

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 5579 of 2021****With****R/SPECIAL CIVIL APPLICATION NO. 965 of 2019****With****CIVIL APPLICATION (FOR VACATING INTERIM RELIEF) NO. 1 of 2019****In R/SPECIAL CIVIL APPLICATION NO. 965 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE NIKHIL S. KARIEL****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
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

NILUBAHEN GORDHANBHAI MACHHI**Versus****STATE OF GUJARAT****Appearance:****SWAPNESHWAR GOUTAM(9051) for the Petitioner(s) No. 1(SCA No.5579/2021)****MR MINESH PARIKH for Petitioner in SCA No.965/2019****MR. HARSH K THAKAR(7172) for the Respondent(s) No. 2****NOTICE SERVED for the Respondent(s) No. 1****CORAM:HONOURABLE MR. JUSTICE NIKHIL S. KARIEL****Date : 11/03/2022****ORAL JUDGMENT****1. Heard learned Advocate Mr.Minesh Parikh for the petitioner in Special**

Civil Application No.965 of 2019, learned Advocate Mr.Swapneshwar Goutam for petitioner in Special Civil Application No.5579 of 2021, learned AGP Ms.Bhati for respondent No.1 State and learned Advocate Mr.Harsh K. Thakkar for respondent No.2 – Gujarat Public Service Commission (“GPSC” for short).

2. Issue Rule. Learned Advocates waive service of Rule on behalf of the respective respondents. With the consent of the parties, the present petitions are taken up for final hearing.
3. Facts relevant for deciding the resent petitions are narrated in brief as herein below:-

3.1. The respondent No.2 had issued an advertisement for filling up the post of Child Development Officer (Female), General State Service, Class-II (CDPO). The advertisement was for filling up of 27 vacancies, which included 7 vacancies for SEBC, 1 vacancy for Scheduled Caste, 5 vacancies for Scheduled Tribe, and 14 vacancies for General Category. The petitioners of both the petitions had applied for selection and whereas the respondent No.2 had published final result on 7.5.2018, which list included the select list, consisting of 27 candidates' waiting lists for General Category, SEBC Category, SC Category, and for ST Category. The petitioner of SCA No.965 of 2019 was figuring at Sr. No.1 in the Waiting List for SEBC Category Candidates, and whereas petitioner of SCA No.5579 of 2021 had her name figuring at Sr. No.1 in the Waiting List of General Category candidates. It appears that since few candidates, who had been given offer of appointment, had not joined and since the waiting list with regard to General Category having not been operated, the petitioner of SCA No.965 of 2019 had preferred representations and such representations not being answered and in the interregnum the GPSC – respondent No.2 herein having issued a fresh advertisement, the said petitioner has preferred SCA No.965 of 2019 *inter alia* praying for a direction that the petitioner being placed in the waiting list for

General Category candidates at Sr. No.1 should have been appointed upon the selected Unreserved candidates not joining. It appears that upon the petition being preferred, learned Coordinate Bench of this Court vide order dated 21.1.2019 while issuing notice had been pleased to direct one post of CDPO (Female), Class-II to be kept available to be offered to the petitioner, if ultimately the petitioner succeeds in the petition. On the other hand, petitioner of SCA No.5579 of 2021, after being placed at Sr. No.1 of waiting list in the SEBC Category had been informed by respondent No.2 GPSC vide a communication dated 18.12.2018 about the GPSC having recommended to the State Government to appoint the said petitioner. That the respondent No.1 State had also informed the petitioner vide a Communication dated 10.1.2019 to appear for document verification. It appears that after the petitioner had appeared for document verification, since order of appoint had not been issued by the respondents, and whereas since the petitioner had *inter alia* apprehended that it is on account of the interim direction of this Court in SCA No.965 of 2019 that the petitioner had not been appointed, therefore, the petitioner has preferred SCA No.5579 of 2021 *inter alia* requesting for a direction to be issued to the State Government to issue appointment order to the said petitioner.

3.2. To complete the narration, it would be relevant to mention that 3 of the 27 selected candidates had either resigned from service or not joined at all, resulting in 3 vacancies occurring in the select list. That the respondent No.1 Department had intimated to the respondent No.2 GPSC about 2 selected candidates having resigned and one candidate not having joined at all, therefore, the candidates were requested to be recommended from the waiting list insofar as the category in which the vacancy had occurred. It also appears that while the State had requested for recommendation of 3 names, the GPSC, relying upon a circular of the State Government dated 24.12.2008, had recommended the name of only one candidate for appointment i.e. the name of the petitioner of SCA No.5579 of 2021,

more particularly informing the State Government that in terms of Circular dated 24.12.2008 only such vacancies in the select list which had occurred on account of the candidates who had been offered appointment, but not joining at all could be filled in by operating the waiting list and whereas in case of candidates in the select list, who have joined but subsequently resigned, the waiting list could not be operated for such vacancies. It appears that the State had accepted the recommendation of the GPSC with regard to only one candidate and whereas consequent thereto, the petitioner of SCA No.5579 of 2021 was called for document verification, and thereafter it appears that the entire process had come to a standstill.

