

GAHC010198282017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C) 3931/2017

1:ARUP MANTA and ANR.
S/O- LATE BIPIN MANTA, PERMANENT RESIDENT OF DIPHU, NEAR
PANCHAYAT OFFICE, PIN- 782460,
DIST- KARBI-ANGLONG, ASSAM

2: MANALISHA CHOUDHURY
W/O- SHYAMANTA KUMAR BARUAH
R/O- YAMINI PATH
JANAKPUR
KAHILIPARA GUWAHATI
PIN- 781019
KAMRUP
METROPOLITAN DISTRICT, ASSAM

VERSUS

1:THE STATE OF ASSAM and 4 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM,
HOME AND POLITICAL DEPTT., DISPUR, GUWAHATI, PIN- 781006

2:THE SECRETARY
TO THE GOVT OF ASSAM
PERSONNEL DEPTT.
DISPUR, GUWAHATI
PIN- 781006
KAMRUP METRO DISTRICT, ASSAM

3:THE DIRECTOR
DIRECTORATE OF FORENSIC SCIENCE
ASSAM
KAHILIPARA
GUWAHATI
PIN- 781019
KAMRUP METROPOLITAN DIST, ASSAM

4:ASSAM PUBLIC SERVICE COMMISSION
REP. BY ITS CHAIRMAN
JAWAHARNAGAR
KHANAPARA
GUWAHATI
PIN- 781022
KAMRUP METROPOLITAN DIST
ASSAM

5:THE SECRETARY
APSC
JAWAHARNAGAR
KHANAPARA
GUWAHATI
PIN- 22
KAMRUP METRO DIST
ASSAM

6:DR. POJUL LOYING
S/O- SRI GOJENDRA NATH LOYING
R/O- VILL- GULUNG TEMERA
P.O.- BADULIPARA
P.S.- DERGAON
DIST- GOLAGHAT
ASSAM
PIN- 785611

For the Petitioners : Mr. U. K. Nair, Sr. Advocate
Mr. M. K. Mishra
Mr. M. Mahanta

For the respondent : Mr. B. Goswami,
Addl. Advocate General, Assam
Mr. D. Nath, Addl. Sr. Govt. Adv.
Mr. S. K. Talukder
Mr. G. Choudhury, SC, APSC

For the respondent No. 6 : Mr. J. Payeng

Linked Case : I.A.(Civil) 2121/2018

1:POJUL LOYING
S/O- SRI GOJENDRA NATH LOYING
R/O- VILL- GULUNG TEMERA
P.O.- BADULIPARA
P.S.- DERGAON
DIST- GOLAGHAT
ASSAM
PIN- 785611.

VERSUS

1:ARUP MANTA AND 6 ORS
S/O- LATE BIPIN MANTA
PERMANENT RESIDENT OF DIPHU
NEAR PANCHAYAT OFFICE
PIN- 782460
DIST- KARBI-ANGLONG
ASSAM.

2:MANALISHA CHOUDHURY
W/O- SHYAMANTA KUMAR BARUAH
R/O- YAMINI PATH
JANAKPUR
KAHILIPARA
GUWAHATI
PIN- 781019
KAMRUP
METROPOLITAN DISTRICT
ASSAM.

3:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM
HOME AND POLITICAL DEPTT.
DISPUR
GUWAHATI
PIN- 781006
KAMRUP (M) DIST.
ASSAM.

4:THE SECRETARY TO THE GOVT OF ASSAM
PERSONNEL DEPTT.
DISPUR
GUWAHATI
PIN- 781006
KAMRUP METRO DISTRICT
ASSAM.

5:THE DIRECTOR
DIRECTORATE OF FORENSIC SCIENCE
ASSAM
KAHILIPARA
GUWAHATI
PIN- 781019
KAMRUP METROPOLITAN DIST
ASSAM.

6:ASSAM PUBLIC SERVICE COMMISSION
REP. BY ITS CHAIRMAN
JAWAHARNAGAR
KHANAPARA
GUWAHATI
PIN- 781022
KAMRUP METROPOLITAN DIST
ASSAM.

7:THE SECRETARY
APSC
JAWAHARNAGAR
KHANAPARA
GUWAHATI
PIN- 22
KAMRUP METRO DIST
ASSAM.

For the Applicant : Mr. J. Payeng

For the respondents : Mr. B. Goswami,
Addl. Advocate General, Assam
Mr. D. Nath, Addl. Sr. Govt. Adv.
Mr. S. K. Talukder
: Mr. G. Choudhury, SC, APSC

Linked Case : WP(C) 7652/2017

1:DR. SMT. MANALISHA CHOUDHURY
W/O. SHYAMANTA KUMAR BARUAH
R/O. YAMINI PATH
JANAKPUR
KAHILIPARA
GUWAHATI
PIN-781019
KAMRUP M DISTRICT
ASSAM.

VERSUS

1:THE STATE OF ASSAM and 6 ORS.
REP. BY THE COMM. and SECY. TO THE GOVT. OF ASSAM
HOME and POLITICAL DEPTT.
DISPUR
GHY.
PIN-781006
KAMRUP M DISTRICT
ASSAM.

2:THE SECRETARY
TO THE GOVT. OF ASSAM
PERSONNEL DEPTT.
DISPUR
GHY.-781006
KAMRUP M DISTRICT
ASSAM.

3:THE SECRETARY
TO THE GOVT. OF ASSAM
ELFARE OF PLAIN TRIBES and BACKWAR CLASSES DEPTT.
DISPUR
GUWAHATI
PIN-781006
KAMRUP M DISTRICT
ASSAM.

4:THE DIRECTOR
DIRECTORATE OF FORENSIC SCIENCE
ASSAM
KAHILIPARA
GUWAHATI
PIN-781019
KAMRUP M DISTRICT ASSAM.

5:ASSAM PUBLIC SERVICE COMMISSION
REP. BY ITS CHAIRMAN JAWAHARNAGAR
KHANAPARA
GUWAHATI
PIN-781022
KAMRUP M DISTRICT ASSAM.

6:THE SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHARNAGAR
KHANAPARA
GUWAHATI
PIN-781022
KAMRUP M DISTRICT ASSAM.

7:THE DY. SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHARNAGAR
KHANAPARA
GUWAHATI
PIN-781022
KAMRUP M DISTRICT ASSAM.

For the Petitioner : Mr. U. K. Nair, Sr. Advocate
Mr. M. K. Mishra
Mr. M. Mahanta
For the respondents : Mr. B. Goswami,
Addl. Advocate General
Mr. D. Nath, Addl. Sr. Govt. Adv.
Mr. S. K. Talukder
Mr. G. Choudhury, SC, APSC

Linked Case : WP(C) 7555/2017

1:RENU BORAH HANDIQUE
W/O SRI DEEPAK HANDIQUE R/O HOUSE NO.-08
NEAR 10 APBN GATE
KAHILIPARA
P.S. DISPUR
GUWAHATI -19
DIST. KAMRUP METRO ASSAM

VERSUS

1:THE STATE OF ASSAM and 5 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
DEPARTMENT OF HOME
DISPUR, GUWAHATI -6.

2:THE COMMISSIONER and SECRETARY
TO THE GOVT. OF ASSAM
DEPARTMENT OF PERSONNEL
DISPUR, GUWAHATI -6.

3:THE SECRETARY
TO THE GOVT. OF ASSAM
DEPARTMENT OF HOME
DISPUR, GUWAHATI -6.

4:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GUWAHATI -6.

5:THE DIRECTOR
DIRECTOR OF FORENSIC SCIENCE
ASSAM
KAHILIPARA, GUWAHATI -6.

6:THE ASSAM PUBLIC SERVICE COMMISSION
REP. BY THE CHAIRMAN
APSC
KHANAPARA
GUWAHATI -22.

