

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**MAT 603 of 2024
CAN 1 of 2024**

**Dr. Arpan Kumar Ghosh
Vs.
State of West Bengal & Ors.**

Appearance:

For the Appellant	:	Mr. Subir Sanyal, Adv. Mr. Subhas Jana, Adv. Mr. Surojit Mukherjee, Adv.
For the Respondent No. 1 to 3	:	Mr. D. N. Maity, Adv. Mr. A. Santra, Adv.
For the Respondent No. 4	:	Ms. Sanghamitra Nandi, Adv.
For the N.M.C	:	Mr. Indranil Roy, Adv. Mr. Sunit Kr. Roy, Adv.
Judgment on	:	23.08.2024

Harish Tandon , J.

The point on which the writ petition was decided by the Single Bench has not only been taken by the appellant being contrary to law but the horizon of the instant appeal has further been extended on the facts disclosed by the respondent authorities in the affidavit-in-opposition filed to

an application for stay; some of which touches upon the facts, some on a pure question of law. We, therefore, permitted the appearing counsel to address all the issues in order to set at rest the issues raised by the writ petitioner in pursuit of rendering the justice.

The facts are more or less undisputed so far as the stand of both the parties before us. The petitioner and the respondent no. 4 in the instant appeal were appointed to the post of Demonstrator of Physiology in JNM Hospital, Kalyani. The notification was issued on 11.06.2018 inviting applications from the existing faculty members holding the post of Demonstrator for the promotional post of Assistant Professor in Physiology. It was clearly indicated in the said notification that the application in prescribed format shall be filed with the concerned head of the Department who shall forward the same to the Office of Principal, College of Medicine and JNM Hospital, Kalyani by 26th June, 2018 (4 pm). After receipt of the said applications within the time and the date so indicated therein, the Principal shall forward this application to the Office of the Registrar, West Bengal University of Health Sciences (WBUHS) for further processing. It was further indicated that the reservation policy of the Government of West Bengal shall be strictly followed and the eligibility criteria shall be as per the Rules and Regulations of the Medical Council of India (MCI).

It is manifest from the said notification that the mode of selection to the promotional post was on the basis of the interview to be notified in due course. Undisputedly, the eligibility criteria as per the Rules of the MCI for the post of Assistant Teacher are MD in Physiology. The record further

revealed that the petitioner/appellant was appointed as Demonstrator in Physiology on 12.11.2009 whereas the respondent no. 4 herein joined in the said post on 01.12.2009 and therefore for the purpose of seniority it is evidently clear that the respondent no.4 was junior to the appellant. At the relevant point of time, the petitioner completed the MD course and the certificate in this regard was issued prior to the last date of application but admittedly the respondent no. 4 could get the certificate of successfully completed the said MD course on 23.07.2018.

According to the writ petitioner, there is no power conferred upon the authorities to dispense with the eligibility criteria in permitting the respondent no. 4 to compete in the selection test which should be restricted to the last date of an application. In other words, it is averred in the said writ petition that since the respondent no. 4 did not have the certificate of successfully completed the MD course on the last date of application, he was not eligible to offer his candidature in the said promotional examination. The petitioner raised the above issue after the declaration of the result by which the respondent no. 4 was promoted to the post of Assistant Professor in physiology before the competent authority which was kept in abeyance as no decision was taken thereupon which constrained the petitioner to file a writ petition before this Court being WP 23786 (W) of 2018 which was disposed of on 12th December, 2018 directing the West Bengal University of Health Sciences (WBUHS) to pass a reasoned order on such representation.

Pursuant to the said direction the Registrar of the said University passed an order on 12.02.2019 rejecting the said application on this score that the respondent no. 4 was selected on merit on the basis of an interview after giving opportunity to all the participating candidates an equal chance. It was further highlighted in the said order that all the participating candidates including the appellant and the respondent no. 4 who were pursuing the MD course in the same academic session (2015-2018) from the different Universities and the respondent no. 4 was permitted to apply for the said post on the condition that he shall produce the final result of the MD course at the time of the interview. It is expressly observed that the Universities have adopted the process of selection in more democratic, broad-based manner and took ultimate decision that the respondent no. 4 is eligible in all respect. The said order of the Registrar is challenged by the petitioner by filing the writ petition which is disposed of by passing the impugned order.

