

**IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE CITY
K O L K A T A – 7 0 0 0 9 1**

Present :-

*Hon'ble Justice Ranjit Kumar Bag,
Judicial Member.*

-AND-

*Hon'ble Dr. Subesh Kumar Das,
Administrative Member.*

J U D G M E N T

-of-

Case No. : O.A. 1125 of 2014 :
BHAGABATI DAS CHATTERJEE + 18 ORS. – V. STATE OF WEST
BENGAL & ORS.

Case No. : O.A. 1126 of 2014 :
RINA MITRA + 12 ORS. – V. STATE OF WEST BENGAL & ORS.

Case No. : O.A. 1127 of 2014 :
MITHU GHOSH + 10 ORS. – V. STATE OF WEST BENGAL & ORS.

For the Applicants (in all applications) :-

**Mr. M. Karim,
Mr. D. Mukherjee,
Mr. A. Samad,
Learned Advocates.**

For the State Respondents :-

**Mr. S. Ghosh,
Learned Advocate.**

Judgment delivered on : July 25, 2018.

**The Judgment delivered by : Justice Ranjit Kumar Bag,
Judicial Member.**

JUDGEMENT

The common question involved in original applications no. 1125 of 2014, 1126 of 2014 and 1127 of 2014 is whether the applicants are entitled to be considered for promotion from the post of Health Assistant (Female) to the post of Staff Nurse, Grade II on the basis of the applications submitted by them in response to Notice dated August 16, 2012 issued by the Deputy Director of Health Services (Nursing), West Bengal and Addendum issued on August 21, 2012 by the said Deputy Director of Health Services (Nursing), West Bengal. Since all the above original applications and original application no. 1345 of 2014 were previously disposed of by one common judgment by this Tribunal and since the said judgment was set aside by the Hon'ble High Court in WPST No. 93 of 2017, we are inclined to dispose of the above three original applications by this common judgment.

2. Out of 19 (nineteen) applicants of OA 1125 of 2014, applicant no. 8, applicant no. 12 are not willing to proceed with the hearing of the application and applicants no. 2, 5, 6, 7, 9, 10, 13, 16 and 19 have not submitted any application in response to Notice dated August 16, 2012 and Addendum dated August 21, 2012 for appointment to the post of Staff Nurse, Grade II as contended by the Learned Counsel for the applicants. Nothing is on record to establish that the said applicants No. 2, 5, 6, 7, 9, 10, 13, 16 and 19 of OA 1125 of 2014 have submitted applications for appointment to the post of Staff Nurse, Grade II in response to Notice dated August 16, 2012 and Addendum dated August 21, 2012. Similarly, out of 13 (thirteen) applicants of OA No. 1126 of 2014, applicant no. 4 died, applicant no. 6 already got promotion to the post of Staff Nurse, Grade II and applicants no. 1, 3, 9, 10, 11, 12 and 13 have not submitted any application in response to Notice dated August 16, 2012 and Addendum dated August 21, 2012 for appointment to the post of the post of Staff Nurse, Grade II as contended by the Learned Counsel for the applicants. No document is produced by the applicants No. 1, 3, 9, 10, 11, 12 and 13 of OA 1126 of 2014 to establish that they submitted applications for appointment to the post of Staff Nurse, Grade II in response to Notice dated August 16,

2012 and Addendum dated August 21, 2012. Learned Counsel for the applicants has also submitted that out of 11 (eleven) applicants of OA No. 1127 of 2014, applicant no. 10 already got promotion to the post of Staff Nurse, Grade II and applicants no. 1, 2, 6, 7, 8 and 11 did not submit any application in response to Notice dated August 16, 2012 and Addendum dated August 21, 2012 for appointment to the post of Staff Nurse, Grade II. There is nothing on record to establish that the applicants No. 1, 2, 6, 7, 8 and 11 submitted applications for appointment to the post of Staff Nurse, Grade II in response to the Notice dated August 16, 2012 and Addendum dated August 21, 2012. Accordingly, we are inclined to consider prayer of only 8 (eight) applicants of OA No. 1125 of 2014 (applicants no. 1, 3, 4, 11, 14, 15, 17 and 18), 4 (four) applicants of OA No. 1126 of 2014 (applicants no. 2, 5, 7 and 8) and 4 (four) applicants of OA No. 1127 of 2014 (applicants no. 3, 4, 5 and 9) who have prayed for direction upon the respondent to consider their application for promotion to the post of Staff Nurse, Grade II.

