the petitioner in a decision in the case of Sat Pal (Supra) to submit that once the recruitment process is conducted and the vacancies are filled in, the waiting list would commence to operate and therefore the stand of the Government in truncating the appointment process based on the Government Resolution dated 23.7.2020 at 35% was wrong. The decision of Sat Pal (Supra), was a case where the respondent therein had approached the High Court as his name figured in a merit list of the SC candidate. He made representations to the respondents stating that one Triloknath was one of the selected candidates who had been offered appointment had not joined and since name figured immediately after Triloknath, he be appointed.

10. Before the High Court the respondent relied on the Rule which envisaged that the merit list of candidates in continuation would constitute the waiting list and will be valid for one year. The High Court directed the respondent to take a decision on the representation in respect of the appointment. Pursuant to the direction issued by the High Court, the State passed an order and the representation was rejected on the ground that the waiting list had out lived utility and, therefore vacancies could not be filled in. What was filed was a contempt petition rather than file a writ petition. The Court gave certain directions, aggrieved by which the State went in appeal.

11. Before the High Court and the Hon'ble Supreme Court it was not a matter of dispute that Sat Pal (Supra) who had participated in the selection figured in the merit list. Triloknath, the candidate immediately above him refused appointment and, therefore, the case of the respondent before the Hon'ble Supreme Court was that he should have been offered appointment immediately.

It is in these facts that the Hon'ble Supreme Court held that it was not a case where the controversy regarding operating a waiting list had a reason. In the recruitment process which was conducted, vacancies were never filled up since the person higher in the merit did not join. It was in this context that the

decision of Sat Pal (Supra) was delivered.

12. Even on a perusal of the decision dated 24.2.2015 passed in Special Civil Application No.17288 of 2015 and allied matters of the Division Bench of this Court in the case of Patel Anuradhaben Arjunbhai and others v. State of Gujarat, advertent to the facts before that Court, what is evident is that a waiting list could not be operated because of the suspension of selection process as the model code of conduct having come into force. The waiting list could not be operated because of such a model code and suspension of appointment by the government. Reliance there also was placed on the decision in the case of Sat Pal (Supra). Considering the decisions rendered by the Hon'ble Supreme Court in the case of Sat Pal (Supra) and others which were relied by the learned counsel for the petitioners therein, the Court observed that in the decision of Sat Pal (Supra), what was observed was that a waiting list would start to operate only after the posts for which the recruitment have been filled up. The Coordinate Bench observed that as held by the Hon'ble Supreme Court, the date of filing of the representation or the date when the authority chooses to fill up the vacancies is of no consequence. The Court further observed that it would be a different proposition if the appointing authority decides not to fill up an available vacancy, despite the availability of candidates in the waiting list. In the case on hand, the authorities had issued call letters inviting the petitioners to remain present. The waiting list could not be operated on account of the model code of conduct and stay orders. Therefore, the case relied upon by Mr. Pujara, learned counsel for the petitioner is a case where the candidates like the petitioners therein were invited for appointment and the waiting list was actually to be operated and not a case where a decision was taken not to fill up the vacancies as in the present case. It is in this context that the Government Resolution dated 23.7.2020 relied upon by Shri Shukla, learned counsel for the respondent – Board needs to be appreciated.

13. The Government by the Resolution of 23.7.2020 truncated the strength of the waiting list to 35% of the notified SEBC vacancies. In other words, 26 candidates were to be selected by publishing the additional waiting list. It was not a case where the name of the petitioner figured on the list and she could not be appointed. The name of the petitioner was only on the provisional merit list and did not figure on the final select list.

14. When the additional Rubinabanu Abdulrazak merit at 433 looking vacancies were filled in, Mansuri much higher in the to her age got priority in appointment. As held by the Hon'ble Supreme court in the case of K. Jayamohan (Supra), merely because the candidate is selected and kept on the waiting list would not acquire an absolute right for appointment. Here was a case where the authority decided not to fill in the vacancies or make further appointments due to the reason of the Circular of 23.7.2020. The decision therefore not to go further and appoint candidates even because there were additional room for appointing candidates in the 17 vacancies was taken by virtue of the Circular of 23.7.2020

cannot be said to be an arbitrary act because whether to fill up a post or not is the decision of the State which cannot be faulted.

15. Accordingly, the petition is dismissed. No order as to costs. Rule is discharged.