

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 8270 of 2014
With
R/SPECIAL CIVIL APPLICATION NO. 14010 of 2014
With
R/SPECIAL CIVIL APPLICATION NO. 14093 of 2014
With
R/SPECIAL CIVIL APPLICATION NO. 14194 of 2014
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R/SPECIAL CIVIL APPLICATION NO. 14226 of 2014
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R/SPECIAL CIVIL APPLICATION NO. 14614 of 2014
With
R/SPECIAL CIVIL APPLICATION NO. 15793 of 2014
With
R/SPECIAL CIVIL APPLICATION NO. 16290 of 2014

FOR APPROVAL AND SIGNATURE:**HONOURABLE MR.JUSTICE RAJESH H.SHUKLA : Sd/-**

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| 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 |

PATEL KIRITKUMAR KANTILAL

Versus

STATE OF GUJARAT

Appearance:**Special Civil Application Nos.8270 & 14483/2014**

MR NIRAV C THAKKAR for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14010/2014

MR BIPIN J JASANI for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14093/2014

MR DIPAK R DAVE for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14194/2014

MR YN OZA, Sr. Adv. with MR NIRZAR DESAI for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14226-14229/2014

MS MAMTA VYAS for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14268/2014

MR VIKRAM THAKORE with MR UTPALA S. BORA for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application Nos.14279 & 14392/2014

MR PS PATEL for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application Nos.14291-14307, 14438-14443/2014, 14517-14518/2014, 14566-14573/2014, 14575-14577/2014, 14607-14610/2014, 14612-14614/2014 & 16290/2014

MR SHALIN MEHTA, Sr. Adv. with MR HEMANG SHAH for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14308/2014

MR PUNAM GADHVI for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14391/2014

MR PRABHAKAR UPADYAY for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application Nos.14414-14436/2014

MR KB PUJARA for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application Nos.14449-14455/2014

MR BHAVESH J PATEL for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14515, 14519 & 14547/2014

MR Y.H. VYAS for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.15793/2014

MR PREMAL R JOSHI for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

Special Civil Application No.14437/2014

MR SHAHIL M SHAH for the PETITIONER(s) No. 1

MR MANAN MEHTA AGP for the RESPONDENT(s) No. 1

MR HS MUNSHAW for the RESPONDENT(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE RAJESH H.SHUKLA****Date : 13/12/2018****COMMON ORAL JUDGMENT**

1. In the present group of petitions, the issue involved regarding the post of Vidyasahayak is common and, therefore, all the matters are heard together and are being decided by this common judgment.
2. The present group of petitions is filed under Articles 14, 19, 226 and 227 of the Constitution of India for the prayers as prayed for inter alia seeking appropriate writ, order or direction that the demand of certificate made by the respondent by the impugned notice dated 01.07.2013 is illegal and further direction to restrain the respondents from taking any coercive action against the petitioners pursuant to such notice dated 01.07.2013 and also for further prayers as stated in detail regarding the appointment of the respective petitioners in different petitions.
3. The facts of the case briefly summarized are as

follows:-

3.1 The petitioners applied to the respondent for the appointment of the post of Vidyasahayak. The appointment letters have been issued to the petitioners as stated in detail in respective petitions and the petitioners have been appointed on fixed monthly salary with the posting at different places in respective Primary Schools.

3.2 It is the case of the petitioners that the original certificates as required by the respondents have been submitted and, therefore, those certificates are with the office of the respondent no.2 and in many cases, the receipt to that effect has been given by the respondent no.2, which is produced on record in some of the matters. It is the case of the petitioners that the respondent started harassing the petitioners and similarly situated persons by issuing notices demanding the original certificates of the petitioners, which has also been produced on record.

3.3 The petitioners gave reply to the respondent

no.2 – District Primary Education Officer, Kheda. However again, the petitioners have been served with the impugned notice dated 01.07.2013 alleging that the petitioners have got the benefit of increment of marks on the basis of some sports certificates, which have not been produced and, therefore, they have been called upon to show cause as to why their services may not be terminated. Such notice dated 01.07.2013, which is impugned, is produced on record with the petition, which has led to filing of the petition on the grounds stated in the memo of petition.

4. The present group of matters have three different types of petitions raising issue regarding the appointment.

4.1 Out of which, Special Civil Application Nos.14414 to 14436 of 2014 have been filed by the petitioners, who have been selected and appointed and who have been represented by learned advocate, Shri K.B. Pujara. There is specific contention that they have been selected on merits and such issue of marks on the basis of certificate or sport certificate

are not relevant.

4.2 Another group of petitions i.e. Special Civil Application No.14291/2014 has been filed by the petitioners, who have been represented by learned Senior Counsel, Shri Shalin Mehta appearing with learned advocate, Shri Hemang Shah. These petitioners are the persons, who are said to have been appointed by irregularity as their names do not appear in the record or in the select list. There is specific case with regard to the bungling and irregularity at the local level by the officers in connivance with the petitioners that such appointments are made without following any procedure and as back-door entry. However it is the case of the petitioners that they have also been appointed and merely because the waiting list is not prepared or the record is not available with the respondent no.2 – District Primary Officer, Kheda or the Government, it would not make their appointment irregular or could be claimed to be a back-door entry. Therefore, learned Senior Counsel, Shri

Shalin Mehta has strenuously made submission with reference to the order passed for terminating the services on the ground that it is in violation of the Rules of natural justice and had the opportunity been given, they could have brought correct facts before the authority. It is, therefore, submitted by learned Senior Counsel, Shri Shalin Mehta that the impugned order passed qua such petitioners is without any justification and when the respondent says that there is no material then, they could not have come to a conclusion about the irregularity and whatever material has been referred including the report of the Committee, has not been supplied, which is in violation of the Rules of natural justice.

- 4.3 On the other hand, in the aforesaid group of petitions, the stand of the respondent – Government is that the names of such petitioners do not appear anywhere in the list and there is no record with regard to their appointment and straightway, the appointments have been made without procedure

in connivance with the local officer and, therefore, such appointments are bad, illegal and any such appointment made by fraud would be illegal and cannot be sustained. Reliance has been placed on the report of the Committee, which was appointed to examine this issue and it has been contended that the report itself speaks about the irregularity and illegal appointments and, therefore, such appointments claimed dishonestly cannot be regularized and the Court in exercise of discretionary jurisdiction under Articles 226 and 227 of the Constitution of India may not exercise the discretion to regularize such appointments claimed dishonestly and by fraudulently.