3. The applicants were appointed to work as Health Assistant (Female) in different Health Institutions under the administrative control of Directorate of Health Services, Government of West Bengal in the scale of pay of Rs.3350-6325/- and they have successfully completed 3 years' training course of General Nursing-cum-Midwifery (in short, GNM), from different Nursing Training Institutions recognised by West Bengal Nursing Council. The Deputy Director of Health Services (Nursing), Government of West Bengal issued one Notice being Memo No. HNG/NPHW/GNM-List/2012/829 dated August 16, 2012 inviting applications from GNM passed candidates who are working as Health Assistant (Female) in different Health Institutions under Government of West Bengal and willing to be appointed as Staff Nurse, Grade II. The last date of submission of application was fixed by the said Notice as September 15, 2012. This Notice was followed by an Addendum issued by Deputy Director of Health Services (Nursing), West Bengal on August 21, 2012, whereby the willing candidates were asked to submit application through proper channel. 16 (sixteen) applicants of above 3 (three) original applications submitted applications for the post of Staff Nurse, Grade II in response to the Notice dated August 16, 2012 followed by Addendum dated August 21, 2012.

During pendency of the said applications, Directorate of Health Services (Nursing Branch) issued another Notice dated September 19, 2012 inviting application from fresh candidates to fill up 1652 vacancies of Staff Nurse, Grade II by way of direct recruitment. The grievance of the applicants is that the respondents initiated the process for filling up posts of Staff Nurse, Grade II by way of direct recruitment without considering the applications submitted by the applicants for promotion to the post of Staff Nurse, Grade II and without cancelling the previous Notice dated August 16, 2012 and Addendum dated August 21, 2012 in response to which the applicants submitted their applications before the authority concerned.

4. Having heard Learned Counsel representing both parties and on consideration of pleadings of both parties, this Tribunal dismissed all above original applications by delivery of common judgment on December 15, 2016. The said judgment of the Tribunal was challenged by some of the applicants before the Hon'ble High Court by filing WPST No. 93 of 2017, WPST No. 94 of 2017 and WPST No. 95 of 2017. All the said writ petitions were disposed of by the Division Bench of the Hon'ble High Court by one common order on November 6, 2017. By the said common order, the Hon'ble High Court had set aside the judgment passed by the Tribunal and directed the Tribunal to hear and dispose of the original applications after exchange of affidavits between the parties and after giving both parties opportunity of hearing. By the said order, the Hon'ble High Court directed the respondents to file reply within November 24, 2017 and to file rejoinder, if any, by the applicants within November 30, 2017. It appears from the materials on record that the parties did not exchange affidavits by filing reply and rejoinder within the time frame fixed by the Hon'ble High Court. Since the time schedule for filing of reply and rejoinder was fixed by the Hon'ble High Court, this Tribunal could not exercise the discretion for extending period of time for filing reply as prayed by the State respondents. However, the Tribunal gave both parties opportunity of hearing as directed by the Hon'ble High Court for deciding afresh the common issues involved in the original applications.

5. There is no dispute that the applicants have been working in the post of Health Assistant (Female) having GNM qualification. It is also not

disputed that the Deputy Director of Health Services (Nursing), West Bengal issued Notice on August 16, 2012 inviting applications from GNM passed Health Assistant (Female) for appointment to the post of Staff Nurse, Grade II. The Addendum was also issued by the said Deputy Director of Health Services (Nursing), West Bengal on August 21, 2012 for submission of applications by Health Assistant (Female) through proper channel for consideration of their candidature for the post of Staff Nurse, Grade II. The further admitted position is that Directorate of Health Services, Nursing Branch, Government of West Bengal issued another Notice on September 19, 2012 inviting applications from fresh candidates for filling up 1652 posts of Staff Nurse, Grade II without considering applications submitted by the applicants for promotion to the post of Staff Nurse, Grade II in response to earlier Notice dated August 14, 2012 and Addendum dated August 21, 2012.

