

CONSTITUTIONAL WRIT
PRESENT: The Hon'ble Justice Pratap Kumar Ray.
And
The Hon'ble Justice Mrinal Kanti Sinha.

Judgment On : 11th FEBRUARY, 2010.
W. P. C.T No.832 of 2003
Director General, CSIR & Anr.
Versus
Smt. Ruma Chakraborty & Ors.

Point:

Precedent: Earlier judgment on identical facts and law whether should be followed and in case of any difference whether it should refer to a larger bench-Writ court whether can grant appropriate relief for rendering justice- Constitution of India- Art. 14, 16

Fact: The appellant by preferring the writ application has challenged the order of Ld. Tribunal whereby direction was passed to give appointment on the basis of select list of 1992 pursuant to an advertisement and to further give seniority over the candidates appointed as Junior Technical Assistant from any panel prepared after 1992 panel in favour of respondents/applicants.

The respondents/applicants applied for the post of Junior Technical Assistant (JTA) pursuant to an advertisement of appellant organization and they were selected by the Selection Committee and placed in the selected panel. The respondents were also directed to fill up the attestation form for Police verification etc., but the respondents/applicants received no further communication from the appellant. The respondents/applicants found advertisement dated 31.1.95 inviting applications for three posts of JTA and subsequently they were informed that due to ban on filling up of any vacancy excluding the vacancy reserved for SC and ST, none of the selected candidates against the said advertisement could be appointed. Thereafter, respondents /applicants have approached the Tribunal for directing the respondents to give appointment to the applicants as JTA on the basis of the panel of 1992 with seniority.

Held: Judicial discipline surely mandates that earlier judgement on identical facts and identical point of law discussed and dealt with should be followed and in the event of any difference of opinion, subsequent coordinate bench will refer the matter stipulating the differential angle on different point for adjudication by larger to settle the legal question involved, only to give a finality of the legal question. In the instant case we are not finding any such materials for reference to

the larger bench as in earlier bench, no argument advanced on the points as urged herein. (Paragraph – 35)

When somebody has suffered injustice and when approach is made to the Court of law particularly as happened in the instant case and when by interim order the Tribunal directed to keep one post vacant and when already three posts are lying vacant with reference to official advertisement of advertisement No.1 of 1990, the respondent No.1 is legally entitled for the appropriate relief. (Paragraph – 39)

The Court of law should not be blind to grant appropriate relief particularly in the writ jurisdiction where rendering of justice is the main paramount consideration for breach of any constitutional provision and more particularly the breach of fundamental rights under Article 14 and 16. (Paragraph – 40)

It is a settled law that the Court of law is bound to decide the issue on the basis of pleading of the parties. (Paragraph – 41)

Cases cited: State of Uttar Pradesh Vs. Dinesh Kumar Sharma (2007) 1 SCC 683, Uttaranchal Forest Ranger Association Vs. State of Uttar Pradesh reported in (2006) 10 SCC 346, Keshab Chandra Joshi Vs. Union of India reported in (1992) Supple 1 SCC 272, Dharampal Satyapal Ltd. & Anr. Vs. State of Bihar & Ors. reported in (2008) 7 SCC 11, (1990) 2 SCC 715. Official Liquidator Vs. Dayanand & Ors. reported in (2008) 10 SCC 1 Mahadeolal Kanodia Vs. Administrative General of West Bengal reported in 1960 SC 963, Lala Sri Bhagwan Vs. Ram Chand Gajendra Gadadhar reported in AIR 1965 SC 1767, Bijoy Lakshmi Sadho (Dr.) Vs. Jagadish reported in (2001) 2 SCC 247 Bihar Vs. Kalika Kuer reported in (2003) 5 SCC 448, State of Punjab Vs. Devhans Marine Breweries Ltd. reported in 2004 11 SCC 26. UP Gram Panchayet Adhikari Sangha Vs. Dayaram Saroj reported in (2007) 2 SCC 138, Sanjay Dhar Vs. K&J PSC reported in (2000) 8 SCC 182, Balbant Singh Narowar Vs. State of Hariyana reported in (2008) 7 SCC 728. K. P. Vargese by ITO reported in (1981) 4 SCC 173, Navnitlal C. Javeri vs. K. K. Sen, A.A.C reported in AIR 1965 SC 1375. C. B. Goutam Vs. Union of India reported in [1993] 1999 ITR 530 UCO Bank Vs. Commissioner of Income Tax reported in (1999) 4 SCC 599 Urban Improvement Trust, Bikaner Vs. Mohanlal reported in (2010) 1 SCC 512 Bhag Singh Vs. Union Territory of Chandigarh reported in (1985) 3 SCC 733, (2001) 9 SCC 248 (Union of India and others –versus- Uma Kant Misra) M/s Goodyar India Ltd –vs- State of Haryana reported in AIR 1990 SC 781 (AIR 1975 SC 1871). 1972 Tax LR 2202) Rajput Ruda Maha v. State of Gujarat (1980) 2 SCR 353: (AIR 1980 SC 1707 at p. 1708). STC 359 : (1974 Tax LR 1730) AIR 1969 SC1276) Coffee Board v. Commr. of Commercial Taxes (1985) 60 STC 142(Kant) Coffee Board. Karnataka v. Commr. Of Commercial Taxes, Karnataka (1988) 70 STC 162 : (AIR 1988 SC 1487). Mittal Engineering Works [P] Ltd –vs- Collector of Central Excise, Meerut reported in 1997(1) SCC 203. Municipal Corporation of Delhi –vs- Gurnam Kaur reported in 1989 (1) SC 101 State of Punjab –vs- Baldev Singh reported in 1999 (6) SCC 172 Regional Manager and others – vs- Pawan Kumar Dubey reported in AIR 1976 SC 1766 Bharat Petroleum Corporation Ltd. India – vs- N.R.Vairmani [2004] 8 SCC page 579 State of Orissa vs. Sudhansu Sekhar Misra reported in AIR 1968 SC 647, Bhavnagar University vs. Palitana Sugar Mill (P) Ltd reported in [2003] 2 SCC 111 Bharat Petroleum Corporation Ltd. India – vs- N. R. Vairmani [2004] 8 SCC page 579. Anil Vasu Dev Salgaonkar vs. Naresh Kushai Shigaonkar reported in reported in 2009 (9) SCC313. Bharat Petroleum Corporation Limited Vs. N. R. Varomani reported in (2004) 8 SCC 579 In London Graving Dock Co. Ltd. v. Horton (AC at p.761)/ (ALL ER p. 14 CD). Home Office v. Dorset Yacht Co. (All ER p.297 g-h) case Sarbosamik Sanghatan KV Vs. State of Maharashtra & Ors. (2008) 1 SCC 498 Quin Vs. Lethem 1901 Appeal Cases 495, Ambika Quarry Works Vs. state of Gujarat reported in (1987) 1 SCC 213 Bhavnagar University Vs. Palitana Sugar Mills (P) Limited reported in

(2003) 2 SCC 111 AIR 1976 SCC 1766 State of Punjab Vs. Baldev Singh reported in (1999) 6 SCC 172

For the petitioners : Mr. Mintu Kumar Goswami

For the respondents : Mr. P. C. Das

Pratap Kumar Ray, J:

1. The order of the learned Tribunal below directing appointment forthwith on the basis of select list of 1992 pursuant to the advertisement No.1/90 with a rider of giving seniority over the candidates appointed as Junior Technical Assistant from any panel prepared after 1992 panel, whether was justified under the constitutional provisions of law read with circulars/ letters of the department concerned, is the question involved herein in the writ application due to assailing of the impugned order of the Tribunal dated 29th April, 2003 passed in Original Application No.1043 of 1997 by the Director General, CSIR & Anr. who are the writ petitioners herein.

2. To answer the issue the factual foundation of the matter and the different circular letters of the department, are required to be dealt with first. It is an admitted position as it appears from the respective affidavits filed before this Court by the respective parties and before the learned Tribunal below in connection with original application above referred to that the respondent No.1 Smt. Ruma Chakraborty stood first from general category candidates in the selection process for recruitment to the post of Junior Technical Assistant in the pay scale of Rs.1400-40-1800-UD-50-2300 as started following advertisement No.1/90 issued by Central Glass & Ceramic Research Institute, Calcutta-700032 who is the writ petitioner herein, declaring thirteen number of vacancies which was categorized as 7 posts for general category candidate, 3 posts for schedule caste candidates and 3 posts for schedule tribe candidates. The report of the selection committee dated 12th March, 1997 recommending appointment of candidates of general category vacancies for the said post reads such: "Central Glass & Ceramic Research Institute Calcutta-32 Ref. No.A-3(3-A)/90-R&C date and time of interview: 3rd, 4th & 5th March, 1992 at 10-00 A.M every day Place of interview: Central Glass & Ceramic Research Institute, 196, Raja S. C. Mullick road, Calcutta-32 Report of the Selection Committee(Annexure 'A') appointed by the Research Council of Central Glass & Ceramic Research Institute for selection of candidates for recruitment to the post of Junior Technical Assistant in the pay scale of

Rs.1400-40-1800-EB-50-2300 against advertisement No.1/90 (CGCRI).

