

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 30, 2021

+ W.P.(C) 6764/2021, CM APPL. 21302/2021

RAHUL KUMAR UPADHYAY

..... Petitioner

Through: Mr. Rajan Mani, Mr. Vivek Kumar
Gaurav and Mr. Shubham Prajapati,
Advs.

versus

NATIONAL BOARD OF EXAMINATION

..... Respondent

Through: Ms. Ruchira Gupta and Ms. Akanksha
Sisodia, Advs. for respondent /NBE

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner with the following prayers: -

“In view of the above facts and circumstances, it is therefore most humbly prayed that this Hon’ble Court may kindly be pleased to :-

i) Issue a writ in the nature of mandamus or any other appropriate writ/s, order/s, direction/s, directing the Respondent to set aside/quash the new advertisement

published by the NBE dated 01.06.2021 as mentioned in para 16 of this petition.

ii) Issue a writ in the nature of mandamus or any other appropriate writ/s, order/s, direction/s, directing the Respondent to declare cutoff marks for PWD categories and allow the present petitioner to sit for 2nd stage of Exam as per the mandate of the law.

iii) Pass any other order/s or direction/s as this Hon'ble Court deems fit and proper be also awarded to the Petitioner and against the Respondents in the interest of justice."

2. The respondent in the present writ petition is the National Board of Examination ('NBE', for short). The counter affidavit filed by Ms. Ruchira Gupta learned counsel appearing on behalf of the respondent, reads that vide resolution dated July 07, 2021, the name of the respondent has been changed from NBE to National Board of Examinations in Medical Sciences ('NBEMS', for short) which is an autonomous body under the Ministry of Health and Family Welfare. Wherever a reference has been made to NBE it shall be read to mean NBEMS.

3. Now coming to the issue at hand, it is the case of the petitioner that he belongs to the category of Persons with Disabilities ('PwD', for short) having 42% post-polio residual paralysis in his lower limb. He appeared for the exam for recruitment in NBE.

4. That the petitioner has applied for the post of Senior Assistant vide advertisement No. 21005/RECT/2020 published by NBE dated July 11, 2020. Thereafter, he appeared for the preliminary examination on the date of August 31, 2020. That through the above-mentioned advertisement the following seats were reserved as per the Central Government Reservation Policy namely: -

Sl. No.	Name of the Post	Total Seat Reserved	Unreserved (UR)	OBC	SC	ST
1.	SENIOR ASSISTANT	18	11	04	02	01
2.	JUNIOR ASSISTANT	57	28	17	07	05
3.	JUNIOR ACCOUNTANT	07	05	01	01	NIL
4.	STENOGRAPHER	08	05	02	01	NIL

In addition, in the said advertisement it was mentioned that *“Reservation for vacancy of SC/ST/OBC-NCL/EWS as per Govt. of India instructions/rules. Total number of vacancies are inclusive of number of vacancies of PWD.”*

5. Mr. Rajan Mani learned counsel appearing on behalf of the petitioner contended that in the above-mentioned advertisement there were no separate seats reserved for the PwD categories. However, according to the roster reservation register, one post of Senior Assistant

is reserved under the UR-PwD-1 Category and the petitioner belongs to the same category. According to Mr. Mani, the petitioner fulfills all the qualifications to get the seat lawfully.

6. Mr. Mani stated that on August 21, 2020, the petitioner approached the respondent / NBE via e-mail and requested them to clearly mention reserved seats for PwD to avoid unnecessary confusion but the respondent has not given any response to the petitioner regarding the same.

7. That on September 14, 2020, the respondent has declared the result of the preliminary examination held on August 31, 2020, wherein the cutoff list of UR, OBC, SC, ST were mentioned but there was no list of PwD Categories.

8. Mr. Mani contended that on September 17, 2020, the petitioner through an e-mail requested the respondent to consider Section.34 of The Rights of Persons with Disabilities Act, 2016 ('RPWD Act, 2016', for short) but the respondent have not responded to it and have completely ignored the mandate of the RPWD Act, 2016.

9. Mr. Mani also stated that the respondent failed to address the grievances of the petitioner. The petitioner on September 27, 2020, approached the Court of Chief Commissioner for Persons with Disabilities (Divyangjan) ['CCPD', for short]. The CCPD has passed its Order dated January 07, 2021, in favour of the petitioner wherein in paragraphs 31 and 32 the CCPD directed the respondent to correct its advertisement by clearly indicating the number of reserved seats for the PwD category as per the relevant provisions of the RPWD Act, 2016. Paragraphs 31 and 32 of the Order passed by the CCPD reads as under: -

“31. From the perusal of the advertisement, it is prima facie evident that Respondent has mentioned about reservation for PwBD in casual manner. Language and mode of mentioning reservation for PwBDs is in complete violation of DoPT OM Dated 26.11.2012,.....”