6. Mr. Karim, Learned Counsel for the applicants contends that the respondents are bound to consider the applications submitted by the applicants prior to issuance of Notice for direct recruitment to fill up the posts of Staff Nurse, Grade II. He further submits that promotion of the applicants from the post of Health Assistant (Female) to Staff Nurse, Grade II will be governed by Memorandum No. Estt/6131/IN-33/79 dated September 1, 1979 issued by Director of Health Services, West Bengal in the absence of any statutory rules for recruitment on the date of issuance of Notice dated August 16, 2012 followed by Addendum dated August 21, 2012. The specific submission of Mr. Karim is that the applicants being Health Assistant (Female) will fall in the category of Staff Nurse, Grade III and thereby they have a right to be considered for promotion to Staff Nurse, Grade II on the basis of Memorandum dated September 1, 1979. On the other hand, Mr. S. Ghosh, Learned Counsel representing the State respondents contends that Memorandum dated September 1, 1979 issued by Director of Health Services, West Bengal was superseded by publication of new recruitment rules on January 19, 2016. He further submits that mere inviting applications from aspiring candidates does not confer any right on the said candidates for appointment to the post of Staff Nurse, Grade II. He also submits that all posts of Staff Nurse, Grade II have already been filled up by way of direct recruitment and as such the applications submitted by

the applicants for promotion to the post of Staff Nurse, Grade II have become infructuous.

7. The first question which calls for determination is whether the applicants working in the posts of Health Assistant (Female) will fall within the category of Staff Nurse, Grade III for the purpose of promotion to Staff Nurse, Grade II and if so, whether norms for promotion will be governed by Memorandum dated September 1, 1979 issued by Director of Health Services, Government of West Bengal. Since Deputy Director of Health Services (Nursing), West Bengal issued Notice on August 16, 2012 and Addendum on August 21, 2012 by inviting applications from Health Assistant (Female) for appointment to the post of Staff Nurse, Grade II, we are of the view that the respondents have treated the posts Health Assistant (Female) in the category of Staff Nurse, Grade III by necessary implication and that is why the applications were invited from the applicants through proper channel for consideration of their case for appointment to the post of Staff Nurse Grade II. No statutory rule was in force in the year 2012 for the purpose of direct recruitment or promotion to fill up the post of Staff Nurse, Grade II. Accordingly, the administrative direction in the form of Memorandum dated September 1, 1979 issued by Director of Health Services, West Bengal must govern both direct recruitment and promotion to fill up posts of Staff Nurse, Grade II. The recruitment rules published in the year 2016 for filling up posts of Staff Nurse, Grade II cannot have any retrospective effect and as such those recruitment rules cannot be followed for filling up posts of Staff Nurse, Grade II in the year 2012. In the absence of existence of any recruitment rules in the year 2012, the administrative direction in the form of Memorandum dated September 1, 1979 must be followed for filling up posts of Staff Nurse, Grade II by way of promotion on the basis of the applications submitted by the applicants. Paragraph (i) of Memorandum dated September 1, 1979 lays down norms of promotion from Staff Nurse Grade III to Staff Nurse Grade II, which is as follows :

“ i) Promotion from Grade III to Grade II

Vacancies available after providing for direct recruitment of G.N.M. passed candidates will be filled up by

- (a) Auxiliary nurses who passed the condensed course in G.N.M. immediately on their passing the said examination.

(b) Others in Grade III, on seniority basis.

Note :- Auxiliary nurses who are promoted to Gr.II on a Seniority basis should be posted in non-teaching Institutions alone to supervise the work of Auxiliary Nurses in Grade III.”

8. On perusal of norms for promotion from Staff Nurse Grade III to Staff Nurse Grade II, we find that the vacancies will be filled up for promotion as available after providing for direct recruitment of GNM passed candidates to fill up posts of Staff Nurse, Grade II. The above norms for promotion also indicate that the promotion from Staff Nurse, Grade III to Staff Nurse, Grade II will be on the basis of seniority and those who will get promotion will be posted in Non-teaching Institution alone to supervise the work of Auxiliary Nurse in Grade III. The State respondents have only stated in the reply that 1652 vacancies were notified on September 19, 2012 for filling up those vacancies of Staff Nurse, Grade II by way of direct recruitment. What were the total numbers of vacancies of Staff Nurse, Grade II on the date of issuance of Notice dated August 16, 2012 and Addendum dated August 21, 2012 have not been disclosed in the reply by the State respondents. The Notice to fill up posts of Staff Nurse, Grade II by way of promotion was issued on August 16, 2012 followed by Addendum on August 21, 2012, whereas Notice for filling up posts of Staff Nurse, Grade II by way of direct recruitment was issued on September 19, 2012 without cancellation of the earlier Notice to fill up the post by way of promotion and without deciding the fate of the earlier applications submitted in response to the Notice dated August 16, 2012 and Addendum dated August 21, 2012.

