
(2023) 02 J&K CK 0077

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 196, 815 Of 2022

J&K Public Service Commission Rauf Ahmad Dar

APPELLANT

Vs

Tajinder Kour And Others

RESPONDENT

Date of Decision : 24-02-2023

Acts Referred:

Citation : (2023) 02 J&K CK 0077

Hon'ble Judges : Sanjeev Kumar, J;Puneet Gupta, J

Bench : Division Bench

Advocate : F.A.Natnoo, R.A.Jan, Vikas Magotra, Abhinav Sharma, Abhirash Sharma, Eishan Dadhichi

Final Decision : Allowed

Judgement

Sanjeev Kumar, J

1. In these two writ petitions, one filed by the Jammu & Kashmir Public Service Commission ["PSC"] and another by one Rauf Ahmed Dar, are directed against the judgment of Central Administrative Tribunal ["CAT"] dated 03.02.2022 passed in OA No.61/234/2021 titled Tajinder Kour v. UT of J&K and others. The CAT has allowed the petition (OA) filed by Tajinder Kour (hereinafter referred to as "original petitioner") and has directed the PSC to recommend the name of original petitioner to the Commissioner/Secretary to Government, Higher Education Department, UT of Jammu & Kashmir for her appointment as Assistant Professor in the discipline of Geography under open merit category.

2. The case set up by the original petitioner before the CAT

2.1. The PSC in the year 2007 issued an advertisement for conducting direct recruitment to the vacancies of Assistant Professors including three posts of Assistant Professor in the discipline of Geography. On the basis of the recommendations made by the PSC, the Government vide G.O. No.201-HE of 2007 dated 12.09.2007 issued appointment orders in respect of three selectees. In the year 2009, another selection process for direct recruitment was conducted

by the PSC and on the recommendations made by it, the Government vide G.O. No.272-HE of 2009 dated 03.12.2009 issued appointment orders in favour of four selected candidates as Lecturer/Assistant Professor in Geography. It is submitted by the original petitioner that the PSC issued another notification in the year 2014 bearing No. 12-PSC(DR-P) of 2014 dated 29.05.2014 for making selection against the vacancies of Assistant Professors in different disciplines and amongst them 43 vacancies of Assistant Professor in Geography were also notified for selection. The PSC having regard to horizontal reservation provided for handicapped category, earmarked one vacancy for the aforesaid category. The selected candidates including the person selected under PHC category, it is claimed, were appointed and the select list was exhausted.

2.2. That PSC vide notification No.10-PSC(DR-P) of 2017 dated 27.10.2017, yet again invited applications for the vacancies of Assistant Professor in Higher Education Department, which included 10 posts of Assistant Professor in Geography with the following breakup:-

Open Merit : 04

RBA : 02

SC : 01

ST : 01

ALC : 01

SLC : 01

In addition, one vacancy under horizontal reservation for PHC category was also kept reserved.

2.3. The original petitioner participated in the aforesaid selection process and was shown as candidate last selected under the open merit category (S.No.4) in the Provisional Select List issued by the PSC vide notification nNo.03-PSC (DR-S) of 2021 dated 05.01.2021.

2.4. It is stated that the mistake committed by the PSC in keeping one vacancy reserved for PHC candidate was, accordingly, rectified while issuing Provisional Select List. Apprehending that with a view to give effect to the advertisement notification, the PSC may rectify the provisional select list and dislodge him, giving benefit of horizontal reservation meant for PHC to the private respondent, the original writ petitioner approached the CAT seeking inter alia a direction to the PSC to de-reserve one post/vacancy of Assistant Professor in Geography earmarked for PHC category, as the same was in violation of the Government Order No.62-SW of 2001 dated 13.03.2001 and the Reservation Rules. The original petitioner also prayed for a direction to the respondents not to disturb him from the select list wherein her name figured at Serial No.4 under open merit category.