“32. Therefore, this court recommends that Respondent shall compute the total number of vacancies and shall re-notify the advertisement clearly indicating number of such vacancies. Respondent is also recommended to indicate clearly whether the posts advertised are suitable for PwBD and also the sub category for which the post is identified suitable. Further Respondent is recommended that while issuing notification again, OMs and relevant provisions of RPwD Act 2016 shall be taken into consideration.....”

It is contended by Mr. Mani that the respondent has illegally forwarded the seat of the PwD category by claiming that no suitable candidate was found for the post but the respondent never declared the cutoff for the PwD candidate. The petitioner scored 116.50/200 marks but was not called for the second stage exam in absence of a cutoff list for the PwD category.

10. It is submitted by Mr. Mani that the petitioner having a good score of 116.50/200 was available in the UR-PwD-1 category and the post of Senior Assistant is also reserved under the same category but the petitioner was intentionally ignored by the respondent against the mandate of law. That apart, the respondent has not published the cutoff list for the PwD category which amounts to discrimination and is in violation of Articles 14, 16, and 21 of the Constitution of India. Moreover, the selection was to be made through a two-stage process. Based on the results of the Computer Based Test (‘CBT’, for short),

except PwD category a total of 460 (5 times the number of vacancies in each category) candidates were shortlisted which is itself a grave violation under the RPDW Act, 2016.

11. Mr. Mani stated that the respondent has illegally violated the Department of Personnel and Training ('DoPT', for short) Office Memorandum ('OM', for short) No. 36035/2/2012-Estt. (Res) dated November 26, 2012, which lays down certain points which are to be kept in mind while advertising the vacancies. Summary of the point is as follows: -

- a) Number of vacancies reserved for different categories of disability should be indicated clearly.
- b) If any post is identified suitable for any particular kind of disability then it shall be indicated clearly.
- c) Person with disability belonging to such category for which the post is identified shall be allowed to apply even if no vacancies are reserved for them. If such a candidate qualifies for examination on his merit then he will be considered for selection for appointment against an unreserved post.
- d) It shall also be indicated that a person suffering from not less than 40% of disability shall alone be eligible for the benefits of reservation.

12. Mr. Mani submitted that the respondent has published a new notification dated June 01, 2021, for the recruitment having the same advertisement No. 21005/RECT/2020. However, in the said advertisement the respondent ignored the grievances of the petitioner which is discrimination against the mandate of law and the provisions

under the RPWD Act, 2016 including various judgments of the Apex Court and other High Courts.

13. Ms. Gupta in her counter-affidavit submitted that the selection process with respect to the advertisement dated July 11, 2020, has already been completed with the issue of merit list of selected candidates declared on December 04, 2020, and the successful candidates having been duly recruited. She also submitted that pursuant to the said advertisement dated July 11, 2020, the petitioner had applied for the post of Senior Assistant under the PwD quota in the UR category. As per the advertisement dated July 11, 2020, the selection was to be made through a two-stage process which involved: -

- i. The preliminary round is known as CBT which was held on August 31, 2020, for short listing of candidates;
- ii. Shortlisted candidates had to undergo a second round i.e., the Skill Test which was held on October 18, 2020.

It is after passing both these tests that a final merit list was prepared for the appointment of candidates.

14. In addition, Ms. Gupta stated that the petitioner did not clear the first round i.e., CBT wherein a total of 460 candidates were shortlisted who obtained the minimum cutoff as required. In the CBT round, the petitioner scored 116.5/200 marks in the UR category which was far below the cutoff of the SC, ST, and OBC category being 156.25/200, 155/200, 165/200 respectively. Consequently, two PwD candidates cleared the first CBT round and appeared in the Skill Test. However, the said candidates did not qualify for the Skill Test and accordingly, the reserved seats for the PwD category were carried forward in compliance with Clause 8 of the OM dated January 15, 2018, issued by DoPT,

Ministry of Personnel, Public Grievances and Pensions, with respect to the reservation for the Persons with Benchmark Disabilities, which stipulates that in case any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year.

15. Further, it was submitted by Ms.Gupta that in so far as the relief of declaring the cut off list of PwD candidates is concerned, the same is untenable in law in as much as the SC, ST and OBC are vertical reservation and benchmark disabilities come under horizontal reservations which cut across the vertical reservations. In other words, a person selected against the quota for persons with benchmark disabilities has to be placed in the appropriate category viz. SC / ST / OBC / UR according to the category to which they belong. Since the person with the benchmark disabilities has to be placed in the appropriate category SC / ST / OBC / UR in the roster meant for reservation, the application form for the post would require candidates applying under the quota with benchmark disabilities to indicate whether they belong to SC / ST / OBC / UR category. As the persons with benchmark disabilities have to apply with reference to the quota reserved for vertical reservation SC / ST / OBC / UR, their cut-off marks were also linked to the category to which they belong. Thus, there are no separate cut-off marks or a separate category of short-listed candidates of the preliminary test i.e., CBT for the PwD category. The cutoff marks for each vertical category of SC / ST / OBC / UR were duly notified by the respondent on January 19, 2021, i.e., after the conduct of the CBT

and on December 04, 2020, the final list of selected candidates was duly issued.