4.4 Third group of petitions i.e. Special Civil Application Nos.14226 to 14228 of 2014 and other allied matters have been filed by the petitioners and other individual petitioners, who have been represented by learned Senior Counsel, Shri Y.N. Oza appearing with learned advocate, Shri Nirzar Desai, learned advocate, Ms. Mamta Vyas. Moreover, learned

advocate, Shri Vikram Thakore, learned advocate, Shri Jasani, learned advocate, Shri P.S. Patel, learned advocate, Shri Prabhakar Upadhyay etc. have also made submissions. This group of petitions have claimed that the stand of the Government is false and it has been stated that the appointments have been made initially after the documents have been verified and the original certificates have been produced and, therefore, now they cannot be asked to produce the original certificate, which they may not have. Further, it has been specifically stated that these persons, who have been appointed and who have been working for many years, are not appointed irregularly merely because record is not available for verification. It has been specifically stated that in any case, these petitioners are covered as they have been appointed after verification of details and the certificates and at the relevant time, no such issues have been raised and, therefore, they are estopped from raising such issues at belated stage.

4.5 Alternatively, it has been claimed that even

if there is any kind of irregularity, the petitioners are appointed after procedure and some of the petitioners have receipts regarding the production of the original certificates and they have also made representation, which have not been considered. Therefore, it has been claimed that in any case, the petitioners are not forming part of those appointees, who are said to have been appointed without any procedure as a back-door entry.

4.6 Much details have been referred to on such issues by learned advocates appearing for the petitioners in the aforesaid three different classes of petitions.

5. Affidavit-in-reply has been filed by the respondent no.2 contending inter alia that though the advertisement was made for 257 posts of Vidyasahayak, it has come on the record that at the relevant point of time, more than 257 posts have been filled up and additional 64 posts have been appointed without any permission of the higher authority. A detailed reference is made to the background and it has been contended that

earlier Writ Petition (PIL) No.39/2012 was filed alleging irregularity in the recruitment of Vidyasahayak pursuant to such advertisement in the year 2008 for 257 posts. Therefore, the Hon'ble High Court looked into the matter and disposed of the said PIL with specific direction to take final decision, copy of said order is produced at Annexure-B dated 20.08.2014. Thus it is clear that it has been contended that Writ Petition (PIL) No.39/2012 was disposed of with direction to the District Panchayat to complete the process of hearing and passing of final order with respect to such appointments. It is, therefore, contended in the affidavit-in-reply that in identical situation, some of the Vidyasahayak have approached this High Court by way of Special Civil Application No.10743/2013 challenging the show cause notice issued by the respondent no.2 and it has been disposed of on the ground that the petitioners have approached at the show cause notice stage and are seeking stay against the departmental proceedings and, therefore, the High Court would decline to entertain such petition. It has also been contended that the order of the

learned Single Judge in the aforesaid petition being Special Civil Application No.10743/2013 has been challenged by way of Letters Patent Appeal No.122/2014, which has already been dismissed by the Hon'ble Division Bench vide order dated 25.07.2014 and, therefore, such petitions may not be entertained.

6. During the course of hearing, as the issue with regard to the record and the appointment of the Committee and the report of the Committee had cropped up, the Court had directed the respondents to file reply and place on record the report if so desired to make the position clear. Therefore, the affidavit-in-reply has been filed on behalf of the respondent no.1 - State by the Education Department. It has been contended that no fundamental rights much less any legal right of the petitioners have been violated and, therefore, the petition is not maintainable. It has been contended that pursuant to Government Resolution dated 19.11.2012, the State Government was pleased to constitute a Committee to inquire into the illegality and irregularity in the appointment of the Primary Teachers i.e. Vidyasahayak by the

District Panchayat, Kheda. Therefore, a detailed inquiry was made and the report has been submitted, which has been placed on record with this affidavit contending that as the appointments of the petitioners are illegal and the concerned District Primary Officers have committed various irregularity in the appointment, the Committee after verification and providing an opportunity of hearing to the concerned petitioners recommended for termination of the services and, therefore, the present petition may not be entertained. It has been specifically stated that additional 64 candidates have been appointed beyond the original advertisement without procedure and contrary to the policy of the State Government by committing illegality and irregularity. Thus no record of addition 64 candidates, who have been appointed, is available with the office of the District Primary Education Office and/or the District Panchayat. It is during such inquiry when the District Primary Education Officer was called upon to produce the record of additional 64 candidates and as such record has not been made available, the appointments have not been approved. Therefore

it has been contended that as no such record is produced on record by the office of the District Primary Education regarding the waiting list, such appointments are irregular. Further reference is made that out of 257 candidates, 51 candidates have been appointed only on the basis of additional marks of sports certificate and they are required to be verified and after verification, appointment of 9 candidates have been approved. It is contended that such petitioners were granted opportunity of hearing to remain present with the documents and, therefore, principles of natural justice have been followed and the submission about the violation of principles of natural justice are misconceived. It has been stated that in view of such irregularity in the appointment of Vidyasahayak by the office of the District Primary Education, Kheda, the concerned officers have been taken to task by initiating departmental proceeding, which have been pending and, therefore, such petitions may not be entertained in exercise of discretionary jurisdiction under Articles 226 and 227 of the Constitution of India.

7. Lastly, it has been contended that issue involved in this group of petitions is no longer res integra as it has been considered by the learned single judge in case of **Patel Tulsiben Ambalal Vs. State of Gujarat**, reported in 2008 (3) GLR 2685, which has also been confirmed by the Hon'ble Apex Court and, therefore, the present petitions may not be entertained.
8. Learned advocate, Shri Pujara referred to the papers and submitted that there were 257 vacancies, which were advertised and notices have been issued and, thereafter, the impugned order has been passed dated 23.09.2014 produced at Annexure-Y in Special Civil Application Nos.14414 to 14436 of 2013. Learned advocate, Shri Pujara pointedly referred to the order at Annexure-Y dated 23.09.2014 and submitted that the order itself suggests that certificates were produced, however, it has been claimed that it appears to be bogus and there is no proof or evidence regarding the participation. He, therefore, submitted that on one hand, the certificate is produced and it is sought to be rejected or overlooked on the ground that it is raising some doubt. Similarly, learned

advocate, Shri Pujara referred to the communication dated 02.12.2005 issued by the Youth Services and Cultural Activities Department to the District Primary Education Officer, District Panchayat, Bhavnagar clarifying on this issue that such organizations have been approved and granted some recognition and, therefore, the certificates could be verified by such association. Therefore, he referred to various certificates and submitted that it could be issued by the concerned association and such presumption about the bogus certificate cannot be made. Learned advocate, Shri Pujara submitted that the petitioners have lost the opportunity of such appointments during all these times and due to passage of time, the petitioners have altered the position, which would be causing prejudice to the petitioners inasmuch as they may be overage and they may not have accepted the appointment elsewhere.