Number of vacancy: 13(thirteen) posts

Reservation: 3 (three) posts for Schedule Caste and
3 (three) posts for Schedule Tribe candidates

1601 (sixteen hundred and one) applicants(ST-10, SC-127 and OC-1464) were
received in response to advertisement No.1/90 (CGCRI)

Out of 1601 applicants 155 (ST-7, SC-42 and OC-106) applicants, who were
considered most suitable have been called for interview (Annexure 'B') and 86
candidates appeared before the Selection Committee (Annexure 'B')

We recommend appointment of the candidates in order of merit as under:-
Sl.

No.

Appln.

Sl.No.

Name of the candidates Disciplin
e number

Pay

recomme
nded

1. 229 Miss Ruma chakraborty (x) & (xi) Minimum
2. 486 Miss Jhum Jhumi Nag (x) & (xi) Minimum
3. 927 Shri Sanjay Kumar Saha (ii) & (iii) Minimum
4. 824 Shri Atraj Singh (S/C) (vii) Minimum
5. 190 Shri Debasis Maiti (vi) Minimum
6. 238 Shri Tapas Ghosh (iv) Minimum
7. 1196 Shri N. K. Venkatesan (v) Minimum
8. 604 Shri Anish Kumar Majumder
(S/C)
(xiv) Minimum

9. 778 Shri Sadanand Ram (S/C) (i) Minimum
10. 1109 Shri Manick Das(S/C) (xiii) Minimum

W A I T L I S T

1. 750 Shri D. Narayanan (x) & (xi) Minimum
2. 659 Shri E. Peter Ravi Kumar (x) & (xi) Minimum
3. 1368 Shri Ajaya Kumar Sharma (iv) Minimum
4. 753 Shri Maqbool Ahmed (vii) Minimum
5. 860 Shri Abhay Kumar Singh (v) Minimum
6. 1034 Shri Kishore Kumar Routhray (vi) Minimum

NONE OF THE CANDIDATES IS RELATED TO US

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Members Chairman

(Abdus Salem) (D. Chakraborty)

(S. Barma)
(B. C. Bhattacharya)
(P. K. Gangopadhyaya)
(R. K. Banerjee)
(B. M. Agarwal)
(H. S. Maiti)
(M. Chakraborty)
A p p r o v e d
(B. K. Sarkar)
Director

3. It is also an admitted fact as revealed from the supplementary affidavit filed by the writ petitioners as per direction of this Court which was affirmed by one Dr. Himadri Sekhar Maity, Director, Central Glass & Ceramic Research Institute, that in terms of advertisement No.1 of 1990 a selection process as started for filling up 13 posts of Junior Technical Assistant by identifying the posts under three different categories namely 7 posts for general category candidates, 3 posts for schedule casts candidate and 3 posts for schedule tribe candidates, therein the respondent Ruma Chakraborty was empanelled as a first candidate in the un-reserved general category and one Sri Atraj Singh though was a member of schedule caste category was empanelled holding 4th position in the panel of general category candidates on merit, who was appointed on 10th January, 1994 but the respondent Ruma Chakraborty and other two empanelled candidate above him were not appointed on the plea of ban imposed by the DO letter No.2/89/91/SCST dated 15th July, 1992 issued by the Joint Secretary, CSIR requesting only to fill up back log vacancy of SC/ST under special recruitment drive. From the said supplementary affidavit it appears further that out of total 7 posts of general category candidates only one candidate empanelled under sl. No.4 of the list of general category candidate, Sri Atraj Singh, was appointed and those six posts which were not filled up, were advertised further by advertisement No.1 of 1995 for fresh recruitment from general category candidates wherein only one candidate, Sri Partha Sarathi Mukherjee was selected and appointed. It appears further that 5 posts of general category which were not filled up with reference to advertisement No.1 of 1990 was again advertised by adding another four vacancies occurred during the period February, 1995 to August, 1996 under advertisement No.3 of 1996 and six general category candidates were selected and appointed, leaving 3 posts still lying vacant from posts advertised by Adv. No.1 of 1990.

4. In the supplementary affidavit it has been admitted further that advertisement No.1 of 1995 and advertisement No.3 of 1996 as published in the

respective years 1995-96, six posts as were advertised against advertisement No.1 of 1990 were included despite the final selection list prepared in terms of advertisement No.1 of 1990 wherein Ruma Chakraborty respondent No.1 topped the list as a first candidate and wherefrom the 4th candidate of the panel was appointed namely Atraj Singh on 10th January, 1994. It appears further from the said affidavit that Ruma Chakraborty has been appointed in terms of order of the Tribunal impugned herein on 18th August, 2003 vide appointment letter dated 25th July, 2003 as issued referring her empanelment as per Adv. No.1 of 1990.

5. Relevant paragraphs 4 & 5 of supplementary affidavit read such:-

“ That the Central Glass & Ceramic Research Institute published an advertisement in the year 1990 being advertise No.1/90 for filling up 13 posts of JTA/Gr.III(1). Out of 13 posts 7 posts were reserved for General candidates, 3 were posts reserved for SC candidates and 3 posts were reserved for ST candidates. The interview for these posts were held on 3rd, 4th and 5th March, 1992. For the posts of ST no panel could be drawn since there were no suitable candidates found. For the posts of SC three candidates were selected and for the posts 7(seven) unreserved category seven candidates were paneled out of which one SC candidate was selected against the posts of general category on merit. During the selection process one DO letter No.2/89/91-SC/ST dated 15th July, 1992 received at this end from the Jt. Secretary, CSIR with the request that filing up of all the vacancies except Gr. IV to be kept in abeyance. But these restrictions will not apply to the filing up of back log vacancies for SC/ST under the special recruitment drive. Accordingly, no general category candidates was given appointment from that panel except (one) SC candidate namely shri Atraj Singh who selected against the vacancy of general category on merit and joined to the post of JTA on 10.01.1994. As per provisions laid down in the rules any SC candidate appointed on their own merit and adjusted against unreserved posts will retain their status of SC/ST and will be eligible to get benefit of reservation in future/further promotions, if any. Accordingly, Shri Atraj Singh is also eligible for further benefit in due course. The vacancy position for general category from the year 1990 to 1996 were as follows:-

A) Posts advt. In the month of July, 1990

Against advt. No.1/90 7 nos.

(less) 1 (one) post offered to one SC candidate 1 No.

carried forward 6 nos.

B) The competent authority had decided to fill up 2(two)

posts out of 6 (six) carried forward posts and

accordingly an advertisement was issued being adv.

No.1/95 (in January, 1995). 1 (one) posts offered to

one general category candidate.

1 No.

selected against advt. No.1/95 namely

Shri Partha Sarathi Mukherjee,

As JTA/Group III(I)

Carried forward 5 nos.

C) (+) vacancies occurred due to Retirement/Resignation during the period from February 1995 to August, 1996

4 nos.

D) Total vacancies from general category advertised in September, 1996 against advertisement No.3/96

9 nos.

All 9 posts in general category advertised against the advertisement No.3/96 and only 6 (six) General Category candidates joined to the posts of JTA/Group III(I)

From the above facts and figures it is clear that the posts advertised against the Advt. No.1/95 and Advt. No.3/96 in the year 1995 and 1996 were inclusive of 6 (six) posts advertised against Advt. No.1/90

5. That in compliance with the Ld. Tribunal order dated 29.4.2003 in O.A.

No.1043 of 1997 the appointing authority issued Appointment letter on

25.7.2003 in favour of respondent No.1 and the respondent No.1 joined the said post on 18.8.2003.

Xerox copy of appointment letter dated 25.7.2003 and joining report dated 18.8.03 are annexed herewith and marked with P-3.”

6. In the appointment letter as annexed in the supplementary affidavit dated 25th July, 2003 this fact has been admitted further that Smt. Ruma Chakraborty appointed in terms of her application dated 5th September, 1990 and on the basis of recommendation of the selection committee who met on 28th December, 1990 and 29th December, 1990 to prepare the final selection list. The first paragraph of the said appointment letter dated 25th July, 2003 is relevant which reads such:

“ CENTRAL GLASS & CERAMIC RESEARCH INSTITUTE

196, RAJA S. C. MULLICK ROAD, KOLKATA-700032

No.A-3(3)/90-R&C Dated 25.07.2003

From: The Director

Central Glass & Ceramic

Research Institute

Kolkata

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To: Ms. Ruma Chakraborty

W/o Ajay Chakraborty

Block 'C', Plot -215

Survey Park, Santoshpur

Kolkata-700075

Subject: Appointment to the post of Junior Technical Assistant
Group-III(1) in the scale of Rs.4500-125-7000/-.

