

A MANDEEP KUMAR AND OTHERS

v.

U.T. CHANDIGARH & OTHERS

(Civil Appeal No. 1908 of 2022)

B MARCH 9, 2022

[INDIRA BANERJEE AND J. K. MAHESHWARI, JJ.]

- Punjab Scheduled Castes and Backward Classes (Reservation in Service) Act, 2006 – s.7 – De-reservation/Interchangeability of the post of SC/ST category of Elementary Trained Teachers (ETT) to OBC category – Held: Interchangeability can be done by the department and not by the appointing authority – s.7 of 2006 Rules stipulates that de-reservation of any reserved vacancy which is to be filled up by direct recruitment or by promotion cannot be done by the appointing authority – In case due to non availability of the eligible candidates of any of the category, the posts remain unfilled, the appointing authority may request to the Department of Welfare of Scheduled Castes and Backward Classes for de-reservation of the said unfilled vacancy – The said de-reservation may be possibly directed by the Department of Welfare of Scheduled Castes and Backward Classes if it is expedient in public interest after recording satisfaction for such de-reservation – The policy letter issued by the state government which was withdrawn but later restored makes it clear that the instructions are not in contravention of s.7 of 2006 Rules – Service law.*

F Dismissing the appeal, the Court

- G HELD:** As per Section 7 of 2006 Act, de-reservation for the reserved vacancy by the appointing authority is restricted. The said de-reservation may be possibly directed by the Department of Welfare of Scheduled Castes and Backward Classes if it is expedient in public interest after recording satisfaction for such de-reservation. In the said contingency the department shall pass an order assigning those reasons. Thus, in the context of 2006 Act also the de-reservation or interchangeability may be possible with a rigour to exercise such

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power by the department, namely; Department of Scheduled Castes and Backward Classes and not by appointing authority. The Policy letter No. 1945-WG-54-17246 which was withdrawn on 11.11.1964, later restored vide letter dated 20.06.1974 makes it clear that those instructions are not in contravention of the provisions of Section 7 of the 2006 Act; in fact, it is as per the spirit of the 2006 Act. Therefore, the interchangeability of the vacant unfilled posts of SC category may be possible due to not having eligible candidates by the department concerned but not by appointing authority. In the said context, the letters returned by the Education Department in favour of the appellants to the department concerned are not of much relevance in particular when the department concerned have not agreed upon the request of interchangeability of the unfilled posts of SC/ST category and refused to accept the request of the appointing authority. [Para 20][831-A-E]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1908 D
of 2022.

From the Judgment and Order dated 17.01.2020 of the High Court of Punjab and Haryana at Chandigarh in CWP No.24383 of 2016.

P. S. Patwalia, Sr. Adv., Gauravjit Singh Patwalia, Tushar Bakshi, E
Advs. for the Appellants.

Karan Bharihoke, Adv. for the Respondents.

The Judgment of the Court was delivered by

J. K. MAHESHWARI, J.

1. Leave granted. F
2. The instant appeal arises out of the judgment dated 17.01.2020, passed by the High Court of Punjab & Haryana in Civil Writ Petition No. 24383 of 2016, whereby the aforesaid Writ Petition was dismissed on the basis of statement made by learned Additional Advocate General of the State of Punjab regarding the decision taken by the authorities to re-advertise the unfilled posts of Elementary Trained Teachers (in short “ETT”) afresh and to fill up it in accordance with law. Being aggrieved by the said judgment, the appellants have preferred the instant appeal. G