9. Learned advocate, Shri Pujara submitted that without considering the submission of the petitioners, the respondent no.3 i.e. the District Primary Education Officer has passed an order of cancellation of appointment and removal of

services dated 23.09.2014 at Annexure-Y. It is, therefore, contended that the petitioners were not given any opportunity to participate in the inquiry held in the present case and they were not afforded any opportunity of hearing. Further he submitted that had the report been made available prepared by the Committee then, the petitioners could have an opportunity to make the representation against it before passing the impugned order. Therefore, it was submitted that in violation of the Rules of natural justice, the impugned order has been passed terminating the services of the petitioners.

10. Lastly, learned advocate, Shri Pujara submitted that the prejudice may be caused to the petitioners, who have been working since long and, therefore on the ground of equity and estoppel, the impugned order may not be sustained. He submitted that the petitioners have altered their position inasmuch as they have been serving for many years and if the termination is not set aside, it would cause prejudice to the petitioners. He submitted that during the service, the petitioners have lost opportunity of other

employment for any other post and also they have become age bar and, therefore, they would not have any chance of alternate employment, therefore, it would result in suffering and prejudice to the petitioner and family and, therefore, such order may also be considered with such mitigating circumstances even if it is assumed that there was some irregularity.

11. Learned advocate, Shri K.B. Pujara submitted that the certificates are not bogus and such notice or termination based on such assumption that the certificate is not genuine, may not be accepted.
12. Learned Senior Counsel, Shri Shalin Mehta referred to the papers at length and submitted that the advertisement has been given for the post of Vidyasahayak and call letters have been received by the candidates including the petitioners and, thereafter, the appointments have been made, however at later stage, show cause notices have been issued. He also referred to the order passed by the learned single judge as stated above and submitted that as it was at the stage of show cause notice, the High Court had declined to interfere and passed an order disposing of those

petitions but it cannot be said that the issue has been concluded or it has been decided earlier. He referred to the papers and affidavit-in-reply filed by the respondent no.3 and submitted that the Gujarat State Kutch Association has been registered as Trust with the Charity Commissioner. Similarly, Federation has also been associated and affiliated with the Kabaddi Association and, therefore, the certificate of sports cannot be brushed aside on the ground that they are not genuine. He referred to further details to support his contention about the issue regarding the certificate and contended that it started with PIL being Writ Petition (PIL) No.39/2012, which was filed and subsequently, it was disposed of with a direction and on the basis of such order of the Hon'ble Division Bench, verification was made. He pointedly referred to the order of the Hon'ble Division Bench in Writ Petition (PIL) No.39/2012 and submitted that whole basis for termination of service is so-called bogus certificate, however, it has not been made clear as to how it could be said to be bogus particularly when the respondents themselves have claimed that there is no record

available. Learned Senior Counsel, Shri Shalin Mehta submitted that the equity have changed and, therefore, doctrine of equity will apply as much time has passed and the petitioners have altered their situation inasmuch as they may not have accepted any other appointments and now they have become age bar and, therefore at such belated stage, claiming the appointments as illegal merely on the basis of doubt that the certificates are not genuine, may not be accepted. Learned Senior Counsel, Shri Shalin Mehta submitted that in some of the cases, there is no sports certificate. He also submitted that after the order of the Hon'ble Division Bench in PIL, the departmental inquiry before the termination was not undertaken and in fact, on the basis of the direction, the Government has issued direction to DEO. Therefore, the notice would clearly suggest that it was a notice of termination without providing an opportunity for clarification or representation. Learned Senior Counsel, Shri Shalin Mehta, therefore, submitted that Rules of natural justice have been violated as no opportunity has been given before taking impugned decision.

13. Similarly, learned Senior Counsel, Shri Shalin Mehta submitted that as now it has been clear by way of affidavit along with the report of the Committee that some inquiry was made. Learned Senior Counsel, Shri Shalin Mehta submitted that this fresh affidavit would also suggest that this report was not submitted to the petitioners and they would not have been given an opportunity to make clarification. He, therefore, submitted that this is in violation of the Rules of natural justice and, therefore, such action/ notice and/or proposed termination may be set aside. In support of this contention, he referred to and relied upon the judgment of the High Court in case of **Patel Tulsiben Ambalal (supra)**. Learned Senior Counsel, Shri Shalin Mehta therefore submitted that the argument that as a member of team, one has participated and, hence, such certificate would not be valid, is misconceived. He submitted that in such situation, it is not possible to secure first or second position at the time of winning the game and, therefore, the certificate cannot be said to be bogus. Therefore, learned Senior Counsel, Shri Shalin Mehta submitted that whether

the termination based on the certificates, which are bogus, can be permitted when the record is not available and, therefore, it is assumed to be bogus without any opportunity to the petitioner. He emphasized that how the documents, which have been placed on record as stated in detail, can be said to be not genuine.

14. Learned Senior Counsel, Shri Shalin Mehta referred to Article 311 of the Constitution of India and submitted that if the termination is without stigma even then the departmental inquiry is required to be followed and, therefore, the termination order is bad in law.

15. Learned Senior Counsel, Shri Shalin Mehta also submitted that the allegation about the irregularity itself may not be sufficient for termination in the summary way. In support of his contention, he has referred to and relied upon the judgment of the Hon'ble Apex Court in case of **Punjab State Electricity Board & Ors. Vs. Leela Singh**, reported in (2007) 12 SCC 146. Learned Senior Counsel, Shri Shalin Mehta has also referred to the judgment of the Hon'ble Apex Court in case of **Kamal Nayan Mishra Vs. State of Madhya**

Pradesh and Others, reported in (2010) 2 SCC 169 and submitted that the judgment about the false information would not apply in the facts of the case. He submitted that even in such situation, termination may not be justified. He submitted that had the opportunity been given, it could have been explained and, therefore, summary dismissal may not be justified.

16. Learned Senior Counsel, Shri Shalin Mehta submitted that the case may also be examined in background of the peculiar facts. He submitted that even if it is assumed that there was some irregularity and officers of the respondents are also responsible, would the petitioners be put to prejudice even if they have benefited or they have joined hands. He emphasized that the Court may consider the fact that the petitioners have altered their position as the petitioners are working since 8-9 years and they may have not accepted the appointments elsewhere and now they are age bar, which would prevent them in future for any such appointment. He submitted that it is not the case of the State that such petitioners had any role to play. Therefore even if the

petitioners are considered as beneficial having taken some advantage, mitigating circumstances may be considered. He emphasized that once the petitioners have become over-age, it would debar them from any future prospectus and it would cause prejudice to the petitioners and family of the petitioners and their social circumstances may also be prejudice. Learned Senior Counsel, Shri Shalin Mehta submitted that such petitioners may have settled in their life with family and if such orders are not set aside and the termination is accepted, it would have a social consequences, which may be harsh and, therefore even accepting without further elaboration that there may be irregularity, the demand result in their prejudice at such belated stage. In support of this submission, learned Senior Counsel, Shri Shalin Mehta has referred to and relied upon the judgment of the Hon'ble Apex Court in case of **Bharatiya Seva Samaj Trust through President & Anr. Vs. Yogesh Ambalal Patel & Anr.**, reported in (2012) 9 SCC 310.