Sir,

With reference to your application dated 05.09.1990, I am directed to inform you that on the recommendation of the Selection Committee which met on 28-29.12.1990, the Director, Central Glass & Ceramic Research Institute, Kolkata has been pleased to approve your appointment as Junior Technical Assistant, Group-III in this Institute on an initial pay of Rs.4,500/- (Rupees four thousand five hundred) only per month in the scale of Rs.4,500-125-7000/- plus usual allowances as admissible under the rules to the council employees stationed in Kolkata on the same pay and status on the following terms & conditions:-”

7. Despite empanelment of Ruma Chakraborty as a first candidate in the selection process for recruitment in the post of Junior Technical Assistant in terms of advertisement No.1 of 1990 relating to vacancy of seven posts from general category as no appointment letter was issued but subsequent advertisement of 1 of 1995 and 3 of 1996 were published for appointment of the candidates afresh, Smt. Ruma Chakraborty respondent No.1 moved the Tribunal in original application No.1043 of 1997 seeking the relief of giving appointment with retrospective effect by maintaining seniority over Partha Mukherjee and Debobrata Ray who were subsequently appointed in terms of subsequent selection process of the year 1995-96. One Sri Sanjay Kumar Saha who was third empanelled candidate of the list recommended by the selection committee in terms of advertisement No.1 of 1990 also moved the Tribunal seeking the same relief by an application under Section 19 of the Administrative Tribunal Act which was registered as original application No.367 of 1998. Both applications were taken up for analogous hearing and a common order delivered by the learned Tribunal below on 29th April, 2003 granting relief of appointment forthwith with seniority over and above the candidates appointed after advertisement No.1 of 1990. The order of tribunal dated 29th April, 2003 read such:

“ As the issues involved in both the OA and the point involved in both the MAs are same, they were heard together and a common order is passed.

2. The brief facts common to both the cases are as follows:

The applicants in the above OAs applied for the post of Junior Technical Assistant (JTA). Pursuant to advertisement No.1/90 of the Central Glass and Ceramic Research Institute (CGCRI) and they were selected by the Selection Committee and placed in the selected panel and the same was also approved by the competent authority, viz., the

Director, CGCRI on 12.3.92. The applicants were also directed to fill up the attestation form for Police verification etc., but the applicants received no further communication from the respondents. The applicants found advertisement dated 31.1.95 being Advt. No.1/95 inviting applications for three posts of JTA(SC-1 and Gen-2). The applicants made representations on 3.2.95 and 7.2.95 to the Director, CGCRI stating that they should be given appointment on the basis of the selection made in 1992. As there was no response, the applicants made an appeal to the Director in March, 1995 and another appeal in April, 1995 to the Director General, New Delhi. The applicants received letter dated 23.9.95 from the Controller of Administration, Calcutta stating that due to ban on filling up of any vacancy excluding the vacancy reserved for SC and ST, none of the selected candidates against adv. No.1/90 could be appointed and that Shri Tapash Ghosh was not appointed from the empanelment against advt. No.1/90 but from the selected panel of 1989 pursuant to the order of CAT, Calcutta Bench. Thereafter, Shri Partha Mukherjee and Shri Debabrata Roy were appointed as JTA in 1996 pursuant to advt. No.1/95 dated 31.1.95. Again the respondents invited applications against 17 posts of JTA (SC-2, ST-1, OBC-5 and Gen-9). Hence the applicants have approached this Tribunal for directing the respondents to give appointment to the applicants as JTA on the basis of the panel of 1992 with seniority over the above said Shri Partha Mukherjee and Shri Debabrata Roy who were empanelled pursuant to advt. No.1/95.

3. The respondents' case is that though the applicants were selected for the post of JTA pursuant to advt. Of 1/90, before the Police verification report was received by the respondents, the Jt. Secretary, CSIR by a DO letter dated 15.7.92 issued instructions to keep all vacancies in abeyance except backlog vacancies of SC and ST, that the case of Shri Tapash Ghosh cannot be considered to be a case of similarly placed person because he was selected in the year 1989 pursuant to advt. No.4/87 and that he was appointed as directed by this Tribunal in OA 150/93. The respondents further contended that one general candidate was selected and appointed pursuant to advt. No.1/95 as per the new CSIR Recruitment Rules, 1994 and that the applicants are not eligible to apply for the post of JTA under the said Rules pursuant to advt. No.3/96. The respondents further contend that withdrawal of restrictions on filling up of vacancies was granted on 19.9.95. The respondents further contend that the validity period of the panel of the year 1992 has expired after one year and hence the applicants are not entitled to get any appointment on the basis of the selected list of 1992. Under these circumstances, the

respondents contend that there are no merits in the OAs and pray for dismissal of the OAs.

4. M.A. No.128/02 in OA 1043/97 & M.A. No.129/02 in OA 367/98
The above Mas have been filed to condone the delay in filing the OAs. The learned counsel for the respondents vehemently opposed the above MAs on the ground of limitation and contended that since the applicants were selected in 1992 they cannot seek remedy in 1997 and 1998. Learned counsel for the applicants submitted that similarly placed person viz., Shri Tapash Ghosh filed OA 150/93 in this Tribunal in which the respondents were directed to appoint him as JTA, that the applicants are also similarly placed persons who are entitled to similar benefits by condoning the delay in filing the OAs on the basis of the Apex Court decision in K.C. Sharma & Ors. Vs. Union of India & Ors. reported in 1998 SCC (L&S) 226. However, the learned counsel for the respondents contended that the above said Tapash Ghosh cannot be considered to be a similarly placed person since the Tribunal directed his appointment on the basis of his selection in 1989 pursuant to Advt. No.4/87 and not on the basis of selection in 1992 pursuant to advt. No.1/90. Of course, it is true that the order of this Tribunal in OA 150/93 was passed on the basis of the selection of said Tapash Ghosh in 1989 though he was in the select list of 1992 also. However, the principle laid down by this Tribunal in OA 150/93 is that the respondents cannot make fresh recruitment without appointing persons who are in the earlier select list. Viewed from this angle, the applicants can be considered as similarly placed persons like the above said Tapash Ghosh, though their selections were pursuant to different notifications. Moreover, the applicants were selected and empanelled in the year 1992, but they were informed by a letter dated 20.9.95 of the Controller of Administration that they could not be appointed due to ban in filling up of the vacancies and hence the applicants had good and sufficient reasons to wait for the lifting of the ban. The learned counsel for the applicants further submitted that the applicants were under bonafide impression that they would be appointed after the ban is lifted by the Government. However, when the applicants came to know of the two advertisements in 1995 and 1996 to fill up the vacancies in the post of JTA from general candidates, they have approached this Tribunal by filing the above OAs. Taking into consideration the information given by the respondents that there was ban in filling up the vacancies and the action of the respondents in inviting applications for the same post in 1995 and 1996 after the restrictions in filling up the vacancies were removed ignoring the earlier select list, we are of the view that this is a fit case in which

the delay in filing the OAs should be condoned in the interest of justice. Accordingly, both the MAs 128/02 and 129/02 are allowed and the delay in filing the above OAs is condoned.

5. After condoning the delay in filing the OAs , we took up OAs 1043/97 and 367/98 for hearing and heard the learned counsel for the applicants and the respondents and considered all the pleadings and relevant records of the case.

6. The learned counsel for the applicants submitted that the action of the respondents in calling for fresh application by advt. No.1/95 for the post of JTA and selecting and appointing Shri Partha Mukherjee and Shri Debabrata Roy ignoring the earlier select list in which the applicants are included is arbitrary, unreasonable and illegal. In this connection, the learned counsel for the applicants relied upon the DOPT OM dated 8.2.82 the relevant portion of which reads as follows:-

“ Once a person is declared successful according to the merit list of selected candidates; which is based on the declared number of vacancies, the appointing authority has the reason to appoint him even if the number of vacancies undergoes a change after his name has been included in the list of selected candidates. Thus, where the selected candidates are awaiting appointment recruitment should either be postponed till all the selected candidates are accommodated, or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates awaiting appointment should be given appointment first, before starting recruitment or examination.”