3.3. Thus, petitioner of SCA No.965 of 2019 seeks direction against the respondents for operating the waiting list insofar as the vacancies that had arisen in the select list and petitioner of SCA No.5579 of 2021 seeks a direction against the respondents for issuing order of appointment subsequent to and consequent upon the petitioner being called for document verification.

4. Learned Advocate Mr.M.B. Parikh on behalf of the petitioner of SCA No.965 of 2019, would submit that there were at least three posts, which had fallen vacant from the select list upon candidates not joining and/or candidates having joined but resigned later on, and whereas according to learned Advocate Mr.Parikh, upon posts falling vacant, it was incumbent upon respondents to have operated the waiting list insofar as the category in which vacancy had arisen and since there was a vacancy upon an unreserved candidate resigning, the respondents ought to have given appointment to the petitioner since the petitioner was figuring at Sr. No.1 in the waiting list of Unreserved Category candidates.

5. Learned Advocate Mr.Swapneshwar Goutam for petitioner in SCA No.5579 of 2021 would submit that the petitioner had, consequent upon vacancies occurring in the select list, been recommended for appointment by the GPSC and the respondent Department had even called the

petitioner for document verification and whereas under such circumstances, the respondents were duty bound to appoint the petitioner and having not done so, the petitioner has sought for appropriate directions against the State.

5.1. It appears that both the State and GPSC have filed their replies in SCA No.965 of 2019 and whereas in SCA No.5579 of 2021 no reply has been filed by either of the respondents.

6. Learned AGP Ms.Surbhi Bhati has contended on behalf of the respondent State that as such at the relevant point of time, the State had requested for operating of the waiting list insofar as the three posts having fallen vacant from the select list and whereas the GPSC had recommended only one name relying upon the Government Circular dated 24.12.2008.
7. Furthermore, learned AGP Ms.Bhati would further submit that none of the petitioners has any vested right to claim for being appointed, more particularly according to the learned AGP, by now the position being well settled that merely on account of the name of a candidate figuring in the select list, the candidate would not acquire any indefeasible right for being appointed. Thus, learned AGP has requested for rejecting the present petition.
8. Submissions of learned AGP have been adopted by learned Advocate Mr.Thakkar appearing on behalf of the respondent GPSC, who would submit that while the State had sought for operating the waiting list for filling up three vacancies, since the GPSC was of the opinion, more particularly relying upon the Government Circular dated 24.12.2008 that the waiting list could be operated only qua such vacancies where candidates after having been appointed had not joined at all and whereas the waiting list could not be operated for such posts that had fallen vacant upon the candidate appointed joining the post but subsequently resigning. Therefore, the GPSC had recommended only one post. Learned Advocate would submit that insofar as petitioner of SCA No.5579 of 2021

the GPSC having made its recommendation and whereas insofar as SCA No.965 of 2019 relying upon Government Circular dated 24.12.2008 since recommendation for appointment had not been made, therefore, no fault could be found with the GPSC.

9. Heard learned Advocates for the respective parties, who have not submitted anything further and perused the records.
10. From the submissions of learned Advocates and perusal of records it appears to this Court that insofar as the respondent State is concerned, initially the respondent State was in favour of filling up the vacancies that had arisen in the select list and whereas it also appears that upon the GPSC recommending only one name, respondent State had accepted the said position and had sought to appoint petitioner of SCA No.5579 of 2021, but it also appears that subsequently on account of preferring of the first petition i.e. SCA No.965 of 2019, the State appears to have placed the process of appointing the petitioner of SCA No.5579 of 2021 in abeyance.
11. Insofar as the respondent GPSC is concerned, it appears that the GPSC relying upon Circular dated 24.12.2008 had not complied with the request of the State to recommend candidates from the the waiting list for three vacancies which had occurred in the select list and whereas they had recommended only one candidate i.e. petitioner of SCA No.5579 of 2021. In the affidavit-in-reply filed by the State both the communications i.e. the recommendation of the State for operating the waiting list for three candidates vide communication dated 29.11.2018 and reply along with recommendation of the petitioner of SCA No.5579 of 2021 by the GPSC vide communication dated 5.12.2018 are placed on records.
12. In the considered opinion of this Court, a detailed discussion and evaluation would not be required in the instant case since it appears that vide judgement dated 21.10.2016, learned Single Judge of this Court (Coram: Ms. Justice Sonia Gokani) in SCA No.15682 of 2014 and allied matters had been pleased to quash and set aside the Government Circular