For the Petitioner : Mr. S. Saikia
Mr. N. J. Gogoi

For the respondents : Mr. B. Goswami,
Addl. Advocate General
Mr. D. Nath, Addl. Sr. Govt. Adv.
Mr. S. K. Talukder
Mr. G. Choudhury, SC, APSC

Linked Case : WP(C) 4200/2017

1:RENU BORAH HANDIQUE
W/O- SRI DEEPAK HANDIQUE
R/O- H NO.8
NEAR 10TH APBN GATE
KAHILIPARA
P.S- DISPUR
GUWAHATI-19
DIST- KAMRUPM
ASSAM

VERSUS

1:THE STATE OF ASSAM and 6 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM
DEPTT.
OF HOME
DISPUR
GUWAHATI-6

2:THE COMMISSIONER AND SECRETARY
TO THE GOVT OF ASSAM
DEPARTMENT OF PERSONNEL
DISPUR
GUWAHATI-6

3:THE SECRETARY
TO THE GOVT OF ASSAM
DEPARTMENT OF HOME
DISPUR
GUWAHATI-6

4:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GUWAHATI-6

5:THE DIRECTOR
DIRECTORATE OF FORENSIC SCIENCE
ASSAM
KAHILIPARA
GUWAHATI-6

6:THE ASSAM PUBLIC SERVICE COMMISSION
REP. BY THE CHAIRMAN
APSC
KHANAPARA
GUWAHATI-22

7:DR. POJUL LOYING
S/O. SRI GOJENDRA NATH LOYING
R/O. GULUNG TEMERA
P.O. BADULIPARA
P.S. DERGAON
DIST. GOLAGHAT
ASSAM
PIN-785611.

For the Petitioner : Mr. S. Saikia
Mr. N. J. Gogoi

For the respondents : Mr. B. Goswami,
Addl. Advocate General
Mr. D. Nath, Addl. Sr. Govt. Adv.
Mr. S. K. Talukder
Mr. G. Choudhury, SC, APSC

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HON'BLE MR. JUSTICE N. KOTISWAR SINGH

Date of hearing: **02.05.2019 & 21.05.2019**

Date of order: **05.09.2019**

:: JUDGMENT AND ORDER (CAV) ::

Heard Mr. U.K. Nair, learned senior counsel assisted by Mr. M. Mahanta, learned counsel for the petitioners in W.P.(C) No. 3931 of 2017 and W.P.(C) No. 7652 of 2017; Mr. S. Saikia, learned counsel assisted by Mr. N. J. Gogoi, learned counsel for the petitioner in W.P.(C) No. 4200 of 2017 and W.P.(C) No. 7555 of 2017. Also heard Mr. B. Goswami, learned Additional Advocate General, Assam assisted by Mr. D. Nath, learned Addl. Sr. Govt. Advocate and Mr. S. K. Talukder, learned counsel for the State respondents; Mr. G. Choudhury, learned Standing Counsel for the APSC as well as Mr. J. Payeng, learned counsel for the respondent No.6 in W.P.(C) No. 3931 of 2017.

2. Considering the commonality of the grievances and issues raised in these petitions, these are heard together and disposed of by this common judgment.

W.P.(C) No. 3931 of 2017

3. In W.P.(C) No. 3931 of 2017, the petitioners, all of whom belong to unreserved category, have challenged the recruitment process initiated by the advertisement dated 16.01.2017 issued by the Assam Public Service Commission (in short, APSC) for recruitment to 4(four) posts in the cadre of Deputy Director in the Assam Forensic Science Laboratory Service by way of direct recruitment, contending that reserving one post for Scheduled Tribe (Plains) [STP] is illegal.

4. As per the aforesaid advertisement dated 16.01.2017, two posts of Deputy Directors under the Directorate of Forensic Science, Assam, Kahilipara, under the Home and Political Science Department were advertised, of which one post under Serology Division has been

reserved for STP and another post under Ballistic Division which is unreserved.

Similarly, two posts of Deputy Directors have been advertised for appointment in the Regional Forensic Laboratory Assam, Jorhat Division, out of which one is under Ballistic Division of unreserved category and another under the Biology Division which is also unreserved.

Thus, out of the 4(four) posts so advertised, one has been reserved for STP under Serology Division in the Directorate of Forensic Science Laboratory Assam, Kahilipara and the rest are all unreserved.

5. Since, all the petitioners belong to unreserved category, they are aggrieved by the reservation of one post of Deputy Director for STP under Serology Division in the Directorate of Forensic Science Assam.

6. According to the learned senior counsel for the petitioners, the aforesaid vacant post of Deputy Director under Serology Division ought to have been kept as unreserved, as in the case of other posts of Deputy Directors in other Divisions.

7. The reason on the basis of which the petitioners have made the aforesaid claim is that since the aforesaid posts of Deputy Directors are sought to be filled up by the Department by direct recruitment, as required under the rules, the authorities were under obligation to follow the roster points provided for direct recruitment.

8. According to the petitioners, if the roster points meant for direct recruitment are applied, there is no question of any of these 4(four) posts being reserved for the STP category.

9. In order to substantiate this submission, learned senior counsel for the petitioners has referred to the Rule 5 of the relevant Service Rules, i.e., "Assam Forensic Science Laboratory Services Rules, 1985" as amended from time to time.

10. The aforesaid Service Rules were amended in 2003 as notified on 25.08.2003. Rule 5(3) of the aforesaid Rules as amended in 2003 provides for the method of recruitment to the cadre of Deputy Director, Senior Scientific Officer of the service by way of promotion in accordance with Rules 12, 13 and 14 thereof.

The said Rule 5 also provides that if requisite number of candidates duly qualified and suitable are not available for filling all the vacancies by way of promotion, the vacancy shall be filled up by direct recruitment in accordance with Rules 16(1) and 18 of the aforesaid Service Rules.

11. As regards the procedure or method to be adopted for filling up the posts by direct recruitment, the same is provided under Rule 6 of the aforesaid Service Rules. Rule 6 provides that the direct recruitment in the cadre of the Assistant Director, Deputy Director, Senior Scientific Officer etc. shall be made on the basis of recommendation made by the Assam Public Service Commission in accordance with the procedure provided under the rules.

Rule 6 reads as follows:

“6. Direct recruitment- Direct recruitment to the cadres of Director, Assistant Director, Senior Scientific Officer, Scientific Officer, Senior Scientific Assistant and Junior Scientific Assistant, of the service shall be made on the basis of recommendations made by the Commission in accordance with the procedure hereinafter provided:

(a) Before the end of each year the Appointing Authority shall make an assessment regarding the likely number of vacancies to be filled up by direct recruitment during the next year and shall intimate the same to the Commission together with the details about reservation for candidates belonging to Scheduled Caste, Scheduled Tribes or any other category as laid down by the Government as provided under Rule 17 and about carry forward of such reservation;

(b) The Appointing Authority shall simultaneously request the commission to recommend a list of candidates for direct recruitment, in order of preference;

(c) The Commission shall make a selection in accordance with the scheme of selection prescribed by the Government in consultation with the Commission. The Commission may hold such test or interview and undertake scrutiny of certificates and other documents, as may be considered necessary;

(d) The Commission shall furnish to the Government a list of candidates recommended by it, in order of preference, found suitable for direct recruitment. The number of candidates in such a list may be approximately double the number of vacancies;

(e) The Commission shall simultaneously publish the list in the Assam Gazette and at such other place the Commission may consider proper.”

12. At this juncture, it may be relevant to mention that as regards reservation of posts, whether by way of promotion or direct recruitment, the same is governed by the **Assam**

Scheduled Castes and Scheduled Tribes (Reservation of Vacancy in Services and Posts) Act, 1978 (hereinafter referred to as the Reservation Act, 1978) as amended from time to time. Rule 5(A) of the aforesaid Reservation Act provides that separate rosters are to be maintained for giving effect to reservation in direct recruitment and promotion [vide Sub-Section (iv) of Section 5(A)].