17. Learned Senior Counsel, Shri Oza appearing with learned advocate, Shri Nirzar Desai as well as

learned advocate, Ms. Mamta Vyas submitted that the respondent operated the waiting list and the argument is that the Panchayat did not take permission of the Government. Learned Senior Counsel, Shri Oza submitted that the fact that the record is not available, does not lead to presumption about the irregularity as procedure has been followed and normally the waiting list is prepared, on the basis of which, the appointments are made. He, therefore, submitted that there are no allegations of favouritism. Learned Senior Counsel, Shri Oza referred to the papers and background and submitted that the stand of the respondent is that there is some irregularity, however, the irregularity may have been committed by the officers at the local level and there is no inquiry as such or no criminal complaint was filed. He, therefore, submitted that even if there is some irregularity, it may not justify that whole process of appointment may be set aside. He again submitted that the report, which has been submitted at the later stage with the affidavit would be sufficient to support his submission that the persons like petitioners may not be held

responsible merely because they may have got appointment and when the record is not available, inference about the irregularity or the involvement of the petitioner is not justified. He submitted that if the approval of the Government is not taken or procedure is not observed by the local officer of the Panchayat, should not be a ground for punishment and termination of services of the persons like petitioners. He pointedly referred to the letters as well as the papers and submitted that when the issue has been joined with regard to the genuineness of the document or the certificate, there are receipts, which have been produced. He referred to such receipts and call letters and submitted that it would *prima facie* suggests that there is no irregularity. Learned Senior Counsel, Shri Oza submitted that on one hand, it is claimed that the record is not available and on the other hand, it has been alleged about the irregularity or the fraud, which is not supported with the material and, therefore, such a ground for termination may not be accepted. He submitted that if the appointments made exceed number of the post advertised i.e. 257 posts then,

the petitioners are not at a fault. He submitted that if the record or the files are missing, it is not the responsibility of the petitioners and inquiry could have been made as to how the files are missing. Learned Senior Counsel, Shri Oza referred to the papers and observations made in the order of the learned Single Judge (Coram : C.L. Soni, J.) in Special Civil Application No. 9134/2011 and allied matters. Learned Senior Counsel, Shri Oza therefore submitted that even if it is held that the appointments have gone beyond the advertised posts even then, the judgment of the Hon'ble Division Bench would squarely answer. He pointedly referred to the judgment of the Hon'ble Division Bench (Coram : Bhaskar Bhattacharya, CJ & J.B. Pardiwala, J.) and submitted that as observed, there is no fault on the part of the persons like petitioners. He tried to submit the difference between the illegality and irregularity and submitted that if it is not illegal, some kind of procedural lapse or the irregularity should not be a ground to punish the petitioners, who are not involved. He submitted that it is not a case that the petitioners have

got the appointment by fraud and, therefore, what is not right ab initio then only, action may be justified.

18. Learned advocate, Ms. Vyas has also referred to the papers and submitted that the petitioners have been appointed on the basis of their HSC and PTC certificates. It has been contended that so far as these petitioners in Special Civil Application Nos.14226 to 14228 of 2014 are concerned, their case is slightly on a different footing because no certificate for sports is given nor any weightage is given on the basis of such sports certificate. She further referred to the papers and pointedly referred to type copy produced at Annexure-X with the petition to support her contention that the documents have already been produced before the authority. She also referred to the papers and submitted that the letter would clearly confirm that the documents have been submitted and, therefore, receipt was given for such documents. Learned advocate, Ms. Vyas therefore submitted that it is not correct to suggest that the documents are not produced. Learned advocate, Ms. Vyas submitted that she would also adopt the

submission made by learned advocate, Shri Pujara, learned Senior Counsel, Shri Y.N. Oza and clarified that the case of the petitioner is on better footing than that of additional 64 candidates, who are said to have been appointed and represented by learned Senior Counsel, Shri Shalin Mehta appearing with learned advocate, Shri Hemang Shah.

19. Learned advocate, Ms. Mamta Vyas also adopted the submissions made by learned Senior Counsel, Shri Oza. She also referred to the papers at length and submitted that if the affidavit of the respondent is considered, it would suggest that when the receipts are produced by the petitioners and the petitioners have been called by call letters, there is no question of any fraud by the petitioners. She pointedly referred to the order passed by the Hon'ble Division Bench (Coram : S.R. Brahmbhatt & A.J. Shastri, JJ.) in Letters Patent Appeal No.1093/2014 and allied matters. She submitted that from out of the initial appointments, when the people have not joined or there are resignations, naturally people in the waiting list would be appointed. She submitted

that as the record and material is not available, it may not be assumed that waiting list is not there and the appointment of the persons or the petitioners are illegal.

20. Learned advocate, Shri Y.H. Vyas for the petitioners of Special Civil Application Nos.14515 to 14547 of 2014 has adopted the arguments made by learned Senior Counsel appearing with learned advocate, Shri Hemang Shah as well as learned Senior Counsel, Shri Y.N. Oza appearing with learned advocate, Shri Nirzar Desai.
21. Learned advocate, Shri Prabhakar Upadhyay for petitioner of Special Civil Application No.14391/2014 has adopted the arguments made by learned advocate, Ms. Mamta Vyas.
22. Learned advocate, Shri P.S. Patel appearing for the petitioners Special Civil Application Nos.14279 & 14392 of 2014 has adopted the arguments made by learned advocate, Shri K.B. Pujara.
23. Learned advocate, Shri Sahil M. Shah appearing for the petitioners Special Civil Application No.14437 of 2014 has adopted the arguments made by learned advocate, Shri K.B. Pujara.

