

**HIGH COURT OF TRIPURA
AGARTALA
WP(C) No.322 of 2025**

Sri Santanu Biswas,

S/o Late Santosh Chandra Biswas,
Resident of village & PO-Gangachara,
PS-Kakraban, Sub-division-Udaipur,
District-Gomati Tripura, PIN-799125,
aged about 41 years.

----- Petitioner(s)

Versus

- 1. The State of Tripura,**
Represented by the Secretary,
Department of Family Welfare &
Preventive Medicine, Government of Tripura,
having his office at New Secretariat Complex,
Agartala, PO-Kunjaban, PS-New Capital Complex,
Sub-Division-Agartala, District-West Tripura.
- 2. The Secretary,**
Family Welfare & Preventive Medicine,
Government of Tripura, having his office
at New Secretariat Complex, Agartala,
PO-Kunjaban, PS-New Capital Complex,
Sub-Division-Agartala, District-West Tripura.
- 3. The Secretary,**
Department of health & Family Welfare,
Government of Tripura, having his office
at New Secretariat Complex, Agartala,
PO-Kunjaban, PS-New Capital Complex,
Sub-Division-Agartala, District-West Tripura.
- 4. The Director,**
Department of Family Welfare & Preventive Medicine,
Government of Tripura, having his office at Pandit
Nehru Office Complex, Gurkhabasti, PO-Kunjaban,
PS-New Capital Complex, Sub-Division-Agartala,
District-West Tripura.
- 5. The food Safety Commissioner & Secretary,**
Department of Health & Family Welfare,
Government of Tripura, having his office
at New Secretariat Complex, Agartala,
PO-Kunjaban, PS-New Capital Complex,
Sub-Division-Agartala, District-West Tripura.

----- Respondent(s)

For Petitioner(s)	:	Mr. Somik Deb, Sr. Adv. Mr. Pannalal Debbarma, Adv.
For Respondent(s)	:	Mr. Dipankar Sarma, Addl. GA.
Date of hearing	:	01.12.2025.
Date of delivery of Judgment & Order	:	08.12.2025
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This writ petition is filed by the petitioner seeking the following reliefs:-

- 2.** Heard Learned Senior Counsel Mr. Somik Deb, assisted by Mr. Pannalal Debbarma, Learned Counsel appearing on behalf of the petitioner and also heard Mr. Dipankar Sarma, Learned Addl. GA appearing on behalf of the State-respondents.
- 3.** Taking part in the hearing, Learned Senior Counsel for the petitioner first of all drawn the attention of the Court that the present petitioner was appointed to the post of Chemist vide memorandum dated 04.01.2011 issued by the authority (Annexure-1). Thereafter, he submitted his joining report to the authority which was duly accepted by the authority (Annexure-3). Later on, his appointment to the said post was further extended by order dated 14.06.2011 (Annexure-4) issued by the respective authority.

4. Learned Senior Counsel also submitted that by virtue of Notification dated 03.03.2011 (Annexure-5) issued by the Health & Family Welfare Department, Government of Tripura, the Public Analyst was appointed as Food Analyst for the purpose of sub-section 01 of Section 45 of the Food Safety & Standards Act, 2006 (*in short FSS Act, 2006*).

5. After that, the petitioner applied to the authority for his deputation to the Government of India, but the authority by Memorandum dated 14.03.2016 (Annexure-6) regretted his prayer. In the meantime, on 29.09.2016 the authority of the petitioner issued working certificate (Annexure-7).

6. After that, the petitioner approached the authority for appearing in the 5th Food Analyst Examination, 2018 which was allowed by Memorandum dated 01.09.2018 issued by the authority (Annexure-8) and the present petitioner qualified in the said examination and accordingly the Food Analyst Examination Board issued certificate that the petitioner was qualified to be appointed as Food Analyst in accordance with sub-rule 1(ii) of Rule 2.1.4 of the Food Safety and Standards Act, 2011 (Annexure-9).