It has been further provided under Rule 5(A) that, "cadre" for the purpose of roster shall mean a particular grade and shall comprise a number of posts to be filled up in a particular manner of recruitment in terms of the applicable recruitment rules [vide Sub Section(v) of Section 5(A)].

13. Referring to the aforesaid reservation rules, learned senior counsel for the petitioners has submitted that if the authorities had opted to resort to direct recruitment in respect of the aforesaid four posts of Deputy Directors under the relevant recruitment rules, as provided under the relevant reservation rules, as applicable in the State of Assam, the roster meant for direct recruitment would have been applicable.

14. It has been further submitted that it is the first time ever that the State Government has sought to fill up the posts of Deputy Directors by way of direct recruitment, as on the earlier occasions, these posts had been always filled by promotion and, as such, having decided to fill up the aforesaid posts by direct recruitment, the State Government was under obligation to follow the roster points of reservation meant for direct recruitment as provided under the Reservation Act of 1978.

15. In this connection, learned senior counsel for the petitioners has referred to the roster points which are followed in the State of Assam as regards direct recruitment which have been appended to the aforesaid Reservation Act.

As per the aforesaid roster points for direct recruitment, the 1st roster point is unreserved. Similarly roster points no. 2 and 3 are also unreserved but the 4th roster post is reserved for OBC.

The 5th and 6th roster points again are unreserved.

The 7th roster point is reserved for SC and the 8th for OBC.

Similarly, roster points no.9, 10 and 11 are unreserved.

The roster point no. 12 is for OBC.

The roster point no. 13 is also unreserved.

The roster point no. 14 is reserved for ST.

16. It has thus been submitted that reservation for ST (whether for STP or STH category), occurs only at the 14th roster point and not prior to that.

If that is so, reserving one of the aforesaid four advertised posts for STP is certainly not in accordance with roster point prescribed for direct recruitment and followed by the State in terms of the Reservation Act.

17. In view of the above, the petitioners have submitted that the aforesaid reservation of one post of Deputy Director in Serology for STP as mentioned in the advertisement is illegal, as there would not be any occasion for reserving any post for ST before the 14th point in the roster is reached.

According to the petitioners, since, this is the first time that the Government has resorted to direct recruitment process, the first three posts are to be unreserved and fourth post is to be reserved for OBC. Hence, reservation for STP as per the aforesaid advertisement is illegal and liable to be set aside.

18. Learned senior counsel for the petitioners in support of his submission has referred to the decision of the Hon'ble Supreme Court in ***R.K. Sabharwal And Ors. Vs. State of Punjab and Ors. reported in 1995 2 SCC 745***, in which the meaning and scope of the words "posts" and "vacancies" had been explained as in Para 6 thereof, which reads as follows:

“6. The expressions 'posts' and 'vacancies', often used in the executive instructions providing for reservations, are rather problematical. The word 'post' means an appointment, job, office or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts

comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation."

19. Learned senior counsel for the petitioners submits that in the present context, cadre for the purpose of roster would mean the particular cadre of Deputy Directors vacancies to which posts are sought to be filled up by direct recruitment or promotion as the case may be. What sub-Section (v) of Section 5(A) read with Section 4 of the Reservation Act provides is that the cadre has to be the basis for determining the mode of recruitment.

According to the learned senior counsel for the petitioners, therefore, even though under the recruitment rules, the Deputy Directors may form a single cadre, yet for the purpose of applying roster points, there can be two separate cadres of Deputy Directors, one, which is to be filled up by way of direct recruitment as opposed to another cadre of Deputy Directors which is to be filled up by way of promotion. In other words, though, apparently there is one single cadre of Deputy Directors under the recruitment rules, there can be deemed to be two sub cadres, one for appointment through direct recruitment and another through promotion for the purpose of determining the roster points as contemplated under Sub-Section (v) of Section 5(A) of the Reservations Rules.

20. It is further submitted that even assuming that one post is to be reserved for STP, as had been done in the present case, the authorities have not indicated as to what criterion or principle has been applied to choose one of these four vacant posts to be filled up by a particular reserved category of candidates. Such a reserved post could be from another division and not necessarily from Serology Division or Biology Division.

21. It has been submitted that the fact remains that all the said four posts are that of Deputy Directors. Of the aforesaid 4(four) posts, one post is for Serology Division, two for Ballistic Division and one for Biology Division but the authorities have not indicated the basis on which the lone post of Serology has been chosen to be filled up by STP. The authorities could well have reserved one of the two posts of Ballistic Divisions, in which event, the lone

post of Serology would have been offered to all the candidates, rather than restricting it to STP candidates only. Thus, by reserving the lone post of Deputy Director under Serology Department for STP, it has the effect of depriving the candidature of all other candidates except STP candidates, to apply for the post of Deputy Director (Serology).

22. It has been accordingly submitted that since no criterion or principle has been disclosed by the authority on the basis for which the one post of Deputy Director under Serology Division has been reserved for STP, it suffers from the vice of arbitrariness and, accordingly on this score also the impugned advertisement is liable to be interfered with.

WP(C) No.4200/2017

23. In W.P.(C) No. 4200 of 2017, the petitioner belongs to OBC category and is presently serving as a Scientific Officer in the Office of the Directorate of Forensic Science, Assam, Kahilipara. Though, he claims to be eligible for promotion to the higher post of Senior Scientific Officer, he is also eligible for appointment to the post of Deputy Director under direct recruitment quota. However, as the post of Deputy Director in Serology Division has been reserved for STP, and since he belongs to OBC category, the petitioner though, eligible for appointment to the said post has been debarred from applying for the said post. Hence, the writ petition.

24. Learned counsel for the petitioner has reiterated the submission advanced on behalf of the petitioners in WP(C) No.3931/2017 to the effect that once the authorities had decided to resort to direct recruitment for filling up the four posts of Deputy Directors, the roster meant for direct recruitment has to be followed in terms of the Sub-sections (iv) and (v) of Section 5(A) of the Reservation Act, 1978. As per the roster prescribed under the aforesaid Act, the roster point No.4 falls for OBC. However, the authorities without notifying the said fourth vacancy for OBC has wrongly reserved it for STP.

25. Learned counsel for the petitioner further submits that it is very clearly laid down under Section 5A (ix) of the Reservation Act, 1978 that before making an appointment by direct recruitment the appointing authority shall ascertain by consulting the roster register maintained by each establishment, whether the post is reserved or unreserved and if it is

reserved, for whom it is so reserved.

It has been further provided that immediately after an appointment is made, particulars thereof shall be entered in the roster register and signed by the appointing authority.

Further, it has been provided under Sub-section (xi) of Section 5(A) of the Reservation Act that every establishment shall prepare and notify the roster for each cadre equivalent to the number of posts with the concurrence of the Personnel Department and Welfare of the Plain Tribes and Backward Class Department.

26. Accordingly, learned counsel for the petitioner has submitted that in the present case since the posts are sought to be filled up by way of direct recruitment, and as the aforesaid provisions of the Reservation Act mandate that there should be a roster register to be maintained by the establishment in the aforesaid manner for the purpose of determining the category for which the reservation is to be made, the authorities are under obligation to maintain such roster register, which, however, has not been done.

It has been submitted that in the present case, there is nothing to indicate that the authority had followed the aforesaid procedure for reserving the said one post of Deputy Director for STP, even though as per roster points under the Act, it is meant for OBC.

27. Learned counsel for the petitioner also submits that the recruitment rules also clearly mention that there are several divisions in the cadre of Deputy Director and each division has different qualifications prescribed which would clearly indicate that these posts under these separate divisions are not interchangeable.

28. In that view of the matter, it will be also necessary for the State authority to identify and lay down the criteria on the basis of which the reservations have to be made in respect of different categories of reserved candidates *vis a vis* the separate divisions.

