

19.09.2022  
Sl. No. 1&2  
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**W.P.A. 12664 of 2019**  
**Dr. Manas Kumar Pratihari.**  
**-Versus-**  
**State of West Bengal & Ors.**  
**with**  
**W.P.A. 9921 of 2018**  
**Dr. Arun Chakraborty.**  
**-Versus-**  
**State of West Bengal & Ors.**

Mr. Bhaghat Chaudhuri,  
Mr. Dilip Kumar Sadhu,  
...for the petitioner in W.P.A. 9921 of 2018  
& respondent in W.P.A. 12664 of 2019.  
Mr. Chitta Priya Ghosh,  
Mr. Samir Kumar Adhikari,  
Mr. Kuntal Ray,  
...for the petitioner in W.P.A. 12664 of 2019.  
Mr. Santanu Kumar Mitra,  
Mr. Mirza Kamruddin,  
...for the State in W.P.A. 9921 of 2018.  
Ms. Sujata Ghosh,  
Ms. Paromita Pal,  
...for the State in W.P.A. 12664 of 2019.

**In re : W.P.A. 12664 of 2019 & W.P.A. 9921 of 2018**

The petitioner in W.P.A. No. 9921 of 2018 (for short W.P.A. 1) has challenged the selection process for appointment of Homoeopathic Medical Officer in Nepura No.10 Gram Panchayat under Binpur-I Block in terms of Memo No. 201/J.Swa/17 dated 01.11.2017 issued by the

Secretary, Zilla Parishad, Paschim Medinipur (now Jhargram Zilla Parishad) and has prayed for issuance of a fresh notification in terms of the guidelines of 1988 State Budget Head.

The petitioner in W.P.A. 12664 of 2019 (for short W.P.A. 2) has prayed for issuance of mandamus to appoint him in the post of Homoeopathy Medical Officer at the said gram panchayat.

Since the two writ petitions arise out of the selection process for appointment of the post of homoeopathy doctor under the same gram panchayat, with the consent of parties both the writ petitions are taken up for analogous hearing as identical questions of law and fact arises for consideration and are decided by this common judgment and order.

The writ petitioner in W.P.A. 1 has challenged the selection process on the ground that the petitioner was not given preference for possessing the B.H.M.S. degree. The writ petitioner submitted representations dated 08.06.2018 and 21.06.2018 praying for appointing him to the post of homoeopathy doctor.

The writ petitioner in W.P.A. 2 claims that he was selected for appointment to the post of homoeopathy doctor at Nepura Gram Panchayat under Binpur-I Block and the Executive Officers of the Panchayat Samity have forwarded the documents of the petitioner for according approval to the appointment of the petitioner. The grievance of the petitioner in W.P.A. No.2 is that he has not been given appointment to the said post till date.

Mr. Chaudhuri, learned advocate appearing for the petitioner in W.P.A. 1 contends that the petitioner is having B.H.M.S. qualification and the writ petitioner in W.P.A. No. 2 is a diploma holder, and as such the writ petitioner in W.P.A. No.1 should be given preference for having the degree in homoeopathy as a degree holder has to be considered as a candidate possessing higher qualification than a diploma holder. Mr. Chaudhuri further submits that the respondent authorities have changed the Rules after initiation of the selection process by holding an interview of fifty marks which was not contemplated in the 1988 guidelines of the State Budget Head. He thus, submits that the selection of doctor on the basis of the oral interview is invalid in the eye of law and

the entire selection process is liable to be set aside. In support of his contention that the selection on the basis of the oral interview lacks transparency and the entire selection process is vitiated Mr. Chaudhuri relied upon a decision of the Hon'ble Supreme Court in the case of *Bishnu Biswas & Ors. Vs. Union of India & Ors.* reported in (2014) 5 Supreme Court Cases 774. He also places reliance upon an order dated April 7, 2017 in W.P. No. 26826 (W) of 2015 in the case of *Md. Mostafa Parhad Hossain & Ors. Vs. The State of West Bengal & Ors.* wherein the Co-ordinate Bench held that where the terms and conditions, Rules or norms for selection has been changed after initiation of the selection process, the entire selection process is liable to be set aside.

Mr. Mitra, learned advocate appearing for the State submits that the call letters for viva voce test was issued to the candidates who were provisionally qualified for the viva voce test for appointment to the post of homoeopathy doctor. He further contended that the petitioner in W.P.A. 1 participated in the said viva voce test along with other candidates called for the said viva voce test and the petitioner in W.P.A. No.2 having secured the highest

marks in the interview was selected for appointment to the post of homoeopathy doctor.