16. Ms. Gupta submitted that according to the advertisement dated July 11, 2020, the selection was to be made through a two-stage process. However, five times the number of vacancies in each category including PwD was drawn after the first stage i.e., CBT with reference to each vertical category SC / ST / OBC / UR, as per the cutoff marks. She submitted that the PwD candidates have to apply with reference to the quota reserved for vertical reservation SC / ST / OBC / UR, their cut-off marks were also linked to the category to which they belong. In the case of the petitioner, he scored marks much lower than the cut-off marks in the SC / ST / OBC category and thus did not qualify for the second stage of the recruitment process.

17. It is further stated that only 53 out of 90 vacant posts were filled up pursuant to the selection process through advertisement dated July 11, 2020, the second phase of the recruitment process has been initiated by the respondent vide advertisement dated June 01, 2021, for filling up the vacant posts. The relevant extracts of paragraph A of the advertisement dated June 01, 2021, relied upon by Ms. Gupta, is stipulated as under: -

“a) The number of vacancies may increase/decrease /withdrawn without prior notice.

b) Vertical reservation for SC/ST/OBC/EWS and Horizontal reservation for PwD/Ex-Serviceman shall be applicable as per extant Government of India orders.

c) In all, four (4) vacancies are earmarked for Persons with Benchmark Disability (PwD) in the cadre strength of Group of Post, one each for:

i) Blindness and low vision;

ii) Deaf and hard of hearing;

iii) Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

iv) Multiple disabilities from amongst persons under clauses (i) to (iii) including deaf-blindness.

The four (4) vacancies are spread out across the available vacancies as per the 100-point roster chart at points 26, 51, 76 & 101. These have been carried forward from the Recruitment drive held on 2020. In case of non availability of suitable person with that benchmark disability or for any other reason, such vacancy shall be carried forward as backlog reserved vacancy to the subsequent year as per Government instructions.

Since the persons with benchmark disabilities have to be placed in the appropriate category viz. SC/ST/OBC/UR in the roster meant of reservation while filling the application form for the post(s), all applicants applying in this category are required to indicate whether they belong to SC/ST/OBC/UR as the case may be.....

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Category-wise bifurcation of Posts: -

Sl. No.	Name of Post	Pay Matrix	No. of Vacancies	RESERVATION			
				UR	SC	ST	OBC

		<i>Level</i>					
1.	<i>SENIOR ASSISTANT</i>	7	8	3	1	NIL	4
2.	<i>JUNIOR ASSISTANT</i>	2	30	5	6	3	16
3.	<i>JUNIOR ACCOUNTANT</i>	4	4	2	1	NIL	1

...”

Consequently, the category-wise bifurcation of posts was also laid down in a Chart mentioned in the advertisement mentioned above. The age limits have been laid down in paragraph C wherein under sub-clause (i) age relaxation has been laid down as per extant Government of India orders and in the case of PwD (UR), the relaxation of 10 years has been given. That apart, in paragraph D of the said advertisement, the selection procedure has been laid down and minimum qualifying marks of 40% for SC/ST and 50% for others have been laid down for selection in both stages of the selection process.

18. That further vide corrigendum dated July 29, 2021, consequent upon Gazette notification no. 38-16/2020-DD- III published by the Ministry of Social Justice and Empowerment on January 04, 2021, paragraph A (c) of the advertisement dated June 01, 2021, was modified as under: -

“In all, four (4) vacancies are earmarked for Persons with Benchmark Disability (PwD) in the cadre strength of Group of Post, one each for:

<i>Sl.No.</i>	<i>Category of disability</i>

a.	<i>Blindness and low vision</i>
b.	<i>Deaf and hard of hearing</i>
c.	<i>Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy</i>
d.	<i>i) autism, specific learning disability, mental illness and intellectual disabilities; ii) Multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness.</i>

.....”

19. It is contended by Ms. Gupta that the petitioner having participated in the selection process in terms of the advertisement / public notice dated July 11, 2020, without any protest or demur, is estopped from challenging the same upon being declared unsuccessful in the first round of the selection process.

20. That apart, Ms. Gupta placed on record the relevant paragraphs of the advertisement dated July 11, 2020, reproduced hereunder: -

i. Para 1.1 (C) of the advertisement, is set out herein below: -

“Reservations for vacancy of SC/ST/OBC-NCL/EWS as per Govt. of India Instructions / rules. Total number of vacancies are inclusive of number of vacancies of PWD.”

ii. Para 1.8 of the advertisement, is set out herein below: -

*“PERSONS WITH DISABILITIES (PwD) CANDIDATES:-
Candidates suffering from various disabilities as identified vide Department of Personnel & Training OM No 36035/02/2017-Estt*

(Res) dated 15-01-2018 (para-2.2) may select following PWD categories in the application form. CAT A: Blindness and low vision; CAT B: Deaf and hard of hearing; CAT C: Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy; CAT D: Autism, intellectual disability, specific learning disability and mental illness. CAT E: Multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness.”