It would be relevant to adumbrate the stand taken by the respondent authorities in affidavit in opposition filed before the Single Bench. It is a specific stand of the authorities that the appellant was not eligible to apply for the post of the Assistant Professor in physiology being a person belonging to unreserved category, as the post was to be filled up from the candidate belonging to a reserved category. The explanation is sought to be given in this regard that the permission to participate in the said selection process so far as the appellant is concerned was given with an anticipation that in the event, the reserved category aspirants failed to establish their eligibility, the promotion can be extended to appellant upon taking a

permission from the backward class Welfare Department. Interestingly, the score-sheets of the interview and the process of selection were disclosed in the said affidavit in opposition which would reveal that the appellant secured 69 marks out of 100 marks whereas the respondent no. 4 secured 57.1 yet he was considered more meritorious. Though the Single Bench has not adverted to the aspect whether such vacancy is to be filled up from the candidate belonging to reserved category on the basis of the stand taken by the respondent authorities but simplicitor proceeded to dismiss the writ petition upholding the decision of the said authority solely on the ground that there was a disclaimer appended to the said notification inviting applications wherein the University reserved the right to cancel the entire process of recruitment/panel/appointment (if any) without assigning any reason or giving any explanation whatsoever. According to the Single Judge since the said disclaimer confers right upon the university to take any decision which in unequivocal terms is final, no interference is warranted in the writ petition.

Mr. Sanyal, the learned advocate appearing for the appellant is very critical on the judgment challenged in the instant appeal on interpretation of the disclaimer in submitting that such disclaimer is relatable to a cancellation of the process for selection without assigning any reason and therefore, by no stretch of imagination can be construed as the power to dispense with the eligibility criteria or changing the rule of the game which is not permissible in law. According to Mr. Sanyal, the disclaimer is restricted to a cancellation of the selection process and not otherwise and therefore, there is an apparent fallacy in an ultimate decision taken in the

impugned order. Mr. Sanyal would submit that the order of the Registrar of the University which is a subject matter of challenge in the writ petition does not reveal even remotely that the post of the Assistant Professor in physiology for which the recruitment process was undertaken is to be filled up from the reserved category candidate and therefore, the authorities cannot take a contrary stand for the first time in the affidavit in opposition filed before the Court. Mr. Sanyal further submits that the impugned order passed by the Registrar of the University is explicit to the extent that the selection was made purely on the basis of merit and the score-sheet appended to the affidavit in opposition filed by the respondent authorities would reveal that the petitioner secured the highest marks and therefore, it is inconceivable that the petitioner is less meritorious. Mr. Sanyal further submits that the eligibility criteria would mean that the candidate must have the requisite educational qualification as on the last date of submission of an application and not beyond it. In support of the aforesaid contention, the reliance is placed upon a judgment of the Apex Court in case of ***Ashok Kumar Sharma & Ors. vs. Chander Shekhar & Anr., reported in (1997) 4 SCC 18, Rakesh Kumar Sharma vs. State (NCT of Delhi) & Ors., reported in (2013) 11 SCC 58 and Rekha Chaturvedi (Smt) vs. University of Rajasthan & Ors., reported in 1993 Supp (3) SCC 168.***

Mr. Sanyal further submits that the decision of the respondent authorities in permitting the respondent no. 4 who admittedly did not possess the certificate relating to successful completion of the MD course as on the last date of the application, to produce the certificate at the time of an interview is beyond the conceivable powers and in view of the ratio of the

judgment as relied upon above is *per se* illegal. Mr. Sanyal vociferously submits that the Single Bench wrongly interpreted the disclaimer clause appended to the said notification to have conferred a unbridle power upon the authorities to relax any of the conditions pertaining to eligibility criteria and therefore, the order warrants interference. Mr. Sanyal would further submit that the stand of the authorities that the said vacancy is required to be filled up from the candidate belonging to a reserved category as per the 50 point roster is also factually incorrect and placed upon the chart showing their respective appointments and the promotion being extended to the candidates which would evidently reveal that the vacancy for which the recruitment process was undertaken shall be filled up as unreserved category even according to 50 point roster adopted by the authorities. He thus submits that the stand of the respondent authorities that the vacancy to be filled up from the candidate of the reserved category is manifestly erroneous and infirm.