7. On the contrary, learned counsel for the respondents contended that the applicants could not be appointed on account of ban in filling up of the vacancies as per letter dated 15.7.92 of the Jt. Secretary, CSIR and that when the ban was lifted by letter dated 19.9.95, the validity period of 1992 select list expired and the new CSIR Recruitment Rules came into force and hence advt. No.1/95 and advt. No.3/96 were issued under the new Recruitment Rules under which the applicants are not eligible to apply. The respondents cannot blow hot and cold by taking inconsistent stand to suit their convenience in a whimsical and arbitrary manner. The respondents expressed their inability to appoint the applicant as per 1992 select list on the ground of ban issued by the Jt. Secretary, CSIR in DO letter dated 15.7.1992 and when the ban was lifted by letter dated 19.9.95 the respondents contended that the validity period of the 1992 panel has expired and the new CSIR Recruitment Rules have come into force and hence the applicants cannot be appointed. If the select panel of 1992 could not be operated due to ban, the validity of 1992 select

panel also cannot expire during the period of ban. Moreover, the introduction of new Recruitment Rules cannot affect the validity of the earlier panel prepared on the basis of the then existing Recruitment Rules. It is clear from the OM cited above that where the selected candidates are awaiting appointment, recruitment should either be postponed till all the selected candidates are accommodated or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates awaiting appointment should be given appointment first, before starting appointment from a fresh list from subsequent recruitment or examination. Hence, we hold that the action of the respondents in inviting applications for the post of JTA by advt. No.1/95 and advt. No.3/96 and selecting and appointing candidates ignoring earlier select list of 1992 pursuant to advertisement No.1/90 in which the applicants are included is arbitrary, unreasonable and illegal. This Bench of the Tribunal had taken similar view in the case of Tapash Ghosh in OA 150/93. Consequently, we direct the respondents to appoint the applicants in OAs 1043/97 and 367/98 as JTA forthwith on the basis of select list of 1992 pursuant to the advt. No.1/90 and if any candidate has been appointed as JTA from any panel prepared after 1992 panel, the applicants should be given seniority over and above the said candidates.

8. In the result, both the OAs are allowed as indicated above with no order as to costs.

(A. Sathath Khan) (S. Biswas)

Member(J) Member (A)”

8. The learned tribunal below relied upon the office memorandum dated 8th February, 1982 of Department of Personal & Administrative Reforms, Ministry of Home Affairs, Government of India which was circulated by reference No.2201/2/73-establishment(D). This office memo was annexed with original application filed by Ruma Chakraborty as Annexure A-8 which read such:

“ No.22011/2/73-Estt.(D)

Govt. of India/Bharat Sarkar

Ministry of Home Affairs/Grih Mantranalaya

Department of Personnel & Administration Reforms

(Kiarnik Aur Prashassnik Sudhar Vibhag)

Date: 8.2.1982

OFFICE MEMORANDUM

Subject: Validity period of list of selected candidates prepared on the basis of direct recruitment/departmental competitive examination.

The undersigned is directed to say that references are being received from time to time from Ministries/Departments enquiring as to what should be the validity period of a list of selected candidates prepared on the basis of direct recruit of departmental competitive examination.

2. Normally, in the case of direct recruitment a list of selected candidates is prepared to the extent of the number of vacancies (other person found suitable being out on a reserved list, in case some of the persons on the list of selected candidates do not become available for appointment). Similarly in the case of departmental competitive examination, the list of selected candidates has to be based on the number of vacancy on the date of declaration of result as the examination is competitive and selection is based on merit. A problem may arise when there is fluctuation in the vacancies after the list of selected candidates is announced.

3. The matter has been carefully considered. Normally, recruitment whether from the open market or through a departmental competitive examination should take place only when there are no candidates available from an earlier list of selected candidates. However, there is likelihood of vacancies arising in future, in case, names of selected candidates are already available, there should either be no further recruitment till available selected candidates are absorbed or declared was for the next examination should take into account the number of persons already on the list of selected candidates awaiting appointment. Thus, there would be a limit on the period of validity of list of selected candidates regard to the extent of declared vacancies either by the method of direct recruitment or through a departmental competitive examination.

4. Once a person is declared successful according to the merit list of selected candidates; which is based on the declared number of vacancies, the appointing authority has the reason to appoint him even if the number of vacancies undergoes a change after his name has been included in the list of selected candidates. Thus, where the selected candidates are awaiting appointment recruitment should either be postponed till all the selected candidates are accommodated, or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates awaiting appointment should be given appointment first, before starting appointment from a fresh list from subsequent recruitment or examination.”

Said paragraph 4 has been quoted by the Tribunal in the order dated 29th April, 2003 to grant appropriate relief.

9. The logic advanced by the learned Tribunal below to grant relief was that when under office memorandum dated 8th February, 1982 there was a categorical direction that no appointment should be made giving a go bye of the panel earlier

prepared and recommended by the selection committee, the concerned authority acted illegally and arbitrarily by not adhering to that.

10. It is the contention of the learned Advocate for the writ petitioners that due to ban as imposed by DO letter dated 15th July, 1992 issued by the Joint Secretary, CSIR the respondent No.1 could not be appointed irrespective of her placement as a first empanelled candidate selected from general category candidate relating to seven declared vacancies in terms of advertisement No.1/90 and as such there was no illegality committed by the organisation refusing her appointment. So far as fresh appointment of 1 of 1995 and 3 of 1996 whereby and whereunder other different candidates were appointed including the respondent Nos.2 and 3 herein, it is the case of the writ petitioners that new recruitment rule came into effect whereby and whereunder the eligibility criterion so far as academic qualification was changed by prescribing that the candidate must be holder of first class in B.Sc level which admittedly was not the qualification of Smt. Ruma Chakraborty. It is the further point raised in the writ application that the Tribunal was wrong to give retrospective effect of appointment by directing grant of notional seniority above the candidates selected and appointed after the advertisement No.1 of 1990 published, having regard to the judgement passed in the case State of Uttar Pradesh Vs. Dinesh Kumar Sharma (2007) 1 SCC 683 wherein the Court held that no retrospective effect of any appointment to be made for the purpose of determining the seniority. It has been urged relying upon the case of Uttaranchal Forest Ranger Association Vs. State of Uttar Pradesh reported in (2006) 10 SCC 346 and Keshab Chandra Joshi Vs. Union of India reported in (1992) Supple 1 SCC 272 that seniority to be counted from the date of appointment and no retrospective effect of such seniority could be granted.

11. Relying upon the judgement passed in the case Dharampal Satyapal Ltd. & Anr. Vs. State of Bihar & Ors. reported in (2008) 7 SCC 11 it has been contended that no seniority and salary could be granted with retrospective effect. It has been further urged that appointment always to be considered prospective in the post in accordance with rules, relying upon the judgement passed in Direct recruitment Case reported in (1990) 2 SCC 715.

12. Besides the aforesaid legal questions urged it has been further submitted by the learned Advocate appearing for the writ petitioners that in an identical case arose out of challenge of common order of the Tribunal in writ application moved by the writ petitioners against the respondent Sanjoy Kumar Saha who admittedly was the third empanelled candidate of the recommended list of the selection committee in terms of advertisement No.1 of 1990, on assailing the notional seniority decision passed by the learned tribunal which was registered

as WPCT No.883 of 2003, wherein by the judgement and order dated 27th February, 2009 the Division Bench (Cor. Amit Talukdar, J and Tapas Kumar Giri, J(As His Lordship then was)) modified the order of the tribunal by quashing the portion of the order impugned therein which is also the impugned order herein in this present writ application. It is contended that as such in this writ application which arose out of challenge of the same self order as passed by the learned Tribunal on hearing two separate original applications analogously, no new order could be passed save and except the order passed by the earlier Division Bench. Learned Advocate has pressed much force upon the doctrine of precedent and judicial discipline on that score and relied upon the following judgements:-

- i) Official Liquidator Vs. Dayanand & Ors. reported in (2008) 10 SCC 1
 - ii) Mahadeolal Kanodia Vs. Administrative General of West Bengal reported in 1960 SC 963
 - iii) Lala Sri Bhagwan Vs. Ram Chand Gajendra Gadadhar reported in AIR 1965 SC 1767
 - iv) Bijoy Lakshmi Sadho (Dr.) Vs. Jagadish reported in (2001) 2 SCC 247
- So far as par incurium principle and its application learned Advocate has relied upon the case Bihar Vs. Kalika Kuer reported in (2003) 5 SCC 448 and State of Punjab Vs. Devhans Marine Brewaries Ltd. reported in 2004 11 SCC 26. On issue of judicial discipline to support the submission that this Court should follow the earlier judgement, learned Advocate has relied upon the case UP Gram Panchayet Adhikari Sangha Vs. Dayaram Saroj reported in (2007) 2 SCC 138.