Ms. Gupta submitted that the PwD candidates were given an age relaxation of 10 years for appearing in the CBT of 2020 by the respondent. Further, all prescribed guidelines for conducting written examinations for persons with benchmark disabilities were duly followed.

21. That the respondent received a notice dated October 26, 2020, issued by the CCPD on the complaint filed by the petitioner that in the advertisement dated July 11, 2020, not even a single seat is reserved for PwD. It was also submitted by Ms. Gupta that the petitioner in the said complaint also stated that there is a violation of Section.34 of the RPWD Act, 2016 and the Articles 14 and 16 of the Constitution of India in regard to the result declaration for the preliminary examination. Thereafter, the respondent submitted its detailed reply relying upon the RPWD Act, 2016 and the relevant OMs issued by the DoPT, Ministry of Personnel, Public Grievances and Pensions viz. OM dated March 27, 2012, stating consolidated order on relaxation in upper age limit allowed to various categories of government servants wherein the extent of age concession for the PwDs is 10 years. The respondent also relied upon the OM dated January 15, 2018, stipulating that the reservation for

PwDs are horizontal reservations that cut across vertical reservations i.e., reservations for SC / ST / OBC. The relevant extract of the OM dated January 15, 2018, relied upon by Ms. Gupta is reproduced as under: -

"11. RELAXATION OF STANDARD OF SUITABILITY:

11.1 If sufficient number of candidates with benchmark disabilities candidates are not available on the basis of the general standard to fill all the vacancies reserved for them, candidates belonging to this category may be selected on relaxed standard to fill up the remaining vacancies reserved for them provided they are not found unfit for such post or posts. However, this provision shall not be used to allow any relaxation in the eligibility criteria laid down for the issuance of certificate of disability.

11.2 Same relaxed standard should be applied for all the candidates with Benchmark Disabilities whether they belong to Unreserved/SC/ST/OBC. No further relaxation of standards will be considered or admissible in favour of any candidate from any category whatsoever."

That apart, Ms. Gupta also relied upon the OM dated August 29, 2018, stating guidelines for conducting written examination for persons with benchmark disabilities 2018.

22. Further, Ms. Gupta stated that an application was filed on January 28, 2021, under covering email dated January 28, 2021, for personal hearing and for re-calling the order dated January 07, 2021, passed by the CCPD. In addition, an email dated February 12, 2021, and

a letter dated February 15, 2021, was sent to CCPD requesting to list the said application, however, the application was not listed.

23. Mr. Mani advocate for the petitioner in his rejoinder submissions denied that the petitioner did not clear the first round i.e., CBT. It is submitted that the respondent has not released the cutoff marks for PwD candidates in contravention of the established juridical line of dictum thereby rendering the entire concept of equality enshrined in Article 14 of the Constitution of India and the object of the adequate representation infructuous. It is further submitted that the respondent has not complied with the provisions of Clause 4.2 of OM dated January 15, 2018, issued by the DoPT. The relevant portion is reproduced herein below: -

“4.2. Persons with benchmark disabilities selected without relaxed standards along with other candidates, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible candidates with benchmark disabilities which will thus comprise of candidates with benchmark disabilities who are lower in merit than the last candidate in merit list but otherwise found suitable for appointment, if necessary, by relaxed standards.”

24. It is submitted by Mr. Mani that in order to ensure equality in the society the legislature has enacted an Act i.e., RPWD Act, 2016, wherein the legislature after due deliberation had made a provision for adequate representation and thereby granted 4% reservation to the PwD category as per Section.34 of the above-mentioned Act. However, the respondent has completely ignored the above-said provision by not adhering to the mandatory provision of the RPWD Act, 2016, and thereby rights of the petitioner got vitiated. It is further submitted that

the country's premier recruiting agencies like Union Public Service Commission (UPSC), Staff Selection Commission (SSC), Securities And Exchange Board of India (SEBI), National Bank For Agricultural And Rural Development (NABARD), and various other departments have been consistently following the mandatory provision of the Act and have been declaring the separate cutoff marks for the PwD candidates even in their examinations.

25. Mr. Mani denied that five times the number of vacancies in each category including PwD have been drawn after the first stage. It is further denied that the cutoff marks for PwD candidates have to apply only with reference to the quota reserved for vertical reservation SC, ST, OBC, and UR. It is submitted that the cutoff marks for the PwD candidates have to be declared separately apart from other categories as per Clause 4.2 of the OM dated January 15, 2018, issued by the DoPT.

26. That apart, Mr. Mani to support his submissions relied upon the judgment of the Supreme Court in the case of **Saurav Yadav and Ors. vs. State of Uttar Pradesh and Ors., (2021) 4 SCC 542**, which sets out the proper procedure for implementing horizontal and vertical reservations. He relied upon paragraphs 23.11 and 43 of the said judgment which are reproduced hereunder: -

“23.11. The High Court then laid down : (Tamannaben Ashokbhai Desai case [Tamannaben Ashokbhai Desai v. Shital Amrutlal Nishar, 2020 SCC OnLine Guj 2592] , SCC OnLine Guj paras 69-71)

“69. For the future guidance of the State Government, we would like to explain the proper and correct method of

implementing horizontal reservation for women in a more lucid manner.....”