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- A 3. The controversy in nutshell brought by way of suo moto PIL registered by the High Court of Punjab & Haryana pertained to inaction of the State of Punjab in filling up of vacancies of ETT, which were advertised vide two separate advertisements dated 08.11.2015 and 30.07.2016. In the abovesaid advertisements, total of 4500 and 2005 vacancies of ETT were notified under various categories inclusive of SC/ST, OBC, freedom fighter, handicapped etc. respectively. After entertaining the Public Interest Litigation and as per the interim directions of the High Court, the posts of ETT had been filled up as per merit and category wise. But due to not having selected eligible candidates of SC/ ST category those posts remained vacant. Now, it is the grievance of the appellants that the unfilled posts of SC/ST category may be filled from the eligible candidates of Backward Class category, directing interchangeability of the said vacant posts.
- B 4. The facts as put forth in appeal, the appellants have applied for the post of ETT in the category of Backward Class. Pursuant to the advertisement, selection process was carried out and appointment letters were issued to the selected candidates. All the notified posts of Backward Classes have been filled up merit wise after the direction of the High Court. In the said process of selection, 595 posts of SC/ST category remained unfilled on account of “non- availability” of eligible candidates in the said category. The appellants herein are claiming appointment against those vacant posts of SC/ST category on the anvil of policy instructions regarding “Reservations of vacancies in State Government Services of members of Backward Classes”, issued by State of Punjab vide letter no. “1945-WG-54- 17246, dated 17.03.1954 (hereinafter to be referred to as Policy letter No.17246). The aforesaid Policy letter provide for “de-reservation/ interchangeability” of the post from SC/ST category to OBC category or vis-à-vis in a contingency of non-availability of eligible candidates belongs to SC/ST or OBC, as the case may be. The appellants submitted various representations to the concerned authorities on the basis of the said Policy letter for interchangeability of the posts of SC/ST into OBC category, which as per appellants was not considered in a right perspective. Now by order impugned as per the statement made by the State Government those posts are being re-advertised, without redressing their grievance.
- C 5. Mr. P.S. Patwalia, learned senior counsel for the appellants contends that against un-filled posts of SC/ST category in terms of
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instructions issued vide Policy letter No. 17246 interchangeability of the post from SC/ST to OBC category is permissible. Sub-section 2 of Section 7 of The Punjab Schedule Castes and Backward Classes (Reservation in Service) Act, 2006 (for short “the 2006 Act”) does not restrain the State Government to fill up the un-filled vacant post of SC/ST category by OBC category by interchanging the same. The respondent-State despite an order of the High Court has rejected the claim, relying upon the instructions issued vide letter No. 1945-WG-54/17248 dated 17.3.1954 (hereinafter to be referred to as “Policy letter No. 17248”) on 2.8.2019, though it is not applicable to the subject in context. This fact was brought to the notice of the Court, however an order was passed on 2.12.2020, directing the respondent to pass order, strictly in accordance with the penultimate paragraph of the order dated 07.09.2018 of the High Court within four weeks. The State Government again vide order dated 11.12.2020, rejected the claim mentioning the incorrect fact of withdrawal of instructions of the Policy letter No. 17246. In fact, the said instructions were restored vide letter No. 1346-SW1-74/11491 dated June 20, 1974 and is in existence. Thus, the State Government sit tight over the matter ignoring their own policies and making attempt to rely the instructions, having no application in the issue. After passing the impugned order dated 17.1.2020 and during pendency of the present appeal, fresh advertisement to fill up the Posts of ETT has been issued without ventilating the grievance of the appellants regarding interchangeability of the posts and to consider the appellants for appointment on the above said Posts.

6. Per contra, Mr. Karan Bharihoke, learned counsel representing the respondent Nos. 2 to 4 contends that as per Section 7 of 2006 Act, de-reservation is not permissible. In terms of the provisions of the 2006 Act and the instructions issued by the State Government, the claim of the appellants has been reconsidered by the Department of Social Justice, Empowerment and Minority, and vide reply dated 5.1.2021 rejected the claim of the appellants. It is urged that by issuing the fresh advertisement, the process to fill up of the vacant posts of ETT in the State has started, however the High Court has not committed any error while passing the order impugned. The State Government in compliance to the order of the High Court is duty bound to fill up the vacant posts of ETT as expeditiously as possible, therefore now process of selection has been started.