7. Learned Senior Counsel further submitted that the petitioner sought permission from the department for permitting him to appear in the TCS/TPS Grade-II Examination which was also regretted by the department by memorandum dated 25.03.2019 (Annexure-10). But on 20.07.2019 the authority of the petitioner i.e. the Health & Family Welfare

Department, Government of Tripura by a notification officiated the petitioner as Food Analyst on interim basis in addition to his normal duties (Annexure-11) which was continued from time to time by subsequent Notification dated 17.08.2019 (Annexure-12), Notification dated 01.11.2019 (Annexure-13) and by another Notification dated 27.01.2021 (Annexure-14), the petitioner was further assigned with the duties of Chief Executive & Head of Laboratory in addition to his normal duties.

8. After that, in the year 2022, the petitioner was promoted to the post of Senior Chemist vide notification dated 28.04.2022 (Annexure -15) and his joining was duly accepted by the authority as Senior Chemist (Annexure -16).

9. Learned Senior Counsel further submitted that for better opportunity the petitioner thereafter, approached to the authority on 19.01.2023 (Annexure-17) and thereafter, again on 01.02.2023 (Annexure-18) for issuing No Objection Certificate to enable him to appear in the examination for the post of Food Analyst(Group-A) under the Government of Madhya Pradesh (Annexure-17) but the authority of the petitioner did not accept his representation and by memorandum dated 04.02.2023 (Annexure-19) regretted his proposal for issuing No Objection Certificate.

10. Learned Senior Counsel again submitted that as the petitioner had requisite qualification for the post of Food Analyst and he was not allowed to appear for examination in other state

for the said post of Public Analyst, so thereafter, the petitioner relying upon the judgment of Hon'ble Gauhati High Court, Agartala Bench in similarly situated situation in Civil Rule 180 of 1998 dated 01.06.2006 titled as **Dr. Karunamay Nath vs. The State of Tripura** approached the authority for appointing him as the Food Analyst on regular basis based upon the notification dated 20.07.2019 issued by the authority which was not considered by the authority and under compelling circumstances the petitioner has approached this Court for directing the respondent authority to promote him to the post of Food Analyst.

11. In support of his contention, Learned Senior Counsel for the petitioner first of all drawn the attention of the Court referring Section 45 of the FSS Act, 2006 and submitted that under the said provision there is a provision for appointing Food Analyst by the authority having the prescribed qualification and the present petitioner has got the requisite qualification but in spite of having the requisite qualification the authority did not consider his matter. Learned Senior Counsel also drawn the attention of this Court referring the qualification in respect of appointment of Food Analyst provided under Rule 2.1.4 of the Food Safety and Standards Rules, 2011 and submitted that the qualification as mentioned in the aforesaid Rule matches with the qualification of the present petitioner but the respondent authority in their counter affidavit took the plea that the

petitioner does not have experience of five years as per the Rules framed by the State Authority and as such, he was not eligible for the said post.

12. Learned Senior Counsel in support of his contention also draw the attention of the Court referring Section 91 of FSS Act, 2006 wherein in sub-section 2(e) power is given to the Central Government to make rules and referring Section 94 of the said Act, Learned Senior Counsel also submitted that although power is given to the State Government to make rules but by the said provision no power is given to the State Government to appoint and to determine the qualification of Food Analyst as referred under Section 45 of the said Act which is only given to the Central Government.

13. Learned Senior Counsel further submitted that in view of Article 246(2) of the Constitution of India although power is vested with the Parliament and the legislature of the State to frame clause in respect of the matters enumerated in Concurrent Lists as mentioned in the Seventh Schedule of Constitution of India. But in view of Article 254(2) of Constitution of India if the law made by the legislature of a State is repugnant to the Central law, in that case, the law made by the Parliament would prevail.

14. Referring the present case, Learned Counsel submitted that in the FSS Act, 2006 and the corresponding Rules regarding appointment of the Food Analyst, nothing is provided

by the Central Government that for appointment to the post of Public Analyst a person should have minimum five years of service experience. In such a situation, there was no scope on the part of the State authority to make a subordinate legislation prescribing the minimum period of five years experience for appointment to the said post of Public Analyst and as such, according to Learned Senior Counsel the Rules framed by the State authority is *ultra vires*, inoperative and not binding upon the petitioner.

