



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 683 of 2021

In R/SPECIAL CIVIL APPLICATION NO. 8753 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.J.DESAI

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

VADODARA MUNICIPAL CORPORATION
Versus
NARENDRA RIDHA RAM JUNAWA

Appearance:

MR NILESH A PANDYA(549) for the Appellant(s) No. 1
for the Respondent(s) No. 1

MR BHUVNESH GAHLOT(10286) for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE A.J.DESAI

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 09/11/2022

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE A.J.DESAI)

1. By way of present Appeal under Clause 15 of the Letters Patent, the appellant herein – Vadodara Municipal Corporation (hereinafter referred to as “Corporation”) has challenged the



judgment and order dated 15.06.2021 passed by the learned Single Judge in Special Civil Application No.8753 of 2020, whereby the learned Single Judge while allowing the petition filed by the respondent held that though the respondent had applied under the reserved category but having received more marks than the last candidate of General category, he shall be treated as General Category candidate and shall be appointed on the post in question.

2. The appeal came to be admitted by the Coordinate Bench vide order dated 28.02.2022 and on the same day, while disposing of the Civil Application, execution and implementation of the impugned order was stayed.

3. Today, the appeal is taken up for final hearing.

4. The short facts, which arise from the record are reproduced as under:

4.1 The appellant Corporation published an advertisement for filling up 48 posts of Staff Nurse. Out of 48 posts, 26 posts were for General Category, where 3 for SC, 7 for ST and 12 for SEBC. The pay-scale for the posts in question was fixed monthly wages at Rs.19,950/- initially for a period of 5 years and thereafter, as per 7th Pay Commission. The General conditions were also referred in



the advertisement like the candidates, who are seeking reservation under SC/ST or SEBC would be granted to those candidates only to whom appropriate certificate has been issued by the competent Officer of the State of Gujarat. The respondent – original petitioner filled up his application and appeared in the examination. The Corporation published the provisional list of candidates qualified for selection for the post of Staff Nurse in connection with the advertisement issued by the Corporation itself. The petitioner obtained 131 marks out of 200 and was shown at Sr. No.9 in the said provisional list.

4.2 As per the procedure prescribed and referred in the advertisement itself, the documents were sought to be verified. At that time, the Corporation found that the present respondent does not belong to SEBC from the State of Gujarat and no certificate issued by any Officer of Gujarat State that he belongs to SEBC was produced and therefore, he was not selected for the post of Staff Nurse.

4.3 The respondent being aggrieved with the said decision of the Corporation, filed captioned writ petition and challenged the same on various grounds. In response to the notice issued by the learned Single Judge, an affidavit in reply dated 04.08.2020 was



filed by the Corporation and opposed the grant of relief as prayed for in the petition. The learned Single Judge after considering the documentary evidence produced on record as well as various decisions of the Hon'ble Apex Court held that since the original petitioner was meritorious and had obtained more marks than the last person appointed from the General category, directed the Corporation to appoint the petitioner for the post of Staff Nurse. Hence, this Appeal.

5. Mr. Nilesh Pandya, learned advocate for the appellant – Corporation has vehemently submitted that the learned Single Judge has committed grave error in accepting the petition filed by the present respondent. By taking us to condition No.4 of the advertisement, he would submit that it was made clear in the advertisement that as per the guidelines issued by the State Government, the reservation to different categories shall be granted only to those candidates who possess the appropriate caste certificate issued by the competent Officer of the State of Gujarat. He would submit that when petitioner has applied for the post in question, he has applied under SEBC category and therefore, now he cannot ask appointment under vacant General Category. He would submit that once he has applied under SEBC



category as per condition No.9 of the advertisement, he can not change the status from SEBC to General category. He would submit that it is an undisputed fact that he does not belong to SEBC from the State of Gujarat and therefore, he is not entitled for the benefits of posting under reserved seat. In support of his submissions, learned advocate Mr. Pandya has relied upon the decision of the Hon'ble Apex Court in the case of ***Bir Singh Vs. Delhi Jal Board and others*** reported in ***(2018) 10 Supreme Court Cases 312***. In support of his submissions, he has placed emphasize in the observations made by the Hon'ble Apex Court in para 34 of the said decision and would submit that he cannot claim his status as SEBC in the State of Gujarat since he is not from said class. He belongs to State of Rajasthan. He, therefore, would submit that the learned Single Judge ought not to have entertained the petition.

