

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL APPELLATE JURISDICTION**

APPELLATE SIDE

MAT 12 OF 2025

With

CAN 1 of 2025

Sri. Sekhar Sarkar

VS

State of West Bengal & Ors.

**Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Biswaroop Chowdhury**

For the Appellant	Mrs. Usha Maity, Adv. Mr. Haider Ali, Adv. Mr. Satyam Sarkar, Adv.
For the State	Mr. Anirban Banerjee, Adv. Ms. Rima Sarkar, Adv.
For WBCSC	Mr. Subhrangsu Panda, Adv. Ms. Ira Bhattacharya, Adv. Ms. M. S. Mahapatra, Adv. Mr. Karan Paswan, Adv.
For respondent nos. 5 & 6	Ms. Amrapali Chaki, Adv.
CAV on	08.04.2025
Judgment on	07.07.2025

Arijit Banerjee, J. :-

1. This appeal is directed against a judgment and order dated October 1, 2024, whereby the appellant's writ petition being WPA 2054 of 2024 was disposed of by a learned Judge of this Court.

2. The appellant/writ petitioner participated in a recruitment process initiated by the West Bengal College Service Commission (in short the Commission) under the Persons with Disability PWD – (B) Category. His name appeared against Serial no. 2 of the provisional merit list published by the Commission. He submitted before the learned Single Judge that there is a vacancy in PWD- (A) category because of non-joining of one of the merit listed candidates. He sought appointment in the said vacancy.

3. The learned Judge disposed of the writ petition with the following observations:-

“The order dated 8th July, 2019 of the Labour Department, Government of West Bengal published in the Kolkata Gazette Extraordinary deals with the Rights of Persons with Disabilities Act, 2016.

It mentions that if 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 filled up through the procedure as mentioned in Section 34(2) of the Rights of Persons with Disabilities Act, 2016.

Section 34(2) of the Act, 2016 lays down that where in any recruitment year 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 and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five

categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability subject to the proviso mentioned in the Section.

From the aforesaid provisions of law, it appears that the vacancy which cannot be filled up in a particular year is required to be carried forward in the succeeding recruitment year.

In the instant case, the vacancy in the PWD- (A) category could not be filled up because of non-joining of the merit listed candidate. For filling up the same, the employer is required to carry forward the vacancy in the succeeding recruitment year. Only if the vacancy still cannot be filled up, then the same may be filled up by interchange among the five categories.

The appropriate authority is directed to take steps in accordance with law to fill up the said vacancy.”

4. Appearing for the appellant/writ petitioner, Ms. Usha Maity, learned Advocate submitted as follows:-

- (i) Advertisement No. 01 of 2020 dated 24.12.2020 was published by the Commission for recruitment of Assistant Professor in English.
- (ii) On 24.11.2022 interview of the petitioner was held.
- (iii) On 22.09.2023, the provisional merit panel was published. The appellant was empanelled as S.C. PWD- (B) category candidate. However, in the advertisement, there was no categorisation as ‘A’, ‘B’ or ‘C’.

(iv) It is settled law that no eligibility criteria or condition can be changed after the advertisement is published. However, in the present case three sub categories under SC, PWD have been shown in the merit panel which does not appear in the advertisement.

(v) The Government order dated July 8, 2019, would show that Model 100- Point Roster of Vacancies as notified by the Labour Department on 01.03.2024 was modified whereby 32nd vacancy in the said notification is reserved for Scheduled Caste (PWD). The Governor was further pleased to identify the vacancies in paragraphs 2 (a), (b), (c) and (d) of the Model 100- Point roster of vacancies by describing the percentage of 'benchmark' disability to ensure that one per cent each shall be reserved for each type of benchmark disability.

“a) 12th Vacancy – Unreserved (Persons with Disabilities – Blindness and low vision).

b) 32nd vacancy – Scheduled Caste (Persons with Disabilities) – Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attacked victims and muscular dystrophy.

c) 42nd Vacancy – Unreserved (Persons with Disabilities – Deaf and hard of hearing).

d) 72nd vacancy – Unreserved (Persons with Disabilities – Autism, intellectual disability, specific learning disability and mental illness and multiple disabilities).”

In paragraph 3 of the said notification dated July 8, 2019, it is specified that if any of the aforesaid vacancies 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 filled up following the procedure mentioned in Section 34(2) of Rights of Persons with Disabilities Act, 2016, which reads as follows:-

“(2) Where in any recruitment year if any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, than a person with disability.”