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- A 7. After having heard learned counsel for the parties and on perusal of the facts of the present case, it is apparent that to fill up the posts of ETT, advertisements were issued on 9.11.2015 for 3522 posts and vide corrigendum dated 13.1.2016, additional 978 posts were again notified making the total posts 4500. In another set of process of recruitment, by subsequent advertisement dated 30.7.2016, 2005 posts of ETT were notified. Appellants applied under both the advertisements and undergone the process of selection for the posts of ETT, and also found place on merit.
- B 8. The Public Interest Litigation came to be registered by High Court because certain applicants belonging to the Backward Class category protested by holding out threats to commit suicide against the inaction of the State of Punjab. As per the protestors, they had qualified their test and were eligible for appointment as ETT. They further insisted that a meeting be held regarding their demands with the Chief Minister of Punjab. The said incident gathered media attention, whereafter, the High Court of Punjab and Haryana took "suo-moto" cognizance on the issue on judicial side treating it as Public Interest Litigation, registering the same i.e., as CWP. No. 24383 of 2016.
- C 9. The said writ petition was disposed by the High Court vide order dated 23.12.2016 with the following directions:
- E "We are of the view, that the methods adopted by the protesters are unfortunate, improper and incorrect. It is to be noticed that at one stage the persons protesting had stated that once the process was initiated, they would end their protest and now, even appointment letter is being offered, but one of the protesters is somewhat unrelenting. In the circumstances, the further continuation of the Court proceedings may not be proper. However, the matter was taken up as it was viewed that the protesting youth may not loose their lives by their misplaced notions and for this they needed counselling and guidance.
- G Ms. Tanu Bedi, Advocate (Amicus Curiae) has emphasized that the matter be kept pending for laying down guidelines in future in such cases. Though we would have liked to do so but for the present, it would be just and expedient to put a quietus to the matter so that the person protesting can climb down from the tower and seek his appointment as Elementary Teacher after
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complying with the necessary formalities. Besides, the State shall continue with its process of offering appointment letters to the Elementary Teachers whose turn on merit has reached so that the recruitment process against the 4005 and the 2005 posts of Elementary Teachers is completed and the vacant posts are filled.

Mr. H.C. Arora, Advocate as also Mr. Jagmohan Singh Bhatti, Advocate (Amicus curiae) and Ms. Tanu Bedi, Advocate (Amicus Curiae) State that they shall jointly file a PIL in this regard. They may do so.

The present petition is, accordingly disposed of.”

10. Thereafter, C.M. No. 5766 of 2017 was filed before the High Court on 3.4.2017 by the appellants informing about the subsequent developments which transpired after passing the said order. The response was sought from the Director, Public Instruction (Elementary Education). A comprehensive affidavit was filed apprising about the vacancies and the steps taken by the Department of School Education for de-reservation/ interchangeability of the post of Schedule Caste/Tribe category to OBC category.

11. As per the response, it is not disputed that 595 posts of SC/ST category are not yet filled due to non-availability of the eligible candidates in the said category. It is also not disputed that out of the said process of selection, about 100 eligible candidates of OBC category were available. It is said the Suo Moto Writ Petition No. 24383 of 2016 was registered to maintain law and order situation due to the protest raised by unemployed youths climbed on tower on account of not filling the posts of ETT. It was further stated that merit candidates of Backward Classes have already been appointed on the vacant posts of the said category. Now they are claiming interchangeability of the 595 unfilled posts of SC/ST category to Backward Class category as per the Policy letter No. 17246. It is further urged Section 7 of the 2006 Act confers powers to the State Government to take decision if expedient in public interest.

12. On perusal of record, it reveals the High Court vide order dated 9.2.2018 directed the Department of Welfare, Government of Punjab to take a decision on the letter of the Department of School Education affording due opportunity of hearing to the applicants. The High Court also granted time to the candidates of Backward Class category to file the fresh representation for consideration. There after