6. Mr. Pandya, learned advocate would further submit that neither the authority nor the Court can relax the condition of getting the appointment and all the conditions are required to be scrupulously followed. In support of his submissions, he has relied upon the decision of the Hon'ble Apex Court in the case of ***Bedanga Talukdar Vs. Saifudullah Khan & Ors.*** reported in ***AIR***



2012 Supreme Court 1803. He has emphasized on paras 28 and 29 of the said decision. He therefore, would submit that the appeal be allowed and the impugned order may be quashed and set aside.

7. On the other hand, Mr. Bhuvnesh Gahlot, learned advocate for the respondent has supported the findings of the learned Single Judge and requested to dismiss the appeal. He would submit that it is an undisputed fact that the petitioner obtained 131 marks out of 200 and was shown at Sr. No.9 in provisional list of the candidate qualified for selection list for the post of Staff Nurse. He would submit that out of the selection list, 22 persons have been selected and 19 have been posted. Last person, who has been appointed has obtained 125.5 marks, whereas the present respondent has obtained 131 marks. He, therefore, would submit that by all means, he is meritorious candidate than the person last selected by the appellant. He would submit that since he has appeared in a competitive examination and has obtained more marks than the last candidates, the Authority cannot deny his appointment only on the ground that he had filled up his form as SEBC candidate though he belongs to reserved class of another State. This aspect has been dealt with by the Hon'ble Apex Court



in various decisions starting from the case of ***Indra Sawhney etc. Vs. Union of India and Ors.*** reported in ***AIR 1993 Supreme Court 477*** (Constitutional Bench of 9 Judges) and onwards. He would submit that while dealing with the provision for reservation under the Constitution of India, it has been observed that even if the member of reserved class found more meritorious, then he should be treated as open competition candidate. Mr. Gehlot, learned advocate has also relied upon the decisions in the cases of (1) ***A.P. Public Service Commission Vs. Baloji Badhavath*** reported in ***2009(5) SCC 1***; (2) ***Rajesh Kumar Daria Vs. Rajasthan Public Service Commission*** reported in ***2007(8) SCC 785*** and (3) ***U.P. Power Corporation Limited and Another Vs. Nitin Kumar and Ors.*** (unreported judgment of ***Division Bench of Allahabad High Court in Special Appeal No.310 of 2015***). In support of his submissions, he has also relied upon the latest decision of the Hon'ble Apex Court in the case of ***Sadhana Singh Dangi Vs. Pinki Asati etc.*** decided on 16.12.2021 in ***Civil Appeal No.7781 of 2021*** and allied matters. He would submit that in the aforesaid decisions, the Hon'ble Apex Court has relied upon the decision of *Indra Sawhney* (Supra) and has held that the candidate might be of a particular class is found more meritorious



then he would be entitled to be appointed as General candidate.

He, therefore, would submit that the appeal be dismissed.

8. We have heard learned advocates appearing for the respective parties. We have gone through the advertisement, application filed by the petitioner, provisional list of candidates produced by the Corporation and the reasons for rejecting the candidature of the petitioner that he does not belong to SEBC Category from the State of Gujarat.

It is not in dispute that the present respondent is not from OBC or SEBC class from the State of Gujarat since he has neither produced any certificate nor claimed that he belongs to particular class of State of Gujarat and therefore, there is no question of applicability of the ratio laid down by the Hon'ble Apex Court in the case of **Bir Singh (Supra)** relied upon by Mr. Pandya, learned advocate for the appellant.