24. Learned advocate, Shri H.S. Mushaw appearing for the respondent – District Primary Education Office – Panchayat has referred to the background that after the PIL, directions were issued and there was some irregularity. He submitted that therefore notices were issued and opportunity was given to the petitioners. He submitted that the departmental inquiry has also been initiated. He referred to the papers and submitted that notice of termination itself suggests that opportunity has been given before termination and, therefore, the submission about the violation of principles of natural justice, is misconceived. He also referred to further affidavit and the report and submitted that report was made after the inquiry was made pursuant to the direction of this High Court and, therefore, the persons, who have been appointed as back-door entry, have been terminated. He, therefore, submitted that no grievance could be made and the involvement of some of the petitioners is obvious that by such irregularity in connivance with local officers, they are the beneficiary, who have got appointment and, therefore, it cannot be argued that the

petitioners, who have got appointments, are punished or they may not be blamed. He submitted that it is the petitioners, who have got appointments by such irregular method are beneficiary and, therefore with the knowledge of such irregularity, appointments have been made. Therefore, the submissions made, are misconceived. Learned advocate, Shri Munshaw referred to the judgment of the High Court in case of **Patel Tulsiben Ambalal (supra)**.

25. Learned advocate, Shri Munshaw referred to the papers and submitted that the argument that if the petitioner as a member of the team has participate, it would be sufficient, however a close look at the same would make it clear that team should be secured first or second position by winning a game and then only, a person who is part of a team having participate could claim such certificate or benefit. He submitted that the report of the Committee constituted pursuant to the order passed by this High Court in Public Interest Litigation would be sufficient to indicate irregular appointments. He, therefore, submitted that the petitioners are given

opportunity to explain and, therefore, the rules of natural justice have been complied with. Learned advocate, Shri Munshaw referred to the papers and submitted that decision to terminate the services has been taken after proper verification and after providing an opportunity and, therefore, it cannot be said to be in violation of rules of natural justice. He pointedly referred to the order of termination as well as affidavit-in-reply and submitted that many petitioners appointed as Vidyasahayak were not having any satisfactory sport certificates though they have been called upon to submit. Therefore, learned advocate, Shri Munshaw submitted that the appointments have been made flouting Government policy without approval and, therefore, such irregular and back-door appointments may not be regularized. Learned advocate, Shri Munshaw referred to and relied upon the judgment of the High Court in case of **Patel Tulsiben Ambalal (supra)**. He submitted that the petitioners are on long term basis and are not yet confirmed and, therefore, when their continuation on the post is by way of interim order of the Court, no right

could be claimed that they have been working for a long. He submitted that the administration may not be directed to continue such appointments otherwise it would amount to paying premium on dishonesty. He has referred to and relied upon the judgment of the Hon'ble Apex Court in case of **Addl. General Manager – Human Resource, Bharat Heavy Electricals Ltd. Vs. Suresh Ramkrishna Burde**, reported in (2007) 5 SCC 336 and emphasized Head Note – A. Learned advocate, Shri Munshaw referred to and relied upon the judgment of the Hon'ble Apex Court in case of **Rakhi Ray & Ors. Vs. High Court of Delhi & Ors.**, reported in (2010) 2 SCC 637 and referred to the observations made,

“In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of

notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more."

26. Learned AGP Shri Manan Mehta referred to the judgment passed by the Hon'ble Division Bench (Coram : S.R. Brahmbhatt & A.J. Shastri, JJ.) in Letters Patent Appeal No.1093/2014 and allied matters. He submitted that as observed, the persons having bogus sports certificate were given appointments. He submitted that there is no waiting list prepared as such and the District Primary Education Officer had prepared the select list of 257 candidates. He submitted that in absence of any such specific waiting list, the appointment could not have been made beyond the number of posts and, therefore even if the candidates had not joined or resigned, would not justify such appointments without any procedure. He pointedly referred to the papers and submitted that in absence of any waiting list, the appointments, which have been made, may not be justified. He referred to the judgments of the Hon'ble Apex Court in case of **Rakhi Ray (supra)** as well as in case of **Malik Mazhar Sultan & Ors. Vs.**

Uttar Pradesh Public Service Commissions & Ors., reported in (2008) 17 SCC 703 and submitted that any such appointment would be illegal and liable to be terminated.

27. Learned AGP Shri Manan Mehta submitted that after the PIL, directions were issued by the High Court, on the basis of which, inquiry was made by a Committee and it has been found that appointments have been made without any procedure by back-door entry. He, therefore, submitted that in view of the judgment of the Hon'ble Apex Court in case of **Rakhi Ray (supra)** summarizing the law, it is evident that any appointment made beyond the number of vacancies advertised is without justification. He also submitted that it has been observed that constitutional discipline requires that this Court should not permit improper exercise of power. He submitted that if such appointments are regularized, it would be at the cost of fresh candidates, who would be denied any such opportunity. He again emphasized the observation made in Paragraph No.7,

"It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised

as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law."

28. Learned AGP Shri Manan Mehta, therefore, submitted that the vacancy could be filled up subject to procedure and in accordance with the Rules and such submissions, which have been made about the violation of rules of natural justice, are misconceived. Learned AGP Shri Manan Mehta submitted that it is a different lis and as could

be seen, after the observations made by the Hon'ble Division Bench in PIL suggesting any irregularity, the matter was remanded and it was verified which also lead to further litigation. Therefore again notices have been issued for verification of such certificate and, thereafter, the candidates, who have been appointed without following procedure and as a back-door entry, cannot be continued. Learned AGP Shri Mehta submitted that the material is not available or the record is not available itself would suggest that there was a large scale of irregularity and if the record is not available, it does not lie in the mouth of the petitioners, who are the beneficiary having obtained appointments in connivance with the officers at local level that they may not be blamed because the record is not available. Therefore, learned AGP Shri Mehta submitted that the fact that there is no record available and waiting list has not been there and the appointments are made on the basis of the so-called resignation of the selected candidates, is misconceived. He submitted that if they are operating the waiting list, there has to be a

waiting list and also there has to be some record that the vacancies have not been filled up from out of the select list permitting operation of the waiting list. Again he referred to the background and submitted that how the appointment could be made in excess of the number of the posts advertised and that too, when there is no record. Therefore, learned AGP Shri Mehta submitted that it is at the connivance of the local persons and the petitioners, such large scale irregularity has occurred. He submitted that any regularization of such candidates would be premium on dishonesty. He further submitted that the persons like petitioners cannot plead ignorance and benefit as they are beneficiary of such irregularity. Learned AGP Shri Mehta submitted that even if it is assumed that there was some irregularity committed at the local level of subordinate officer, would not justify regularization and if it is done, it would indicate that some authority or discretion is exercised at the local level disregarding the statutory provision and the procedure and still no action could be taken and they can get away. He, therefore, submitted that the submission made that

inquiry has been made and criminal complaint has been made, is totally ill-founded as the fact remains that inquiry has been made and after the report, decision has been taken and again opportunity has been given to the concerned persons and, therefore, it cannot be said to be in violation of rules of natural justice.

