

(2011) 05 GUJ CK 0108

In the Gujarat High Court

Case No : Special Civil Application No. 1282 of 2011

Patel Rakeshkumar Dharamdas

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Bombay Primary Education Act, 1947 — Section 23A
Constitution of India, 1950 — Article 14, 16(1), 16(4), 226
Penal Code, 1860 (IPC) — Section 465, 467, 468, 471
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 33

Citation : (2011) 05 GUJ CK 0108

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : K.B. Pujara and Kashyap K. Pujara, for the Appellant; L.B. Dabhi, Asstt. Government Pleader for Respondents 1 and 2 and R.V. Acharya, for Respondent 3, for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J.—Rule. Mr. L.B. Dabhi, learned Assistant Government Pleader, waives service of notice of Rule on behalf of Respondents Nos. 1 and 2. Ms. R.V. Acharya, learned advocate, waives service of notice of Rule on behalf of Respondent No. 3. On the facts and in the circumstances of the case, and with the consent of the learned advocates for the respective parties, the petition is being heard and finally decided.

2. By preferring this petition under Article 226 of the Constitution of India, the Petitioner has prayed, inter alia, for the issuance of a Writ of Mandamus or any other appropriate Writ or direction to the Respondents, to give appointment to the Petitioner as Vidya Sahayak as a Physically Handicapped Art Teachers Diploma (ATD) Candidate, pursuant to advertisement dated 21.04.2007, with all consequential benefits, with effect from the date on which appointment was given to other candidates and to hold the denial of the said appointment as being

illegal and arbitrary.

3. Briefly stated, the relevant facts of the case are that Respondent No. 3, District Primary Education Officer, Bhavnagar District Education Committee, issued advertisement dated 21.04.2007 for recruitment of a total number of 486 Vidya Sahayaks, out of which 19 vacancies were advertised for ATD candidates. The Petitioner is a Physically Handicapped candidate belonging to the General (Unreserved) category. Pursuant thereto, the Petitioner, having passed the HSC and ATD examinations, applied for the post of Vidya Sahayak. Out of the nineteen vacancies for ATD candidates, one vacancy was to be filled up by a Physically Handicapped candidate, as per the statutory mandate requiring reservation of 3% of the vacancies under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Act" for short). The application dated 24.04.2007 of the Petitioner was acknowledged by letter dated 30.04.2007 by the Respondents. A merit list and waiting list of ATD candidates for the said 19 vacancies was prepared and published by Respondent No. 3. The merit of the Petitioner is 76.642%. One Mr. Dhandhla Dineshkumar Labhshankar was placed in the merit list as a Physically Handicapped candidate and the Petitioner was placed at Sr. No. 1 of the waiting list of Physically Handicapped candidates. An Interview Call Letter dated 05.07.2007 was issued to the Petitioner by Respondent No. 3, to appear in the interview scheduled to be held on 16.07.2007. The Petitioner remained present for the oral interview for which no marks are awarded and only the verification of certificates and mark-sheets is carried out. The certificates and documents submitted by the Petitioner were verified and found to be in order. However, upon a suspicion that the Certificate of Disability of Mr. Dhandhla Dineshkumar Labhshankar, who had been placed in the merit list, was bogus and forged, the said candidate was not given appointment, though all other candidates in the merit list were given appointments after some time. The case of the Petitioner is that, as the merit-listed candidate Mr. Dhandhla Dineshkumar Labhshankar was not given appointment, the Petitioner being at Sr. No. 1 of the waiting list, ought to have been given appointment in his place. An inquiry was held by Respondent No. 3 in order to ascertain the genuineness, or otherwise, of the disability certificate of Mr. Dhandhla Dineshkumar Labhshankar, which culminated in the finding that the Certificate of Disability submitted by the said candidate was forged and fabricated and that the said candidate had attempted to defraud the authorities by submitting a bogus certificate with a view to obtaining appointment. Consequently, a criminal complaint was filed against the said candidate by Respondent No. 3 on 13.08.2008, for offences punishable under Sections 465, 467, 468, 471 of the Indian Penal Code. The criminal case against the said candidate is still pending. Having found that a fraudulent Certificate of Disability has been produced by Mr. Dhandhla Dineshkumar Labhshankar, his name stood cancelled from the merit list. The grievance of the Petitioner is that, though on cancellation of the name of the said candidate, Petitioner was entitled to be placed in the merit list by virtue of his being at Sr. No. 1 in the waiting list, as he