2.5. The claim of the original petitioner was primarily based on his contention that after the enactment of Jammu & Kashmir Reservation Act, 2004 and the Rules of 2005 framed thereunder, the first process of selection for filling up the vacancies of Assistant Professor in Geography in Higher Education Department was undertaken in the year 2007 when three vacancies were notified and filled up. Again in the year 2009, four more posts/vacancies were advertised and filled up. In the year 2014, PSC notified 43 fresh vacancies of Assistant Professors in Geography, in which one of the posts was kept reserved for horizontal reservation of PHC. It is claimed that from the year 2007, till issuance of advertisement notification of 2017, the respondents had consumed 50 vacancies and had, thus, reached the roster point 50 and the next vacancy under horizontal reservation for PHC was to be provided at S.No.67. It was submitted that since only 10 posts were notified in the year 2017, which took the selection/appointment to the roster point 60 and, therefore, there was no warrant to earmark one out of ten posts for PHC category. Strong reliance was placed by the original petitioner on Government Order No.62-SW of 2001 dated 13.03.2001 wherein for the purposes of granting horizontal reservation in favour of PHC category, three blocks have been created i.e. 1 to 33; 34 to 67 and 68 to

100. It is on the basis of the provisions of aforesaid Government Order, it was contended by the original petitioner that next vacancy would fall to the share of PHC category at roster point No.67 i.e. when seven more vacancies are notified in future.

3. The petition was contested both, by PSC as well as private respondent.

Stand of the PSC

3.1 Precise and concise stand of the PSC is that the indenting department i.e. Department of Higher Education referred only 10 vacancies of Assistant Professors in the discipline of Geography providing further that one post shall be filled up from PHC category, which, as per the reservation rules, is entitled to 3% horizontal reservation. The original petitioner, private respondent and other eligible candidates participated in the selection process, which was set in motion by the PSC vide advertisement No.10-PSC(DR-P) of 2017 dated 27.10.2017.

3.2 On the basis of performance of candidates in the interview and other related parameters, the select list was notified vide Notification No.03-PSC(DR-S) of 2021 dated 05.01.2021. It was also submitted by the PSC that though, one post was specifically earmarked for PHC category but while preparing the provisional select list, the candidature of PHC candidates was erroneously/inadvertently not considered and as a consequence whereof, the original petitioner came to be shown as last selected candidate in the open merit. When this error was noticed by the PSC, the matter was got re-examined and it was found that private respondent Mr. Rauf Ahmad Dar, who happens to be a PHC/OM category have secured 50.32 was supposed to be selected against the 4th vacancy earmarked under the open merit. Consequently, the original petitioner i.e. the last selected

candidate in the open merit category was sought to be replaced by PHC/OM candidate i.e. by private respondent. It is, thus, submitted that the select list in which the name of original petitioner appeared was only provisional and nothing prevented the PSC to rectify its mistake, which it had inadvertently committed.

3.3 Going beyond its brief, the PSC in its reply affidavit also sought to explain the legal position viz-a-viz the application of roster for horizontal reservation meant for specially abled candidates (PHC). It was submitted by the PSC that even if the claim of the original petitioner is admitted to be correct that after promulgation of reservation rules only 60 vacancies have been notified for selection and appointment as Assistant Professor in the discipline of Geography, yet the second vacancy meant for PHC would fall in the 2nd block between 34 to 67. The PSC appears to have suggested that with a view to give horizontal reservation meant for PHC category, the first vacancy in the blocks created under Government Order No.62-SW of 2001 is required to be earmarked for PHC category. The PSC seems to have derived support from the view taken by Hon'ble the Supreme Court in the case of Union of India and another v. National Federation of the Blind, 2013 (10) SCC 772.

4. Stand of the Higher Education Department (respondent No.2 herein)

4.1. The Department of Higher Education in its affidavit filed through Additional Secretary has not clearly and unequivocally refuted the contention of the original petitioner that after the promulgation of the Reservation Rules, the department has so far filled up only 60 vacancies including 10 vacancies in contention in these petitions. It is, however, submitted that since 3% horizontal reservation is meant for handicapped (PHC) category, as such, while notifying ten vacancies in the year 2017, one vacancy was identified to be filled up from the said category and that there is no violation of Government Order No.62-SW of 2001 or the Reservation Rules. The Department of Higher Education has not made any attempt or effort to explain the manner in which the reservation roster including roster meant for PHC category has been adhered to.