Mr. Maity, learned Advocate appearing for the University strenuously submits that all the participating candidates were pursuing the MD course in the same academic session but from the different Universities and since the respondent no. 4 could not collect the certificate of completion of the said course on the last date of an application, in order to bring fairness, a decision was taken to permit the respondent no. 4 to participate in the selection process with the rider that the certificate of MD course shall be produced at the time of interview. It is further submitted that the respondent no. 4 was found successful on the basis of a merit between the candidates belonging to the reserved category and therefore, the merit was

taken as a parameter for promoting the respondent no. 4 to the post of the Assistant Professor in physiology. It is sought to be contended that the hospital was established for the first time in 2009 and the Post of Assistant Professor was filled up through a direct recruitment as per the 100 point roster and after any vacancy arose in the aforesaid post, being the promotional post, the 50 point roster was applied in terms of the provisions contained in the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976. It is further submitted that the first appointment to the said promotional posts was filled up through direct recruitment process though such post are earmarked as promotional post, as the University was established for the first time in 2009, the roster was in fact, applied when the eligible candidates in the feeder post were found and the roster policy was adopted since then. Mr. Maity further submits that the relaxation to submit the certificate of MD course was granted to the respondent no. 4 as all the candidates were pursuing the said course in the same academic sessions but from the different Universities which cannot be said to be unreasonable and irrational.

Mr. Indranil Roy, learned advocate appearing for the Medical Council of India submits that he has negligible role in the instant proceedings but since it has been made a party to the proceedings, any decision taken by the Court shall be respected.

Ms. Nandi, learned advocate appearing for the respondent no. 4 submits that her client was found successful in the selection process as a

meritorious candidate and is discharging the duties in the position of the Assistant Professor since last 6 to 8 years. According to her, relegating the respondent no. 4 to the feeder post has a cascading effect imputing a stigma on him which should also be taken note of by the Court. She reiterates and adopts the submission of the respondent authorities that the said vacancy was earmarked for the reserved category candidate and being the meritorious candidate under such reserved category such appointment should not be faulted with. She arduously submits that the University have taken a reasonable approach in giving a relaxation to produce the certificate of successful completion of the MD course at the time of an interview which in fact was duly complied with and such decision therefore cannot be said to be unreasonable.

On the conspicuous of the aforesaid facts we feel it prudent to determine the points so agitated on the legal parameters applicable in this regard. The undisputed facts as unfurled hereinbefore may be summarised with further precision as follows:

- (i) The Post of the Assistant Professor in physiology fell vacant on the promotion of one Dr. Sujata Biswas who admittedly belonged to a reserved category to the post of the Associate Professor. At the time of establishing the said hospital, two posts were sanctioned for Assistant Professor in Physiology which were filled up through direct recruitment. Dr. Sujata Biswas and Dr. Suchandra

Banerjee were initially appointed to the said post wherein Dr. Sujata Biswas belonged to a reserved category.

- (ii) The first vacancy occurred on the resignation of Dr. Suchandra Banerjee who admittedly belonged to unserved category and Dr. Dipa Saha was appointed to such post which according to the respondent authorities was also done through a direct recruitment.
- (iii) Subsequently, Dr. Dipa Saha resigned from the said post and Dr. Avijit Mondal was appointed to the said post, who undisputedly belonged to a reserved category.
- (iv) The post for which the respondent no. 4 has been promoted subsequently felt vacant on the promotion of Dr. Sujata Biswas which according to the respondent authorities is treated as a first vacancy in the said promotional post to be filled up from the candidate of the reserved category.
- (v) Indubitably, the respondent no. 4 did not have the certificate pertaining to the successful completion of the MD course as on the last date of application and a relaxation was granted by permitting him to produce the certificate as on the date of interview.
- (vi) Admittedly, the appellant was also permitted to participate in the said selection process and was awarded the highest marks amongst three candidates including the respondent no. 4.