13. Learned advocate for the respondent Ruma Chakraborty however, has relied upon the judgement passed in the case Sanjay Dhar Vs. K&J PSC reported in (2000) 8 SCC 182 and Balbant Singh Narowar Vs. State of Hariyana reported in (2008) 7 SCC 728.

14. Learned Advocate for the respondent Ruma Chakraborty has submitted that the respondent No.1 is entitled to get not only the seniority but all other benefits with retrospective effect in view of the admitted fact that the writ petitioners committed gross illegality by not appointing her prior to the appointment of candidates ranked below her in terms of selection as per advertisement No.1 of 1990 and the candidates subsequently selected in terms of subsequent advertisement No.1 of 1995 and 3 of 1996.

15. Having regard to the rival contention of the parties before us, and the respective affidavits and documents and the records as produced, the following

points emerge for consideration of the impugned order of the learned Tribunal under the scanner of the judicial review in exercise of our power under Article 226 of the Constitution of India.

- i) Whether the portion of the impugned order which is under challenge regarding the direction of the learned Tribunal below that in the event of appointment of any candidate as Junior Technical Assistant from any panel prepared after 1992 panel the applicant should be given seniority over and above the said candidates was justified.
- ii) Whether the impugned order regarding grant of seniority above the candidates appointed from post 1992 panel of JTA is a relief in consonance with the remedy available for a breach under Article 14 and 16 of the Constitution of India.
- iii) Whether the judgement delivered by Division Bench [coram Amit Talukdar, J and Tapas Kumar Giri, J (As His Lordship then was)] in WPCT No.882 of 2003 on 27th February, 2009 modifying the identical order impugned as passed in the original application in favour of one Sanoy Kumar Saha in original application No.1043 of 1997 as heard along with miscellaneous application No.128 of 2002 would be an embargo to pass appropriate order in this writ application on the basis of respective affidavits as filed, the documents and the records as produced before us.
- iv) Whether any relief could be granted in the nature of payment of salary, allowances and benefits with retrospective effect on considering the appointment of the present respondent No.1 as deemed appointment with retrospective effect from the date when junior of the panel was appointed in the post of JTA on the basis of rejoinder filed in the affidavit-in-opposition by the respondent No.1 praying such relief.
- v) Whether any relief could be granted in the nature of payment of salary allowance and benefits with retrospective effect on considering the appointment of the present respondent No.1 as deemed appointment with retrospective effect from the date when a junior of the panel was appointed in the post of JTA on the basis of rejoinder filed in the affidavit-inopposition by the respondent No.1 praying such relief though the respondent No.1 has not challenged the order dated 29th April, 2003 passed in her original application OA No.367 of 1998 heard along with miscellaneous application No.129 of 2002 , in exercise of power of the writ Court for rendering complete justice in between the rival parties on taking note that affidavit-in-opposition also as a pleading, in the event the Court considers that there was no merit in the writ application to quash the order of seniority as was directed to be considered by the learned tribunal. Point Nos.1 and 2 are taken up together for effective adjudication. To deal with those two points we have to consider as to whether there was any breach of Article 14 & 16 of the Constitution of India as well as non-statutory circulars letter/instruction of the department on issue of the selection process

and appointment thereof of a candidate in the said.

16. It is an admitted position as already discussed above that the respondent No.1 Ruma Chakraborty ranked first in the panel on the basis of merit wherein one Sri Atraj Singh secured 4th rank in the panel with reference to selection of candidates relating to 7 posts for general category candidates as advertised, who appeared in the selection process not for the posts of reserved quota of Schedule Caste candidates for consideration of his candidature but in the quota of general category candidates earmarked in terms of advertisement No.1/1990. From the records it is proved that the selection committee recommended appointment of the candidates in the vacancies of general category in order of merit by holding interview in March, 1992. It is also an admitted position as it appears from the supplementary affidavit filed by the writ petitioners herein, particularly from paragraph 4 of the supplementary affidavit affirmed on 15th day of September, 2009 wherein contention was to this effect “accordingly no general category candidate was given appointment from that panel except one schedule caste candidate namely Sri Atraj Singh who was selected against the vacancy of general category on merit and joined to the post of JTA on 10th January, 1994”. Reason for giving appointment to said Atraj Singh, a 4th empanelled candidate of panel recommended for appointment by the selection committee in March, 1992 wherein the respondent No.1 ranked first in order of merit with reference to vacancy of general category also has been stated in the said supplementary affidavit to this effect “that due to receipt of one DO letter No.2/81/91/SC/ST dated 15th July, 1992 issued by Joint Secretary, CSIR requesting not to fill up all vacancies except Group-IV with rider that such restriction would not apply to the filling up of backlog vacancies for schedule caste/schedule tribe under special recruitment drive; Sri Atraj Singh irrespective of his rank position as 4th candidate below the respondent No.1 of the same panel was appointed”. The letter of 15th July, 1992 of Joint Secretary (Administration) as has been relied upon as the reason of appointment of Sri Atraj Singh though he secured 4th position in said panel has been annexed as Annexure “R-1” in the affidavit-inreply filed by the writ petitioners on affirming the same on 27th August, 2009.

The letter read such:

“ COUNCIL OF SCIENTIFIC & INDUSTRIAL RESEARCH

Anusandhan Bhavan, Rail Marg, New Delhi-110 001

DILIP KUMAR

Joint Secretary (Admn)

D. O. No.2/89/91-SC/ST

July 15, 1992

To

All the Heads of Labs/Institutes

During the Poor Review and the budget meetings. DGSIR had emphasized

that in view of the sharp increase in the salary budget and other financial constraints, the Labs/Institutes should observe strict financial discipline and ensure that :

(i) Vacancies in Group IV if considered necessary to be filled up, should be filled up with the prior approval of DGSIR: and

(ii) Vacancies in other groups to be kept in abeyance.

2. I hope these instructions of DGSIR are being strictly observed by your Lab/Institute.

26

3. However, I would like to clarify that these directions of DGSIR do not apply to the filling up of backlog vacancies for SCs/STs under the Special Recruitment Drive. You may kindly continue to make recruitment against these vacancies as per existing instructions in the matter.

Kindly acknowledge receipt.

With kind regards.

Sincerely yours

Sd/-

(Dilip Kumar)

Copy to :

1. All Sr. CCAs/COAs/Aos of National Labs/Institutes

2. All Sr. F&Aos/F&Aos of National Labs/Institutes

3. DS(CO) for similar action in the CSIR headquarters

4. SR.DS(EI), CSIR Headquarters

5. SPA to F.A, CSIR

6. US/LA

7. US(EI)

(Sr. Deputy Secretary)”

17. On bare reading of the said letter dated 15th July, 1992 it appears that vacancies were directed to be kept in abeyance due to financial constrain and in paragraph 3 of the said letter there was a rider that such restrain would not be applicable to fill up the backlog vacancy for schedule caste and schedule tribe under special recruitment drive.

18. Having regard to the factual matrix of the case and the admitted position Sri Atraj Singh though belongs to schedule caste Community but he appeared for consideration of his merit in the selection process relating to seven vacancies of general category as declared by advertisement No.1/90 along with general category candidates and became successful to secure a rank as 4th candidate of the recommended panel by selection committee for being appointed in the vacancy of general category quota in order of merit. Hence, Sri Atraj Singh,

irrespective of his caste status belonging to schedule caste community, was not legally appointed prior to the appointment of respondent No.1 Ruma Chakraborty who ranked first in the said panel and other candidates of the panel who ranked 2nd and 3rd position of the panel recommended for appointment in March, 1992. The said clause 3 of the letter dated 15th July, 1992 did not permit the writ petitioners to appoint Atraj Singh a selected candidate holding 4th position in the panel of general category but the said paragraph 3 was relating to filling up of back log vacancy earmarked for schedule caste and schedule tribe candidates under special recruitment drive. In advertisement No.1/1990 total vacancy declaration was 13 and out of said 13 posts, 7 posts were earmarked for general category candidates, 3 posts were reserved for schedule caste candidate and 3 posts for schedule tribe candidates. The appointee Atraj Singh who was appointed as JTA on 10th January, 1994 never was a candidate for said 3 reserve vacancies of schedule caste candidates, but he was a candidate for the 7 vacant posts reserved for general category candidates and thereby ranked 4th position in the panel. The selection committee when recommended to appoint the candidates in order of merit by adjudging the respective position of candidates in March, 1992 wherein the respondent No.1 ranked first, the writ petitioners not only caused arbitrary action under anvil of Article 14 of Constitution of India by not appointing Ruma Chakraborty prior to the appointment of Atraj Singh but they also caused direct breach of Article 14 of Constitution of India in discriminatory angle as well as Article 16, equality clause of employment, which are basic structure of the Constitution of India. Hence, it is proved from the records that there was a breach of Article 14 and 16 so far as denial of appointment to respondent No.1 Ruma Chakraborty despite her panel position as a first candidate of the panel prepared by the selection committee in March, 1992 as already quoted above and by giving appointment to a junior candidate who held rank position 4th in the merit list on breach of the recommendation of appointment made by the selection committee.