5. Reply affidavit of the private respondent and the stand taken therein.

5.1. While replicating the stand of the PSC and the department of Higher Education, the private respondent in his reply affidavit has submitted that since one vacancy was specifically earmarked for PHC category, therefore, private respondent, a candidate belonging to PHC category with highest merit was entitled to be adjusted under the open merit. The PSC, which had not applied the reservation roster while preparing the provisional select list, corrected its mistake so as to bring its select list in tune with the requisition made by the Higher Education Department and the advertisement notification issued by it. It is, thus, contended that by earmarking one vacancy under horizontal reservation for PHC category, the official respondents have only complied with and followed the mandate of Reservation Act and the Rules framed thereunder.

5.2 The private respondent in its reply affidavit has taken serious exception to

the conduct of the original petitioner, who had remained silent when advertisement notification was issued and raked up the issue only when he apprehended that he may have to give way to adjust a physically challenged person for which one vacancy stood earmarked in the advertisement notification itself.

Arguments

6. From a reading of the impugned judgment, it transpires that the learned counsel appearing for their respective clients primarily rallied around their stand taken by them in their respective reply affidavits. The CAT considered the entire matter in light of the rival contentions and having regard to various provisions of the Jammu & Kashmir Reservation Act, 2004 ["Reservation Act"] and the Jammu & Kashmir Reservation Rules, 2005 ["Reservation Rules"] framed thereunder as also the provisions of Government Order No.62-SW of 2001 dated 13.03.2001 came to the conclusion that there was substance in the plea of the original petitioner that next vacancy for PHC category was to be offered at roster point 67 and that the selection and appointment to the vacancies of Assistant Professor in the discipline of Geography had reached only upto 60 point and, therefore, no vacancy for the PHC category was required to be earmarked for PHC category. Upholding the contention of the original petition and rejecting the plea of the official respondents as well as private respondent, CAT allowed the OA and issued directions referred to herein above vide its judgment impugned dated 03.02.2022. It is this judgment of the CAT, which is assailed before us by the PSC as well as private respondent on various grounds.

7. Having heard learned counsel for the parties and perused the material on record, we are of the considered opinion that the decision of these two petitions hinges on determination of following points:-

i) Whether original petitioner being fully aware that one vacancy in the discipline of Geography, as per the advertisement notification No.10-PSC(DR-P) of 2017 dated 27.10.2017, was earmarked for PHC category under horizontal reservation and having participated in the selection is estopped by his conduct to later on claim that no vacancy under horizontal reservation for PHC category could have been earmarked in the advertisement notification?

ii) Whether with a view to give effect to 3% horizontal reservation meant for PHC category, the first vacancy in each of the three blocks created under Government Order No.62-SW of 2001 dated 13.03.2001 is required to be earmarked or that the three vacancies meant for PHC category are to be earmarked at roster point No.33, 67 and 100?

iii) Whether the appointing authority/indenting department under the Reservation Rules and the provisions of Government Order No.62-SW of 2001 has the flexibility or discretion in earmarking any of the vacancy in the block for PHC category?

Point No.(i)

8. We have noticed the stand of the PSC as well as Higher Education Department and the private respondent before the CAT. The PSC as well as the Department of Higher Education have not questioned the conduct of the petitioner in any manner. However, private respondent in his reply affidavit as taken an exception to the conduct of the original petitioner, who, after having participated in the selection process and being fully aware that one vacancy out of the notified vacancies was earmarked for PHC category under 3% horizontal reservation, had chosen to file petition only when the private respondent was sought to be adjusted against the vacancy meant for PHC candidate.

9. It was submitted before the CAT and argued before us that the original petitioner is disentitled by his conduct to raise such plea after the selection process was about to be concluded. The original petitioner, it is contended by Mr. R.A.Jan, learned senior counsel representing the private respondent, never questioned the advertisement notification which unequivocally earmarked one vacancy for PHC by way of 3% horizontal reservation. In the OA also, he has not challenged the advertisement notice, but has only sought a direction to de-reserve the vacancy earmarked for PHC category, which course is not permissible in law.