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- A vide order dated 9.5.2018 passed by the Principal Secretary, Department of Welfare of Scheduled Castes, Backward Classes and Minorities, these representations were rejected relying on the instruction letter No. 17248. It is true those instructions were not applicable and they had to consider the Policy letter No. 17246, relevant on the issue. There after High
- B Court vide order dated 7.9.2018 directed the State Government to pass a fresh order in terms of the Policy letter No. 17246. The State Government filed the reply by way of additional affidavit before the High Court and said that Department of Social Welfare, Punjab vide letter dated 4.10.2018 declined to interchange the vacant post of SC/ST category to the Backward Class. In the meantime, Writ Petition (PIL)
- C No. 108 of 2019 was filed before the High Court making prayer to issue the direction to the State of Punjab to fill up the said vacant posts of Scheduled Caste category, which was disposed of vide order dated 15.05.2019. The application filed by the appellants in the said Writ Petition for modification was also disposed off observing that while passing the order, the appellants/applicants may also be given an opportunity of hearing. Thereafter, Director, Education Department on 16.8.2019 wrote a letter to the Principal Secretary, Social Justice, Empowerment and Minorities (Reservation Cell) seeking guidance regarding interchangeability. The Department of Social Justice, relied upon the order dated 9.5.2018 and said the interchangeability of the posts is not
- D permissible. The High Court after the response, passed the order impugned dated 17.01.2020 dismissing the writ petition with the following observations:
- E “Having perused the record, it is also observed that a public interest litigation CWP-PIL-108-2019 was filed before this Court praying for issuance of a direction to the State of Punjab to fill up the aforesaid vacant posts of Schedule caste category, which petition has been disposed of by this Court vide order dated 15.5.2019 directing the State of Punjab to consider the representation of public interest petitioners. IT is further observed that a
- F miscellaneous application was filed by certain OBC candidates seeking recall and modification of the direction issued by this Court on 15.05.2019 in CWP-PIL-108-2019, which has also been disposed of by this Court by order dated 30.5.2019 with a modification that the applicants would also be granted hearing by the authorities while taking a decision.
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The respondents in their additional affidavit have placed order dated 02.08.2019 on record passed by the Director, Education, Punjab, in compliance with the order passed by this Court in Public Interest Litigation as well as the order of modification dated 30.05.2019. From a perusal of the same, it is evident that the authorities have examined the issue and have rejected the claim of the applicants.

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The learned Additional Advocate General, appearing for the State of Punjab submits that the authorities have now taken a decision to re-advertise the posts and fill up the same in accordance with law.

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In view of the aforesaid facts and events that have transpired, we do not find any reason to keep the present petition pending which was initiated suo moto by this Court on account of the illegal mode of protest adopted by certain persons. More so, in view of the fact that the issue that was subsequently taken up by this Court in the present case, has already been addressed and appropriate orders have been passed in CWP-PIL-108-2019. In the circumstances, as nothing further survives for decision in the present suo moto writ petition, the same is accordingly dismissed, taking the statement of the learned Additional Advocate General, Punjab on instructions from Ms. Malka Rani, Senior Assistant, DPI(EE) on record, that they are taking up steps for filling up the posts in accordance with law, including the steps of examining the issue of seeking dereservation, if so advised, as contained in Section 7(2) of the Punjab Scheduled Castes and Backward Classes (Reservation in Service) Act, 2006.

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In view of the aforesaid discussion, as the petition is dismissed no further orders are required to be passed by this Court in the applications filed by the applicants.”

13. On filing the present appeal and after issuance of notice, indeed on 2.12.2020 this Court passed the following order

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“Having heard Shri P.S. Patwalia and Shri Bharihoke at same length, it appears clear to us that the High Court order dated 07.09.2018 in particular:

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“Learned State counsel prays for time to seek instructions and to file an affidavit in this regard. In case it is found that the earlier order passed was based on instructions issued vide letter