19. Besides the breach of Article 14 and 16 due to appointment of Atraj Singh denying the appointment to Ruma Chakraborty the first candidate of the panel, it appears from the records that they breached their own circular letter regarding appointment of the empanelled candidates recommended by the selection committee.

20. Learned Tribunal below relied upon the DoPT OM dated 8th February, 1982 to grant relief to the respondent No.1 the applicant before the Tribunal. The said office memorandum No.22011/2/79-Establishment(D) dated 8th February, 1982 issued by the Government of India, Ministry of Home Affairs, Department of Personnel & Administration Reforms, is a binding circular letter even if it is a

non-statutory administrative instruction upon the writ petitioner No.2. The said office memorandum dated 8th February, 1982 is quoted hereinbelow which was relied upon in the original application filed by the respondent No.1 before the learned Tribunal below annexing the same as Annexure 'A' appearing at page 23 of the original application which read such:

“ No.22011/2/73-Estt.(D)

Govt. of India/Bharat Sarkar

Ministry of Home Affairs/Grih Mantranalaya

Department of Personnel & Administration Reforms

(Kiarmik Aur Prashassnik Sudhar Vibhag)

Date: 8.2.1982

OFFICE MEMORANDUM

Subject: Validity period of list of selected candidates prepared on the basis of direct recruitment/departmental competitive examination.

The undersigned is directed to say that references are being received from time to time from Ministries/Departments enquiring as to what should be the validity period of a list of selected candidates prepared on the basis of direct recruit of departmental competitive examination.

2. Normally, in the case of direct recruitment a list of selected candidates is prepared to the extent of the number of vacancies (other person found suitable being out on a reserved list, in case some of the persons on the list of selected candidates do not become available for appointment). Similarly in the case of departmental competitive examination, the list of selected candidates has to be based on the number of vacancy on the date of declaration of result as the examination is competitive and selection is based on merit. A problem may when there is fluctuation in the vacancies after the list of selected candidates is announced.

3. The matter has been carefully considered. Normally, recruitment whether from the open market or through a departmental competitive examination should take place only when there are no candidates available from an earlier list of selected candidates. However, there is likelihood of vacancies arising in future, in case, names of selected candidates are already available, there should either be no further recruitment till available selected candidates are absorbed or declared was for the next examination should take into account the number of persons already on the list of selected candidates awaiting appointment. Thus, there would be a limit on the period of validity of list of selected candidates regard to the extent of declared vacancies either by the method of direct recruitment or through a departmental competitive examination.

4. Once a person is declared successful according to the merit list of selected candidates; which is based on the declared number of vacancies, the appointing authority has the reason to appoint him even if the number of vacancies undergoes a change after his name has been included in the list

of selected candidates. Thus, where the selected candidates are awaiting appointment recruitment should either be postponed till all the selected candidates are accommodated, or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates awaiting appointment should be given appointments first, before starting appointment from a fresh list from subsequent recruitment or examination.”

Paragraph 4 of the said office memo stipulates that when selected candidates are waiting for appointment, recruitment either should be postponed till all selected candidates are accommodated or alternatively intake for the next recruitment should be reduced to the similar number of candidates awaiting appointment and the candidates waiting, appointment should be given to them first before giving appointment from a fresh list from subsequent recruitment or examination. This office memorandum was binding to the writ petitioners namely the Director General, CSIR, New Delhi as well as the Director, CGCRI office at Kolkata. The office memorandum dated 8th February, 1982 is a direction issued by the Competent Authority empowered to issue such direction which is binding to the writ petitioners and all departmental employees and same is enforceable by the Court by considering it as having statutory flavour. The legal position is settled to that effect. Reliance is placed to the judgement passed in the case K. P. Vargese by ITO reported in (1981) 4 SCC 173 wherein earlier view passed in the case Navnitlal C. Javeri vs. K. K. Sen, A.A.C reported in AIR 1965 SC 1375 a judgement of constitution bench was relied upon. The case Vargese (Supra) was considered further and was approved in the case C. B. Goutam Vs. Union of India reported in [1993] 1999 ITR 530 a judgement of Constitution Bench. In latest decision of UCO Bank Vs. Commissioner of Income Tax reported in (1999) 4 SCC 599, the view expressed in the case Vargese (Supra), Navnitlal C. Javeri (supra) & C. B. Goutam (Supra) was referred to and relied.

Having regard to such legal position we are of the view that office memorandum dated 8th February, 1982 had a binding effect to the department concerned namely the writ petitioners and they should not have issued further employment notification declaring the vacancy without deducting the vacancies for which selection already made from the new advertisement being the advertisement No.1 of 1995 and advertisement No.3 of 1995. From the supplementary affidavit affirmed on 15th day of September, 2009 by the writ petitioner herein, it appears that one Partha Sarathi Mukherjee was appointed as a general category candidate in terms of selection made following the advertisement No.1 of 1995 and subsequently in terms of advertisement No.3 of 1996 out of Nine declared vacancy of general category, six candidates have already been appointed. Considering the supplementary affidavit accordingly it appears that there was a total breach of direction issued under office Memo dated 8th February, 1982.

21. Learned Tribunal below relied upon that office memo, on considering the factual matrix of this case as proved from the respective affidavits and the office record as produced. Accordingly it is clear that the writ petitioners on breach of Article 14 and 16 of the Constitution of India appointed one Atraj Singh in the post of JTA in a general category vacancy on 10th January 1994 with reference to vacancy in terms of advertisement No.1 of 1990 wherein respondent Ruma Chakraborty ranked first in the panel in order of merit, appointed Partha Sarathi Mukherjee by holding a new selection process held following the advertisement No.1 of 1995 and subsequently appointed other six candidates in general category vacancy in terms of advertisement No.3 of 1996. All those appointments accordingly right from the appointment of Atraj Singh were in breach of Article 14 and 16 of the Constitution as well as circular letter of 8th February, 1982. Besides the aforesaid breach the conduct of the writ petitioners is also not appreciable. The writ petitioners are authority under Article 12 of the Constitution of India and they should act as a model employer by taking care of constitutional provision and more particularly the equality clause of appointment under Article 16 of the Constitution of India while appointing any candidate from a panel. It is a settled legal position that the state litigant, the Government undertakings, and the authorities under Article 12 of the Constitution of India should act in tune of the constitutional mandate. Reliance is placed to the judgement passed in the case Urban Improvement Trust, Bikaner Vs. Mohanlal reported in (2010) 1 SCC 512 wherein the Apex Court relied upon the view of three Judges Bench passed in the case Bhag Singh Vs. Union Territory of Chandigarh reported in (1985) 3 SCC 733, paragraph 3 of which read such: "The State Government must do what is fair and just to the citizen and should not as far as possible except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably be prejudice, take up a plea to defect the legitimate and just claim of the citizen".

22. In the instant case the respondent Ruma Chakraborty had a just and legitimate claim for being appointed prior to Atraj Singh other candidates. Having regard to such, breach of Article 14 & 16 and the breach of office memorandum dated 8th February, 1982 is proved and as such the respondent No.1 is lawfully entitled to have the relief and remedy of injustice as meted out upon her in a Court of law and the findings of the Tribunal to that effect cannot be said as perverse or illegal granting notional seniority above the juniors appointed in the post of Junior Technical Assistant, which is impugned before us. So far as further remedy as prayed for by respondent No. 1 regarding all service benefits, to be dealt with later on. Point Nos.1 and 2 accordingly answered.

23. Point No.3 is now being considered. It is admitted fact that by the order dated 27th February, 2009 in WPCT No.882 of 2003, being a writ petition assailing the order dated 29th April, 2003, a common order, passed by the learned Tribunal below with reference to application filed by Sanjoy Kumar Saha being original application No.1043 of 1997, the order of the Tribunal was modified by quashing the direction for maintenance of notional seniority. The order of the said Division Bench dated 27th February, 2005 read such: “Very fair stand has been taken by the Union of India with regard to the order passed by the learned Central Administrative Tribunal (Calcutta Bench) in M. A. No.128 of 2002. So far as it relates to the appointment of the present respondents to the post of J.T.A(Junior Technical Assistant). However, it feels that the other portion of the order passed by the learned Tribunal giving them seniority with retrospective effect from 1992 is not compatible with the situation since the respondents have not as yet joined the post. They cannot have a retrospective seniority without their joining the said post.