On the backdrop of the aforesaid undisputed facts, let us examine whether the stand of the respondent authorities can be sustained on the legal parameters. The advertisement inviting the application dated 11.06.2018 was issued and published for inviting an application from the eligible faculty members for promotion to higher academic posts of a Professor, Associate Professor and Assistant Professor in different discipline of the modern medicine in the said hospital. We are concerned with the post of Assistant Professor in Physiology which was indicated as one post. The said notification vividly revealed that the application has to be processed through proper channel and the reservation policy of the Government of West Bengal shall be strictly followed. It was further indicated that the eligibility criteria shall be as per the Rules and Regulations of the Medical Council of India. The minimum qualification for teachers in Medical Institutions Regulation, 1998 framed by the Medical Council of India is exposit of the eligibility criteria relating to an Assistant Professor. It is provided in the said regulation that for the post of an Assistant Professor, a post-graduate qualification i.e., MD/MS in a concerned subject shall be the eligibility qualification with the rider that the candidate must complete three years in teaching and research experience as junior resident in a recognized medical college in a concerned subject and one year as senior resident in the concerned subject in a recognized medical college.

It can be reasonably inferred that the eligibility criteria enshrined in the said Notification dated 11.06.2018 to the extent that the same shall be as per the Rules and Regulations of the Medical Council of India which is the post-graduate qualification i.e., MD/MS in a concerned subject and the

candidate must also possessed the teaching and research experience of three years as junior resident in a recognized medical college in concerned subject and one year as senior resident in concerned subject in a recognized medical college. It is not disputed that all the three candidates who offered their candidature for the said post including the appellant and the respondent ultimately possessed the post-graduate degree but so far as the respondent no. 4 is concerned the certificate relating to successful completion of the said post-graduate course was not submitted nor possessed as on the last date of application under the said Notification dated 11.06.2018.

The first point therefore fell for consideration whether the University can permit the respondent no. 4 by relaxing the conditions incorporated in the said notification in the garb of adopting a democratic, broad-based and increment in the talent pool for selection in the said post. It is too fundamental to recapitulate that an individual can do anything unless forbidden by law; on the other hand, the statutory authority cannot do a thing not conferred by law. The University is a creature of a statute and therefore, cannot transgress the boundaries set forth in the statutory provision in adopting a thing not included therein. The notification dated 11.06.2018 being the repository of the informations, criteria and the process to be adopted does not contain any power of relaxation into an eligibility criteria which the intending candidate should possess. As indicated above, as on the date of the interview all the candidates possess the requisite eligibility in educational qualification but a point is taken by

the appellant that such eligibility relating to educational qualification must be possessed by the intending candidate as on the last date of application.

In ***Rekha Chaturvedi (supra)*** somewhat identical facts appears to have been involved therein. The advertisement for appointment of the Assistant Professor (Lecturers) in the department of History, University of Rajasthan was published inviting an application within November 14, 1983. The minimum requisite educational qualification for the said post was also expressly included therein in accordance with the ordinance of the said University. Certain educational qualification which did not find place in the said ordinance were adopted by the University and also permitted the candidate to participate in the said selection process. The question that fell for consideration in the said report was whether a person who did not admittedly possess the educational qualification as on the last date of submission of an application can be permitted to participate in the said recruitment process in departure from the ordinance of the University. The Apex Court thus held that the moment the cut-off date for an application with the requisite educational qualification is fixed, the candidate who does not possess such qualification as on the said last date cannot be permitted as an eligible candidate. It is further held that if the last date for submission of the application with the requisite educational qualification is done away with without any power to relax the same it would invite the worst consequences in the following:

“10. The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last date for making applications has only

to be stated to be rejected. The date of selection is invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to state whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications. Unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence, viz., even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications. We have, therefore, no hesitation in holding that when the Selection Committee in the present case, as argued by Shri Manoj Swarup, took into consideration the requisite qualifications as on the date of selection rather than on the last date of preferring applications, it acted with patent illegality, and on this ground itself the selections in question are liable to be quashed. Reference in this connection may also be made to two recent decisions of this Court in *A.P. Public Service Commission, Hyderabad v. B. Sarat*

Chandra and District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram v. M. Tripura Sundari Devi.