was eligible and qualified, he was not offered appointment. Respondent No. 3 kept on delaying the issuance of appointment to the Petitioner, despite repeated oral and written representations dated 1.04.2009, 29.09.2009 and 01.10.2009, on the ground that the approval of the higher authorities was awaited. By letter dated 16.04.2010, Respondent No. 3 wrote to the Director of Primary Education (Respondent No. 2), seeking approval for appointing the Petitioner. In the said letter, Respondent No. 3 has referred to Government Resolution dated 18.09.2007, which enjoins the authority to give appointment to wait-listed candidates in the event that the selected candidate is found not to be possessing the requisite eligibility or qualification. At the time of filing of the petition, no reply to this communication had been received by Respondent No. 3 from Respondent No. 2. However, in the affidavit-in-reply filed on behalf of Respondent No. 3, affirmed on 28.02.2011, a stand is taken that vide letter dated 08.02.2011, received from Respondent No. 2, it has been communicated that the Petitioner cannot be given appointment as the time-limit for operation of the waiting list for recruitment of the year 2007, is over. Another stand taken by Respondent No. 3 is that, as criminal proceedings against the candidate who produced the false Certificate are pending, it is not possible for the Respondent to give appointment to the Petitioner as, if the said candidate is acquitted by the Criminal Court, he would be entitled to appointment.

4. It is in the above factual background that the Petitioner has invoked the extraordinary jurisdiction of this Court.

5. A rejoinder has been filed by the Petitioner, reiterating the stand taken in the petition and controverting the averments made in the affidavit-in-reply.

6. On behalf of the Petitioner, Mr. K.B. Pujara, learned advocate has made elaborate and detailed submissions, the gist of which is as below:

(1) On the date of interview itself, the Petitioner was entitled to appointment being at Sr. No. 1 of the waiting list, as the candidature of the person above him in the merit list was cancelled on the ground of submitting a fraudulent certificate of disability. As such, the Petitioner should have been considered for appointment on the date of interview itself, therefore, there is no question of expiry of validity of the waiting list, as the waiting list would have come into operation automatically, and the Petitioner became entitled for appointment on the post reserved for a Physically Disabled candidate. In the enquiry directed to be held by Respondent No. 2, it was established that the certificate submitted by the said candidate was fraudulent and a criminal complaint was filed on 13.08.2008 by Respondent No. 3. Though the Petitioner became entitled for appointment at the time of interview, however, as this was not done, again the occasion arose for operation of the waiting list on 13.08.2008, when the criminal complaint was filed. The Respondents have not operated the wait list for reasons best known to them, though there was no impediment to do so.

(2) Till the filing of the petition, the stand of Respondent No. 3, as seen from

letter dated 16.04.2010 was that, as per provisions of Government Resolution dated 18.09.2007, the Petitioner is eligible and entitled to appointment, being at Sr. No. 1 of the waiting list, as the candidature of the merit-listed candidate has been cancelled. In spite of this, during the pendency of the petition, the said Respondent has now taken a contrary stand by stating that the Petitioner is not entitled to appointment as the period of validity of the select list has expired. The stand taken by the Respondents in the affidavit-in-reply is irrational and arbitrary, taking into consideration the fact that there is no doubt regarding the eligibility and entitlement of the Petitioner.