29. Learned AGP Shri Manan Mehta has also referred to and relied upon the judgment of the Hon'ble Apex Court in case of **State of Orissa Vs. Mamata Mohanty**, reported in (2011) 3 SCC 436.
30. Moreover, learned AGP Shri Mehta submitted that the submission that the petitioners have been over age, they have let go certain appointments and thereby they have altered the position, cannot be a ground to disregard or overlook such irregularity. He submitted that such a ground cannot be accepted and any sympathy would be misplaced. He, therefore, submitted that merely passage of time or the fact that they have been continued by interim order of the Court would not make any difference and they cannot be permitted to claim any benefit or sympathy. In support of his submission, he also referred to and relied

upon the judgment of the Hon'ble Apex Court in case of **Suresh Ramkrishna Burde (supra)** relied upon learned advocate, Shri Munshaw.

31. Learned AGP Shri Manan Mehta again submitted that the petitioners have been continued due to litigation and, therefore, when the irregularity came to the notice, action has been taken and, therefore, any such submission on equitable ground, are misconceived. Learned AGP Shri Manan Mehta therefore submitted that when PIL was filed, it came to the notice and, therefore, Committee was formed by Government Resolution dated 19.11.2012. Thereafter, the candidates were called upon and after scrutiny and verification, the decision has been taken after the confidential report was submitted. He, therefore, submitted that it cannot be said that there is any violation of rules of natural justice and/or there is any arbitrariness. He submitted that such appointments may not be regularized in exercise of discretionary jurisdiction under Articles 226 and 227 of the Constitution of India.
32. In view of the background of the facts and rival submissions, it is required to be considered

whether the impugned notices for termination of the services can be sustained and whether the action of termination would stand justified.

33. As recorded hereinabove, according to some of the petitioners, they have been selected as per the procedure and after lapse of time, when they have been appointed and they have been working for years, issues is sought to be raised that the sport certificates produced by them were not genuine and irregularity had been committed at the local office of the District Education Officer, Kheda.

34. There is another set of petitions representing the petitioners by learned Senior Counsel, Shri Shalin Mehta appearing with learned advocate, Shri Hemang Shah. These petitioners are according to the responders are special category of persons, who have been appointed by back-door entry surreptitiously and beyond the prescribe number of posts, which were advertised.

35. There is yet another third category of people represented by learned Senior Counsel, Shri Y.N. Oza appearing with learned advocate, Shri Nirzar Desai as well and learned advocate, Ms. Mamta

Vyas, who are appointed and who have been working for years but according to them, they are sought to be terminated with the notices even though they had produced sports certificates, which have been verified and, therefore, if the clients represented by learned Senior Counsel, Shri Shalin Mehta are accommodated, there is no justification to terminate the services of the petitioners in Special Civil Application No.14194/2014 represented by learned Senior Counsel, Shri Y.N. Oza appearing with learned advocate, Shri Nirzar Desai as well as learned advocate, Ms. Mamta Vyas.

36. It is required to be stated that in the recruitment of Vidyasahayak, there was a policy to give 5% weightage/mark to the candidates having certificate of performance in sports. This policy and the recruitment was also subject matter of litigation and this Court in a judgment in Special Civil Application No. 9574/2008 and allied group of matters dated 12.08.2018 upheld the decision of the Government of ignoring such certificate for the purpose of appointment based on the sports certificate. Therefore it appears that the issue of bogus or in-genuine sport certificate has been

subject matter of litigation and consideration before the Court. Therefore this Court had in the earlier judgment upheld the decision of the Government to ignore such certificate after scrutiny. It is also conveyed that thereafter the Government has scraped such policy to give weightage on such certificates. However, the present group of matters are also related to partly issue of weightage given to the sport certificates in the recruitment process and such certificate are claimed to be bogus. Further this process of the recruitment in the present group of petitions is also about the same time but before the judgment was delivered. Therefore as it appears from the record in the proceeding of group of petitions, the Director of Primary Education vide communication dated 21.05.2008 asked the District Primary Education Officer to scrutinize such certificate and stopped preparation of the merit list. Thereafter, it appears that the scrutiny had taken place as could be seen from the communication/ order dated 23.09.2014 at Annexure-Y produced in some of the petitions including Special Civil Application No. 14414 to 14436 of

2014. The order dated 23.09.2014 clearly refers to the irregularity in the recruitment based on the bogus sports certificate and/or disability certificate and the recruitment of persons in excess of the post advertised. The order refers to different litigation before the High Court including the PIL being Writ Petition (PIL) No.39/2012 and the order dated 20.08.2014 by the Hon'ble Division Bench. Similarly, reference is made to other orders in Special Civil Application No. 10768/2013 and allied matters. Therefore, the submissions have been made at length referring to the background of the facts that in earlier round, the Hon'ble Division Bench had directed the respondent no.3 to decide the issue, however, the respondent no.3 has not decided the question and has mechanically passed the impugned order. The emphasis has been made that even if the Association or the Organization which had granted sports certificate, is required to have recognition for the purpose of grant and even if there is no recognition of such Association by the State Government, it may have affiliation with other recognized Association at the higher level

like Federation. Therefore, it has been emphasized that the documents produced by many petitioners state affiliation of Gujarat State Kabaddi Association with Amateur Kabaddi Federation of India and Gujarat State Olympic Association. Therefore it has been contended that even if there is any lapse or irregularity, the petitioners may not be made to suffer. Learned advocates have emphasized the observations in a judgment made by the Hon'ble Division Bench in PIL being Writ Petition (PIL) No.39/2012 dated 20.08.2014,

"However, we cannot lose sight of the fact that such appointments were made six long years back. Mere irregularity may not be sufficient to terminate such appointees, that too, summarily."