W.P.(C) No. 7555/2017

29. In this petition, the petitioner belongs to OBC category. The petitioner has also challenged the advertisement dated 16.01.2017 by which 5 posts of Senior Scientific Officers are sought to be filled up under unreserved category under the Directorate of Forensic Science, Assam, Kahilipara in several Divisions of which, 1 post of Senior Scientific Officer is

under Serology Division. According to the petitioner, since 5 posts of Senior Scientific Officers had been advertised for appointment by way of direct recruitment, the roster point which is prescribed for direct recruitment under the Act provides for reservation for OBC under the 4th roster point. If that is so, at least one of the 5 advertised posts ought to have been reserved for OBC candidates.

It has been submitted by the learned counsel for the petitioner that though the stand taken by the authority is that the roster point, meant for promotion, had been adopted in the present case for filling up the vacant posts of Senior Scientific Officers by way of direct recruitment, the said stand is contrary to the provisions of the Reservation Act which provides under Section 5 A of the Reservation Act that the roster prepared for the direct recruitment has to be adopted if the method of recruitment is by way of direct recruitment. Therefore, the authorities by adopting the roster points meant for promotion has made an error.

30. Learned counsel for the petitioner submits that the reservation for OBC is provided only in respect of the direct recruitment quota and not under the promotion quota. Therefore, by adopting the roster points, which are meant for promotion and which do not provide for reservation for the OBCs, the authorities have deprived the right of OBCs including the present petitioner for appointment to the said post against reserved post for OBCs under the direct recruitment quota.

31. It has been further submitted that in the State of Assam there is a separate provision for reservation for women candidates as provided under Assam Women (Reservation of Vacancies in Services and Posts) Act, 2005 hereinafter referred to as the Women's Reservation Act. It has been provided under Section 4 of the said Act that 30% of the vacancies in respect of all appointments to the services and posts in any establishment which are to be filled up by direct recruitment will be reserved for women candidates.

Section 4 of the aforesaid Act reads as follows:

4. Reservation for Women in vacancies to be filled up by direct recruitment- At the commencement of this Act, 30 percent of the vacancies in respect of all appointments to be services and posts in the establishment which are to be filled up by direct recruitment shall be reserved for the women candidates:

Provided that the aforesaid reservation shall be inclusive of the reservation provided statutorily or otherwise of the Scheduled Castes, Scheduled Tribes (Plains), Scheduled Tribes (Hills), Other Backward Classes, More Other Backward Classes and persons with disabilities within the respective reserved category:

Provided further that 30 percent reservation of the vacancies in respect of the Women for the remaining unreserved category of candidates shall be available to the Women of unreserved category only.

However, in the present case it is seen that not a single post has been reserved for women. As such, the aforesaid advertisement, which does not provide for reservation for women, is also illegal. The petitioner being a woman is entitled to reservation to one of the 5 advertised posts of Senior Scientific Officers which are sought to be filled up by direct recruitment.

WP(C) No.7652/2017

32. The petitioner who belongs to an unreserved category and who is working as a Scientific Officer, has raised a similar plea, by claiming for reservation of at least one of the 5 posts for women in terms of Section 4 of the Women's Act in which it has been provided that 30% of the advertised posts have to be reserved for the women candidates. Mr. U.K. Nair, learned Senior Counsel for the petitioner submits that as regards the petitioner's claim, the respondent no.1 has contended in Para no.17 of the affidavit-in-opposition that in the draft advertisement submitted by the Director In-charge, of Forensic Science, Assam, reservation for women was proposed and the same was forwarded to the Assam Public Service Commission. However, no reservation has been provided for women in the said advertisement and as such it is illegal, being violative of the provisions of Section 4 of the aforesaid Women's Reservation Act.

Response of the State:

33. In response Mr. B. Goswami, learned Addl. Advocate General for the State has raised the basic issue of maintainability of the writ petition, WP(C) No. 3931/2017 filed by the two petitioners.

It has been submitted that the first petitioner, Sri Arup Manta, belongs to ST(H) community and the second petitioner, Smt. Manalisha Choudhury, belongs to General category. Their pleaded case as clearly evident from para No. 21 of the writ petition is that reservation should be in terms of the roster points mentioned in the Reservation Act, under which 1st, 2nd and 3rd points are unreserved and the 4th post is reserved for OBC. Since neither of the petitioners belongs to the OBC, they cannot have any grievance and on this ground alone this petition is liable to be dismissed as not maintainable.

34. It has been submitted that the petition obviously has not been filed in a representative capacity and the petitioners cannot go beyond their own legal rights and since their legal rights are not adversely affected, the present petitioners who do not belong to OBC category cannot file the present petition. They are essentially busy bodies.

35. It has been also submitted that both the petitioners had participated in the recruitment process as they were eligible for appointment to the post of Deputy Director in Biology Division. The essential qualifications required for appointment to the post of Deputy Director, Serology are similar for the post of Deputy Director, Biology Division for which they had participated in the recruitment process and having not successful, they have turned around and have challenged the advertisement to the post of Deputy Director in the Serology Division.

36. In support of his contentions, learned Addl. Advocate General for the State has relied on the decision of the Hon'ble Supreme Court rendered in ***Ayaubkhan Noorkhan Vs. State of Maharashtra and Ors., AIR 2013 SC 58*** in which it was held that a stranger cannot be permitted to meddle in a proceeding unless he satisfies the Court that he falls within the category of aggrieved persons. It has been submitted that since none of the petitioners belongs to OBC category, they are as good as strangers and cannot have any grievance as according to themselves one of the posts is to be reserved for OBC category when none of them belongs to OBC category.

The Hon'ble Supreme Court held in para No. 7 of the aforesaid decision as follows:

7. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. In fact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide : State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12; Saghir Ahmad &Anr. v. State of U.P., AIR 1954 SC 728; Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal &Ors., AIR 1962 SC 1044; Rajendra Singh v. State of Madhya Pradesh, AIR 1996 SC 2736; and Tamilnadu Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar &Ors., (2009) 2 SCC 784).

37. It has been further submitted by the learned Addl. Advocate General that the petitioner No. 2, Smt. Manalisha Choudhury had approached this Court earlier challenging the same recruitment process initiated by advertisement dated 16.01.2017 on the ground, inter-alia, that there was no expert in the Selection Panel.

Thus, since this petitioner had earlier approached this Court challenging the same advertisement in writ petition, WP(C) 3279/2017, the present petition is barred by the principle of *constructive res judicata* even if the present issues raised herein had not been specifically raised in the previous petition. It has been stated that the aforesaid writ petition was dismissed by this Court vide order dated 27.10.2017.

Thus, having failed in the earlier writ petition, the said petitioner cannot file a fresh writ petition bringing out new grounds for challenging the same recruitment process.

38. Learned Addl. Advocate General submits that even though the writ petitioners have not

taken the pleas in their pleadings which have been raised at the time of hearing, yet these pleas do not have merit for the following reasons.

39. Learned Addl. Advocate General for the State submits that reading of Rule 5(3) of the Assam Forensic Science Laboratory Service Rules, 1995 as amended in 2003 would clearly indicate that the main mode of recruitment to the post of Deputy Director is by way of promotion unlike in the case of Senior Scientific Officer in which 50% is earmarked for promotion and remaining for direct recruitment. However, no such quota has been earmarked for direct recruitment for the posts of the Deputy Directors. Direct recruitment has been kept as a contingent provision under the Service Rules, to be invoked only when eligible candidates are not available for promotion to the posts of Deputy Directors. It has been submitted that the normal method for appointment to the post of Deputy Directors has been prescribed as promotion under the Rules. In other words, direct recruitment cannot be resorted to by the authorities unless eligible and suitable candidates are not available in the feeder grade. Therefore, since the Service Rules contemplate filling up the posts of Deputy Director only by way of promotion under normal circumstances, the authorities have prepared the roster meant for promotion only so far and not for direct recruitment. It has been submitted that since the method of direct recruitment is by way of exception, it cannot have the effect of qualifying the general norm provided in the Service Rules i.e. for recruitment to the posts of Deputy Director by way of promotion.