- A No. 1945-WG-54/17248 dated 17.3.1954, then the respondent-Department shall pass a fresh order on the basis of the instructions vide letter No. 1945-WG-54-17246 dated 17.3.1954.”
- B has not yet been complied with. We had been shown an order dated 02.08.2019 which merely reiterates the 07.09.2018 order without the Government applying its mind to the penultimate paragraph of the High Court order dated 07.09.2018 set out hereinabove.
- C We therefore, direct the respondent to pass an order strictly in accordance with the penultimate paragraph of order dated 07.09.2018 within four weeks from today.
- The interlocutory application is disposed of accordingly.
- Application for impleadment is dismissed as withdrawn.”
- D 14. In response to the order, the additional affidavit is filed before this Court, inter alia, contending that the interchangeability of the posts of SC/ST category of ETT to OBC category is not permissible with regard to the instructions contained in Policy letter No. 17246, it is said those instructions have already been withdrawn. It is stated that the de-reservation/ interchangeability of the post from SC/ST category to
- E OBC category is not permissible as per Section 7 of 2006 Act.
- F 15. In this regard to appreciate the arguments, the provision of Section 7 of 2006 Act is required to be quoted for ready reference, which is reproduced as thus:
- G “7. De-reservation of reserved vacancy. – (1) There shall be no de-reservation of any reserved vacancy by any appointing authority in any establishment, which is to be filled up by direct recruitment or by promotion. In case, a qualified or eligible Scheduled Castes or Backward Classes candidate, as the case may be, is not available to fill up such vacancy, in that situation, such vacancy shall remain unfilled.
- H (2) Notwithstanding anything contained in sub-section (1), if, in the public interest, it is deemed necessary to fill up any vacancy referred to in that sub-section, the appointing authority shall refer the vacancy to the Department of Welfare of Scheduled Castes and Backward Classes for de-reservation. Upon such reference,

the Department of Welfare of Scheduled Castes and Backward Classes may, if it is satisfied that it is necessary or expedient so to do, by order in writing, de-reserve the vacancy, subject to the condition that the vacancy so de-reserved, shall be carried forward against a subsequent unreserved vacancy. “

16. From the bare reading of the aforesaid, it is clear that de-reservation of any reserved vacancy which is to be filled up by direct recruitment or by promotion cannot be done by the appointing authority. In case due to non-availability of the eligible candidates of any of the category, the posts remain unfilled, the appointing authority may request to the Department of Welfare of Scheduled Castes and Backward Classes for de-reservation of the said unfilled vacancy. On such request after recording satisfaction, if necessary or expedient in the public interest, subject to the condition to carry forward the said vacancy against subsequent unreserved vacancy the order may be passed by the said department.

17. In this context, the instructions issued vide Policy letter No. 17246 are also relevant, which are extracted and reproduced as thus:

“Government have now decided that, on the basis of their population, an additional 2 per cent of vacancies in the State Government services should also be reserved for members of the ‘Backward Classes’ and that before vacancies reserved for Backward Classes are thrown open to others, they should first be offered to candidates of Scheduled Castes/Tribes, if available. In the same way, before vacancies meant for Scheduled Castes/Tribes are thrown open to others owing to unavailability of suitable candidates, they shall be offered first to the backward classes.”

18. The aforesaid Policy letter was withdrawn vide letter No. 13565-4WGI-64/23892 dated 11th November, 1964, but it was again restored adding some conditions vide letter No. 1346-SW1-74/11491 dated 20.06.1974; the relevant extract of such instruction is also reproduced as thus:

“I am directed to refer to the subject noted above and to say that prior to 11th November, 1964, in the event of non-availability of Scheduled Castes/Tribes candidate against a reserved vacancy, preference was given to Backward Classes candidates and vice versa, over other general candidates. This inter-changeability of

- A reserved vacancies was withdrawn – vide para 4 of Punjab Government letter No. 13565- 4WG1-64/23892 dated 11th November, 1964, with the result that if a reserved vacancy is not filled by the candidate belonging to the particular category for which it is reserved it is carried forward in accordance with the current instructions, or, if this is not possible, it is thrown open to other generally.
- B 2. This matter has been engaging the attention of Government for some time past and it has now been decided that after the carry forward rule has been exhausted and a suitable scheduled cast candidate has still not become available, a vacancy reserved for this category should first of all be offered to a candidate belonging to the Backward Classes, before it is thrown open for general recruitment. In case a Backward Class candidate avails of such a vacancy, the vacancy properly reserved for a Backward Class candidate later in the roster would then go to a Scheduled Caste candidate instead.
- C 3. The receipt of this communication may please be acknowledged.
- D 19. The clarification as issued vide letter No. 2/246/78- SW3/7416 dated 10.12.1979 written by the Secretary to Government of Punjab, Scheduled Caste and Backward Classes to all heads of Departments is also relevant however, reproduced as under:
- “Subject: Reservation in services for members of Scheduled Castes and Backward Classes- Interchangeability of reserved posts between them.**
- E F I am directed to invite a reference of Punjab Government letter No. 1346-SW1-74/11491 dated 20th June, 1994 and letter No. 771-SW1-76 dated 6th April, 1976, on the subject noted above, and to say while giving the benefits of interchangeability to a backward Class candidate and vice-versa, the Department do not obtain no-objection certificate from the Department of Welfare of Scheduled Castes and Backward Classes despite clear provision in the instructions. To make it clear, under the instructions, no-objection certificate is a must before the vacancy meant for Scheduled Castes person is offered to a Backward Class candidate and vice-versa.
- G H 2. Its receipt may please be acknowledged.”