(3) The Petitioner has repeatedly made oral and written representations to Respondent No. 3 for appointment as per his eligibility and entitlement. After acknowledging the eligibility and entitlement of the Petitioner, by letter dated 16.04.2010, the appointment has been delayed without any legal justification on the specious ground that approval is required to be taken from Respondent No. 2, even though Respondent No. 3 is the competent authority to confer appointment. Upon conclusion of the inquiry and filing the criminal complaint against the candidate in question, there was no reason whatsoever to delay, or deny, appointment to the Petitioner. The waiting list had become operable at that point of time, and the delay caused by the Respondents cannot be a ground to deny appointment to the Petitioner, who is not at fault. The Petitioner cannot be deprived of his legitimate entitlement for appointment on the ground that criminal proceedings are pending against the candidate who produced the fraudulent certificate, as stated by Respondent No. 3 in the affidavit-in-reply. Injustice has been caused to the Petitioner for no fault of his own, and the Respondents were bound to give appointment to the Petitioner in view of the provisions of Government Resolution dated 18.09.2007. Having failed to do so, the Petitioner cannot be made to suffer injustice on the technical ground that the validity period of the select list has expired, especially when he had become eligible for appointment on the day of the interview itself, upon disqualification of the merit-listed candidate.

(4) That as per the provisions of the Act, it is mandatory for the Respondents to appoint one person in the category of "Physically Disabled", and as no other Physically Disabled candidate has been appointed in the process of recruitment, pursuant to advertisement dated 21.04.2007, the Respondents are bound to fulfil the statutory mandate and confer appointment upon the Petitioner.

7. In support of the above submissions, the learned advocate for the Petitioner, has placed reliance upon the following judgments:

- (1) Jai Narain Ram Vs. State of U.P. and others,
- (2) Dir. S.C.T.I. for Med. Sci. and Tech. and Another Vs. M. Pushkaran,
- (3) Vinodkumar Rajabhai Rathod Vs. State of Gujarat,

8. Ms. R.V. Acharya, learned advocate, has appeared for Respondent No. 3.

Referring to the affidavit-in-reply filed by the said Respondent, it is submitted that, though the candidature of the merit-listed candidate was cancelled on finding that his Certificate of Disability is not genuine and a criminal complaint was filed against the said candidate, however, as the criminal case is pending before the competent Court, it is not possible for Respondent No. 3 to give appointment to the Petitioner as, in case the said candidate is acquitted, he would be entitled to get appointment on the post in question. It is further submitted that Respondent No. 3 had written to Respondent No. 2 for approval regarding the appointment of the Petitioner. However, the same has been refused by Respondent No. 2, by letter dated 08.02.2011, on the ground that the time-limit for exhaustion of the waiting list for the recruitment of the year 2007 is over, therefore, the Petitioner cannot be given appointment.

9. Mr. L.B. Dabhi, learned Assistant Government Pleader, has appeared for Respondents Nos. 1 and 2. Referring to the affidavit-in-reply filed by Respondent No. 2 (Director of Primary Education), it is submitted that, as per Section 23A of the Bombay Primary Education Act, 1947, Respondent No. 3 is the competent authority to appoint Vidya Sahayaks. It is further submitted that as per Government Resolution dated 18.09.2007, the waiting list would be in force for a period of one year, or till the date on which a new select list is prepared, whichever is earlier. By now, two recruitment processes have taken place in the years 2008 and 2009-10, therefore, the tenure of the waiting list has automatically come to an end. For this reason, the Petitioner is not entitled for appointment.

10. On the above grounds, it is prayed that the petition be dismissed.

11. I have heard the learned Counsel for the respective parties, perused the averments made in the petition and other documents annexed thereto, and have considered the submissions made at the Bar.

12. The admitted facts of the case are that on 16.07.2007, when the interview for the post of Vidya Sahayak was held, it was found that the Certificate of Disability of one Mr. Dhandhla Dineshkumar Labhshankar, who was placed in the merit list, was fraudulent and bogus, therefore, his candidature was cancelled and he was not given appointment. The Petitioner was next in merit with 76.642%, and his name was placed at Sr. No. 1 in the waiting list. On cancellation of the candidature of the merit-listed candidate, the Petitioner would have to be considered for appointment, being the next meritorious candidate in the category of physically disabled. Admittedly, no other physically handicapped candidate has been appointed in the said category, pursuant to advertisement dated 21.04.2007. The Petitioner, being the next meritorious candidate, was eligible for appointment in the said category on the date of the interview itself, against the sole post reserved for a physically disabled candidate. In the inquiry that was held to ascertain the genuineness, or otherwise, of the Certificate of Disability submitted by the merit-listed candidate, it was found that the said Certificate was a fraudulent one. Respondent No. 3, therefore, filed a criminal