10. Per contra, Mr. Abhinav Sharma, learned senior counsel appearing for the original petitioner submitted that since four vacancies were earmarked for the open merit category and one post separately under horizontal reservation for PHC, it did not occur to the original petitioner to raise the issue at the time of issuance of the advertisement notification or subsequently when the selection was undertaken. He submits that no separate vacancy is required to be earmarked in the advertisement notification for giving effect to horizontal reservation. Dwelling upon applicability of the roster, Mr. Sharma submits that the PSC vide its notification issued in the year 2017 misrepresented that apart from ten vacancies notified under different categories, one vacancy was also reserved for the handicapped category. It was only when the original petitioner came to know that candidate selected under PHC category was to be adjusted in open merit, that too, by dislodging the original petitioner, he got cause of action to raise his grievance before the competent Court of law. He submits that it is in these special circumstances, the original petitioner filed the OA before the CAT.

11. We have given our anxious consideration to the rival contentions. It is true that a selecting body is not supposed to earmark a vacancy separately for making selection from the reserved category(ies) entitled to horizontal reservation. It is sufficient for the selection body to say that with a view to give effect to horizontal reservation one or more vacancy out of the notified vacancies shall be filled up from the reserved categories under horizontal reservation.

12. In the instant case, the PSC has surely deviated from this principle and has in the advertisement notification earmarked one vacancy to be filled up under

horizontal reservation from the PHC category. We will not be surprised, if some of the candidates misunderstood that this one vacancy earmarked for PHC category is a vacancy notified in addition to the ten posts in terms of the advertisement notification of 2017. We, however, cannot give our imprimatur to the contention of Mr. Abhinav Sharma, learned senior counsel that the original petitioner had no cause of action to challenge the advertisement notification. As per the case set up by the original petitioner in OA, the second vacancy for PHC category was to be earmarked at roster point of 67 and the department of High Education had only filled up 60 vacancies. One vacancy in the category of PHC, as per the contention of the original petitioner, stood filled up in the year 2014. If that being the stated position of the original petitioner, it is difficult to comprehend as to why the original petitioner kept mum and raised no protest when one more vacancy came to be earmarked for PHC category in the advertisement notification of 2017. Even the advertisement notification of 2017 was not subject matter of challenge before the CAT, though, the original petitioner had prayed for de-reserving one vacancy kept reserved for PHC category.

13. Indisputably, original petitioner has participated in the selection process and taken a chance. It is only when he came to be placed at the bottom of the open merit list and was to be dislodged by the PHC category candidate belonging to open merit, he thought of filing the petition. This aspect, though, highlighted by the private respondent in his reply affidavit has missed the consideration of the CAT. The explanation tendered by the original petitioner before this Court for not preferring writ petition immediately after the advertisement notification was issued is totally illusory and without any substance.

14. Whether or not the reservation roster was correctly applied; whether or not any vacancy was available for the category of physically handicapped are the questions which cannot be permitted to be raised or considered by the Court after the conclusion of the selection process . The right to be selected and appointed has accrued to the private respondent strictly, as per the requisition given by the indenting department and the advertisement notification issued by the PSC. There is no dispute that the private respondent is a candidate with highest merit in the PHC/open category and his name for selection is required to be considered against one vacancy earmarked for the purposes.

15. Since the private respondent belongs to the general category and, therefore, he would eat away the last candidate selected under the open merit category. Unfortunately, the original petitioner is the last candidate selected under open merit and, therefore, it is the mandate of law that he gives way to the candidate entitled under horizontal reservation i.e. private respondent belonging to PHC/OM category. The PSC has done nothing wrong by correcting its mistake and considering the candidature of the private respondent in place of the original petitioner, moreso, when no right had accrued to the original petitioner by her mere placement in the provisional select list.