20. From the above it is clear that as per Section 7 of 2006 Act, de-reservation for the reserved vacancy by the appointing authority is restricted. The said de-reservation may be possibly directed by the Department of Welfare of Scheduled Castes and Backward Classes if it is expedient in public interest after recording satisfaction for such de-reservation. In the said contingency the department shall pass an order assigning those reasons. Thus, in the context of 2006 Act also the de-reservation or interchangeability may be possible with a rigour to exercise such power by the department, namely; Department of Scheduled Castes and Backward Classes and not by appointing authority. If we examine the Policy letter No. 1945-WG-54-17246 which was withdrawn on 11.11.1964, later restored vide letter dated 20.06.1974 makes it clear that those instructions are not in contravention of the provisions of Section 7 of the 2006 Act; in fact, it is as per the spirit of the 2006 Act. Therefore, in the net result, the interchangeability of the vacant unfilled posts of SC category may be possible due to not having eligible candidates by the department concerned but not by appointing authority. In the said context, the letters returned by the Education Department in favour of the appellants to the department concerned are not of much relevance in particular when the department concerned have not agreed upon the request of interchangeability of the unfilled posts of SC/ST category and refused to accept the request of the appointing authority. In addition to the aforesaid it is required to be observed in the manner in which the protest was started by the candidates of the OBC category was not justified. The High Court has rightly observed that steps taken by the protestors were unfortunate, improper and incorrect. The suo moto PIL No. 108-2019 was entertained to save the life of protesting youth, and it should not be influenced by misplaced notions and they may be counselled or guided by the authorities. However, after issuing the direction, the candidates of the OBC category were appointed in terms of their merit. Thereafter, by filing the miscellaneous applications and subsequent writ petitions the relief to fill up the vacant posts of SC/ST category from the candidates of the Backward Classes has been pressed upon, which has been rejected by the High Court by the order impugned. At this stage it cannot be lost sight that the merit list was prepared in furtherance to the advertisement of the year 2015-2016 and to accommodate the candidates of the said merit list. Thereafter interchangeability for unfilled 595 vacancies of SC/ST category has been prayed for. In our considered opinion, issuance of such direction after 6

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- A years of notifying the selection list for filling up the unfilled vacancies of SC/ST category by OBC would be wholly unjustified. In addition, the selection list prepared in the year 2016 would not survive after the lapse of a long time to fill up the vacancies after interchangeability. It is to observe that rejection of claims of appellants by the departmental authorities relying upon wrong instructions or mentioning incorrect fact of withdrawal of Policy letter No. 17246 would not confer any right to appellants to claim the reliefs. Such an act of the departmental authorities may be deprecated but it would not confer any right to the appellants to seek direction of interchangeability of the unfilled 595 posts of ETT of SC/ST category to OBC category. Therefore, the argument advanced
- B by learned senior counsel Mr. Patwaria in this regard is hereby repelled. As stated by the respondent, the process to fill up the vacant posts of ETT in the state has already been advertised, which is in accordance to law. Therefore, in view of the discussion made hereinabove, we are not inclined to grant the relief as prayed in this appeal.
- C 21. In view of the foregoing discussion, we are not inclined to interfere in the order impugned. Accordingly, this appeal stands dismissed. No order as to costs.

Devika Gujral
(Assisted by : Shevali Monga, LCRA)

Appeal dismissed.