15. So, Learned Senior Counsel urged for setting aside the Public Analyst, Health & Family Welfare Department Recruitment Rules, 2009 specifically the column No.11 of Schedule III of the said Rules and further submitted that since the petitioner has got requisite qualification for the post of Public Analyst as such, by framing subordinate legislation, the Rule made by the State Authority cannot debar the present petitioner from applying for the said post. It was further submitted that the State authority also cannot debar itself from promoting the petitioner to the said post and therefore Learned Counsel asked for issuing necessary directions.

16. In support of his contentions, Learned Senior Counsel relied upon the citation of the Hon'ble Supreme Court of India reported in **(2011) 3 SCC 139 [titled as Offshore Holdings Private Limited vs. Bangalore Development Authority &**

Ors.] wherein in para No. 63, 67-76 the Hon'ble Apex court observed as under:-

"63. As this was the principal argument vehemently addressed by the learned counsel appearing for the appellant, let us examine the ambit and scope of these entries and its impact on the validity of law so enacted. Article-246 of the Constitution of India provides the subject-matters on which laws can be enacted by Parliament or by the State Legislatures, as the case may be. In terms of Article 246(1) of the Constitution, Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I of Schedule VII, referred to as "the Union List". Article 246(2) empowers Parliament and the State Legislature, subject to Article 246(1), to make laws on any of the matters enumerated in List III of Schedule VII, termed as "the Concurrent List". Subject to clauses (1) and (2) of Article 246, the State has exclusive powers to make laws for such State, or any part thereof, with respect to any of the matters enumerated in List III of Schedule VII, termed as State List under Article 246(3). Article 246(4) gives power to Parliament to make laws with respect to any matter for any part of the territory of India not included in a "State" and notwithstanding that such matter is a matter enumerated in the State List.

67. The entries in the legislative lists are not the source of powers for the legislative constituents but they merely demarcate the fields of legislation. It is by now well-settled law that these entries are to be construed liberally and widely so as to attain the purpose for which they have been enacted. Narrow interpretation of the entries is likely to defeat their object as it is not always possible to write these entries with such precision that they cover all possible topics and without any overlapping.

68. We may refer to some of the judgments which have enunciated these principles over a considerable period. While interpreting the entries in the constitutional lists a seven-Judge Bench of this Court in *Union of India v. Harbhajan Singh Dhillon*: (1971) 2 SCC 779 held as under: (SCC p. 792, paras 22-24)

"22. It must be remembered that the function of the Lists is not to confer powers; they merely demarcate the legislative field. The Federal Court, while interpreting the Government of India Act in *Governor-General-in-Council v. Releigh Investment Co*: 1944 FCR 229 observed:
(FCR p. 261)

*... It would not be right to derive the power to legislate on this topic merely from the reference to it in the List, because the purpose of the Lists was not to create or confer powers, but only to distribute between the Federal and the Provincial Legislatures the powers which had been conferred by Sections 99 and 100 of the Act.'

23. In *Harakchand Ratanchand Banthia v. Union of India*: (1969) 2 SCC 166 Ramaswami, J., speaking on behalf of the Court, while dealing with the Gold (Control) Act (45 of 1968), observed: (SCC p. 174, para 8)

"8. Before construing these entries it is useful to notice some of the well-settled rules of interpretation laid down by the Federal Court and by this Court in the matter of construing the entries. The power to legislate is given to the appropriate legislatures by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate."

24. We are compelled to give full effect to Article 248 because we know of no principle of construction by which we can cut down the wide words of a substantive article like Article 248 by the wording of entry in Schedule VII. If the argument of the respondent is accepted, Article 248 would have to be redrafted as follows:

'Parliament has exclusive power to make any law with respect to any matter not mentioned in the Concurrent List or State List, provided it has not been mentioned by way of exclusion in any entry in List I.'

We simply have not the power to add a proviso like this to Article 248."

69. A Constitution Bench of this Court in *Ujagar Prints (2) v. Union of India*: (1989) 3 SCC 488 described these entries and also stated the principles which would help in interpretation of these entries. While enunciating these principles, this Court held as under: (SCC pp. 512-13, para 48)

"48. Entries to the legislative lists, it must be recalled, are not sources of the legislative power but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression 'with respect to' in Article 246 brings in the doctrine of 'pith and substance' in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially 'with respect to' the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic."