16. In the case of Anupal Singh and others vs. State of Uttar Pradesh, (2020) 2

SCC 173, one of the issues before the Hon'ble Supreme Court was whether the private respondents before it, who had participated in the interview, could challenge the Office Memorandum dated 12.10.2014 and the selection. The issue had arisen in the context of similar fact situation as we are confronted with in the case on hand. The Hon'ble Supreme Court, after referring to catena of judgments on the issue, held that it is a settled law that a person having consciously participated in the interview cannot turn around and challenge the selection process. The private respondents knew that by the revised notification dated 12.10.2014, the number of vacancies of different categories have been changed and knowing the same, they participated in the interview and have taken a chance and opportunity thereon without any protest. Having participated in the interview and having failed in the final selection, it is not open to the private respondents to turn around and challenge the revised notification dated 12.10.2014 and the revised requisition of a number of vacancies in different categories.

17 The discussion on the issue is made in paras (55) to (61) of the judgment which, for facility of reference, is set out below:

"55. Having participated in the interview, the private respondents cannot challenge the Office Memorandum dated 12.10.2014 and the selection. On behalf of the appellants, it was contended that after the revised notification dated 12.10.2014, the private respondents participated in the interview without protest and only after the result was announced and finding that they were not selected, the private respondents chose to challenge the revised notification dated 12.10.2014 and the private respondents are estopped from challenging the selection process. It is a settled law that a person having consciously participated in the interview cannot turn around and challenge the selection process.

56. Observing that the result of the interview cannot be challenged by a candidate who has participated in the interview and has taken the chance to get selected at the said interview and ultimately, finds himself to be unsuccessful, in *Madan Lal and Others v. State of J&K and Others* (1995) 3 SCC 486, it was held as under:-

"9. 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."

57. In *K.H. Siraj v. High Court of Kerala and Others* (2006) 6 SCC 395, it was held as under:-

"73. The appellant-petitioners having participated in the interview in this background, it is not open to the appellant-petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum mark for the interview was not proper."

58. In *Union of India and Others v. S. Vinodh Kumar and Others* (2007) 8 SCC 100, it was held as under:-

"19. In *Chandra Prakash Tiwari v. Shakuntala Shukla* (2002) 6 SCC 127, it was further observed:-

"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."

59. Same principle was reiterated in *Sadananda Halo and Others v. Momtaz Ali Sheikh and Others* (2008) 4 SCC 619 wherein, it was held as under:-

"59. It is also a settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule. This position was reiterated by this Court in its latest judgment in *Union of India v. S. Vinodh Kumar* (2007) 8 SCC 100. The Court also referred to the judgment in *Om Prakash Shukla v. Akhilesh Kumar Shukla* 1986 Supp SCC 285, where it has been held specifically that when a candidate appears in the examination without protest and subsequently is found to be not successful in the examination, the question of entertaining the petition challenging such examination would not arise."

60. Before the declaration of the result of the written examination on 15.09.2014, the State Government by its Government order dated 20.08.2014 revised the requisition thereby revising the number of vacancies in different categories. UP Public Service Commission issued Office Memorandum dated 12.10.2014 specifically mentioning the number of vacancies to be filled up in various categories in accordance with the requisition sent by the State Government. The said Office Memorandum dated 12.10.2014 published by UP Public Service Commission reads as under:-

"UPPSC

INTERVIEW PROGRAMME

Month October/November/December, 2014 (24)

OFFICE MEMORANDUM

98. Post Subordinate Agricultural Service Class III (Provisional Asstt. Group C)

Agricultural Deptt. U.P.

October – 27, 28, 29, 30

Reservation November – 05, 07, 10, 11, 12

2515 posts–Non-reserved 14 15, 17,18,19,20,21,22,25,26

1882 posts – SC 27, 28, 29

201 posts – ST December – 01, 02, 03, 04, 05,06

2030 posts – OBC 08, 09, 10, 11, 12, 15, 16,17, 18,19

Pay Scale Rs.5200-20200/- 20, 22, 23, 24, 2014

Grade Pay Rs.2400/- Before 10.00 a.m.

Advertisement No.A-5/E-1/2013

Last Date: 21.11.2013

It is thus clear that the candidates who appeared in the interview were well aware about the modification/revision in number of vacancies of Technical Assistants in different categories. The private respondents/intervening applicants have appeared in the interview with their eyes wide open regarding the modified vacancies to be filled up in various categories of the posts. Having appeared in the interview without any demur or protest, it is not open to the candidates to challenge the selection process on the ground that there was modification in the number of vacancies in different categories and they are estopped by the principle of estoppel from challenging the same.