40. It has been further submitted that if the stand of the petitioners is to be accepted, it would mean providing another set of roster points for direct recruitment which is merely a contingent provision, and not meant to be a regular feature for appointment to the post of Deputy Director, which in turn would create administrative chaos and cause uncertainties as it cannot be ascertained as to when direct recruitment will be invoked. Thus, uniformity and continuity will be disrupted.

It has been submitted that, had it been like the case of the post of Senior Scientific Officer, for which the rules specifically provide for a specific quotas for promotion and direct recruitment, the matter would have been otherwise. Therefore, preparing or maintaining a separate roster point based on direct recruitment method of appointment which is meant to

be a contingent provision would create confusion. Thus, adopting the roster point meant for promotion which is the main method of recruitment contemplated under the Service Rules cannot prejudice the case of anybody.

The aforesaid position has been clarified in the affidavit-in- opposition filed by the official respondent No. 3 in para No. 19 thereof that though the posts of Deputy Director are promotional posts, these four posts of Deputy Directors have been advertised only because of non-availability of eligible departmental candidates in the feeder grades and accordingly, the roster points prepared for promotion have been applied, being roster points no. 5, 9, 10 and 11.

It has been submitted that out of the aforesaid, roster point no. 5 is a backlog vacancy for ST(P) and the roster points no. 9,10 and 11 are for unreserved candidates.

41. Learned Addl. Advocate General further submits that the aforesaid roster points are based on the 13 point model roster of promotion for cadre having strength up to 13 persons and 100 point roster which has been relied upon by the two petitioners will not be applicable.

It has been accordingly submitted that there is no illegality in the aforesaid fixation of reservation points.

42. Learned Addl. Advocate General submits that the provisions of law are very clearly indicated in Rule 5 (3) of Service Rules which provides for method of appointment to the post of Deputy Director which is by way of promotion.

In that view of the matter, when rules are specific, clear and unambiguous, there is no scope for introducing any other method of appointment to dilute the specific provision of Service Rules, as sought to be done by the petitioners.

43. In this regard, learned Additional Advocate General has relied on the decision of Hon'ble Supreme Court rendered in ***Jagdish Chandra Patnaik and Ors. Vs. State of Orissa and Ors. (1998) 4 SCC 456***, in which the Hon'ble Supreme Court held in para No. 24 as follows:

“ 24. Rule 26 with which we are really concerned in the present case is the rule of seniority. It would be appropriate to extract the said Rule 26 in extenso:-

"Rule 26 - Seniority - (1) When officers are recruited by Promotion and by direct recruitment during the same year, the promoted officers shall be considered senior to the officers directly recruited irrespective of their dates of joining the appointment. (2) Between the two groups of promoted officers, those promoted from the rank of Sub-Assistant Engineers shall en bloc be senior to those promoted from the rank of Junior Engineers.

(3) Subject to provision of Sub-rules (1) and (2) seniority of officers shall be determined in accordance with the order in which their names appear in the lists prepared by the commission."

The very scheme of recruitment under the Rules, as indicated above, unequivocally indicates that in case of direct recruit the final authority lies with the State Government who issues appointment orders from amongst the persons found eligible by the Public Service Commission and further who have been found medically fit by the Medical Board. Even such an appointee is also required to undergo probation for two years and thereafter he can be confirmed in the service. Under Rule 26, which is the rule for determining inter se seniority between promotees and direct recruits when the expression used is "officers are recruited by promotion and by direct recruitment" necessarily it means that when they are appointed as Assistant Engineers by the State Government. To import something else into the Rule will neither be in the interest of justice nor is it necessary in any manner and it would tantamount to a legislation by the Court. It is a well known principle of construction of statute that when the language used in the statute is unambiguous and on a plain gramatical meaning being given to the words in the Statute, the end result is neither arbitrary, irrational or contrary to the object of the statute, then it is the duty of the Court to give effect to the words used in the Statutes as the words declare the intention of the law making authority best. In that view of the matter we do not see any justification to go into the question of quota meant for direct recruits and promotees nor is it necessary to find out as to the year in which the vacancy arose against which the recruitment is made. On an analysis of the scheme of the rules, as narrated earlier, we are of the considered opinion that the expression 'recruited' would mean appointed and the expression 'during the same year' in Rule 26 would mean during the calendar year and, therefore, direct recruits recruited during the calendar year would be junior to the promotee recruits recruited during the said calendar year.

Similarly, it was so held in **Raghunath Rai Bareja and Anr. Vs. Punjab National Bank and Ors. (2007) 2 SCC 230**, in the following words:

40. *It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a*

statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB vs. Securities and Exchange Board of India, AIR 2004 SC 4219. As held in Prakash Nath Khanna vs. C.I.T.¹⁴ 2004 (9) SCC 686, the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide Delhi Financial Corporation vs. Rajiv Anand, 2004 (11) SCC 625. Where the legislative intent is clear from the language, the Court should give effect to it, vide Government of Andhra Pradesh vs. Road Rollers Owners Welfare Association 2004(6) SCC 210, and the Court should not seek to amend the law in the grab of interpretation

43. *In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn. pp 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.*

44. *As the Privy Council observed (per Viscount Simonds, L.C.)(IA p.71) "Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used."(see Emperor v. Benoarilal Sarma, AIR 1945 PC 48, pg. 53).*

46. *The rules of interpretation other than the literal rule would come into play only if there is any doubt with regard to the express language used or if the plain meaning would lead to an absurdity. Where the words are unequivocal, there is no scope for importing any rule of interpretation vide Pandian Chemicals Ltd. vs. C.I.T. 2003(5) SCC 590.*

47. *It is only where the provisions of a statute are ambiguous that the Court can depart from a literal or strict construction vide Narsiruddin vs. Sita Ram Agarwal AIR 2003 SC 1543. Where the words of a statute are plain and unambiguous effect must be given to them vide Bhaiji vs. Sub- Divisional Officer, Thandla 2003(1) SCC 692.*

Accordingly, it has been submitted by learned Additional Advocate General that when the rules are clear as to the method of appointment, which is by way of promotion, the question of bringing any law related to direct recruitment in the present case, does not arise.

44. It has been submitted by the learned Additional Advocate General that the roster meant for direct recruitment cannot be brought in the present case, as the main method of recruitment is by way of promotion and as such, the roster points meant for promotion have been followed.

45. Coming to WP(C) 4200/2017, learned Additional Advocate General though not insisting on non-maintainability of the petition, has submitted in the same line. He has contended that there is no need to apply the roster points meant for direct recruitment as the method of appointment to the post of Deputy Director is essentially by way of promotion and the direct recruitment is to be resorted only by way of exception and as such, not the norm. Therefore, the roster meant for direct recruitment, cannot be applied in the present case.

46. According to the Ld. Additional Advocate General, as also mentioned in the affidavit filed by the official Respondents, since the posts in the cadre of the Deputy Directors as per Service Rules are to be filled up by promotion, the roster points meant for promotion had been followed, even though this direct recruitment method had been adopted as an exception due to non availability of eligible candidates in the feeder cadre. Accordingly, in terms of the roster points maintained for promotion, three of the advertised posts are unreserved and one has been reserved for STP as per the roster points.

47. It has been contended that the question of applying roster points meant for direct recruitment does not arise in the present case, as the posts of Deputy Directors according to the Service Rules have to be filled up by promotion. It is only by way of exception that direct recruitment has to be resorted to, if eligible persons are not available for appointment by promotion as in the present case. Otherwise, rules contemplate filling up the posts of Deputy Directors by way of promotion only under normal circumstances. Thus, the process for appointment by promotion is the norm and direct recruitment is the exception, which can be invoked only when promotion cannot be made because of the non-availability of eligible officers in the feeder grade.