dated 24.12.2008. It would be relevant to mention that Circular dated 24.12.2008 *inter alia* envisaged two situations i.e. in case of medical and education departments, waiting list should be operated in case a selected candidate does not join or a selected candidate after joining resigns or for any reason the post falls vacant. For the other Departments, the waiting list could be operated only in case of selected candidates not joining. Learned Coordinate Bench after detailed discussion and reasoning had found the said Government Circular to be unjust, arbitrary, and violative of Articles 14 and 16 of the Constitution of India and insofar as it restricts operation of waiting list for filling up of posts in the eventuality of resignation of the candidates or post falls vacant for any reason after the candidate joins for all departments, except the medical and education departments. It appears that the judgement of learned Coordinate Bench had been challenged by the State Government by preferring LPA No.1566 of 2017, and while the LPA is pending, no stay has been granted by the Hon'ble Division Bench upon the judgement of the learned Coordinate Bench.

13. While the judgement of the learned Coordinate Bench referred to herein above had been delivered on 21.10.2016, yet it is shocking to note that vide communication dated 15.12.2018 the respondent No.2 GPSC relying upon the very Government Circular, rather the very portion of the Circular which is declared to be arbitrary and violative of Articles 14 and 16 of the Constitution had not acceded to the request of the State Government to operate the waiting list for such vacancies which had arisen on account of selected candidates joining and thereafter resigning. That the GPSC having its principal function as conducting selection process and recommending appropriate candidate upon requisition by the State Government, not being aware about the judgement of this Court which sets aside a portion of the Government Circular with regard to the preparation of waiting list, to state the least, is an unimaginable situation. Preparation of waiting list being an essential function upon the culmination of selection process and a policy decision of the State as regards preparation of waiting list being interfered with by the High Court, ought to

have been and should have been within the knowledge of the respondent GPSC.

13.1. That it is only on account of such lack of knowledge of the judgement of this Court by the GPSC that both the petitioners have been forced to approach this Court. As noted herein above, the State Government had diligently requested the GPSC to recommend candidates from the waiting list insofar as the three vacancies that had fallen vacant on account of the candidate either not joining or having joined and resigned, the GPSC relying upon the Circular dated 24.12.2008, rather relying upon the portion which had been interfered with by this Court of Circular dated 24.12.2008 had declined to recommend candidates from the waiting list insofar as two vacancies since such vacancies had arisen on account of the selected candidates resigning after joining.

14. In this view of the fact, in the considered opinion of this Court, since a learned Coordinate Bench having declared Circular dated 24.12.2008 as being unjust, arbitrary and violative of Articles 14 and 16 of the Constitution of India, insofar as the Circular differentiates between the education and medical departments with regard to operating of waiting list for such posts falling vacant upon candidate joining and subsequently resigning or for any other reason, it was incumbent upon the GPSC to have accepted the request of the State and recommended appointment of candidates for the three posts by operating the waiting list as requested by the State.

15. Furthermore, in the considered opinion of this Court, the other issues raised by the parties with regard to the scope and extent of how waiting list is required to be operated etc., is not required to be dealt with, since the entire issue has arisen only on account of the GPSC having relying upon such portion of a Circular which had already been declared violative of the Constitution of India by this Court.

16. Furthermore, insofar as the submissions on behalf of the State that a candidate does not get an indefeasible right merely on account of name of the said candidate figuring in the select/waiting list, in the considered opinion of this Court, the State cannot be heard to submit the said contention more particularly when the State itself had recommended for operating the waiting list, which had been turned down by the GPSC. In any case, in the considered opinion of this Court, the proposition that a candidate whose name appearing in the select list does not get an indefeasible right for appointment is not a completely unqualified proposition, rather such proposition has been clarified by the Hon'ble Apex Court by holding that the State cannot act in an arbitrary manner and the decision not to fill up vacancies has to be taken *bona fide* for appropriate reasons. This Court at this stage proposes to refer to the decision of the Constitutional Bench of the Hon'ble Apex Court in case of **Shankarsan Dash Vs. Union of India, reported in (1991) 3 SCC 47**. Paragraphs 7 and 8 of the said decision being relevant for the purpose are reproduced herein below for benefit:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha and Others*, [1974] 1 SCR 165; *Miss Neelima Shangla v. State of Haryana and Others*, [1986] 4 SCC 268 and *Jitendra Kumar and Others v. State of Punjab and Others*, [1985] 1 SCR 899.