complaint against the said candidate on 13.08.2008. In the interregnum, for reasons best known to the Respondents, the name of the Petitioner was not considered for appointment. On the date of interview when the candidature of the merit-listed candidate was cancelled and at the time of filing the criminal complaint, there was no impediment in giving appointment to the Petitioner, who was the next meritorious candidate. It is not disputed that the Petitioner was eligible and qualified at the relevant period of time, and entitled to be appointed as per the provisions of Government Resolution dated 18.09.2007. This Resolution clearly stipulates that in the event that the selected candidate is found not to be possessing the requisite eligibility or qualification, the authorities should give appointment to the wait-listed candidate. Respondent No. 2, by letter dated 17.02.2010, has inquired from Respondent No. 3, whether the Petitioner was eligible and entitled for appointment as per Government Resolution dated 18.09.2007. This was done in reference to a representation made by the Petitioner to Respondent No. 2, on 01.10.2009. In response to communication dated 17.02.2010, Respondent No. 3 replied vide letter dated 16.04.2010, that at the relevant period of time, the Petitioner was eligible and qualified, and entitled to appointment as per provisions of Government Resolution dated 18.09.2007.

13. In the background of the above factual position, it would be fruitful to advert to the expositions of law rendered by the Supreme Court and this Court, as relied upon by the learned advocate for the Petitioner.

14. In *Jai Narain Ram v. State of U.P. and Ors.* (supra), for the recruitment for the 15 posts of Treasury Officer - Accounts Officer in U.P. Finance and Accounts Services, Sales Tax Officers (6 posts) and Regional Audit Officers (4 posts), an advertisement came to be issued. Four posts were reserved for members of the Scheduled Caste. The candidates duly selected to those posts did not opt to join service. The next four qualified candidates in the merit list were denied appointment on the ground that there was no requisition by the State Government to the Service Commission for preparation of the waiting list. The Appellant therein was the 4th candidate amongst the candidates who were standing in the order of merit. In the said background, the Supreme Court held that the rejection of the Appellant's claim for appointment is illegal and unconstitutional. The relevant extract of the above-referred judgment is quoted hereinbelow:

6. It is not in dispute that the Appellant is a reserved candidate belonging to Scheduled Castes. In view of the admitted position that four posts were reserved in the Finance Department in category 1 mentioned earlier and 4 selected candidates appeared to have not joined in the service, as asserted in para 11 of the SLP and not specifically denied by the Respondents in the counter-affidavit in para 6 as referred to earlier, it is clear that the Appellant also is the 4th candidate in the order of merit would have been selected, had there been a requisition by the State Government for appointment of the reserved candidates.

7. Right to seek appointment to a post under Article 14 read with Article 16(1) and (4) is a constitutional right to equality. The State failed to perform its constitutional duty to requisition the P.S.C. to recommend the next qualified person to the posts reserved for scheduled castes. Under these circumstances, the denial of appointment to the Appellant and three others above him is unconstitutional. Therefore, the Respondents are not justified in denying the claim of the Appellant for the appointment to the above post.