43. Finally, we must say that the steps indicated by the High Court of Gujarat in para 69 of its judgment in *Tamannaben Ashokbhai Desai* [*Tamannaben Ashokbhai Desai v. Shital Amrutlal Nishar*, 2020 SCC OnLine Guj 2592] contemplate the correct and appropriate procedure for considering and giving effect to both vertical and horizontal reservations. The illustration given by us deals with only one possible dimension. There could be multiple such possibilities. Even going by the present illustration, the first female candidate allocated in the vertical column for Scheduled Tribes may have secured higher position than the candidate at Serial No. 64. In that event said candidate must be shifted from the category of Scheduled Tribes to Open/General category causing a resultant vacancy in the vertical column of Scheduled Tribes. Such vacancy must then enure to the benefit of the candidate in the waiting list for Scheduled Tribes-Female. The steps indicated by the Gujarat High Court will take care of every such possibility. It is true that the exercise of laying down a procedure must necessarily be left to the authorities concerned but we may observe that one set out in said judgment will certainly satisfy all claims and will not lead to any incongruity as highlighted by us in the preceding paragraphs.”

27. In this regard, it is submitted by Mr. Mani that the said procedure in *Tamannaben Ashokbhai Desai vs. Shital Amrutlal Nishar*, 2020 SCC OnLine Guj 2592, prescribes that when sufficient

women candidates are not available on their own merit in the open category, the shortfall is to be made up by selecting additional women candidates lower in the overall merit list of candidates. Similarly, when sufficient women candidates are not available on their own merit in their respective vertical category, the shortfall is to be made up by selecting additional women candidates lower in the merit list of candidates in that vertical category. It is therefore clear from the said procedure that the cut-off marks for women candidates will be lowered as necessary in order to fulfill the prescribed percentage in their respective vertical categories UR / SC / ST / OBC. Therefore, the cut-off marks for PwD candidates will have to be lowered as necessary in order to fulfill the prescribed percentage in their respective vertical category UR / SC / ST / OBC. According to Mr. Mani, the submission made by the respondent that the PwD candidates have to apply with reference to the quota reserved for vertical reservation i.e., SC / ST / OBC / UR, that their cut-off marks are linked to the category in which they belong, and that there are no separate cut-off marks for PwD is legally unsustainable because of the following reasons: -

- i. That the PwD candidates have to apply with reference to the quota reserved for vertical reservation i.e., SC / ST / OBC / UR.
- ii. That the cut-off marks of PwD candidates are linked to the category in which they belong.
- iii. That there are no separate cut-off marks for PwD candidates.

28. Mr. Mani further submitted that the selection for the skill test was five times the number of vacancies available in the post of Senior Assistant. He further stated that one vacancy was reserved for PwD-1

(UR), the respondent was to select five candidates from the PwD-1 category merit list of the CBT for the ensuing skill test. That according to the procedure described in *Tamannaben Ashokbhai Desai (supra)*, the cut-off marks for PwD candidates were to be lowered as necessary in order to bring five candidates within the zone of consideration for the skill test. However, the respondent only called two PwD candidates for the skill test, by stating that the PwD candidates have to meet the cut-off marks of their respective vertical categories. The respondent, therefore, did not follow the legal and correct procedure as set down in *Tamannaben Ashokbhai Desai (supra)*. According to Mr. Mani, the respondent ought to call the petitioner for the skill test pursuant to the advertisement dated July 11, 2020, and to appoint the petitioner to the post of Senior Assistant if he is not found unfit.

29. Having heard the learned counsel for the parties, the issues which arise for consideration in this writ petition are (i) whether the petitioner can challenge the advertisement published on June 01, 2021, when he has not applied pursuant thereto for the post in question i.e., Sr. Assistant and; (ii) whether the petitioner is entitled to be considered for the second stage of selection in terms of an earlier advertisement of the year 2020 when he had scored 116.5 / 200 marks in the unreserved category, much below the last cut-off marks of 165.50 for candidates belonging to the unreserved category against horizontal reservation of PwD category, when the selection process is complete and appointments made.

30. At the outset, I intend to deal with the issue at (i) above. The submission of Ms. Gupta is that the selection process with respect to the advertisement issued on July 11, 2020, against which the petitioner had

appeared in the first stage of the process, he scored 116.5 / 200 marks and was not selected for the second stage which process is also complete and the merit list of selected candidates having been declared on December 04, 2020, and the successful candidates having been duly recruited, the petitioner cannot challenge the same, is appealing. From the prayers, as made above, it is noted that the petitioner has challenged the fresh advertisement issued on June 01, 2021. Admittedly, the petitioner has not applied against the said advertisement.