9. The petitioner has stated that he belongs to OBC. Subsequent to examination held by the Corporation, when the result was declared, the provisional list of candidates qualified for the selection list for the post of Staff Nurse was published. The petitioner was shown at Sr. No.9 having obtained 131 marks out of 200. It is also not in dispute that the last candidate, who has been



selected and appointed is less meritorious than the respondent since he has obtained 125.5 marks out of 200. Therefore, it is undisputed fact that though he might have filled up the form as SEBC, but having obtained more marks, he is supposed to be selected competing with other candidates, who might be of General category or any other category. It cannot be said that once a member from reserved class would remain in that particular class though he might be much more meritorious than the other persons, who had competed in the examination. All these aspects have been dealt with by the Hon'ble Apex Court in the case of **Indra Sawhney (Supra)**. It has been specifically observed in para 94 A and particularly, last portion of the said para reads as under:

"In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

It has been categorically observed that if the person from the particular class is more meritorious, it shall be treated as open competitor. Relevant para is reproduced hereunder:



“The words “provision for reservation of appointments or post” in Ar. 16(4) do not contemplate only one form of provision namely reservation simpliciter. The words take in other forms of special provisions like preferences, concessions and exemption. Reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The Constitutional scheme and context of Art. 16(4) make it clear that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration – the admonition of Ar. 335. Therefore, where the State finds it necessary – for the purpose of giving full effect to the provisions of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under Cl.(4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provisions for reservations can be provided as part of concept of reservations itself. Similarly, in given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments / posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under Cl.(4) itself. In this sense, Cl(4) of Art.16 is exhaustive of the special provisions that can be made in favour of “the backward class of citizens”.

10. Similar ratio is laid down by the Hon’ble Apex Court in the case of **A.P. Public Service Commission (Supra)** as well as **Rajesh Kumar Daria (Supra)**. In the latest decision of the Hon’ble Apex court in the case of **Sadhana Singh Dangi (Supra)**, the Hon’ble Apex Court dealing with similar type of reservation, has



observed on the same line. Para 12 is relevant, which reads as under:

“12. This Court thus considered two views, one which was taken by the High Courts of Rajasthan, Bombay, Gujarat and Uttarakhand; and, the second, which had weighed with the High Courts of Allahabad and Madhya Pradesh. After considering the totality of the circumstances as well as the rival submissions, the view taken by the High Courts of Rajasthan, Bombay, Gujarat and Uttarakhand was accepted to be the correct view and the one which was taken by the High Courts of Allahabad and Madhya Pradesh was not approved.

“The decision of this Court in Sourav Yadav had considered all the cases on the point starting from Indra Sawhney (supra) up to Mamta Bisht (supra) as well as other decisions. It was finally concluded that the candidates belonging to the category of OBC (Female) or any other reserved category (Female) were entitled as a matter of right to have their candidature considered against the category meant for Unreserved Female Candidates if their merit position demanded so. It was further held that the category of Unreserved (Female) is not a specially allocated or reserved for those candidates who did not belong to any of the categories of SC, ST or OBCs and that by very nature “unreserved category” must mean and include every person who on the strength of merit could be entitled to be considered in that category.”

11. Considering the ratio laid down by the Hon'ble Apex Court, it cannot be said that the learned Single Judge has relaxed the conditions while considering the case of the petitioner and, therefore, the judgment in the case of **Bir Singh (Supra)** relied upon by Mr. Pandya learned advocate is not applicable.

12. We are in agreement with the findings of the learned Single Judge with regard to the observations made in paras 7 to 10 in which the learned Single Judge has discussed various decisions of



the Hon'ble Apex Court. Same are reproduced as under:

"[7] The question therefore arise as to whether the petitioner who had applied for the post as a reserved category candidate can be treated as an open category candidate. To answer this issue, reference be made to several judgments of the Supreme Court first being A.P.Public Service Commission v/s. Balaji Badhavath, reported in 2009 (5) SCC 1, wherein the Apex Court had also taken into consideration the question that if reserved category candidates are meritorious enough to compete with the open category candidates then they are to be recruited in that category and the candidates below them will have to be considered for appointment in the reserved category. Specifically addressing this issue, the Apex Court in para-37 has held as under:-