70. This Court, while referring to the principles of interpretation of entries in the legislative lists, expanded the application to all ancillary or subsidiary matters in *Jijubhai Nanabhai Kachar v. State of Gujarat* : 1995 Supp (1) SCC 596 and held as under: (SCC p. 609, para 7)

"7. It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power from Article 246 and other related articles of the Constitution. Therefore, the power to make the Amendment Act is derived not from the respective entries but under Article 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the Government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude."

This line of interpretation had been stated in *Hoechst Pharmaceuticals Ltd. v. State of Bihar*: (1983) 4 SCC 45 and followed in different judgments of this Court including the judgments cited above.

71. The courts have taken a consistent view and it is well-settled law that various entries in the three Lists are not powers of legislation but are fields of legislation. The power to legislate flows, amongst others, from Article 246 of the Constitution. Article 246(2), being the source of power incorporates the non obstante clause, "Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the legislature of any State" have power to make laws with respect to any of the matters enumerated in List III. Article 246 clearly demarcates the fields of legislative power of the two legislative constituents. It clearly states on what field, with reference to the relevant constitutional lists and which of the legislative constituents has power to legislate in terms of Article 246 of the Constitution. While the States would have exclusive power to legislate under Article 246(2) of the Constitution in relation to List II; the Concurrent List keeps the field open for enactment of laws by either of the legislative constituents.

72. In the event the field is covered by the Central legislation, the State Legislature is not expected to enact a law contrary to or in conflict with the law framed by Parliament on the same subject. In that event, it is likely to be hit by the rule of repugnancy and it would be a stillborn or invalid law on that ground. Exceptions are not unknown to the rule of repugnancy/covered field. They are the

constitutional exceptions under Article 254(2) and the judge enunciated law where the courts declare that both the laws can coexist and operate without conflict. The repugnancy generally relates to the matters enumerated in List III of the Constitution.

73. The Court has to keep in mind that it is construing a Federal Constitution. It is the essence of a Federal Constitution that there should be a distribution of legislative powers between the Centre and the Provinces. In a Federal Constitution unlike a legally omnipotent legislature like British Parliament, the constitutionality of a law turns upon the construction of entries in the legislative lists. If a legislature with limited or qualified jurisdiction transgresses its powers, such transgression may be open, direct or overt, or disguised, indirect or covert and it may encroach upon a field prohibited to it. Wherever legislative powers are so distributed, situation may arise where two legislative fields might apparently overlap, it is then the duty of the courts, however, difficult it may be, to ascertain to what degree and to what extent, the Authority to deal with the matters falling within these classes of subjects exist in each legislature and to define, in the particular case before them, the limits of respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other. (Refer A.S. Krishna v. Madras State: AIR 1957 SC 297 and Federation of Hotels and Restaurants v. Union of India: (1989) 3 SCC 634)

74. Keeping these principles in mind and applying different doctrines, as already referred, different Benches of this Court had the occasion to deal with the BDA Act. In *Munithimmaiah* (2002) 4SCC 326 the Court had taken the view that the BDA Act was a self-contained code enacted with reference to Entry 5 of List II and the provisions of Central Act 68 of 1984 cannot form an integral part of the BDA Act.

75. This two-Judge Bench judgment was reiterated with approval by a three-Judge Bench of this Court in *Bondu Ramaswamy*: (2010) 7 SCC 129 and while referring to the entries in the constitutional lists the Court rejected the contention that the law enacted under the BDA Act was referable to Entry 42 of List III of Schedule VII and held as under: (SCC pp. 173-75, paras 90 & 92)

"90. The second contention urged by the appellants is as follows: a development authority is a city improvement trust referred to in Entry 5 of the State List (List II of the Seventh Schedule). 'Acquisition of property' is a matter enumerated in Entry 42 in the Concurrent List (List III of the Seventh Schedule). The LA Act relating to acquisition of property, is an existing law with respect to a matter (Entry 42) enumerated in the Concurrent List. The BDA Act providing for acquisition of property is a law made by the State Legislature under Entry 42 of the Concurrent List. Article 254 of the