11. However, for the reasons which follow, we are-not inclined to set aside the selections in spite of the said illegality. The selected candidates have been working in the respective posts since February 1985. We are now in January 1993. Almost eight years have elapsed. There is also no record before us to show as to how the Selection Committee had proceeded to weigh the respective merits of the candidates and to relax the minimum qualifications in favour of some in exercise of the discretionary powers vested in it under the University Ordinance. If the considerations which weighed with the Committee in relaxing the requisite qualifications were valid, it would result in injustice to those who have been selected. We, however, feel it necessary to emphasise and bring to the notice of the University that the illegal practices in the selection of candidates which have come to light and which seem to be followed usually at its end must stop forthwith. It is for this purpose that we lay down the following guidelines for the future selection process:

A. The University must note that the qualifications it advertises for the posts should not be at variance with those prescribed by its Ordinance/Statutes.

B. The candidates selected must be qualified as on the last date for making applications for the posts in question or on the date to be specifically mentioned in the advertisement/notification for the purpose. The qualifications acquired by the candidates after the said

date should not be taken into consideration, as that would be arbitrary and result in discrimination. It must be remembered that when the advertisement/notification represents that the candidates must have the qualifications in question, with reference to the last date for making the applications or with reference to the specific date mentioned for the purpose, those who do not have such qualifications do not apply for the posts even though they are likely to acquire such qualifications and do acquire them after the said date. In the circumstances, many who would otherwise be entitled to be considered and may even be better than those who apply, can have a legitimate grievance since they are left out of consideration.

C. When the University or its Selection Committee relaxes the minimum required qualifications, unless it specifically stated in the advertisement/notification both that the qualifications will be relaxed and also the conditions on which they will be relaxed, the relaxation will be illegal.

D. The University/Selection Committee must mention in its proceedings of selection the reasons for making relaxations, if any, in respect of each of the candidates in whose favour relaxation is made.

E. The minutes of the meetings of the Selection Committee should be preserved for a sufficiently long time, and if the selection process is challenged until the challenge is finally disposed of. An adverse inference is liable to be drawn if the minutes are destroyed or a plea is taken that they are not available.”

The aforesaid ratio of law is further reiterated and restated in a subsequent Three-Judge Bench decision of the Apex Court in ***Ashok Kumar Sharma (supra)*** in the following:

“6. The review petitions came up for final hearing on 3-3-1997. We heard the learned counsel for the review petitioners, for the State of Jammu & Kashmir and for the 33 respondents. So far as the first issue referred to in our Order dated 1-9-1995 is concerned, we are of the respectful opinion that majority judgment (rendered by Dr T.K. Thommen and V Ramaswami, JJ.) is unsustainable in law. The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their applications ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority judgment. This is also the proposition affirmed in *Rekha Chaturvedi v.*

University of Rajasthan. The reasoning in the majority opinion that by allowing the 33 respondents to appear for the interview, the recruiting authority was able to get the best talent available and that such course was in furtherance of public interest is, with respect, an impermissible justification. It is, in our considered opinion, a clear error of law and an error apparent on the face of the record. In our opinion, R.M. Sahai, J. (and the Division Bench of the High Court) was right in holding that the 33 respondents could not have been allowed to appear for the interview.”

Even a decade before the Apex Court in *Rakesh Kumar Sharma (supra)* held in unequivocal term that the eligibility criteria should be restricted as on the last date of making an application and the candidate who acquired such qualification subsequent thereto should not be permitted to participate in the said examination. In such backdrop it is held:

“12. In U.P. Public Service Commission v. Alpana, this Court, after considering a large number of its earlier judgments, held that eligibility conditions should be examined as on the last date for receipt of applications by the Commission. That too was a case where the result of a candidate was declared subsequent to the last date of submission of the applications. This Court held that as the result does not relate back to the date of examination and eligibility of the candidate is to be considered on the last date of submissions of applications, therefore, a candidate, whose result has not been declared up to the last date of submission of applications, would not be eligible.

22. It also needs to be noted that like the present appellant there could be large number of candidates who were not eligible as per the

requirement of rules/advertisement since they did not possess the required eligibility on the last date of submission of the application forms. Granting any benefit to the appellant would be violative of the doctrine of equality, a backbone of the fundamental rights under our constitution. A large number of such candidates may not have applied considering themselves to be ineligible adhering to the statutory rules and the terms of the advertisement.”