8. In *State of Haryana v. Subhash Chander Marwaha and Others*, (supra) 15 vacancies of Subordinate Judges were advertised, and

out of the selection list only 7, who had secured more than 55% marks, were appointed, although under the relevant rules the eligibility condition required only 45% marks. Since the High Court had recommended earlier, to the Punjab Government that only the candidates securing 55% marks or more should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the High Court claiming a right of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the Government to decide how MANY appointments should be made and although the High Court had appreciated the position correctly, it had ``somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies''. It was expressly ruled that the existence of vacancies does not give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in *Jitendra Kumar and Others v. State of Punjab and Others*, was turned down holding that it was open to the Government to decide how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying for selection or even after selection. It is true that the claim of the petitioner in the case of *Miss Neelima Shangla v. State of Haryana* was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission which sent to the Government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The Government accordingly made only 17 appointments and stated before the Court that they were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was observed that it is, of course, open to the Government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and there must be a conscious application of mind by the Government and the High Court before the number of persons selected for appointment is restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant.”

17. Having regard to the law laid down by the Hon'ble Apex Court, in the context of the facts of this case, it could be observed that while at the relevant point of time the State had acted fairly, yet on account of an

erroneous decision of the respondent GPSC, the candidates as well as the State had to bear the brunt. Again it is not the case of the State herein that it had decided not to fill up the vacancies which had arisen in the select list on account of vacancies in the select list as noted herein above, the State was in favour of filling up of all the vacancies and could not fill up the same on account of an erroneous decision by the GPSC.

18. In this view of the matter, in the considered opinion of this Court, both the petitioners of SCA No.965 of 2019 and No.5579 of 2021 are entitled for appointment, more particularly both the candidates figuring in respective waiting lists of General Category and SEBC Category in which categories vacancies had arisen in the select list. That but for the aspect of GPSC not being aware about the decision of this Court and having taken an erroneous decision, both the petitioners would have been appointed since the year 2019.

19. Having regard to the aforesaid discussion, in the considered opinion of this Court, both the petitions deserve to be allowed and the following directions are passed:-

19.1. Respondents No.1 and 2 are directed to take such appropriate steps to offer appointment to petitioner of SCA No.965 of 2019 and petitioner of SCA No.5579 of 2021 to the post of CDPC (Female), Class-II.

19.2. That the appointments shall be on the posts directed to be kept vacant by the learned Coordinate Bench of this Court vide order dated 21.1.2019 in SCA No.965 of 2019 and vide order dated 15.2.2022 by this Court in these petitions.

19.3. The petitioners shall be placed in the seniority list of CDPO (Class-II) after candidate No.27 or the last candidate, as the case may be, appointed to the post of CDPO (Female), Class-II pursuant to the advertisement No.59/2016-17. The petitioners shall also be entitled to

draw salary and other emoluments as available to the last candidate appointed pursuant to the advertisement No.59/2016-17.

19.4. It is clarified that while the salary being paid to the last candidate referred to herein above will be treated as a bench-mark for calculating the salary and other emoluments to the petitioners, but the petitioner shall not be entitled for any arrears.

19.5. It is further clarified that while the petitioners would be entitled to seniority from a date below the date on which the last candidate of selection pursuant to advertisement No.59/2016-17 had been appointed and whereas it is further clarified that in case of further promotion, whether experience is a criteria, then the petitioners shall be considered for such promotion only after completing the actual years of experience in the lower cadre.

19.6. Since this Court has come to a conclusion that the petitioners were forced to approach this Court on account of GPSC relying upon a Circular of the Government or on such portion of the Circular which has been declared to be arbitrary and violative of Articles 14 and 16 of the Constitution, therefore, the respondent No.2 GPSC is required to be saddled with costs, which would be payable to the petitioners. Costs quantified at Rs.25,000/- in each of the petitions is imposed upon GPSC, which shall be paid by GPSC through the Registry of this Court to the respective petitioners.

20. The petitions stand allowed. Rule is made absolute to the aforesaid extent.

21. In view of the order passed in the main matter, the Civil Application would not survive and shall stand disposed of accordingly.

Sd/-
(NIKHIL S. KARIEL,J)

V.V.P. PODUVAL