31. The submission of Mr. Mani is that the petitioner is within his right to challenge the fresh advertisement, inasmuch as the respondent had violated the DoPT OM dated November 26, 2021, which mandates the respondent to indicate the number of vacancies reserved for different categories of disability; if any post is identified suitable for any particular kind of disability then it shall be indicated; a person with disability belonging to such category for which the post is identified shall be allowed to apply even if no vacancies are reserved for them and if such a candidate qualifies for examination on his own merit then he will be considered for selection for appointment against the unreserved post. I am afraid, the aforesaid aspects highlighted by Mr. Mani cannot be the grounds to set aside the advertisement for the year 2021. In fact, I find, under the garb of challenging the advertisement of June 01, 2021, the petitioner is primarily seeking a direction against the respondent to declare cut-off marks for the PwD category and allow him to sit for the second stage of examination pursuant to the fresh advertisement. In the absence of any challenge to the selection process undertaken vide advertisement dated July 11, 2020, the petitioner cannot under the garb of challenging the advertisement dated June 01, 2021, seek a direction to

be included in the second stage of selection under the advertisement dated June 01, 2021. Having not challenged the process of selection, in which he could not qualify the first stage of CBT, to be eligible to the second stage he cannot challenge the same process in the fresh advertisement more so, against which he has not applied. The law in this regard is well settled. This Court recently in the judgment of ***Piyush Kumar Singh vs. NTPC Ltd., W.P. (C) 1632/2021 decided on October 26, 2021***, has on a similar issue held that ‘*A candidate, who participates in the selection without demur, taking a calculated chance to get selected, cannot be allowed to turn around and challenge the criteria of selection once he is declared unsuccessful, is well settled.*’

32. Moreover, the submission of Mr. Mani that the advertisement did not indicate the number of vacancies reserved for different categories of disability is substantially met as it is noted respondent under the earlier advertisement dated July 11, 2020, in paragraph 1.8 has stated as under:-

“1.8 PERSONS WITH DISABILITIES (PwD) CANDIDATES:- *Candidates suffering from various disabilities as identified vide Department of Personnel & Training OM No 36035/02/2017-Estt (Res) dated 15-01-2018 (para-2.2) may select following PWD categories in the application form. CAT A: Blindness and low vision; CAT B: Deaf and hard of hearing; CAT C: Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy; CAT D: Autism, intellectual disability, specific learning disability and mental illness. CAT E: Multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness.”*

33. Similarly, even under the fresh advertisement dated June 01, 2021, the respondent had stated as under:-

“A. DETAILS OF THE VACANCY:-

<i>Sl. No.</i>	<i>Name of Post</i>	<i>Pay Matrix Level</i>	<i>No. of Post (s)</i>	<i>Eligibility conditions</i>
1.	SENIOR ASSISTANT	<i>Level 7</i>	8	Age: Below 27 Years. Educational Qualifications <u>ESSENTIAL</u> 1. Degree from recognised University/ Board. 2. To qualify Examination as may be prescribed by NBE.
2.	JUNIOR ASSISTANT	<i>Level 2</i>	30	Age: Below 27 Years. Educational Qualifications <u>ESSENTIAL</u> 1. passed Senior Secondary Examination from a recognised Board/ University recognised by Central/State Govt /UT Administration / Education Authority' 2. Proficiency in use of Computers and Basic Software Packages such as Windows/Network

				Operating System/LAN Architecture. 3. To qualify Examination as may be prescribed NBE.
3.	JUNIOR ACCOUNTANT	Level 4	4	Age: Below 27 Years. Educational Qualifications <u>ESSENTIAL</u> 1. Bachelor Degree with Maths or Statics or a Degree in Commerce from a recognise University. 2.To qualify Examination as may be prescribed by NBE. <u>DESIRABLE QUALIFICATION</u> 1. Three Years' experience in dealing with Accounts in some Govt. institutions with knowledge of computer based accountin.

Note: -

a) The number of vacancies may increase/decrease/withdrawn without prior notice.

b) Vertical reservation for SC/ST/OBC/EWS and Horizontal reservation for PwD/Ex-Serviceman shall be applicable as per extant Government of India orders.

c) In all, four (4) vacancies are earmarked for Persons with Benchmark Disability (PwD) in the cadre strength of Group of Post, one each for:

i) Blindness and low vision;

ii) Deaf and hard of hearing;

iii) Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

iv) Multiple disabilities from amongst persons under clauses (i) to (iii) including deaf-blindness.

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34. No doubt, in the earlier advertisement of July 11, 2020, the respondent had not mentioned the number of vacancies earmarked for persons with benchmark disability but that would not vitiate the selection process in which the petitioner had applied but could not able to secure the cut-off marks required for General category candidate in the first selection process of CBT, which was 165.50 marks. In fact, the petitioner had received only 116.5 marks out of 200 marks, which is much below the cut-off marks required to be achieved even by an ST candidate. The petition is liable to be dismissed on the short ground, the petitioner having participated without demur in the selection process under the advertisement of 2020, he cannot seek any direction on the basis of that selection / advertisement. Since the learned counsel for the parties have argued the case even on merit, I proceed to consider the case as pleaded by Mr. Mani, learned counsel for the petitioner, even on merits.