Constitution provides that if there is any repugnancy between a law made by the State Legislature (the BDA Act) and an existing Central law in regard to a matter enumerated in the Concurrent List (the LA Act), then subject to the provisions of clause (2) thereof, the existing Central law shall prevail and the State law, to the extent of repugnancy, shall be void. Clause (2) of Article 254 provides that if the law made by the State Legislature in regard to any matter enumerated in the Concurrent List, contains any provision repugnant to an existing law with respect to that matter, then, the law so made by the State Legislature, if it had been reserved for the consideration of the President and has received his assent, shall prevail in that State. It is contended that the provisions of Section 19 of the BDA Act are repugnant to the provisions of Section 6 of the LA Act; and as the BDA Act has not been reserved for consideration of the President and has not received his assent, Section 6 of the LA Act will prevail over Section 19 of the BDA Act. This contention also has no merit.

* * *

92. Where the law covered by an entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can coexist and operate without repugnancy to the provisions of the existing law. This Court in *Munithimmaiah v. State of Karnataka*: (2002) 4 SCC 326 has held that the BDA Act is an Act to provide for the establishment of a development authority to facilitate and ensure planned growth and development of the city of Bangalore and areas adjacent thereto, and that acquisition of any lands, for such development, is merely incidental to the main object of the Act, that is, development of Bangalore Metropolitan Area. This Court held that in pith and substance, the BDA Act is one which squarely falls under Entry 5 of List II of the Seventh Schedule and is not a law for acquisition of land like the LA Act, traceable to Entry 42 of List III of the Seventh Schedule, the field in respect of which is already occupied by the Central Act, as amended from time to time. This Court held that if at all, the BDA Act, so far as acquisition of land for its developmental activities is concerned, in substance and effect will constitute a special law providing for acquisition for the special purposes of BDA and the same will not be considered to be a part of the LA Act. The fallacy in the contention of the appellants is that it assumes, erroneously, that the BDA Act is a law referable to Entry 42 of List III, while it is a law referable to Entry 5 of List II.

Hence the question of repugnancy and Section 6 of the LA Act prevailing over Section 19 of the BDA Act would not at all arise."

76. Once we analyse the abovestated principle, it is obvious that entries in the constitutional lists play a significant role in examining the legislative field taking its source of power from Article 246 of the Constitution. The BDA Act is an Act which provides for formulation and implementation of schemes relating to development of Bangalore City. Acquisition of land is neither its purpose nor its object and is merely an incidental consequence of principal purpose of development of land. Planned development under the scheme is a very wide concept and the Authorities concerned are accordingly vested with amplified functions and powers."

Referring the same Learned Senior Counsel submitted that in view of Article 254 of the Constitution of India the law made by the Parliament would prevail over the law made by the State Legislature. So in the present case the rule framed by the authority in the year 2019 imposing a condition of five years experience cannot be applied in the present case for according promotion to the present petitioner.

17. Reliance was placed on another judgment of the Hon'ble Supreme Court in ***D.R. Yadav & Another vs. R. K. Singh & Another*** reported in **(2003) 7 SCC 110** wherein in para Nos.11, 20-21 the Hon'ble Apex Court observed as under:

"11. It is not in dispute that two different rules relating to determination of seniority were operating in the field; one being a general rule known as "the Uttar Pradesh Government Servants Seniority Rules, 1991"; the other being the special rules known as "the U.P. Development Authorities Centralised Services Rules, 1985" framed by the State of Uttar Pradesh in exercise of its powers conferred under Section 55 of the Uttar Pradesh Urban Planning and Development Act, 1973 read with Section 5-A thereof.

20. The 1991 Rules were framed by the Governor of Uttar Pradesh in exercise of his power conferred under the proviso appended to Article 309 of the Constitution of India. The proviso appended to Article 309 of the Constitution reads thus:

"Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act."

21. On a plain reading of the said provision, there cannot be any doubt whatsoever that rules framed thereunder would apply so long as a statute or statutory rules or any other subordinate legislation governing the conditions of service are not enacted or made or not otherwise operating in the field. In other words, rules made under the proviso to Article 309 of the Constitution are for a transitory period and the same would give way to the special rules once framed. However, if a statute or rules made thereunder was/were already operating in the field, the general rules made under the proviso to Article 309 would not apply to the services created thereunder."

Referring the same Learned Senior Counsel submitted that this present case is squarely covered by the said judgment.