37. As stated above, whole issue cropped up in PIL being Writ Petition (PIL) No.39/2012 and the Hon'ble Division Bench directed to examine and scrutinize such certificates and irregularity in the appointments. It is because of such directions, the exercise has been undertaken due to the orders passed by the Courts. However as stated at length by some of the Counsel including learned Senior Counsel, Shri Y.N. Oza appearing with

learned advocate, Shri Nirzar Desai and learned advocate, Ms. Mamta Vyas that many candidates have submitted their sports certificates and/or testimonial for verification and there was a special camp for verification and, therefore, it cannot be said that the appointments of some of the petitioners are bogus or based on such certificates. Further it has been pointedly referred to the records to submit that the original record or the certificates have been given to the authority for the purpose of verification and, therefore, many candidates may not have the original certificates and their services are either terminated or show cause notices have been issued only on the ground that they have not produced the original certificate. This has led to heart burning and ground of litigation, which culminated into the appointment of the Special Committee by the Government. The Hon'ble Division Bench in PIL being Writ Petition (PIL) No.39/2012 made the appointments subject to result of the petition and, thereafter on the basis of the scrutiny, when the show cause notices came to be issued, again it was a matter of

litigation and the Committee had submitted the report, on the basis of which, the decision has been taken by the respondent – District Primary Education Officer, Kheda to terminate the services of the candidates, who did not possess the qualification prescribed by the Government as concluded by the Committee. The instructions were issued by the Director of Primary Education and, thereafter, the notice and the impugned order came to be passed. It is required to be stated that the report of the Committee was not placed on record till hearing before this Court and subsequently vide order dated 10.08.2018, the respondent – Government was providing an opportunity to clear the stand of the Government on affidavit and the contents of the report, which was placed on record. It was granted subject to the objection by learned Senior Counsel, Shri Shalin Mehta appearing with learned advocate, Shri Hemang Shah for some of the petitioners as well as learned advocate, Shri K.B. Pujara and other advocates appearing for the respective petitioners. Thereafter additional affidavit came to be filed and it has been stated that 64 more candidates

have been appointed than the original advertisement without following procedure contrary to the policy of the State Government. However it has been stated that during the inquiry, it has come on the record that the record of additional candidates, who have been appointed, is not available with the District Primary Officer or the District Panchayat. It is, therefore, contended that such appointments are back-door appointments without any record. Further it has been clearly stated in the affidavit that out of 257 candidates, data-base and the certificate of 9 candidates have been verified and it has tallied to the sports activities and, therefore, their appointments was approved. Further it is the case of some of the candidates even before the Committee that they are not benefited by additional marks of sport certificate. However there is some discrepancy while examining with the statement of the officers of the District Panchayat and, therefore, they are contradictory. Therefore, it is stated in the affidavit that their appointments appear to be doubtful as stated in Para Nos.8.4 to 8.5 of the reply. Moreover, it

is contended in the affidavit that there is no longer res-integra such appointments, which have been claimed on the bogus sport certificates, could be a matter of scrutiny and any such appointment could be bad as decided by this Court in a judgment in case of **Patel Tulsiben Ambalal (supra)**. It is stated that this judgment has been confirmed by the Hon'ble Division Bench as well as the Hon'ble Apex Court and, therefore, such issue cannot be permitted to be agitated and as per the direction given by the Hon'ble Division Bench, after the scrutiny, the notices have been issued and, thereafter, impugned order for termination have been passed.

38. Again affidavit in reply has been filed by the respondent no.3 – District Primary Education Officer in some of the matters like Special Civil Application No. 14392/2014. It has made reference to PIL being Writ Petition (PIL) No.39/2012 before the Hon'ble Division Bench and this affidavit clearly refers to the fact that after the order of the Hon'ble Division Bench in the aforesaid PIL, scrutiny has been made after providing an opportunity to the concerned candidates, who are

the petitioners therein. It has been clearly stated that principles of natural justice have been complied with and the opportunity has been given to represent the case at various levels including by Committee appointed by the respondent no.1 vide Government Resolution dated 19.11.2012. It is also stated in detail that the advertisement was for the recruitment of 257 Vidyasahayak and 62 candidates have been appointed without approval and 32 appointees have been removed by the Kheda District Panchayat as their appointments were on the basis of unacceptable sports certificates. It is also stated that 64 wrongful appointments were already made.

39. Thus it transpires from the record that there have been rounds of litigation with regard to the weightage given for the sport certificates and the issues regarding the genuineness of the sport certificate. However as stated above, before it could be decided when the recruitment process has been undertake with the consideration of the sport certificate and when the Hon'ble Division Bench as per the order passed in Writ Petition (PIL) No.39/2012 directed to scrutinize and the

appointments to be made subject to the petitions, scrutiny has been made. However it is at that stage as referred to by learned advocates appearing for the petitioners in many matters that they have submitted the original certificates, the scrutiny have been made at the camp and the appointments have been made after the scrutiny and, hence, they would stand on a different footing partly than the appointment of so-called total irregular appointment made by way of back-door entries for 64 such candidates. At the same time, the issue is not with regard to only sport certificates but appointments, which have been made in excess of number of posts advertised. The submissions have been made by learned advocates for the petitioner that it is not factually so inasmuch as when the candidates, who have been appointed have not resumed or joint, further appointments have been made from the waiting list and, therefore, scrutiny based on the relevant material and record would be necessary apart from the aspect of genuineness of the sports certificate. Therefore, the recruitment procedure itself requires a closer scrutiny. Admittedly,

there is no record available as stated on record by the State. Further, the material or the record for the appointments of the special 64 candidates is also not there. It appears that it is after the order of the Hon'ble Division Bench in Writ Petition (PIL) No.39/2012 and other litigations, the Committee came to be constituted by the Government by Government Resolution dated 19.11.2012 for the purpose of scrutiny of the entire process of recruitment. The report has been made by the Committee which is now subsequently placed on record after this Court passed an order. Therefore, the report of the Committee would be most relevant, which could throw light on the aspect of the recruitment procedure when there is no material available and which would not have been available for perusal of the Court. The report has clearly stated about the irregularities and at the same time, has clearly stated that the record was not available. Therefore, it has clearly stated that in a meeting dated 26.08.2012, certain facts were noted inter alia that the appointments of 64 candidates were found to be doubtful. However these appointments have been

said to be doubtful as local officers had not produced the record before the Committee. Thereafter apparent irregularity etc. have been referred to. However it has been stated that after the resignation of the candidates, though waiting list was required to be prepared, no record was available. Similarly, 257 vacancy were filled up. Out of 64 candidates, 51 candidates were given appointment on the basis of the sport certificate. Thus 64 candidates as referred, are not in the merit list. At the same time, there is reference to the verification of such certificate at the camp at Gandhinagar, but no verification or scrutiny was made by the authority or competent officer as recorded in the report. Therefore inspite of the directions and the instructions by the Director of Primary Education, the concerned District Primary Education Officer and/or representative had not made necessary scrutiny or had not followed the instructions. The report clearly states that for special 64 candidates, who are said to have been appointed, no record is available nor there is any waiting list. Therefore, they have stated that since the