It has been accordingly submitted that in such a situation, if the Department adopts the roster meant for direct recruitment, it will create serious anomalies and also confusion. It would be more rational and ensure continuity and predictability if the roster for promotion is uniformly applied for all the appointments being made in the same Departments, even while adopting the direct recruitment method. Bringing in a different rosters meant for direct recruitment would upset the existing arrangements made by following the roster meant for promotion.

48. Responding to the submissions advanced by the petitioners in WP(C) No. 7555/2017 and WP (C) No. 7652/2017, learned Addl. Advocate General has made the same submissions as regards non-following of roster points meant for direct recruitment.

49. However, as regards the issue of reservation for women, it has been contended that this provision will arise only when there is a specific provision for direct recruitment under the Service Rules and not otherwise.

Learned Additional Advocate General has submitted even though the five posts of Senior Scientific Officers have been advertised for appointment by direct recruitment, since the main method of recruitment is by way of promotion and not by direct recruitment under the Service Rules, the question of reservation of women also does not arise as the question of reservation would arise only where the posts are to be filled up by way of direct recruitment.

Reply of the petitioners and response thereto :

50. Mr. U.K. Nair, learned senior counsel for the petitioners, in response, has submitted that the contention of the State that the method of recruitment to the post of Deputy Director is primarily promotional and as such, the roster points meant for promotion can only be applied does not stand to scrutiny for the Service Rules contemplate, as provided under Rule 5(3) that as and when direct recruitment method is adopted, the same shall be made in accordance with Rule 6(1) and 18 of the Service Rules. Rule 6(1) provides for the method and procedure to be followed in making direct recruitment wherein it has been clearly

provided that while making appointment by direct recruitment, the appointing authority has to make an assessment about the number of vacancies to be filled up in the next recruitment and also about the reservation of the candidates belonging Schedule Caste (SC) and Schedule Tribe (ST) and any other category as laid down by the Government, as provided under Rule 17 of the Service Rules.

Rule 17 provides that reservation has to be made in terms of the Schedule Castes and Schedule Tribes (Reservation of Vacancies in Service and Post) Act 1978 as amended from time to time.

Therefore, there cannot be any escape from the fact that if the authorities decide to resort to direct recruitment process, all the attending and ancillary laws connected with direct recruitment have to be followed. If that is so, the roster meant for direct recruitment has to be also followed in the instant case.

51. It has been submitted that there cannot be any dispute at the Bar that the reservation will differ when these two methods of promotion and direct recruitment are adopted at the time of making appointment. When appointments are made by promotion, there can be reservation for SC and ST and not for OBC or such other similar categories. However, when appointments are made by way of direct recruitment, not only reservation for SC and ST, but also for other categories like OBC etc. would come into operation.

Accordingly, it has been submitted that the authorities were bound to follow the roster points meant for direct recruitment since they have adopted the direct recruitment as the method for appointment to fill up the said vacant posts of Deputy Directors though under normal circumstances, these were to be filled up by way of promotion.

52. Learned senior counsel for the petitioners has also submitted that the State has taken the stand that the Model Roster Points meant for cadre having strength up to 13 posts have been adopted, which itself indicates following of rosters of reservation depending on the method of recruitment.

It has been submitted that the roster points followed in initial recruitment has to be continued in the subsequent years of recruitment. In the present case, the authorities have not indicated as to which of the roster points has been followed, as to indicate how the lone

post of Deputy Director in Serology has been served for ST(P).

53. Learned senior counsel further submits that as regards appointments to the posts of Senior Scientific Officers, it is very clearly evident from their own assertion made in the affidavit-in-opposition that the Directorate while forwarding the requisition to the Assam Public Service Commission (APSC) had proposed for reserving a post for women as per the Assam Women Reservation in Services Act, 1995. Thus, they were proceeding to follow the reservation roster meant for direct recruitment as otherwise, there cannot be any reservation for women if it these were promotional posts and as such, it has been submitted that the authorities cannot blow hot and cold while trying to make reservation for women.

54. Learned senior counsel also submits that if one reads Rule 6(1) of the Service Rules as mentioned above, it specifically deals with recruitment to the post of Deputy Director as well as Senior Scientific Officer by way of direct recruitment.

Therefore, the rules also clearly envisage that recruitment to the posts of Deputy Directors can be made by way of direct recruitment also, in which event, all attending rules and laws relating to direct recruitment have to be applied.

55. Further, it has been submitted that it is not correct that the petitioner No.2 in WP(C) 3931/217 has not disclosed that she had approached this Court earlier, as it has been clearly mentioned in para No. 27 of the writ petition about the aforesaid writ petition filed by the writ petitioner No. 2 and no occasion arose earlier to challenge the recruitment process for the post of Deputy Director in Serology Division as it was supposed to be a reserved post.

56. Mr. S. Saikia, learned counsel for the petitioner in WP(C) 7555/2017 submits that the issue of non-maintainability of the petition raised by the State will not apply in the present case in as much as the petitioner never applied for the post of Deputy Director, Jorhat Centre.

57. Mr. B. Goswami, learned Addl. Advocate General in response has submitted that applicability of the procedure meant for direct recruitment has to be understood in the context of main Rule 5(3) for the posts of Deputy Director and Senior Scientific Officers which

provides for appointment to the post only by way of promotion and as such, promotion being the main method provided, only the roster meant for promotion has to be applied. Reference to Rule 6(1) is only for the purpose of making the procedure to be followed while making the exception. It has been also submitted that the stand of the State has been clearly mentioned in para No. 19 of the affidavit in opposition, which has not been denied by the petitioners. It has been submitted that Rule 6(1) cannot be applied independently. It has to be read in the context of Rule 5(3) which is the main rule governing the method of appointment to the post of Deputy Director.

58. Mr. B. Goswami, learned Addl. Advocate General for the State accordingly submits that the petitioners have miserably failed to make out any case in their favour and their pleas amount to both malice in law as well in fact and hence, deserves to be dismissed with cost.

59. Mr. J. Payeng, learned counsel for the private respondent No.6 has also raised the preliminary objection as regards maintainability of the writ petitions in WP(C)3931/2017 as well as WP(C) 4200/2017. It has been submitted that the petitioner No. 2 in WP(C) 3931/2017 as well as petitioner in WP(C) 4200/2017 had both applied for the post of Deputy Director, Serology Division in the Directorate of Forensic Science Laboratory, Guwahati. However, their applications were rejected at the threshold by the Assam Public Service Commission (APSC) on the ground that none of them belongs to ST(P) category. However, the said petitioners chose not to raise any objection against the rejection of their applications but continued to take part in the recruitment process for other posts which they had applied. Accordingly, it has been submitted by learned counsel for the private respondent that the present petitions are barred by principle of estoppel.

60. In this regard, learned counsel for the private respondent No. 6 placed reliance on the decisions of Hon'ble Supreme Court rendered in ***Chandra Prakash Tiwari and Ors vs. Shakuntala Shukla and Ors. (2002) 6 SCC 127*** as well as in ***Madras Institute of Development Studies and Anr. Vs. . K. Sivasubramaniyan and Anr., (2016) 1 SCC 454.***

In ***Chandra Prakash Tiwari (supra)***, the Hon'ble Supreme Court held as follows:

32. *In conclusion, this Court recorded that the issue of estoppel by conduct can*

*only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhawan pertaining the doctrine of Estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/selection. It is a remedy which stands barred and it is in this perspective in Om Parkash Shukla (*Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.*, [1986] Supp. SCC 285) a Three Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a Petition challenging the said examination would not arise.*

34 . There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, 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 there was some lacuna in the process.

In **Madras Institute of Development Studies (supra)**, the Hon'ble Supreme Court also held in para No. 14, 15, 16, 17 and 18 as follows:

14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.

15. In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Anthropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held:-

“15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the

proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting (AIR p. 432, para 9)

“9.....It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.”