18. Learned Senior Counsel further referred another decision of the Hon'ble Apex Court of India reported in **(2011) 8 SCC 708 [titled as Rajiv Sarin & Another vs. State of Uttarakhand & Others]** wherein para Nos. 51(11-12), 52 & 53 Hon'ble the Apex Court observed as under:

"51. Further, in Govt. of A.P. v. J.B. Educational Society: (2005) 3 SCC 212 this Court while explaining the scope of Articles 246 and 254 of the Constitution and considering the proposition laid down by this Court in M. Karunanidhi case: (1979) 3 SCC 431 with respect to the situations in which repugnancy would arise, held as follows at pp. 219-20: (J.B. Educational Society case (supra), SCC paras 9-11)

"11. With respect to matters enumerated in List III (Concurrent List), both Parliament and the State Legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament

and the State Legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict."

"12. ... First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the non obstante clause in Article 246(1), in the second, by reason of Article 254(1). Clause (2) of Article 254 deals with a situation where the State legislation having been reserved and having obtained the President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State legislation."

52. The aforesaid position makes it quite clear that even if both the legislations are relatable to List III of the Seventh Schedule to the Constitution, the test for repugnancy is whether the two legislations "exercise their power over the same subject-matter..." and secondly, whether the law of Parliament was intended "to be exhaustive to cover the entire field". The answer to both these questions in the instant case is in the negative, as the Forest Act, 1927 deals with the law relating to forest transit, forest levy and forest produce, whereas the KUZALR Act deals with the land and agrarian reforms.

53. In respect of the Concurrent List under the Seventh Schedule to the Constitution, by definition both the legislatures viz. Parliament and the State Legislatures are competent to enact a law. Thus, the only way in which the doctrine of pith and substance can and is utilised in determining the question of repugnancy is to find out whether in pith and substance the two laws operate and relate to the same matter or not. This can be either in the context of the same entry in List III or different entries in List III of the Seventh Schedule to the Constitution. In other words, what has to be examined is whether the two Acts deal with the same field in the sense of the same subject-matter or deal with different matters."

Referring the same Learned Senior Counsel submitted that although the State has framed a Rule in exercise of the powers under Article 309 of Constitution of India in the year 2009 but that would not debar the respondent authority to consider the promotion of the present petitioner to the post of Public Analyst.

19. Finally, Learned Senior Counsel relied upon another citation of the Hon'ble Supreme Court of India reported in ***(2016) 3 SCC 643 [titled as Shree Bhagwati Steel Rolling Mills vs. Commissioner Of Central Excise And Another]*** wherein in para Nos.25, 28, 29 the Hon'ble Apex Court observed as under:-

" 25. However, Shri Aggarwal has also argued that in this appeal as well as in Civil Appeals Nos. 4281 and 4282 of 2007, the rule providing for payment of interest would itself be ultra vires inasmuch as Section 3-A of the Act does not itself provide for the payment of interest. He argued that despite the fact that this point was not raised before any of the authorities below he ought to be allowed to raise it for the first time in this Court not only as it is a pure question of law but also because, according to him, this Court has held that rules which are ultra vires ought to be ignored by the courts even if there is no substantive challenge to them.

28. Shri Aggarwal in order to buttress his submission that he ought to be allowed to raise a pure question of law going to the very jurisdiction to levy interest, cited before us the judgment in Bharthidasan University v. All-India Council for Technical Education: (2001) 8 SCC 676 and in particular para 14 thereof which reads as follow: (SCC pp. 688-89)

"14. The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that the Regulations made under Section 23 of the Act have 'constitutional' and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question,

which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions."

29. It would be seen that Shri Aggarwal is on firm ground because this Court has specifically stated that rules or regulations which are in the nature of subordinate legislation which are ultra vires are bound to be ignored by the courts when the question of their enforcement arises and the mere fact that there is no specific relief sought for to strike down or declare them ultra vires would not stand in the court's way of not enforcing them. We also feel that since this is a question of the very jurisdiction to levy interest and is otherwise covered by a Constitution Bench decision of this Court, it would be a travesty of justice if we would not allow Shri Aggarwal to make this submission."