(emphasis supplied)

15. In that case, the Appellant therein was 4th candidate in the order of merit and the appointment was not given on the ground that there was no requisition by the State Government. In comparison thereto, the case of the Petitioner can be said to be on a firmer footing, as the Petitioner was first in the order of merit in the waiting list. Respondent No. 3, who is the competent authority, had the power to issue appointment to the Petitioner on the date of the interview itself when the candidature of the merit-listed candidate was cancelled as per provisions of Government Resolution dated 18.09.2007. There was no impediment in appointing the Petitioner at the relevant point of time or even after conclusion of the inquiry against the said candidate, and filing of the police complaint against him. The inaction and omission of the concerned Respondents in giving effect to the provisions of the said Government Resolution and unnecessarily delaying the matter on the untenable ground that in case of acquittal, the concerned candidate would be entitled to appointment cannot be justified in law. It is shocking that Respondent No. 3 is prepared to wait till the conclusion of the criminal proceedings for the verdict in the case of the said candidate and to offer appointment to him in case of acquittal, even though it has been found in the enquiry that the Certificate of Disability submitted by the said candidate is not genuine. However, at the same time, the Respondents are denying appointment to the Petitioner on the ground of delay which cannot be attributed to him at all. In my considered view, the stand taken by Respondent No. 3 is nothing short of being irrational and unacceptable, as the reason that is sought to be pressed into service for not appointing the Petitioner, namely, expiry of the waiting list, could not be overlooked if the Respondents decide to confer appointment on the said candidate, in case of acquittal. Surprisingly, Respondent No. 3 appears to be ready to give appointment to the candidate whose Disability Certificate has been found to be false in the enquiry, in the event of his acquittal in the criminal case, while denying appointment to the Petitioner, whose certificates were found to be in order and about whose eligibility and entitlement, there is no doubt. The principles of law enunciated in the above-mentioned judgment would, therefore, be squarely applicable to the facts of the present case, and it be incumbent upon the Respondents to offer appointment to the Petitioner who was the next meritorious candidate.

16. In *Dir. S.C.T.I. for Med. Sci. and Tech. and Anr. v. M. Pushkaran* (supra), vacancies for the posts of Security Guards were advertised and the select list

prepared. Out of three vacant posts, appointment was made to two posts. Subsequently, a policy decision was taken to contract out the services of Security Guards and the person in the select list was refused appointment on the third vacant post in view of the new policy. While holding that select listed candidates do not have a vested right for appointment, the Supreme Court observed that:

18. The application of law would, therefore, depend upon the fact situation obtaining in each case. The judgment of the High Court in view of the aforementioned authoritative pronouncements cannot be said to be perverse. The Respondent was to be offered with the appointment at a point of time when no policy decision was taken. There was, thus, no reason not to offer any appointment in his favour. Why the select panel was ignored has not been explained. Even the purported policy decision was not in their contemplation. We, therefore, do not see any reason to interfere with the impugned judgment.

19. Furthermore, the Respondent is an ex-serviceman. He in ordinary case should have been offered appointment particularly when three posts were vacant. The decision to abolish posts was not taken at a point of time when he had filed the writ petition. It was expected that on 16.06.2005 when the third candidate refused to join the post he should have been offered the same.

(emphasis supplied)

17. The fact situation obtaining in the present case is somewhat similar to the one obtaining in the above-cited cases and the dictum of the Supreme Court would be squarely applicable. The Petitioner herein was to be offered appointment on the date of interview held on 16.07.2007 when the candidature of the merit-listed candidate was cancelled. It was at this stage that the waiting list was to be operated. Respondent No. 3 being competent in this regard, there was no reason, whatsoever, not to offer appointment to the Petitioner after the candidature of the merit-listed candidate was cancelled. Once it was found that the Disability Certificate of the said candidate, was indeed fraudulent and forged, and a criminal complaint was lodged against the said candidate, there was all the more reason to offer appointment to the Petitioner. No explanation, whatsoever, is forthcoming from Respondents why appointment was not offered to the Petitioner at the relevant period of time, and why the waiting list was not operated in spite of the clear stipulations in Government Resolution dated 18.09.2007. It is clearly stated in the said Resolution that in the eventuality that a candidate in the merit list fails to appear, if his appointment is cancelled, if he is found to be ineligible, or if he resigns from the post which falls vacant, then it is incumbent upon the authorities to operate the waiting list. The said provisions of the Government Resolution would come into operation immediately upon cancellation of the candidature of the merit-listed candidate, and the waiting list would come into operation. There was no occasion, therefore, to deny appointment to the Petitioner who is No. 1 in the waiting list, in the category of physically disabled persons. The claim of the Petitioner for appointment came into existence at the time of cancellation of the candidature of the merit-listed

candidate. The Respondents have omitted to adhere to the provisions of the said Government Resolution at the relevant point of time and their inaction in delaying appointment has resulted in a situation that the Petitioner is being deprived of this legitimate claim for appointment on the ground of delay, which is solely attributable to the Respondents. In such a situation, the Respondents cannot be permitted to derive advantage from their own acts of omission and commission, thereby causing injustice to the Petitioner.