16. *In Madan Lal & Ors. vs. State of J&K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that:-(SCC p. 493, para 9)*

“9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. 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 this petition. It is now well settled 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 case of Om Prakash Shukla v. Akhilesh Kumar Shukla¹ it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

17. *In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:-*

“We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner’s name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

18. *In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under:-*

“In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had

waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

61. Accordingly, it has been contended that as these petitioners themselves had taken part in the recruitment process for other posts, without raising any challenge to their rejection because of which they were debarred from taking part in the recruitment process in the post of Deputy Director, Serology Division, these two petitions are clearly barred by estoppel.

62. Learned counsel for the private respondent while endorsing the stand taken by the State submits that the aforesaid reservation for ST(P) is by way of carrying forward the earlier backlog vacancy meant for ST(P). It has been submitted that on an earlier occasion, as the vacancy meant for ST(P) could not be filled up by way of promotion, the said vacancy meant for ST(P) had been carried forward which has to be filled up by a candidate belonging to such category and as such, there is no illegality in carrying forward the roster point and keeping the said one post of Deputy Director, Serology Division as reserved for ST(P).

63. In this regard, he has referred to sub-Section (viii) of Section 5(A) of the Reservation Act as amended in 2012 which provides for filling up unfilled backlog vacancies of ST(P) and SC by special drive so that the prescribed percentage of reservation is maintained.

64. Mr. U.K. Nair, learned senior counsel for the petitioners has controverted the argument advanced by the counsel for private respondent by stating that non-challenging of the rejection of their applications for appointment to the post of Deputy Director, Serology Division is not relevant for the reason that the petitioner had challenged the very advertisement issued by which the said post had been earmarked for ST(P).

It has been also submitted that secondly, the interpretation adopted by the counsel for the private respondent based on Sub-Section (viii) of Rule 5 A of the Reservation Act is misplaced for the reason that Sub-Section (viii) has to be read in the context of the preceding Sub-Sections (iv) and (v) which provide for separate rosters for these two methods of appointment, by promotion and direct recruitment. However, there cannot be mixing up of

roster points meant for direct recruitment with that of promotion as these rosters have to be followed separately and independently in the context of the specific mode of recruitment, either direct recruitment or promotion.

65. It has been submitted by Mr. S. Saikia learned counsel for petitioner in WP(C) No. 4200 of 2017 and WP(C) No. 7555 of 2017 that it is not correct to contend on behalf of private respondent that the rejection of the application of the petitioners was not challenged. In fact, soon after the rejection of the applications of the petitioner in WP(C) 4200/2017, the petitioners had submitted a representation to the Director, Forensic Science Laboratory, Kahilipara against the said rejection contending that the posts cannot be reserved for ST(P) and ought to be kept to be as unreserved for all the candidates to apply.

DECISION BY THE COURT:

66. It is evident that the disputes as discussed above revolve round the issue as to which will be the appropriate roster points, meant for direct recruitment or for promotion, which have to be applied in making appointment to the advertised posts of Deputy Directors sought to be filled up by direct recruitment.

67. In the opinion of this Court, the clue to the solution of the disputes is to be found in Section 5A of the Assam Scheduled Castes and Scheduled Tribe (Reservation of Vacancies in Services and Posts) Act. 1978, as amended in the year 2012, by which the aforesaid Section 5A was also inserted.

Section 5 A of the aforesaid Reservation Act reads as follows:

“5 A. The reservation for the members of the Scheduled Castes and the Scheduled Tribes in services or posts in an Establishment shall be given effect to in the following manner, namely :

- (i) A post-based Roster Register shall be maintained to give effect to the reservation of vacancies for Scheduled Castes and Scheduled Tribes. Such roster shall be based on the Model Roster as per Schedule I and II appended to this Act and shall be adopted for the purpose by each Establishment in such manner that the prescribed percentage of reservation is maintained in each cadre;

(ii) Each Appointing authority shall prepare and notify the roster based on the principles laid down in this Act and maintain Roster Register in a manner containing such number of points as are equivalent to the number of posts in a cadre. In case of any increase or decrease in the cadre strength, the roster shall correspondingly be expanded or contracted;

(iii) The roster is to be operated on the principle of replacement and not as a running account, in other words, the points at which reservation for different categories applies are fixed as per the roster and vacancies caused by retirement etc. of persons occupying those points shall be filled up by appointment of persons of the respective categories;

(iv) Separate rosters are to be maintained for giving effect to reservation in direct recruitment and promotion;

(v) Cadre, for the purpose of a roster, shall mean a particular grade and shall comprise the number of posts to be filled by a particular mode of recruitment in terms of the applicable recruitment rule. Thus in a cadre of say, 100 posts, where the recruitment rules prescribe a ratio of 50:50 for direct recruitment and promotion, two rosters- one for direct recruitment and one for promotion (when reservation in promotion applies)- each comprising 50 points shall be drawn up on the lines of the respective rosters;

(Emphasis added)

(vi) Since reservation does not apply to transfer on deputation or transfer, where the recruitment rules prescribe a percentage of posts to be filled by this method, such posts shall be excluded while preparing the rosters;

(vii) Appointments of candidates belonging to Scheduled Castes and Scheduled Tribes which were made on merit and not due to reservation, are not to be counted towards reservations so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments;

(viii) For initial adoption of this post based roster, the existing backlog vacancies in a cadre where the prescribed percentage of reservation for the Scheduled Castes and Scheduled Tribes has not been achieved as per post-based roster prepared under this Amendment Act, shall be considered as vacancies released by recruitment, resignation, promotion etc. of the persons belonging to the said reserved categories and the same are to be filled up by direct recruitment or by promotion of eligible persons from the respective categories by special drive so that the prescribed percentage of reservation is maintained;

(ix) Before making an appointment by direct recruitment, the Appointing authority shall ascertain by consulting the Roster Register maintained by each Establishment, whether the post is reserved or unreserved, and if it is reserved, for whom it is so reserved. Immediately after an appointment is made, the particulars thereof shall be entered in the Roster Register and signed by the Appointing authority;

- (x) In the absence of a qualified Scheduled Castes or Scheduled Tribes candidate, as the case may be, in a particular year, the vacancy shall be carried forward and filled up in the next year;
- (xi) Every Establishment shall prepare and notify the roster for each cadre equivalent to the number of posts with the concurrence of the Personnel Department and Welfare of Plains Tribes and Backward Class Department;
- (xii) The roster shall be maintained separately for permanent and temporary posts;
- (xiii) A vacancy caused due to any reason whatsoever, except termination of service during probation, shall be treated as a fresh vacancy;
- (xiv) A candidate who claims to be a member of the Scheduled Castes or the Scheduled Tribes shall support his candidature by a Certificate from Deputy Commissioner/ Sub-Divisional Officer or from such other authority as may be prescribed by rules made under the Act.”

68. Of our particular interest are Sub-sections (iv) and (v) of Section 5A. Sub-section (iv) provides that separate rosters are to be maintained for giving effect to reservation in direct recruitment and promotion. Sub-section (v) further provides that, cadre, for the purpose of a roster, shall mean a particular grade and shall comprise the number of posts to be filled by a particular mode of recruitment in terms of the applicable recruitment rule . Thus in a cadre of say, 100 posts, where the recruitment rules prescribe a ratio of 50:50 for direct recruitment and promotion, two rosters - one for direct recruitment and one for promotion (when reservation in promotion applies) - each comprising 50 points shall be drawn up on the lines of the respective rosters.

69. From the above, what one can ascertain is that there can be two sets of rosters, one for direct recruitment and another for promotion. Thus, cadre for the purpose of reservation can consist of two categories of posts which are to be filled up on the basis of particular method of recruitment, viz., direct recruitment and promotion. Accordingly, in the same Department consisting of a particular cadre, such particular cadre can consist of two more sub cadres (or two separate groups of the posts) for the purpose of reservation. There can be a (sub) cadre of posts to be filled up by direct recruitment for which a roster has to be maintained and another (sub) cadre of posts to be filled up by promotion for which another roster has to be maintained. Hence, two separate rosters, one for direct recruitment and another for promotion have to be maintained as provided under Sub-Sections (iv) and (v) of

Section 5A of the Reservation Act, referred to above, even if these posts form a single cadre under the relevant Service Rules.