Referring the same, Learned Senior Counsel submitted that in view of the existence of the Rule framed by the respondent authority there will be no bar for the State authority to consider appointment and promotion of the petitioner to the post of Public Analyst and asked for allowing this writ petition.

20. On the contrary, Learned Addl. GA appearing on behalf of the State-respondents has drawn the attention of the Court that the State respondents have filed their counter affidavit wherein at para No. 10 it has been clearly mentioned that the present petitioner has not completed the minimum experience of five years in the grade of Senior Chemist, as such, this present petition is not maintainable. It is further submitted by Learned Addl. GA that it is the prerogative of the State Legislature/State Executive to consider promotion of any person to a particular post subject to requirement/need and in

this regard, there is very limited scope on the part of this Court to direct the State authority to promote the petitioner to the post he is approaching.

21. In support of his contention, Learned Addl. GA relied upon one citation of the Hon'ble Supreme Court of India reported in **(2024) 11 SCC 424 [titled as Ravikumar Dhansukhlal Maheta And Another vs. High Court of Gujarat And Others]** wherein in para No.81 the Hon'ble Apex Court observed as under:-

"81. This Court in its decision in *State of Kerala v. N.M. Thomas*: (1976) 2 SCC 310 held that policies pertaining to promotions can be said to broadly fall within two distinct categories being: (i) promotions which are based on the principle of "merit-cum-seniority" and, (ii) promotions which are based on the principle of "seniority-cum-merit". It further held that when it comes to promotions based on principle of "seniority-cum-merit", a senior who has the minimum requisite merit shall be entitled to promotion even though there might be others who are more meritorious. The relevant observations read as under: (SCC p. 335, para 38)

"38. The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit, seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) and 16(2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate representation will not similarly violate Article 14 or Articles 16(1) and (2)." (emphasis supplied)"

Referring the same he submitted that no government servant can claim for promotion as a matter of right rather it is the prerogative of the legislature or the executive to formulate

the method for filling vacancies on promotion based on the nature of employment and functions. Since in the case of the present petitioner there is a requirement of five years experience as a Senior Chemist to be eligible for the post of Public Analyst and the petitioner does not have the said experience as such, he is not entitled to claim for the said promotional post and the Court cannot direct the state executive to consider promotion of the petitioner to the said post and asked for dismissal of this writ petition.

22. Reference was further placed in another judgment of a Division Bench of this High Court in **WP(C) No.105/2024** dated 09.09.2024 particularly para No.12, wherein this High Court has observed as under:-

"[12] While considering the submissions of both the sides, we are of the view that it is always within the competency of the employer to change the service rules or to alter and to amend the same regarding avenues of promotion necessitated by administrative exigencies and there is no right conferred upon any employee to claim that rules governing condition of the service should be kept unaltered forever. Reference in this regard may also be made to a decision of the Apex Court in case of P.U Joshi and others vs. Accountant General, Ahmedabad & Ors, (2003) 2 SCC 632 and the relevant Para-10 of the said decision is gainfully extracted hereunder:

"10. We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues

of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

So, it is well within the competency of the State to amend the Rules by way of incorporating Havildar (Engine Fitters) in the feeder post. Moreso, maximum numbers of posts of Naib Subedar (Supervisor Grade-II Technical) have been kept for filling up from the post of Havildar (Radio Technicians)."

Referring the same he also submitted that the observation made by the Division Bench of this High Court squarely covers the present petition and as such, the present petitioner is not entitled to get any relief in this writ petition, and urged for dismissal of the writ petition with costs.

23. After hearing both the sides the salient point for consideration in this writ petition is:

(i) Whether this court in exercise of the power confer under Article 226 of the Constitution direct the respondent-state authority to consider promotion of the

present petitioner to the post of Public Analyst ignoring the Recruitment Rule framed by the state authority.

24. I have heard both the sides at length and perused the writ petition, counter affidavit and documents submitted by both the sides to determine this writ petition.

25. Since the petitioner approached this Court for promotion to the post of Public Analyst which comes under the purview of Section 45 of Food Safety & Standards Act, 2006. In this regard, in 7th Schedule (Article 246) in List III of the Concurrent List, item No.18 deals about "Adulteration of foodstuffs and other goods". From the aforesaid concurrent list, it appears that the present subject matter comes under concurrent list.