35. It was the submission of Mr. Mani that the reservation for PwD being a horizontal reservation, the respondent should not have confined itself to the cut-off marks but should have called persons from different categories under the PwD on the basis of qualifying marks. I am not in

agreement with the submission made by Mr. Mani. Suffice to state that the respondent have called candidates from different categories for the second stage process on the basis of the following cut-off marks:-

“xxxx

xxxx

xxxx

3. The cut-off marks (out of 200) for various categories and posts for the computer based entrance test held on 31-08-2020 are as follows:

Category	Senior Assistant	Junior Accountant	Stenographer	Junior Assistant
<i>UR</i>	<i>165.50</i>	<i>143.00</i>	<i>132.50</i>	<i>148.75</i>
<i>OBC (Non Creamy Layer)</i>	<i>165.00</i>	<i>145.25</i>	<i>132.25</i>	<i>149.25</i>
<i>SC</i>	<i>156.25</i>	<i>130.25</i>	<i>116.25</i>	<i>142.50</i>
<i>ST</i>	<i>155.00</i>	<i>No Post</i>	<i>No Post</i>	<i>133.00</i>

xxxx

xxxx

xxxx”

36. The basis for arriving at the cut-off marks is, five times the number of vacancies in each category with reference to the vertical reservation SC / ST / OBC / UR. It is also the stand of the respondent, as contended by Ms. Gupta that the PwD candidates have to apply with reference to quota reserved for vertical reservation SC / ST / OBC / UR, and their cut-off marks were also linked to the category to which they belonged. In the case of the petitioner, he secured marks much lower than the cut-off marks in the SC / ST / OBC / UR category and did not qualify for the second stage of the recruitment process.

37. I may state here that the plea advanced by Mr. Mani is settled by the Division Bench of Allahabad High Court in the matter of ***Neetu Devi Singh vs. High Court of Judicature at Allahabad and Ors., MANU/UP/0244/2008***, wherein the Court has, in paragraph 12 held as under:-

“12. In view thereof, as the reservation is provided for physically handicapped persons, though horizontal in nature, he/she must secure minimum qualifying marks as fixed by the authority concerned. The appellant-petitioner who has failed to achieve the said benchmark as she secured 36 percent marks while qualifying marks had been fixed as 55 percent, would be denied further consideration in view of the provisions of [Article 335](#) of the Constitution of India. It is not the case of the appellant-petitioner that any other physically handicapped person securing lesser marks than her, is being permitted consideration any further.”

38. The aforesaid dicta of law has been followed by the Division Bench of this Court in the case of ***Manish Sharma vs. Lt. Governor and Ors., MANU/DE/2792/2019***, wherein in paragraph 38, the Division Bench by placing reliance on the judgment in the case of ***Neetu Devi Singh (supra)*** has in paragraphs 38 and 39 held as under:-

“38. Finally, we would place reliance on paragraphs 9, 10 and 12 of the judgment of a Division Bench of the Allahabad High Court headed by Justice B.S. Chauhan (as his Lordship then was), in the case of Neetu Devi Singh (supra), wherein it was held as under:-

9. A Constitution Bench of the Hon'ble Supreme Court in E. Chinniah Vs. State of Andhra Pradesh and Ors., held as under:-

Furthermore, the emphasis on efficient administration placed by Article 335 of the Constitution must also be considered when claims of Scheduled Castes and

Scheduled Tribes to employment in the services of the Union are to be considered.

A Constitution Bench of the Apex Court in M. Nagraj and Ors. v. Union of India and Ors., examined the validity of the Constitution (Seventy Seventh Amendment) Act, 1995; the Constitution (Eighty First Amendment) Act 2000; the Constitution (Eighty Second Amendment) Act 2000; and the Constitution (Eighty Fifth Amendment) Act 2001, providing for reservation to Scheduled Castes in promotions, which also provided for relaxation of qualifying marks etc. and held that constitutional limitation of efficiency under Article 335 if the appropriate government enacting a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside the strike down such legislation... It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables could be accommodated.

10. Thus, only in exceptional cases, for compelling interest of the reserved category candidates, the State may relax the qualifying marks after identification by weighing the comparable data, without affecting general efficiency of service as mandated under Article 335 of the Constitution.

12. In view thereof, as the reservation is provided for physically handicapped persons, though horizontal in nature, he/she must secure minimum qualifying marks as fixed by the authority concerned. The appellant-petitioner who has failed to achieve the said benchmark as she secured 36 percent marks while qualifying marks had been fixed as 55 percent, would be denied further

consideration in view of the provisions of Article 335 of the Constitution of India. It is not the case of the appellant-petitioner that any other physically handicapped person securing lesser marks than her, is being permitted consideration any further.