24. As a part of its submission, the Union of India has relied on a decision of the Supreme Court reported in (2001) 9 SCC 248:: Union of India and others –versus- Uma Kant Misra. On the strength of the said decision of the Supreme Court, Union of India and others –vs.- Uma Kant Misra (supra) the learned counsel for the Union of India in his usual fairness has submitted that while he has no objection in the Tribunal’s order giving appointment to the applicants to the post of J.T.A in terms of the order of the Tribunal, but the finding of the Tribunal giving them retrospective seniority cannot be tenable and he has prayed for setting aside that portion of the order.

25. Learned counsel on behalf of the private respondents have disputed this position. He has submitted that earlier the Tribunal had fixed the seniority of one’s Tapash Ghosh in O.A No.150 of 1993 which persuaded the learned Tribunal to pass the impugned finding, part of which have been assailed by the Union of India while the other portion have been left unchallenged. According to the learned counsel for the respondents, it would be per se discriminatory. In the event, they are not given retrospective effect as directed by the learned Tribunal, even though similarly situated person Tapash Ghosh filed in O.A. No.150 of 1993 has been given the same effect. In our opinion, since the petitioners have not used any return simply on the basis of an oral submission, this position cannot be accepted. In the

event, the said situation shows that similarly situated person Tapash Ghosh has been given the retrospective seniority, it would obviously be open to the petitioners to canvass the point at an appropriate stage.

26. Needless to say, however, that the question of inter se seniority would be assessed by the departmental rules.

Since the other portion of the order with regard to the appointment to the respondents to the post of J.T.A has not been questioned by the Union of India, we feel that we need not enter into the said question.

27. With this aforesaid modification of the order, this application is disposed of accordingly.

28. There will be no order as to costs.

29. Urgent xerox certified copy of this order, if applied for, be supplied to the parties on priority basis.”

30. On a reading of the said order it appears that before the said Division Bench there was no argument advanced alleging breach of Article 14 and 16 of the Constitution of India as well as breach of office memorandum dated 8th February, 1982, a binding memorandum to the department concerned and as such the said Division Bench had no opportunity/scope to deal with the issue of constitutional breach of equality clause in employment under Article 16 and arbitrary and discriminatory action under Article 14 of Constitution of India.

31. Before the said Division Bench there was also no disclosure about respective vacancies, appointments made therein and the other particulars as have been disclosed here in the supplementary affidavit by the writ petitioners as already quoted above. It appears from the said order that the said Division Bench of High Court, Calcutta only considered the order of the Tribunal as earlier passed in the case of one Tapash Ghosh in original application No.150 of 1993 who availed the order of notional seniority, on the strength of which the respondent therein Sri Sanjoy Kumar Saha prayed relief and the Court kept the point open to canvas it in appropriate stage. There is no dispute of principle of law that a judgement delivered by a Court on identical facts and applying identical legal principle should be followed by the subsequent coordinate bench, but it is also a settled legal position that a judgement of a Court of coordinate bench, has a binding

effect in the event the factual matrix dealt with by the Bench and the question of law involved therein, argued and answered in the earlier bench, were identical. The point whether a judgment where relevant statutes and legal points neither argued nor answered could be a 'precedent' was dealt with by the Apex Court in the case of *M/s Goodyar India Ltd –vs- State of Haryana reported in AIR 1990 SC 781* where in paragraph 34 the point was discussed in detail, which reads such –

“34. This ingredient was neither argued nor was considered, so the passing reference based on the phraseology of the section is not the dictum of Kandaswami's case (AIR 1975 SC 1871). Secondly, in S.9 in the instant case, the raw materials purchased or used in the manufacture of new goods and thereafter those new goods were dispatched outside the State of Haryana whereupon the tax was levied. This important factor is wholly missing in S.7A of the Tamil Nadu Act, which was considered in Kandaswami's case (AIR 1975 SC 1871). In that decision, this Court approved the Kerala High Court's decision in *Malabar Fruit Products (1972 Tax LR 2202) (supra)*, which was confined to the interpretation of the words goods, the sale or purchase under the Act. A decision on a question which has not been argued cannot be treated as a precedent. See the observations of this Court in *Rajput Ruda Maha v. State of Gujarat (1980) 2 SCR 353 at p. 356 : (AIR 1980 SC 1707 at p. 1708)*. The decision of the Division Bench of the Kerala High Court in *STC 359 : (1974 Tax LR 1730)* is clearly distinguishable. In *Ganesh Prasad Dixit's case (AIR 1969 SC 1276) (supra)* the question of constitutional validity was not argued. A reference was made by Mr. Tewatia to the decision of the High Court in the *Coffee Board v. Commr. of Commercial Taxes (1985) 60 STC 142(Kant)* and the decision of this Court in *Coffee Board. Karnataka v. Commr. of Commercial Taxes, Karnataka (1988) 70 STC 162 : (AIR 1988 SC 1487)*. In these cases the question involved was the acquisition of coffee by the Coffee Board under compulsory acquisition or purchase or sale of goods. That question is entirely different from the question with which we are concerned in these appeals.”

32. Similar view was expressed by the Apex Court in the case of *Mittal Engineering Works [P] Ltd –vs- Collector of Central Excise, Meerut reported in 1997(1) SCC 203*.

33. In the case of *Municipal Corporation of Delhi –vs- Gurnam Kaur reported in 1989 (1) SC 101*, the Court held that 'a decision should be treated as given per incuriam when it is given in ignorance of a statute or of a rule having the force of a statute. It is a settled position of law that a decision of the court takes its

colour from the question involved in the case in which it was rendered as held in the case of *State of Punjab –vs- Baldev Singh* reported in 1999 (6) SCC 172, a judgment of constitutional bench. It is also a settled legal position of law that one additional or different fact may make a world of difference between conclusions in two cases itself when the same principles are applied in each case to a similar facts. Reliance is placed in the case of *Regional Manager and others – vs- Pawan Kumar Dubey* reported in AIR 1976 SC 1766, a judgment of three

39 judges Bench. The same view has been reiterated in the case by identifying the principles as “circumstantial flexibility” in para 11 of *Bharat Petroleum Corporation Ltd. India –vs- N.R. Vairmani* [2004] 8 SCC page 579, para 11 of the said report reads such -

“11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases blindly placing reliance on a decision is not proper.”

34. A little difference in facts or even one additional fact may make a lot of difference in the precedential value of a decision, is the view expressed in the case of *State of Orissa vs. Sudhansu Sekhar Misra* reported in AIR 1968 SC 647, *Bhavnagar University vs. Paltina Sugar Mill (P) Ltd* reported in [2003] 2 SCC 111

and *Bharat Petroleum Corporation Ltd. India –vs- N. R. Vairmani* [2004] 8 SCC page 579. It is held that precedential status should be on basis of some principle of law supported by reasons and some observation without laying down the principle of law and without giving reasons, do not tantamount to precedent. Reliance is placed in the judgment passed in the case of *Anil Vasu Dev Salgaonkar vs. Naresh Kushai Shigaonkar* reported in reported in 2009 (9) SCC 313.

35. Having regard to the legal position in the instant case it appears that before the earlier Division Bench as no argument was advanced by disclosing the respective appointment dates, selection criterion etc. and no argument advanced about breach of Article 14 and 16 of the Constitution as has been argued before us and as in the earlier Division Bench the binding effect of the office memorandum dated 8th February, 1982 was also not argued and thrashed, relying upon the settled legal position to that effect about binding effect of office memorandum/direction as has been considered by us, the said judgement of earlier Bench in its nature cannot be considered as a binding judgement before us on that score. There is also no question of reference of the matter for constitution of a larger bench as the question of law as has been considered in this writ application on the reflection of the constitutional provision, binding

effect of office memorandum etc. were not at all the material foundation of adjudication before the said writ Court to deal with the said writ application. The argument of the learned Advocate for the petitioners for referring the matter for constitution of a larger bench accordingly is not sustainable though the learned Advocate has relied upon different judgements on that score. Judicial discipline surely mandates that earlier judgement on identical facts and identical point of law discussed and dealt with should be followed and in the event of any difference of opinion, subsequent coordinate bench will refer the matter stipulating the differential angle on different point for adjudication by larger to settle the legal question involved, only to give a finality of the legal question. In the instant case we are not finding any such materials for reference to the larger bench as in earlier bench, no argument advanced on the points as urged herein.

36. Beside such earlier Bench practically kept the point open granting leave to respondent therein to agitate issue of benefit granted to one Tapash Ghosh complying with order of tribunal about notional seniority.