The law enunciated in the above reports uniformly laid down that the eligibility criteria in the said notification is restricted to a last date of application and relaxing such conditions without any authority so reserved is impermissible and smack of arbitrariness. The authority cannot permit a candidate who does not possess the requisite educational qualification as on the last date of submission of application in the garb of a broad-based and democratic process. The candidate who did not possess the requisite educational qualification as on the last date of submission may in his conscious decision considered himself to be ineligible and may not apply for such post which in the event, such relaxation is provided shall tantamount to depriving such candidate who may be found to be more meritorious had he applied for such post.

It leads to another ancillary point relatable to a power of relaxation to be derived from the disclaimer which is interpreted by the Court to have conferred power upon the authorities in this regard. The disclaimer Clause is quoted as under:

“The WBUHS reserves the right to cancel the entire process of recruitment/panel/appointment (if any) without assigning any reason

or giving any explanation whatsoever. The decision of the WBUHS is final and no arbitration in any form will be entertained. The situation of vacancy may change.”

The Single Bench interpreted the aforesaid disclaimer Clause to have conferred a power upon the selection committee to relax the eligibility criteria and such decision is final meaning thereby not amenable to be challenged before the Court. The meaningful reading of the language employed in the disclaimer Clause does not appear to have bestowed power upon the authorities to relax the eligibility criteria as on the date of application but has its operation to the cancellation of the process of recruitment/panel/appointment without assigning any reason or giving any explanation whatsoever. Had it been a case that the University have decided to scrap the entire selection process, the interference under the judicial review may be minimal as such decision is final. It cannot be stretched too far to include within its folds the power to relax the minimum eligibility criteria which every candidate aspiring for such post must possess. It would not be misnomer to suggest that the power to relax in all or any of the conditions enshrined in the notification issued for recruitment/selection process must emanate from the statutory provisions or the Rules applicable in this regard or at times such power is expressly communicated to all the aspirants by inserting a clause provided, there is no such embargo created in the statutory provisions. In such situation, the authorities having power to relax if exercise such power in a reasonable manner as sought to be projected in the instant case, there is no difficulty in upholding such decision as they are the best persons in the relevant field

having expertise. We are unable to countenance the interpretation assigned by the Single Bench that the said disclaimer clause conferred right upon the authorities to relax all or any of the conditions including the minimum educational qualification to exist as on the last date of an application.

The other seminal point involved in the instant appeal though not taken by the authority while disposing of the representation as directed by this court in an earlier writ petition is the adoption and/or adherence of a roster in terms of the provisions contained in West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976. The reliance appears to have been taken on Section 4 of the said Act providing that all appointments to the services and post in the establishment are to be filled up by the direct recruitment to be regulated by the provisions contained therein. Section 4 of the said Act is quoted below:

“4. (1) After the commencement of this Act all appointments to services and posts in an establishment which are to be filled up by direct recruitment shall be regulated in the following manner, namely,-

(a) subject to the other provisions of this Act twenty-two per cent of the vacancies shall be reserved for candidates belonging to Scheduled Castes and six per cent for candidates belonging to Scheduled Tribes, in the manner set out in Schedule I

Provided that the State Government may, from time to time, by notification in the Official Gazette, increase the percentage so, however, that the reservation shall not exceed twenty-five per cent in

the case of Scheduled Castes and ten per cent in the case of Scheduled Tribes:

Provided also that in respect of the West Bengal Civil Service (Judicial), the percentage shall be ten for Scheduled Castes and five for Scheduled Tribes;

(b) fees, if any, prescribed for any examination for selection to any service or post shall not be charged in the case of candidates belonging to the Scheduled Castes or the Scheduled Tribes;

(c) the members of the Scheduled Castes and the Scheduled Tribes shall be entitled to a concession of five years over the prescribed maximum age limit for appointment to any service or post.

(2) The member of any Scheduled Caste or Scheduled Tribe candidate qualifying on merit for appointment to any unreserved vacancy in a service or post in any establishment to be filled up by direct recruitment shall not be deducted from the quota reserved in such service or post for such candidate under sub-section (1)."