18. It deserves to be noted that Respondent No. 3 has acknowledged in letter dated 16.04.2010 that the Petitioner was eligible, qualified and entitled for appointment at the relevant period of time as per provisions of Government Resolution dated 18.09.2007. In a complete volte-face, the Respondents are now denying appointment to the Petitioner on the ground that the validity of the waiting list has expired, for which situation they alone are responsible. As per Section 23A of the Bombay Primary Education Act, 1947, Respondent No. 3 is the competent authority to appoint the Petitioner. There was only one post reserved for a physically disabled candidate. Respondent No. 3 was competent to appoint the Petitioner, who was the next meritorious candidate at the time of cancellation of the candidature of the merit-listed candidate. He is not bound to seek approval of Respondent No. 2 or to await the outcome of the criminal proceedings against the said candidate, and to offer appointment to him, if acquitted. A contradictory stand is taken by Respondent No. 3 who is ready to await the outcome of criminal proceedings on one hand, but states that the waiting list has expired in the case of the Petitioner. It is not understood how the validity of the waiting list can be stretched in favour of the candidate whose certificate is found to be fraudulent, when a stand is taken that it has expired in the case of the Petitioner. Taking such a stand amounts to tacit encouragement of persons indulging in wrong practices at the cost of genuine candidates, such as the Petitioner.

19. Another ground for denial of appointment is that, after the recruitment for the year 2007, pursuant to the advertisement dated 21.04.2007, there have been other recruitments in the years 2008, 2009-10, and as per Government Resolution dated 18.09.2007, appointment cannot be given to the Petitioner on this ground. No material has been produced to show that the reserved post on which the Petitioner was to be appointed as a Physically Disabled person, has been either filled up or carried forward, or that the statutory provisions of the Act, which enjoins that 3% of the vacancies are reserved for physically handicapped persons, have been complied with in respect of the recruitment undertaken pursuant to advertisement dated 21.04.2007.

20. In *Vinodkumar Rajabhai Rathod v. State of Gujarat and Ors.* (supra), a similar situation was dealt with by this Court wherein the Gujarat Public Service Commission published the select list and waiting list on 09.06.2000 and the Petitioner therein was kept at Sr. No. 1 in the waiting list. The posts advertised were that of Lecturer Physics in the Gujarat Education Service Class-II

(Collegiate Branch). Lecturers had been appointed on adhoc basis against the posts and continued without consultation with the GPSC, in contravention of the statutory recruitment rules and were working. Therefore, the GPSC selectees were not given appointment and the select list was not operated for more than two years. Appointment to the Petitioner therein was denied, though there was a clear vacancy for the post in which he was placed in the waiting list, on the ground that the validity of the select list had lapsed. Negating the said stand, the Court held as below:

There is considerable substance in the submissions made by the learned Counsel for the Petitioner that the Respondents not having operated the select list for more than two years in order to protect the ad hoc lecturers who were and are being continued without consultation of the G.P.S.C. in contravention of the statutory recruitment rules, cannot be permitted to rely on the said fact for denying appointment to the Petitioner. Even when a clear vacancy for G.P.S.C. candidate was available when a Scheduled Caste candidate at Sr. No. 25 of the select list did not join, the Respondents ought to have offered appointment to the person at Sr. No. 1 in the waiting list. (Para 10)