9. Naturally, the next question for consideration is whether the applicants have the right to be considered for promotion to the post of Staff Nurse, Grade II in terms of Memorandum dated September 1, 1979 issued by Director of Health Services, Government of West Bengal. It is relevant to consider a few decisions cited from the Bar. In “Shankarsan Dash V. Union of India” reported in (1991) 3 SCC 47, the Constitution Bench of the Hon’ble Supreme Court has observed in Paragraph 7 of the judgment as follows :

“7. Ordinarily, the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so

indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancy has to be taken bona fide for appropriate reasons.”

10. By following the above test laid down by the Hon’ble Supreme Court, we would like to refer the fact of the present case where the respondents have not considered the application submitted by the applicants in response to Notice dated August 16, 2012 followed by Addendum dated August 21, 2012 for promotion to the post of Staff Nurse, Grade II. On the contrary, the respondents have initiated the process for filling up vacancies of Staff Nurse, Grade II by way of direct recruitment by inviting application from fresh candidates by issuing Notice on September 19, 2012 without rescinding or cancelling earlier notice on the basis on which the applicants have already submitted their applications. The respondents have abandoned the process initiated for promotion of the applicants from the post of Health Assistant (Female) falling in the category of Staff Nurse, Grade III to the post of Staff Nurse, Grade II without any valid reasons. Accordingly, we are of the view that the respondents have acted in an arbitrary manner by not considering the applications submitted by the applicants in response to Notice dated August 16, 2012 and Addendum dated August 21, 2012 for promotion to the post of Staff Nurse, Grade II.

11. In “Jaisingh Dalal and Others V. The State of Haryana and Another” reported in 1993 SUPP (2) 600, the Hon’ble Supreme Court had to resolve the dispute relating to special recruitment to Haryana Civil Service (Executive Branch) from amongst Class II officers who fulfilled the eligibility criteria. When Haryana Public Service Commission (in short, HPSC) was in the process of selecting candidates based on their past record and interviews, there was a change of Government and new Government decided to review the decision of the earlier Government with regard to special recruitment to fill up the vacancies. The contention of the appellants before the Apex Court was that the Government is bound to complete the selection process which has already been initiated to fill up the vacancies. By dismissing the appeal, the Hon’ble Supreme Court observed in Paragraph 10 of the judgment as follows :

“10. It is, therefore, obvious that even after the State Government has decided to resort to special recruitment, it may for valid reasons change its

mind and one of the reasons could be that it desires to revise the extant eligibility criteria or substitute the same. The authority which has power to specify the method of recruitment must be deemed to have the power to revise and substitute the same in the same manner.”

The ratio of the above decision is that the State Government has the power and authority to stall the recruitment process already initiated for valid reasons which includes change of eligibility criteria for the selection. In the instant case, the selection process initiated by the State respondents for giving promotion to the applicants from the post of Health Assistant (Female) to the post of Staff Nurse, Grade II by issuing Notice dated August 16, 2012 and Addendum dated August 21, 2012 has not been cancelled or rescinded at any material point of time. No valid reasons are forthcoming before the Tribunal for giving up the process of selection initiated for giving promotion from the post of Health Assistant (Female) to the post of Staff Nurse, Grade II. So, the facts of the present case are clearly distinguishable from the facts of “Jaisingh Dalal” (supra) and as such the ratio of the said case cannot be made applicable in the facts of the present case.