According to the respondent authorities the appointment to the services or the posts shall strictly adhere to Schedule I appended thereto i.e., 100 point roster as the first appointment to the aforesaid post was through a process of direct recruitment. The reason sought to be assigned in this regard is that the college and hospital was established for the first time in 2009 upon sanction of the various posts including the two post of Assistant Professor in Physiology as there was no eligible candidate in the feeder post i.e., Demonstrator. According to the respondent authorities, the

one of the posts was reserved for Scheduled Castes candidate and the other post was under the General category in terms of the said Schedule which is in conformity with the Schedule I of the said Act. The respondent authorities further took stand that the vacancy in question arose for the first time to be filled up as promotional post in view of Schedule II appended to Section 5 of the said Act and was earmarked for reserved category. Section 5 of the said Act is relatable to the reservation policy for filling up the promotional post in any establishment. The 50 point roster is introduced in this regard in Schedule II thereof. Even for the purpose of the argument sake or in order to consider the stand of the respondent authorities as narrated hereinabove, the stand so taken has any substance in relation to the aforesaid Act, there is no incongruity in understanding the meaning of the “establishment” defined therein to mean an office of the State Government, local or statutory authority constituted under any State Act for the present purpose. The dichotomy between Section 4 and 5 as quoted hereinabove leaves no ambiguity in our mind that they operate in a specific field i.e., Section 4 operates in the event, the services or the posts are to be filled up by direct recruitment and the Section 5 operates when it to be filled by promotion. What appears to have been the stand of the authority which in our opinion does not appear to hold water is that the first 3 appointments to such promotional post was done through direct recruitment and it is only on a further vacancy having arisen, the same has to be treated under Section 5 more particularly, Schedule II and therefore, such post is to be kept for the reserved category. At the outset we must say that the aforesaid stand was not taken by the Registrar in its decision being the subject matter

of the writ petition in terms of the direction passed by this court in an earlier writ petition. It is only in the affidavit-in-opposition filed to a writ petition the aforesaid point is taken. We are conscious of the decision of the Apex Court in ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., reported in (1978) 1 SCC 405*** which in unequivocal term forbids the authorities to take a stand foreign to a stand taken in an order being the subject matter of the litigation nor such stand can be taken at the bar for the first time. It is held that the authorities shall defend the judicial review on the basis of the stand taking in a conscious decision and shall neither be permitted to take new stand nor can make an improvement at the time of hearing of the writ petition. It is thus held:

“8. The Second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji :

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

The aforesaid proposition has been applied consistently in a subsequent decision namely, ***United Air Travel Services through its proprietor A.D.M. Anwar Khan vs. Union of India through Secretary (Ministry of External Affairs), reported in (2018) 8 SCC 141***, wherein the plea taken at the bar *de hors* the ground on which the application for registration for Haj 2016 was not accepted.

Without adieu to the aforesaid point, let us test the stand on the basis of the facts discerned in course of the hearing. The contention of the respondent authorities is that the first appointment to the said post was made through a direct recruitment following Schedule I of the said Act where the first post shall be filled up with the reserved category candidate and the second should be with the unreserved category. The first vacancy occurred when Dr. Suchandra Banerjee resigned from the said post and in her place Dr. Dipa Saha was appointed which according to the respondent authorities through a direct recruitment. In such situation, even Schedule I and Schedule II required such vacancy to be filled up with the candidate belonging to a Scheduled Tribe.

Subsequently, Dr. Dipa Saha resigned on 25th November, 2013 and the said vacancy was filled up with Dr. Avijit Mondal belonging to a Scheduled Tribe. The respondent has taken a plea that the said vacancy of Dr. Avijit Mondal being a 4th vacancy was filled up with the candidate belonging to Scheduled Tribe in accordance with Schedule I. The vacancy which is a subject matter of dispute arose when Dr. Sujata Biswas belonging