(vi) Paragraph 4 of the Government Order dated July 8, 2019, specifies that no curtailment of existing percentage of reservation for Scheduled Caste can be made in this regard. If no suitable SC candidate with benchmark disability is available for filling up the 32nd vacancy, then the same will first be filled up by a SC candidate with other benchmark disability by interchange among the categories mentioned in paragraph 2(a), (c) and (d) with explicit and prior permission of the appropriate Government. If there is no person with disability available for the relevant vacancy in that year, the employer, then only, shall fill up the vacancy by appointment of a SC

person without any disability with the prior permission of the appropriate Government.

(vii) The post of Assistant Professor in English in the relevant institution is not the 12th vacancy meant for unreserved PWD-A category.

(viii) The appellant belongs to Rajbanshi category which is a recruitment scheduled caste. He is a physically disabled person (Orthopedically) and his disability is calculated at 50 per cent as would appear from the Disability Certificate issued by the District Hospital, Jalpaiguri.

(ix) Both Section 34(2) of the Rights of Persons with Disability Act, 2016, and the Government order dated July 8, 2019, contemplate filling up of a vacancy by inter changing categories if suitable SC candidate of a particular category is not available. Therefore, the vacancy which is still subsisting in Netaji Subhas Maha Vidyalaya at Haldibari, Cooch Behar, for unreserved PWD-A category can be filled up by recommending an appointment for the appellant herein who belongs to SC-PWD-B category. The petitioner being an empanelled candidate under the SC-PWD-B category cannot be left without service on the plea that the vacancy is in unreserved PWD-A category.

Submission made on behalf of the West Bengal College Service Commission

5. The appellant belongs to Scheduled Caste category. He is also a physically handicapped person with benchmark disability (Locomotor

Disability including Cerebral Palsy, Leprosy, Dwarfism, Acid Attack Victims and Muscular Dystrophy) which falls under 32nd vacancy interms of the 'Model 100-Point Roster'. The appellant was empanelled at Serial no. 2 under PWD- (B) category out of 1 notified vacancy.

6. The appellant is seeking recommendation under PWD- (A) category that belongs to unreserved class of Persons with Disabilities -Blindness and low vision which falls under 12th vacancy interms of the Model 100-Point Roster.

7. Therefore, the vacancy not being the 32nd vacancy interms of the Model 100-Point Roster, the appellant cannot claim appointment. The appellant does not qualify for the 12th vacancy.

8. The appellant also cannot claim recommendation for appointment by interchange with other categories. The Government Notification dated July 8, 2019 on which the appellant heavily relies clearly states that if any of the vacancies against Serial nos. 12, 32, 42 and 72 of the Model 100-Point Roster 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 filled up through the procedure as mentioned in section 34 (2) of Rights of Persons with Disabilities Act, 2016. Therefore, the procedure under section 34 (2) of the 2016 Act will have to be followed by the authorities.

9. It was further submitted that clause 4 of the amended notification dated July 8, 2019, would apply if there is any vacancy under the 32nd vacancy in terms of the Model 100-Point Roster. However, the available vacancy is for PWD- (A) Category which falls under the 12th vacancy in

terms of the Model 100-Point Roster. Therefore, clause 4 of the notification dated July 8, 2019, would not come to the aid of the appellant.

10. It was also submitted that the Commission is not the appropriate authority to fill up the concerned vacancy upon interchanging categories pertaining to benchmark disabilities. Unless the appointing authority makes a proper requisition upon obtaining prior permission and approval from the State Government including authentication from the Social Welfare Department of the Government of West Bengal, the Commission cannot do anything in the matter. The Commission is merely an authority for selecting and recommending eligible candidates through a proper selection process. The governing bodies of the respective colleges are the appointing authorities in terms of law and they maintain the vacancy roster in terms of the Model 100-Point Roster.

Court's View

11. It is not in dispute that the appellant applied for the post of Assistant Professor in English subject for PWD-(B) category under the Rights of Persons with Disabilities Act, 2016. It is also an admitted case that the appellant's name appeared against Serial no. 2 in the panel/merit list.

12. One post in the PWD-(A) category remained vacant since the recommended candidate did not join the post. The appellant claims that his name should be recommended for appointment in that post, by interchanging with other categories. He primarily relies on a Government Order dated July 8, 2019, whereby modification was made in the 'Model 100- Point Roster of Vacancies' as had been notified by the Labour

Department of the State Government vide a notification dated 01/03/2011.
The said Government Order needs to be noticed in its entirety.

“In exercise of power conferred by Sec 34(1) of the ‘Rights of Persons with Disabilities Act, 2016’, the Governor is pleased to make the following modification in the ‘Model 100-Point Roster of Vacancies’ as notified by Labour Department vide Notification No.50-EMP/1M-25/98 Dated 01/03/ 011.