(emphasis supplied)

The Special Appeal lacks merit and is accordingly dismissed.

39. In the light of the aforesaid authoritative judicial pronouncements, we have no hesitation in accepting the submission made by Mr.Chadha, Senior Advocate appearing for the petitioner that in the present case, relaxation in the minimum qualifying marks for the written examination was granted to the respondent no.3 without any application of mind and without the respondent no.2 conducting any deliberations prior to the issuance of the advertisement. Therefore, there was no occasion for the respondent no.2 to extend relaxation to physically handicapped candidates belonging to the General category, that too when the scope of the unamended Rule 22, did not encompass physically handicapped candidates under reserved category.”

(emphasis supplied)

39. In the case in hand, there are no qualifying marks fixed by the respondent in the first stage of the selection process, under the advertisement of July 11, 2020, but the cut-off marks were fixed on the basis of principle, against one vacancy five candidates on the basis of marks shall be called for the Second Stage, e.g., as against 11 vacancies, 55 candidates were called for General category vacancies and the last candidate called had secured 165.50 marks which became the cut-off for General category. The submission of Mr. Mani is that the petitioner has got a good score of 116.50/200 and the respondent had intentionally ignored the petitioner against the mandate of law. I am afraid the said submission of Mr. Mani is unmerited, as the plea, if accepted, would

mean, there has to be further relaxation of the cut-off marks, including the zone of consideration contrary to the principle followed and moreover, the horizontal reservation does not encompass persons with disability are entitled to the benefit of vertical reservation, which in effect is the submission of Mr. Mani.

40. Mr. Mani in support of his submission has relied upon the judgment in the case of *Saurav Yadav (supra)*. The facts, which arise for consideration before the Supreme Court was that pursuant to the Supreme Court's order dated July 24, 2019, selection to the 3295 posts in accordance with merit and consistent with the reservation policy of the Government was undertaken by the Uttar Pradesh Government. According to the results declared on November 11, 2019, 188 posts in the 'General Female Category' were filled up. While doing so, the claim of 'OBC Female Candidates' was not considered or taken into account. The last candidate appointed in the category of 'General Female' had secured 274.8298 marks. 21 OBC applicants who secured marks greater than the candidate with 274.8298 challenged the action on part of the State Government in refusing to consider the claim of 'OBC Female Category' candidates in respect of 'General Female Category' seats. The Apex Court in the said judgment held that 'Open category is open to all' and 'any selection which results in candidates getting selected against Open/General category with less merit than the other available candidates will certainly be opposed to principles of equality'. The aforesaid judgment has no application for the issue, which arises for consideration in this petition. I must also state, during his submission, Mr. Mani has also relied upon the judgment of the High Court of Gujarat in *Tamannaben Ashokbhai Desai (supra)* wherein the

Supreme Court in **Saurav Yadav (supra)** has in paragraph 43 held as under:-

“43. Finally, we must say that the steps indicated by the High Court of Gujarat in para 69 of its judgment in Tamannaben Ashokbhai Desai [Tamannaben Ashokbhai Desai v. Shital Amrutlal Nishar, 2020 SCC OnLine Guj 2592] contemplate the correct and appropriate procedure for considering and giving effect to both vertical and horizontal reservations. The illustration given by us deals with only one possible dimension. There could be multiple such possibilities. Even going by the present illustration, the first female candidate allocated in the vertical column for Scheduled Tribes may have secured higher position than the candidate at Serial No. 64. In that event said candidate must be shifted from the category of Scheduled Tribes to Open/General category causing a resultant vacancy in the vertical column of Scheduled Tribes. Such vacancy must then enure to the benefit of the candidate in the waiting list for Scheduled Tribes-Female. The steps indicated by the Gujarat High Court will take care of every such possibility. It is true that the exercise of laying down a procedure must necessarily be left to the authorities concerned but we may observe that one set out in said judgment will certainly satisfy all claims and will not lead to any incongruity as highlighted by us in the preceding paragraphs.”

41. From the above, it is clear that in **Tamannaben Ashokbhai Desai (supra)**, the Gujarat High Court in paragraph 69 had contemplated the correct and appropriate procedure for considering and giving effect to both vertical and horizontal reservation. The Supreme Court has said that the candidate allocated in the vertical column for ST may have secured a higher position than the candidate at Sl. No. 64, in that event, said candidates must be shifted from the category of ST to Open / General category causing resultant vacancy in the vertical

column of ST. Such vacancy then enures to the benefit of the candidate in the waiting list of ST females. The aforesaid also demonstrate that the said judgment does not deal with the issue, which falls for consideration in this case. As stated above, the issue urged by Mr. Mani has been settled by the Division Bench of the Allahabad High Court in *Neetu Devi Singh (supra)* and also followed by the Division Bench in the case of *Manish Sharma (supra)*. The petitioner is not entitled to relaxation in cut-off marks till 116.50 marks.

42. I do not see any merit in the petition. The same is dismissed. No costs.

CM. No. 21302/2021 (for Stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 30, 2021/ak/jg