Mr. Ghosh, learned advocate representing the writ petitioner in W.P.A. No.2 contended that the petitioner in W.P.A. No.1 having participated in the viva voce test is estopped from challenging the process of selection of candidates on the basis of such viva voce test. In support of his contention that a candidate having participated in the selection process is estopped from challenging the selection process at the subsequent stage, Mr. Ghosh placed reliance upon a decision of the Hon'ble Supreme Court in the case of *Dhananjay Malik & Ors. Vs. State of Uttaranchal & Ors.* reported in (2008) 4 Supreme Court Cases 171.

Heard the learned advocates for the parties and perused the materials on record. It appears from the notification dated 23.05.1988 that the requisite qualification for appointment as a Medical Officer is D.M.S. or equivalent. It further appears from the notification dated 04.12.2017 that the requisite qualification is DMS or equivalent.

Mr. Chaudhury could not produce any rule, norm for giving preference to a degree holder while giving appointment to the post of Homoeopathy Medical Officer. The notification dated 23.05.1988 is silent as to giving any preference to a BHMS degree holder. It further appears from the record that the concerned Block Development Officer issued a call letter to the petitioner under Memo No. 1212 dated May 14, 2018 requesting him to appear for the viva voce test of fifty marks before the Block Level Selection Committee and the date of such viva voce test was fixed on June 7, 2018.

It is not in dispute that the petitioner in W.P.A. No.1 participated in the said viva voce test at the scheduled date and time without any protest. On the following day i.e. on 08.06.2018, petitioner submitted a representation before the concerned Block Development Officer contending that B.H.M.S. or a post graduate qualified candidate should be given preference while giving appointment to the post of homoeopathy officer. In the subsequent representation dated June 21, 2018, the petitioner again prayed for giving preference to B.H.M.S. or post graduate qualified doctors. Thus, it is evident that the case of the petitioner in W.P.A.

No.1 in his representations before the authorities was to give him preference for possessing the B.H.M.S. degree. The petitioner in W.P.A. No.1 participated in the viva voce test without any demur and after being successful in the said test is now challenging the selection process. The Hon'ble Supreme Court in the case of Dhananjay Malik (Supra) held that a candidate having unsuccessfully participated in the process of selection without any demur are estopped from challenging the selection process. The Hon'ble Supreme Court held thus -

*“it is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.*

*In Madan Lal V. State of J&K- this Court pointed out that when the petitioners appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.*

*In the present case, as already pointed out, the respondent-writ petitioners herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the*

*Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done."*

This Court, therefore, holds that the petitioner in W.P.A. No.1 having participated in the viva voce test without any demur is estopped from complaining that the selection process was not held in accordance with the Rules.

The decision of the Co-ordinate Bench in the case of Md. Mostafa Parhad Hossain (Supra) is not applicable to the case on hand as in that case the negative marking system as contemplated in the selection process was not followed and instead of marking the papers by OMR machines, the papers were physically checked. After taking note of such factual scenario, the Co-ordinate Bench was pleased to set aside the selection process in the case of Md. Mostafa Parhad Hossain (Supra).

In Bishnu Biswas (Supra), the Hon'ble Supreme Court took note of the fact that the High Court after considering several issues recorded a finding of fact that awarding of marks in the oral interview indicated lack of transparency in the matter. On the basis of such factual

finding, the Hon'ble Supreme Court was pleased to hold that the selection of candidates on the basis of marks awarded in the interview was arbitrary and is liable to be struck down. The said decision also has no manner of the application to the case on hand.

It is not in dispute that the writ petitioner in W.P.A. No. 2 secured more marks than the petitioner in W.P.A. No. 1 in the viva voce test and he has been selected for appointment. Since the papers relating to the appointment of the petitioner in W.P.A. No.2 has been forwarded to the Secretary for granting approval for appointment, the Secretary, Paschim Medinipur Zilla Parishad (now Jhargram Zilla Parishad) being the respondent no.5 herein is directed to issue necessary approval and thereafter the respondent authorities shall issue appointment letter to the petitioner. The entire exercise shall be completed as expeditiously as possible but positively within a period of twenty one working days from the date of communication of this order.

With the above observations, W.P.A. 12664 of 2019 and W.P.A. 9921 of 2018 are, accordingly, disposed of.

There shall be however no order as to costs.

Urgent photostat copy of this order, if applied for, be given to the parties after observing necessary formalities.

**(Hiranmay Bhattacharyya, J.)**