61. The private respondents knew that by the revised notification dated 12.10.2014, the number of vacancies of different categories have been changed and knowing the same, they participated in the interview and have taken a chance and opportunity thereon without any protest. Having participated in the interview and having failed in the final selection, it is not open to the private respondents to turn around and challenge the revised notification dated 12.10.2014 and the revised requisition of the number of vacancies in different categories. Having regard to the consistent view taken by the Supreme Court, the High Court should not have granted any relief to the private respondents/intervenors.

18. We are aware that Rule of Estoppel, particularly, in the matter of recruitment, is not absolute and is differentiated where a candidate by agreeing to participate

in the selection process only accepts the prescribed procedure and not the illegality in it. In a case where a candidate, who has participated in the selection process, alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be ignored merely because a candidate has taken part in the selection process. In many cases, it is possible that a candidate may not have even locus to assail the incurable illegality or violation of any provision of the Constitution, unless he/she participates in the selection process. This is so held by the Hon'ble Supreme Court in the case of Dr. Meeta Sahai vs. State of Bihar and others, (2019) SCC 17. Except for the aforesaid exceptions and the exceptions of the similar nature, a candidate, who acquiesces in the procedure and the terms and conditions of selection, cannot be allowed to turn around later to throw challenge to the selection only after he finds the result of selection not palatable. The issue was recently considered by the Supreme Court in the case of State of Uttar Pradesh vs. Karunesh Kumar and others, 2022 SCC Online SC 1706. Placing strong reliance on Anupal Singh's case, the Supreme Court has reiterated the same principle.

Para (20) and relevant extract of Para (21) is reproduced hereunder:

"20. We have already placed the relevant rules and considered their import. Clause 15(1) of the 1978 Rules deals with a Selection Committee, while we are concerned with the recruitment made by the Selection Commission statutorily created by an enactment, the 2014 Act. Under the 1978 Rules, no written examination was contemplated as against a mere interview. This was consciously given a go-by, to the knowledge of the candidates who willingly participated in the selection process by taking the written examination, and thereafter, the interview. This process was adopted in tune with the 2015 Rules, and in terms of the powers conferred to the Commission under the 2014 Act. Therefore, the 1978 Rules are put into cold storage qua a selection even at the time of conducting the written examination.

21. A candidate who has participated in the selection process adopted under the 2015 Rules is estopped and has acquiesced himself from questioning it thereafter, as held by this Court in the case of Anupal Singh (supra):

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.....
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19 From the above, the legal position is clear that, a candidate, who has participated in the selection process, shall be deemed to have acquiesced in the terms and conditions of selection laid down in the Advertisement Notification and is, thus, estopped from questioning it thereafter. The original petitioner was well aware that one of the vacancies notified for selection was earmarked for PHC category and if the selected PHC candidate happens to be the general category candidate, he/she would eat away the candidate last selected under the open

merit category. The petitioner kept quiet and allowed the process to proceed. It is true that because of his merit, the original petitioner came to be placed at the bottom of the general category/open merit list. Since the private respondent was PHC/general candidate with highest merit in the category of PHC, as such, he was to be necessarily adjusted against the last vacancy meant for open merit category which, in the provisional list, was occupied by the original petitioner. Simply because the original petitioner could not visualize such eventuality which otherwise was most likely if not inevitable, he cannot be permitted to assail the selection of private respondent whose selection is in complete conformity with the requisition as well as the Advertisement notification issued by the PSC.

20 In view of the above, determination of other points/questions becomes purely academic, as such, these questions are left open to be determined in appropriate proceedings. Accordingly, these petitions are allowed and, accordingly, the judgment impugned dated 03.02.2022 passed by the CAT is set aside. Consequently, OA No. 61/234/2021 is dismissed. The PSC shall proceed to finalize the selection in accordance with law.

Record be returned back to the learned counsel appearing for the PSC.