A candidate in the waiting list in order of merit has a right to claim that he may be appointed if one or other selected candidate does not join. The occasion for the Petitioner to claim such right did not arise before 31-12-2002 when for the first time posting orders were issued in favour of the G.P.S.C. selected candidates. Such candidates were given time to report for duty, and therefore, the fact whether any G.P.S.C. selected candidate had not reported for duty, and consequent vacancy was available would not be known till January, 2003. It is only in the background of these facts that one has to consider whether the Respondent-authorities were justified in not accepting the Petitioner's representations dated 23-1-2003 by which the Petitioner requested the Respondents to appoint the Petitioner as a lecturer in Physics in the vacancy made available by not joining of a Scheduled Caste candidate from the select list. The submission made on behalf of the Respondents that validity of the waiting list was only two years and that the period began to run from 22-9-2000 cannot at all, therefore, be accepted in the aforesaid peculiar facts and circumstances of the case. (Para 10; See also paras 12 and 13)

21. The principles of law laid down in the above case are instantly applicable to the facts of the case in hand. Having failed to offer appointment to the Petitioner at the relevant point of time, despite the fact that he was eligible and entitled thereto, the Respondents cannot be permitted to take shelter behind the technical stand that the validity of the waiting list has expired, when they themselves are responsible for the delay.

22. Having acknowledged the eligibility and entitlement of the Petitioner, and in view of the provisions of Government Resolution dated 18.09.2007, the Respondents cannot be permitted to approbate and reprobate in the same breath, by taking mutually contradictory stands. Judged in the background of the

factual matrix of the case, there can be no doubt that the acts of omission and commission of the Respondents are not only unjust and unfair, they are also tainted by the vice of arbitrariness and discrimination, hence, are unsustainable in law.

23. It cannot be lost sight of that the post on which the Petitioner claims appointment is reserved for a Physically Disabled person. The Respondents are enjoined by the provisions of Section 33 of the Act to appoint in every establishment, such percentage of vacancies for physically disabled persons, which are not less than 3%. The relevant provision of law reads as under:

33. Reservation of posts: Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons 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 of 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.

24. In the present case, one post was reserved for a physically disabled person, in which category the Petitioner falls. As per the mandate of the above-quoted Section, the Respondents were bound to appoint a physically disabled person to the sole post reserved for that category. This post should rightly have been offered to the Petitioner who was first in the waiting list, when the candidature of the merit-listed candidate was cancelled. There is no material on record to show that if there has been a subsequent recruitment drive, as is stated in the affidavit-in-reply filed by Respondent No. 2, the post reserved for a physically handicapped person has either been carried forward, or filled up. Apart from a bald statement, no material has been produced by the said Respondent which would go to show how many posts in this category were subsequently advertised and filled up.

25. As already discussed hereinabove, the provisions of Government Resolution dated 18.09.2007 which stipulates that in case of ineligibility of the merit-listed candidate the waiting list should be operated, would come into effect first in point of time, than the provision regarding the time period of validity of the waiting list. The entitlement of the Petitioner for the post in question came into being prior in point of time when the waiting list was valid and operable.

26. When the legitimate entitlement of the Petitioner arose at the time of

interview itself, and as the appointment has been delayed by the Respondents for untenable and unexplainable reasons which cannot be attributed to the Petitioner, the ground of expiry of the waiting list cannot be sustained. Respondent No. 3 was competent to offer appointment to the Petitioner as per provisions of Government Resolution dated 18.09.2007, and there was no occasion to await sanction of Respondent No. 2. The Petitioner, cannot, therefore, be penalized for the acts of omission of the concerned Respondent.

27. Examined from every angle, the case of the Petitioner has considerable merit. The stand of the Respondents in denying appointment to the Petitioner is unjust and arbitrary, on the facts and in the circumstances of the case.

28. In view of the above discussion, and for the aforesaid reasons, the petition is allowed. The Respondents are directed to offer appointment to the Petitioner as Vidya Sahayak, in the Physically Disabled category, pursuant to advertisement dated 21.04.2007, within a period of one month from the date of receipt of the Writ of this Court. Rule is made absolute to the above extent. There shall be no orders as to costs.