to a Scheduled Caste category was promoted to a post of an Associate Professor and the said vacancy is required to be filled up in terms of Schedule II and therefore is earmarked for Scheduled Castes. We do not find any justification in the aforesaid stand for the simple reason that the aforesaid two posts of the Assistant Professor in Physiology was all along intended to be filled up by way of promotion and not by direct recruitment. The stand of the respondent authorities that there is no eligible candidate at the feeder post and therefore, appointment was made through a direct recruitment if accepted, there is no logic or symmetry in not following the roster be it 100 point or 50 point as in both the cases, the vacancy to be filled up with the category of person remained unchanged. The statutory authority cannot be permitted to act at its sweet will and switch over from Schedule I to Schedule II while filling up the vacancy in the garb of an ineligible candidate. Each vacancies in the service or the post must follow the roster point and it is inconceivable that the statutory authority would adopt a pick and choose policy i.e., one suits to its purpose is adopted. Even if we accept the stand of the respondent authorise that the exigencies prevalent at the time of each of the vacancy warrants adherence of Schedule I though in fact requires adherence of Schedule II, it cannot abruptly switch over and start the applicability of Schedule II discarding the actions taken in terms of Schedule I. The exigencies may be perceived in relation to a mode of filling up the vacancy but not to undermine the roster having a statutory flavour. The facts as disclosed hereinabove *in extenso* leaves no ambiguity in our mind that the disclosure of the vacancies would lead to a 5th or 6th vacancy which in both Schedule I and II should be filled

up by a candidate belonging to an unreserved category. The activation of Schedule II for the first time as it is to be done through the process of promotion has a cascading effect and smack of arbitrariness. The report card disclosed in the affidavit-in-opposition by the respondent authorities vividly reflects the merit of each of the candidates and it can be said in unequivocal words that the appellant was more meritorious than the other having secured 69 marks out of 100 in comparison to 57.1 marks out of 100 secured by the respondent no. 4. The uniformity and the certainty in the recruitment process is the hallmark of fair and transparent selection of a meritorious candidate and therefore, the stand of the authorities as projected is not acceptable.

The explanation offered by the respondent authorities that the appellant was permitted to participate in the said selection process for the reason that in the event the meritorious candidate under the reserved category is not found, the appellant can be appointed to the said post after taking an approval from the department of Backward Class Welfare Department, does not appear to be plausible. Apart from the appellant, two candidates i.e., the respondent no. 4 and 6 also applied and belonged to a reserved category and therefore, the merit could have been judged between them. Permitting the appellant to participate in the selection process and having found that he secured the best marks amongst the other candidates, the decision of the respondent authorities that the said vacancy is to be filled up with the reserved category candidate does not appear to hold water and do not deserve any appreciation.

It takes us to another situation that the said respondent no. 4 is working in the post of Assistant Professor since last 6 to 8 years and quashing and setting aside the decision of the authorities would impact his service. There is no fetter on the part of the Court of equity or the Constitutional Court to bring an equilibrium into the situation keeping in mind the interest of the candidates. If we revert the respondent no. 1 to the feeder post it has a cascading effect not on his service career but may percolate a negative signal into the students of the said college and hospital. We are informed in course of hearing that a post of Assistant Professor in Physiology has fallen vacant in the month of December, 2023. We, therefore, feel that a balance is required to be established for the ends of justice not to quash and set aside the appointment of the respondent no. 4 which otherwise is inevitable conclusion in view of the discussions made hereinabove.

We, therefore, direct the respondent authorities to promote the appellant to the post of Assistant Professor. We are conscious of the fact that the appellant was entitled to be promoted to such post from the date when the respondent no. 4 was appointed and if his appointment is to be reckoned from the day when the subsequent vacancy has arisen i.e., December, 2023 he shall be deprived of the seniority in the said cadre. We therefore direct the authorities that the appointment of the appellant to the post of Assistant Professor shall be deemed to have been made on the day when the respondent no. 4 was appointed and shall get all the notional benefits not the actual benefits attributable to the said post on and from the Month of December, 2023. The seniority of the respondent no. 4 shall be

reckoned from December, 2023 but the authorities are not entitled to take away any benefit given to the respondent no. 4 from the anterior date nor shall recover any amount paid to him attached to the said post. The appeal and application are disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

(Harish Tandon, J.)

I agree.

(Prasenjit Biswas, J.)