"37. One other aspect of the matter must be kept in mind. If category-wise statement is prepared, as has been directed by High Court, it may detrimental to the interest of the meritorious candidates belonging to the reserved categories. The reserved category candidates have to options. If they are meritorious enough to compete with the open category candidates, they are recruited in that category. The candidates below them would be considered for appointment in the reserved categories. This is now a well-settled principle of law as has been laid down by this Court in several decisions. [See for example, Union of India and Anr. V/s. Satya Prakash and Ors.. 2006 4 SCC 550, para 18 to 20, Ritesh R. Shah V/s. Y.L.Yamul, 1996 2 SCR 695 at 700-701, R.K. Daria V/s. Rajasthan Public Service Commission, 2007 8 SCC 785 [para 9]"

[8] In case of Rajesh Kumar Daria v/s. Rajasthan Public Service Commission, reported in 2007 (8) SCC 785, the Supreme Court was dealing with issue of reservation, but the issue before the Apex Court in this case was pertaining to horizontal reservation within the vertical reservation however, with regards to the competing of the reserved category candidates with the open category candidates, the Supreme Court in para-8 has held as under:-

"8. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Art. 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota



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

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]

[9] In case of U.P. Power Corporation Limited and Another v/s. Nitin



Kumar and others. In unreported judgment, the Division Bench of Allahbad High Court in Special Appeal No.310 of 2015 had examined the case. The issue therein was quite similar to the present issue and while examining the provision of Section 3(6) of Uttar Pradesh Public Services (Reserved for Scheduled Caste, Scheduled Tribes and Other Backward Classes) Act. 1994, the Court has held as under:-

“....Section 3 (6) is a statutory recognition of the principle that if a candidate belonging to a reserved category is selected on the basis of merit in open competition with general candidates, such a candidate is to be adjusted not against the vacancies reserved for the reserved category to which the candidate belongs but against the unreserved seats. This proceeds on the foundation that where a candidate is meritorious enough to be placed within the zone of selected candidates independent of any claim of reservation and purely on the basis of the merit of the candidate, the candidate ought not to be relegated to a seat against the reserved category. The simple reason for this principle is that reservation is a process by which a certain number of posts or seats is carved out for stipulated categories such as OBC, Scheduled Castes and Scheduled Tribes. Unreserved seats do not constitute a reservation for candidates belonging to categories other than the reserved categories. An unreserved post or seat is one in which every individual irrespective of the category to which the person belongs can compete in open merit. Hence, the principle which is embodied in Section 3 (6) is not confined in its application only at the stage when the final select list is to be drawn up. If the submission of the appellants were to be accepted, that would result in seriously absurd consequences. As the learned Single Judge noted, in the present case itself, the petitioners who belong to the OBC category had in fact secured higher marks in the written test than the last short-listed candidate from the unreserved category. However, they were sought to be excluded from short-listing for the unreserved posts only on the ground that as a candidate who had declared himself or herself to be of a reserved category, that candidate would have to be excluded from shortlisting from the unreserved category even if on the basis of the position in merit, such a candidate would otherwise fall in the list of short-listed candidates in the open or unreserved category. Such a consequence would not be permissible in law.....”

[10] Considering the various pronouncements as narrated hereinabove, the Court is of the opinion that the respondent- corporation ought go have treated the candidature of the petitioner as open category candidate. From the documents on record, the result declared by the respondent-corporation it is apparent that in the provisional list of



candidates qualified for the selection list for the post of Staff Nurse, the petitioner was at Sr.No.9 having secured 131 marks, wherein as other candidates of general category whose names appeared in the selection list are shown to have received marks 129, 128.5, 125.5 etc. Meaning thereby, marks which are lesser than the marks of the present petitioner, the petitioner has received the marks enough to compete with the candidates of general category and ought to have treated as candidate of general category.”

13. In view of above position, we do not find any merits in appeal and same is dismissed. Interim relief granted earlier, stands vacated forthwith.

Request made by learned advocate Mr. Nilesh Pandya to stay the operation and implementation of this order is hereby rejected.

(A.J.DESAI, J)

(NISHA M. THAKORE,J)

Y.N. VYAS