26. Now for the sake of convenience let us narrate hereinbelow the relevant provision of Section 45 of the Food Safety & Standards Act, 2006 which provides as under:

"45. Food Analysts- The Commissioner of Food Safety may, by notification, appoint such persons as he thinks fit, having the qualifications prescribed by the Central Government, to be Food Analysts for such local areas as may be assigned to them by the Commissioner of Food Safety:

Provided that no person, who has any financial interest in the manufacture or sale of any article of food shall be appointed to be a Food Analyst under this section:

Provided further that different Food Analysts may be appointed for different articles of food."

From the aforesaid provision, it appears that Food Analyst may be appointed by the Commissioner of Food Safety by notification in the official gazette for such areas as may be assigned to them by the Commissioner of Food Safety.

27. Section 91 of the FSS Act, 2006 provides power of the Central Government to make rules. Sub-rule-2(e) of Rule 91 of the said Act provides as under:

"91. Power of Central government to make Rules-

2. In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(e) Qualifications of Food Analysts under Section 45;"

From the aforesaid provision it appears that in sub-rule (e) of Rule 2 of Section 91, the power is given to the Central Government to make rules in respect of qualifications of the Food Analyst as provided under Section 45 of the Food Safety and Standards Act, 2006.

28. In the said Act, power is also given to the State Government to make rules under Section 94. For the sake of convenience let us reproduce hereinbelow the relevant provision of Section 94 which provides as under:-

"94. Power of State Government to make rules:-

(1) Subject to the power of the Central Government and the Food Authority to make rules and regulations respectively, the State Government may, after previous publication and with the previous approval of the Food Authority, by notification in the Official Gazette, make rules to carry out the functions and duties assigned to the State Government and the State Commissioner of Food Safety under this Act and the rules and regulations made thereunder.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) other functions of the Commissioner of Food Safety under clause (f) of sub-section (2) of Section 30;

(b) earmarking a fund and the manner in which reward shall be paid to a person rendering assistance in detection of offence or apprehension of offender under Section 95; and

(c) any other matter which is required to be, or may be prescribed or in respect of which provision is to be made by rules by the State Government.

(3) Every rule made by the State Government under this Act shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses or where such State Legislature consists of one House, before that House."

From the aforesaid provision it appears that the legislature in Section 94 did not endorse any power to the State Government to determine qualification for the post of Food Analyst which power is exclusively given to the Central Government. Since by the aforesaid Act, no power is vested to the State Government to frame rules, it is surprising as to how the State Government in exercise of the powers provided under Article 309 of the Constitution of India, has framed recruitment rules for the post of Public Analyst which is only given to the Central Government. Admittedly, in this case the petitioner has not challenged the said recruitment rules framed by the State authority.

29. I have also gone through the citation referred by the Learned Counsel for the State. As already stated, it is the settled position of law that a government servant cannot claim promotion as a matter of right because our Constitution does not prescribe such criteria. It is the legislature or the executive who may decide the method for filling up vacancies to promotional posts.

30. It is also on record that the judgment referred and relied upon by the petitioner in respect of Dr. Karunamoy Nath has attained finality and the Government has implemented the direction of the High Court and by notification dated 31.08.2016 the State appointed said Dr. Karunamay Nath to the post of Public Analyst.

31. In this case admittedly the petitioner has not challenged the recruitment rules framed by the State executive for the post of Public Analyst. So until and unless the rules are challenged there is no scope to make any observation in this regard that the said rules are ultra vires, inoperative and not binding upon for petitioner. But considering the facts and circumstances of the present case and in view of the settled legal position, imposition of five years experience for the post of Senior Chemist would definitely create an embargo to the petitioner for claiming the post of Public Analyst inspite of having requisite qualification to be appointed as a Public Analyst.

32. In the result, after hearing both the sides it appears to this Court that the present petitioner is not entitled to get any relief in this instant writ petition without challenging the existing recruitment rules by the State authority although he has got the requisite qualifications to be appointed as Public Analyst.

33. In view of the above observations the present writ petition stands disposed of.

No order as to costs.

Pending applications if any, also stands disposed of.

JUDGE

SATABDI DUTTA Digitally signed by SATABDI DUTTA
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