It is also a settled legal position of law that every writ applications and/or case is decided on the basis of respective pleadings of the parties and the documents as are relied upon and judgment takes its colour from the fact pleaded. In this case, by supplementary affidavit writ petitioner have admitted some new facts as discussed above, which practically moulded our decision making process. There was no such pleading before the earlier Bench. Hence, point No.3 is answered accordingly.

37. Point nos. 4 and 5 are now is taken up for consideration. On the basis of the aforesaid findings and observation writ application should be dismissed due to clear breach of Article 14 and 16 of the Constitution of India by giving appointment to one Atraj Singh, fourth candidate of the panel, with effect from 10th January, 1994 denying appointment to the respondent Ruma Chakraborty a first candidate of the said panel. The logic as advanced by writ petitioners to justify their action, is not legally sustainable as DO letter dated 15th July, 1992 never directed to appoint a candidate who was junior in panel and who despite his caste status as member of S.C. community contested for posts of general category. The petitioners accordingly did not follow their own DO letter dated 15th

July, 1992 so far as appointment of Atraj Singh is concerned as such it was a case of discrimination to deny appointment to respondent Ruma Chakraborty. The OM dated 8th February, 1982 has a binding effect upon the petitioners and there was of breach office memorandum also by declaring the vacancies without taking note of vacancies which were subject matter of earlier recommendation made by the selection committee in terms of advertisement No.1 of 1990. As such

the appointment of Atraj Singh and appointments on basis of subsequent advertisements of the years 1995 and 1996 both were on breach of their office memorandum, a binding memorandum whereby the respondent Ruma Chakraborty accrued a right to be appointed prior to appointment of any selectee in terms of advertisement No.1 of 1990, and subsequent advertisements of 1 of 1995 as well as 3 of 1996.

38. The issue of delayed appointment and consequential relief thereof, has been considered by the three Judges Bench in the case Sanjoy Dhar (supra) wherein the Apex Court due to delayed appointment without any justification granted relief of notional seniority by directing deemed appointment with retrospective effect. In the instant case the said judgement is fully applicable. The relevant portion of the judgement reads such:

“15. We have already noticed the learned Single Judge having directed the appellant to be appointed on the post of Munsif in the event of his name finding place in the select list subject to the outcome of the writ petition which order was modified by the Division Bench in LPA staying the order of the learned Single Judge but at the same time directing one vacancy to be kept reserved. The High Court and the Government of J&K (Law Department) were not justified in bypassing the judicial order of the High Court and making appointments exhausting all available vacancies. The right of the appellant, if otherwise sustainable, cannot be allowed to be lost merely because of an appointment having been made wittingly or unwittingly in defiance of the judicial order of the High Court.

16. For the foregoing reasons the appeal is allowed. The judgement under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6.3.1995 and assigned a place of seniority consistently with his placement in the order of merit in the select list prepared by J&K PSC and later forwarded to the Law Department. During the course of hearing the learned Senior Counsel for the appellant made a statement at the Bar that the appellant was interested only in having his seniority reckoned notionally in terms of this order and was not claiming any monetary benefit by way of emoluments for the period for which he would have served in case he would have been appointed by order dated 6.3.1995. We record that statement and direct that the appellant shall be entitled only to the benefit of notional seniority (and not monetary benefits) being given to him by implementing this order. The appeal is disposed of accordingly. The contesting respondents shall pay the appellant costs quantified at Rs.5000.”

39. That the judgements as referred to by the learned Advocate of the petitioners all are relating to promotion but not of initial appointment and the factual matrix of those cases are completely different from the factual matrix of the present one. Herein there is a complete breach of constitutional provision as well as office memorandum, a binding memorandum. Here respondent No. 1 Ruma Chakraborty has suffered injustice. When somebody has suffered injustice and when approach is made to the Court of law particularly as happened in the instant case and when by interim order the Tribunal directed to keep one post vacant and when already three posts are lying vacant with reference to official advertisement of advertisement No.1 of 1990, the respondent No.1 is legally entitled for the appropriate relief. The judgements as referred to by the writ petitioners to counter it are not applicable in the instant case due to factual difference. The ratio decidendi of the judgement only has a binding precedent. It is also a settled legal position that even change of a word and/or factual matrix of a case, the judgement has no applicability. Reliance is placed to the judgement passed in the case Bharat Petroleum Corporation Limited Vs. N. R. Varomani reported in (2004) 8 SCC 579 wherein the Apex Court in paragraph 11 discussed the doctrine of "circumstantial flexibility". The relevant paragraphs 9, 10, 11 and 12 of the said judgement read such:

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgements of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* (AC at p.761) Lord Mac Dermott observed: (ALL ER p. 14 CD). "The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,..."

10. In *Home Office v. Dorset Yacht Co.* (All ER p.297 g-h) Lord Reid said "Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in *Shepherd Homes Ltd. v. Sandham* (No.2) observed : "One must not, of course, construe even a reserved judgement of Russel, L.J. as if it were an Act of parliament." And, in *Herrington v. British Railways Board* Lord Morris said (All ER p.761 c).

“There is always peril in treating the words of a speech or a judgement as though they were words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.”

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear obstructions which could impede it.”

40. In the case *Sarbosamik Sanghatan KV Vs. State of Maharashtra & Ors.* (2008) 1 SCC 498 the Apex Court considered the judgement passed in *Bharat Petroleum Corporation Limited(Supra)* as well as other judgements as were relied upon therein namely *Quin Vs. Lethem* 1901 Appeal Cases 495, *Ambika Quarry Works Vs. state of Gujarat* reported in (1987) 1 SCC 213 and the judgement *Bhavnagar University Vs. Palitana Sugar Mills (P) Limited* reported in (2003) 2 SCC 111. Even a three Judges Bench, in the case *Regional Manager vs. Pawan Kumar Dube*, reported in AIR 1976 SCC 1766 held “one additional or different fact can make a world of difference between conclusion in two cases, even when the same principles are applied in each case to similar facts.” In the constitutional Bench judgement passed in the case *State of Punjab Vs. Baldev Singh* reported in (1999) 6 SCC 172 the Court held “ a decision of the Court takes its colour from the question involved in the case in which it was rendered.” Having regard to the settled legal position as discussed above, and the factual matrix as discussed dealing with pleading of the parties, the Court of law should not be blind to grant appropriate relief particularly in the writ jurisdiction where rendering of justice is the main paramount consideration for breach of any constitutional provision and more particularly the breach of fundamental rights under Article 14 and 16. As such, argument advanced by the learned Advocate of the petitioners is not accepted.

41. So far as payment of arrears salary etc. and service benefits with retrospective effect as made in the affidavit-in-opposition, we cannot consider the same for adjudication in this case for the sole reason that the respondent did not file any writ application assailing the order of the Tribunal on the premises that though she was entitled legally to get all arrears salary and benefits but Learned Tribunal refused it. It is a settled law that the Court of law is bound to decide the issue on the basis of pleading of the parties. Here the writ petitioners have come up assailing the order of the learned Tribunal below being aggrieved by grant of notional seniority and retrospective effect of seniority. Hence, in this writ, the Court is only concerned to adjudicate the point whether the Learned Tribunal was right or wrong to grant such relief. Since, we have not adjudicated the relief of arrear salary, this point is kept open and respondent No.1 is at liberty to agitate it by filing appropriate application, as per law.

42. So far as impugned order of the Tribunal is concerned about grant of notional seniority at par with juniors appointed, we are confirming the same and further exercising power of Writ Court we are directing that the respondent, Ruma Chakraborty will be entitled to get seniority with effect from 10th January, 1994 in the post of Junior Technical Assistant when Atraj Singh, a junior candidate in the panel was appointed and for that purpose having regard to the judgement of three Judges Bench of the Apex Court passed in the case Sanjoy Dhar(supra), her present appointment as made in the said post in terms of order of tribunal should be deemed as a “deemed appointment” effective from the date 10th January, 1994 and her seniority in service to be counted from that date. No monetary relief so far as arrears salary could be granted to her in this writ as she has not challenged the order of the Tribunal and in the writ application of the writ petitioner, the respondent is not entitled to get that relief. As such, this point is kept open. Point No.4 and 5 are accordingly answered.

43. Having regard to aforesaid findings and observation the writ application accordingly stands dismissed so far as prayers made, but exercising power of Writ Court to render proper justice the order of the Tribunal is modified by directing that notional seniority be counted by considering appointment of respondent No.1 as “deemed appointment” with effect from 10th January, 1994 at par Atraj Singh.

No order as to costs.

(Pratap Kumar Ray,J.)

I agree,

(Mrinal Kanti Sinha, J.)