instructions of the Director of the Primary Education have not been followed up and no record is available, if the termination is made, it may lead to litigation and reference is also made to the irregularity at the lower level. It has been specifically recorded that the irregularity are not by the candidates and it cannot happen without the support from the administration at the local level and there is also abuse of the exercise of power. Therefore, as the report as stated in a very balance way about the facts prevalent candidly stating about the role of the concerned officer at the local level and also the fact that without their cooperation and support, such appointment could not have been made. It has specifically noted that inspite of the directions by the Director, Primary Education to verify and scrutinize the sports certificate, which would have been included verification of special 64 candidates, who are said to have been appointed irregularly, it could have been noticed and verification could have been made from the record and the material at that very moment. However since it has not been done, the appointments have

been made and even these 64 candidates have been working for years. There is no explanation in the affidavit either by the respondent no.3 or the State as to why the direction given by the Director, Primary Education was not followed. It is stated during the argument that some inquiry was initiated against the concerned District Primary Education Officer or subordinates but it is also the fact that it has not been taken to a logical conclusion. Further had there been such irregularity including the abuse of the exercise of power at the local level, at the level of District Primary Education Officer, Kheda and its subordinates and also there are irregular appointments, for which, material was also been made available, the complaints could have been filed including criminal complaint for the alleged misconduct or the offence. There is nothing on record to suggest what steps were taken if the record was missing and not available after at-least Committee had insisted for production. It is a serious matter and it could have been taken seriously by filing criminal complaint against the erring officer at the local level and also by

appropriate departmental measures. As stated at the bar, initially no such action was taken and departmental proceedings were initiated belatedly with reluctance.

40. It is in this circumstances, even after the appointment of the Committee for the fact finding and verification on the basis of the material, it has been specifically recorded about the lack of material and inferences are drawn and on the basis of which, action is taken, which is challenged in the present petition. It is in this circumstances, without any material coupled with the different lapses as reflected from the report and when even before the Committee, material is not produced nor any steps have been taken at that stage, the Court would find it difficulty to accept the submissions made by the respondents about the irregularity or the illegal appointments. There is no quarrel that any appointment or the public employment obtained on the basis of falsehood cannot be sustained and it has to be set aside. However in the facts of the case, submissions have been made with emphasis about the irregularity and the fraud or in connivance with the local officer by the candidate

suggesting that as they are beneficially, they would be guilty of the connivance and, therefore, inference has to be drawn, are misconceived.

41. On the other hand, learned advocates for the petitioners including learned advocate, Shri Pujara as well as learned Senior Counsel, Shri Shalin Mehta have specifically submitted that even if the irregularity is accepted, the petitioners cannot be blamed, particularly, when after the appointment or during the process, there was stages for scrutiny and verification, which have been done in some cases as submitted by learned advocate, Ms. Vyas that verification has been made and they have submitted the originals. This itself suggests that it could not have been possible even if the petitioners had desired without the active cooperation and support from the officer of the District Primary Education Officer and its subordinates. Even the Committee has in the report clearly referred to this aspect. Therefore, the submission about the fraud and the irregularity has to be *prima facie* established with the material, which is missing in the present case. It is because the material is not available, the

inference is sought to be drawn because some of the petitioners are beneficiary. Even if it is accepted that some of the petitioners are beneficiary, entire procedure cannot be set aside particularly when many petitioners having undergone entire selection procedure are appointed and there was verification or scrutiny of the certificates or testimonials. Therefore, the issue of fraud and irregularity does not fulfill the necessary criteria with necessary material and it fall short of the required criteria for inference or the conclusion that the appointments were by way of fraud only. It is at that stage, the judgment of the Hon'ble Apex Court in case of **Mahipal Singh Tomar Vs. State of Uttar Pradesh & Ors.**, reported in (2013) 16 SCC 771 referred to and relied upon by learned senior Counsel, Shri Shalin Mehta as well as learned advocate, Shri K.B. Pujara, is required to be considered. (Para No.13).

42. Therefore, the submission made by learned advocate, Shri Munshaw for the respondent no.3 cannot be readily accepted. The emphasis on the aspect of irregularity stares in the face even

with regard to the respondent no.3 and the role played by the respondent no.3. Therefore even if it is assumed for the sake of argument that the petitioners, particularly, those 64 candidates, who are beneficiary and their appointment is irregular even then, totality of the facts would require consideration of the relevant facts like,

- (1) passage of time;
- (2) fact that the petitioners have been working and functioning for many years;
- (3) even if it is by way of interim relief, they have continued but the fact would not change that with the passage of time, they have been over-age and are debarred from claiming any appointment elsewhere.

43. Further as rightly submitted, some of the petitioners might have let go other option and to that extent, they have altered their position, which may cause prejudice if this factual background is not considered. It is in this circumstances, having regard to the totality of the facts and even if there is any irregularity coupled with the fact that no material or record is available for scrutiny even before this Court,

action cannot be justified. Moreover when the report of the Committee was not produced throughout and it has been produced after the order of this Court, the petitioners would have further opportunity to throw some light on the report. Therefore, the present petitions deserves to be allowed.

44. At the cost of repetition, it is required to be noted that this Court has noted the irregularity and any appointment claimed on the basis of the falsehood or misrepresentation or by fraud would disentitle the persons and there is no quarrel on the issue and law declared by the Hon'ble Apex Court. However in peculiar facts as stated and discussion hereinabove, where because of the lack of material coupled with the relevant other circumstances as discussed above, it may not be justified to sustain the order of termination at this stage and, therefore, even if it is assumed that there is any irregularity, circumstances would not justify the termination. It is not possible to segregate the case of special 64 candidates, who have been appointed irregularly once whole process is not set aside nor it can be

said that they are at fault or they are to be blamed, therefore even for those 64 persons, who are said to be beneficiary, the report as stated above has clearly indicated that no material is available and if the appointments are made from waiting list after some candidates have been joined, the appointments or so-called excess appointments also cannot be set aside. Therefore accepting the irregularity and some kind of connivance with some of the petitioners as beneficiary may have played mischief, since they are all eligible, they have been appointed and working for many years, now they are age bar and having no option and have settled in their life and, hence, it would cause prejudice. Further it is not that these candidates alone are to be blamed or they have played fraud or mischief resorting to falsehood to get the appointment, which would have rendered them liable for such consequences for termination, but as recorded, the Committee of the Government specifically has recorded that it could have been done with the active support of the District Primary Education Officer and the subordinates and when no other

material is available, it may not be justified to blame the petitioners. Therefore, the present petitions deserve to be allowed.

45. In the circumstances, the present group of petitions stands allowed. The impugned notice dated 01.07.2013 asking the petitioner to produce sport certificate and the impugned orders dated 23.09.2014 terminating the services of the petitioners in respective petitions are hereby quashed and set aside. Rule is made absolute to the aforesaid extent.

46. Registry is directed to place copy of this judgment in each matter.

Sd/-
(RAJESH H. SHUKLA, J.)

Gautam