70. But, the question may arise, as to whether Sub-section (v) of Section 5A can be applicable in the present case, as there is no such specification of percentage of quota for recruitment from two sources of direct recruitment and promotion in the relevant Service Rules, i.e., Assam Forensic Science Laboratory Services Rules, 1985.

71. This Court, however, is of the view that such non provision for specific percentage of recruitment quota is of not much importance, since the rules provide for appointment by way of direct recruitment also, apart from the normal method of recruitment by promotion, though, it may be contingent upon non availability of eligible candidates for promotion. It was contented by the Ld. Additional Advocate General that promotion is the norm and the direct recruitment is the exception and in the past, all appointments to the posts of Deputy Directors had been made by way of promotion. This Court is of the opinion that nevertheless, the aforesaid Service Rules provide for both the methods of recruitment, direct and promotion. Once, direct recruitment is also made permissible, whether, contingent upon happening of certain events, which is, non availability of eligible candidates for promotion, the mode of appointment by direct recruitment must be given full effect with all the attending attributes. In other words, all the procedures and provisions of law required to be followed for effecting direct recruitment must be given effect to unless specifically prohibited under the rules. Thus, for example, if the posts are to be filled up by direct recruitment, the posts have to be advertised and appointments have to be made on the basis of merit based on open competition etc. In the same manner, if there be any specific reservation rules framed for direct recruitment, the same must be also followed.

In the present case, as discussed above, there are specific provisions for maintaining reservation in direct recruitment as provided under Sub-sections (iv) and (v) of Section 5 A of the Reservation Act referred to above. Hence, the aforesaid provisions of the Reservation Act have to be followed also. There cannot be any escape from the aforesaid provision of the

reservation statute.

72. As regards absence of any specific quota for direct recruitment and promotion, as discussed above, since direct promotion is also permitted as one of the methods of recruitment based upon certain contingencies, it can be deemed that there will be also a quota for direct recruitment, but rather than a fixed one, it will be variable, depending on the existence of the aforesaid contingency. Thus, where eligible candidates are available and accordingly, all the posts are filled up by promotion, the promotion quota for the particular recruitment year can be considered to be 100 per cent. On the other hand, if all the vacant posts are to be filled up by direct recruitment, the quota for direct recruitment for that particular recruitment year can be deemed to be 100 per cent or to the extent of number of vacancies sought to be filled by direct recruitment. Because of the very nature of the mode of recruitment will be variable and the respective quotas i.e., for the promotion and direct recruitment have to be considered on the basis of the particular recruitment year only, for the method of direct recruitment cannot be invoked so long as eligible candidates in the feeder grades are available in a particular recruitment year as provided under the rules.

However, as far as roster points are concerned, the points will be continuously followed in respect of the separate modes of recruitment. In other words, as far as the roster for promotion is concerned, if these four posts had to be filled up by promotion, the roster maintained for promotion will be followed. However, if these are to be filled up by direct recruitment, the roster meant for direct recruitment has to be followed.

73. In the present case, even if this is for the first time that direct recruitment has been resorted to, the roster for direct recruitment as provided under the Reservation Act has to be applied and followed from the very beginning and which will be continued as and when recruitment is made by direct recruitment in future.

Thus, the rosters points prepared for promotion and direct recruitment have to be maintained and followed as provided under Section 5 A of the Reservation Act, and to be applied depending upon the nature of recruitment being made.

74. This Court would accordingly hold that in view of the specific provisions of Section 5A referred to above, there can be no escape from the obligation to maintain separate roster for

direct recruitment.

The contention of the State authorities that the roster points meant for promotion have to be followed as the promotion is the primary source of recruitment cannot be accepted in the teeth of the specific provision under Sub-Section (v) of Section 5A of the Assam Scheduled Castes and Scheduled Tribe (Reservation of Vacancies in Services and Posts) Act. 1978.

The law, otherwise, also does not contemplate hybrid application of laws, one governing direct recruitment with that governing promotion for the reasons that criteria to be applied for making direct appointment and promotion are different and not comparable. While direct recruitment would involve public advertisement of posts, and selection to be made from amongst the best candidates on the basis of performance in the competitive examination, in case of promotion it is confined only to a few candidates who are already in the feeder cadre of posts who fall within the zone of consideration and the selection will be based primarily on the service records, rather than any competitive examination as in the case of direct recruitment. In the present case, under the service rules, though promotion may be the preferred mode of appointment for the posts of Deputy Directors, since, direct recruitment is also permitted as an alternative method of recruitment, all the features attending direct recruitment must be followed if direct recruitment is to be adopted. If that is so, separate roster points meant for direct recruitment need to be adopted while invoking direct recruitment as the method of recruitment as in the present case, as required under Sub-Section (v) of Section 5A of the Assam Scheduled Castes and Scheduled Tribe (Reservation of Vacancies in Services and Posts) Act. 1978. If there be some provision for a separate roster for direct recruitment, such provision cannot be rendered redundant on the premise that promotion is the preferred method of recruitment to the post of Deputy Director, as contended by the learned Addl. Advocate General.

75. There is yet another important issue raised by the petitioners that there is no rational basis for picking the post of Serology Division to be reserved for STP. After this Court has decided that roster meant for direct recruitment must be followed in the instant case, this issue perhaps has become academic in nature, in as much as there cannot be any reservation for STP under the roster for direct recruitment as discussed above. However, this Court

cannot but make the observation that for choosing one of the four vacant posts, which belong to different disciplines, there must be a rational basis for picking up one of these disparate posts for reserving for STP, for that matter for any reserved category, without which criteria such a decision would be left to the *ipse dixit* of the authority, which is not contemplated under the law as it would be hit by arbitrariness, offending Articles 14 and 16 of the Constitution. There must be some reasonable criteria, for example, absence of any officer belonging to a particular reserved community in the particular Division or Section etc. which must be disclosed before embarking upon the exercise of recruitment.

76. As regards the issue of non maintainability of the writ petitions, this Court, in the light of the submission made by the petitioners, would hold the petitions to be maintainable. Further, the issue raised in these petitions are too fundamental to be rejected merely on the ground of non maintainability of the petitions.

Accordingly, this Court would hold that the decisions cited by the learned Addl. Advocate General and the learned counsel for the private respondent are not applicable in the present case.

77. For the reasons discussed above, this Court without any hesitation would hold that the impugned advertisement issued on 16.01.2017 by the Assam Public Service Commission for recruitment to 4(four) posts in the cadre of Deputy Director in Assam Forensic Science Laboratory Service by way of direct recruitment is not tenable in law and accordingly, it is set aside.

Resultantly, the recommendations made by the Selection Committee/Assam Public Service Commission for appointment to the aforesaid posts are also set aside.

The respondents authorities would be required to advertise these posts again by following the roster points meant for direct recruitment as provided under Section 5A of the Assam Scheduled Castes and Scheduled Tribe (Reservation of Vacancies in Services and Posts) Act. 1978 after properly identifying the port/posts for any particular reserved category, after applying a reasonable criteria for doing the same as directed above.

Further, the State respondents are also required to reserve 30% of the said posts for women as provided under the Assam Women (Reservation for Vacancies in Services and Posts) Act, 2005.

78. In the result, for the reasons discussed above, all the writ petitions, WP(C) No. 3931/2017, WP(C) No.4200/2017, WP(C) No. 7555/2017 and WP(C) No. 7652/2017 are allowed, by setting aside the impugned orders/actions of the Official Respondents.

Interlocutory Application, IA(C) No. 2121 of 2018 is accordingly disposed of.

JUDGE

Comparing Assistant