32nd vacancy in the said notification is reserved for ‘Scheduled Caste (Person with Disabilities).”

2. The Governor is further pleased to identify the below mentioned vacancies of the ‘Model I 00-Point Roster of Vacancies’ for the following types of benchmark disabilities to ensure that one per cent each shall be reserved for each type of benchmark disability-

(a) 12th Vacancy- Unreserved (Persons with Disabilities - Blindness and low vision)

b) 32nd Vacancy- Scheduled Caste (Persons with Disabilities- Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy).

c) 42nd Vacancy- Unreserved (Persons with Disabilities - Deaf and Hard of Hearing).

d) 72nd Vacancy- Unreserved (Persons with Disabilities - Autism, intellectual disability, specific learning disability, mental illness and multiple disabilities).

3. If any of these vacancies cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reason, such vacancies shall be filled up through the procedure as mentioned in Sec 34(2) of 'Rights of Persons with Disabilities Act, 2016'.

4. No curtailment of existing percentage of reservation for Scheduled Caste can be made in this regard. Hence, if no suitable SC candidate with benchmark disability is available for filling up of 32nd vacancy, then said vacancy will first be filled up by a SC candidate with other benchmark disabilities by interchange among the categories as mentioned in para 2, (a),(c) and (d) with explicit and prior permission of 'Appropriate Government'. If there is no person with disability available for the relevant vacancy in that year, the employer, then only, shall fill up the vacancy by appointment of a SC person without any disability with approval of the 'Appropriate Government'.

5. 'Appropriate Government' in the foregoing paragraph will have the same connotation and meaning as defined in Sec 2 (b)(ii) of 'Rights of Persons with Disabilities Act, 2016'.

6. All appropriate authorities of the Government have been consulted on respective issues concerning them.

7. This order issues in terms of Sec 14 of The West Bengal Regulation of Recruitment in State Government Establishments and Establishments of Public Undertakings, Statutory Bodies, Govt. Companies and Local authorities Act, 1999.

By order of the Governor,

Sd/-

MALAY KUMAR DE

Chief Secretary to the Government of West Bengal”

13. Relying on the aforesaid Government Order, the petitioner claims appointment by an interchange among the categories. This claim of the petitioner, in my opinion, is not well founded.

14. The aforesaid Government Order clearly envisages that if any of the vacancies mentioned in paragraph 2 of the Order cannot be filled up by reason of a suitable person with benchmark disability not being available or for any other sufficient reason, such vacancy shall be filled up through the procedure laid down in Section 34(2) of the Rights of Persons with Disabilities Act, 2016. Therefore, we need to advert to the said provision of law. Section 34(2) of the 2016 Act reads as follows:-

“34. Reservation.

(2). Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the

succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability: Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.”

15. It clearly appears from the said statutory provision that if 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. Only if even in the succeeding recruitment year a suitable person is not available, the vacancy may first sought to be filled by interchange among the various categories of disabilities and only when there is no person with disability available for the post in that succeeding year, the employer shall fill up the vacancy by appointment of a person other than a person with disability. Therefore, just because there is vacancy in PWD-(A) category, the appellant/petitioner cannot as a matter of right claim appointment in that post by interchange among categories. The procedure under Section 34(2) has to be followed. It is a statutory mandate.

16. It is not in dispute that the vacancy is against serial no. 12 in the Model 100- Point Roster of Vacancies which is an unreserved post for

persons with disabilities-blindness and low vision. The applicant's disability is of the kind envisaged in the post against Serial no. 32 of the Model 100 Point Roster of Vacancies which includes locomotor disability. Therefore, if in a particular year, a vacancy against Serial no. 12 of the Model 100- Point Roster of Vacancies cannot be filled up for want of suitable person with benchmark disability or other sufficient reason, such vacancy has to be carried forward in the succeeding recruitment year and even if in that year a suitable person is not available, can the vacancy be filled up by interchange amongst categories. Hence, the appellant cannot straight away claim appointment in the concerned vacant post which is contemplated against Serial no. 12 of the Model 100- Point Roster of Vacancies.

17. I have extracted the relevant portion of the learned Single Judge's order hereinabove. The learned Judge correctly appreciated the applicable law and disposed of the writ petition by not allowing the writ petitioner's prayer but by directing the appropriate authority to take steps in accordance with law to fill up the concerned vacancy. I find no infirmity in the said order. Hence, there is no reason to interfere with the order under appeal. The appeal and the connected application are dismissed. There will be no order as to costs.

18. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(Biswaroop Chowdhury, J.)

(Arijit Banerjee, J.)