12. In “B L Gupta and Another V. MCD” reported in (1998) 9 SCC 223, the Hon’ble Supreme Court dealt with the procedure to be followed for appointment to the post of Assistant Accountants in Delhi Electric Supply Undertakings by way of promotion. For filling up the vacancies of Assistant Accountants there were 2 (two) feeder posts – one was Senior Clerk with 3 years’ of experience and the other was Junior Clerk with 8 years’ of experience. The rules of 1978 required that the selection of candidates for appointment to the posts of Assistant Accountant would be by way of examination from the eligible Junior Clerks and Senior Clerks. In the year 1995 the Corporation amended the recruitment rules to the effect that 80% of the posts of Assistant Accountant were to be filled up by promotion on the basis of seniority and 20% of the posts of Assistant Accountants by way of examination. The Hon’ble Supreme Court held that the vacancies which had arisen prior to 1995 amendment of the recruitment rules could only be filled up as per provision of old rules of 1978. In this reported case, the existing right of an employee to be considered for promotion in the vacancies arising before amendment of the recruitment rules was curtailed by amendment of the said rules and thereby the Hon’ble

Supreme Court held that the amended rules can apply on vacancies which arose after amendment of the said rules.

13. In the instant case, the applicants have the right to be considered for promotion in the vacancies of Staff Nurse, Grade II on the basis of norms laid down in Memorandum dated September 1, 1979. We have already observed that the State respondents have not cancelled or rescinded Notice dated August 16, 2012 and Addendum dated August 21, 2012 in response to which the applicants submitted their application through proper channel for consideration of their case for promotion to the post of Staff Nurse, Grade II. Nor have the State respondents stalled the process of selection of the applicants for the post of Staff Nurse, Grade II by way of promotion at any material point of time by furnishing valid reasons. On the contrary, the State respondents have taken arbitrary decision to fill up 1652 vacancies of Staff Nurse, Grade II by way of direct recruitment by inviting applications from the fresh candidates in terms of Notice dated September 19, 2012 after issuance of notice inviting application for filling up the posts of Staff Nurse, Grade II by way of promotion. It is well-settled that every Government employee has the right to be considered for promotion, though promotion itself is never considered as a matter of right.

14. In view of our above findings, the State respondents are duty bound to consider the application submitted by the applicants in response to Notice dated August 16, 2012 followed by Addendum dated August 21, 2012 for promotion to the post of Staff Nurse, Grade II on the basis of principle laid down in Paragraph (i) of Memorandum dated September 1, 1979 issued by Director of Health Services, Government of West Bengal. The stand taken by the State respondents is that all 1652 vacancies of Staff Nurse, Grade II have already been filled up by way of direct recruitment initiated by the State respondents by issuing Notice on September 19, 2012 and on subsequent dates. Since the State respondents have acted in an arbitrary manner for filling up vacancies of Staff Nurse, Grade II by way of direct recruitment without cancelling the process already initiated for filling up the vacancies of Staff Nurse, Grade II by way of promotion, we are of the view that the respondent No. 2, Director of Health Services, Government of West Bengal will consider the applications submitted by the applicants for

promotion on the basis of seniority in terms of Memorandum dated September 1, 1979 and if they are found to be suitable for promotion to the posts of Staff Nurse, Grade II, they will be placed in the seniority just above the directly recruited Staff Nurse, Grade II who were appointed in response to Notice dated September 19, 2012. However, the fixation of pay of the applicants in the post of Staff Nurse, Grade II, if found suitable for the promotional post, will be fixed notionally from the date on which directly recruited Staff Nurse, Grade II joined in the said posts on the basis of Notice dated September 19, 2012 and actual financial benefit will be given to the applicants in the promotional post of Staff Nurse, Grade II from the date of actual joining in the said post.

15. The respondent no. 2, Director of Health Services, Government of West Bengal is directed to complete the entire exercise of consideration of the applications submitted by 16 (sixteen) applicants mentioned above in response to Notice dated August 16, 2012 followed by Addendum dated August 21, 2012 for promotion to the post of Staff Nurse, Grade II in accordance with Memorandum dated September 1, 1979 and in the light of the observations made by us in the body of the judgment within a period of 12 weeks from the date of communication of the order.

16. With the above direction, all original applications are disposed of.

17. The urgent Xerox certified copy of the judgment and order be supplied to the parties, if applied for, on priority basis after observance of all necessary formalities.

(Dr. Subesh Kumar Das)
MEMBER(A)

(Ranjit Kumar Bag)
MEMBER (J)