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**(2009) 06 CAL CK 0044**  
**In the Calcutta High Court**  
**Case No : Writ Petition No. 2680 (W) of 2009**

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|---------------------------------|----|------------|
| Mst. Sarbanu Khatun (Bibi)      | Vs | APPELLANT  |
| State of West Bengal and Others |    | RESPONDENT |

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**Date of Decision :** 29-06-2009

**Acts Referred:**

**Citation :** (2009) 3 CALLT 505

**Hon'ble Judges :** Dipankar Datta, J

**Bench :** Single Bench

**Advocate :** Robiul Islam, for the Appellant; Bhaskar Ghosh for the State, for the Respondent

**Final Decision :** Allowed

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## Judgement

Dipankar Datta, J.—The petitioner and the sixth respondent were contenders for engagement as Auxiliary Nurse and Midwife in Juranpur Health Sub-Centre under Domkal Block, Murshidabad. They had responded to an advertisement inviting applications issued sometime in 2006.

2. In terms of the applicable guidelines for engagement as Auxiliary Nurse and Midwife, selection shall be strictly on merit based on the marks obtained by the candidates in the Madhyamik or equivalent examination.

3. The petitioner appeared in the High Madrasah Examination conducted by the West Bengal Board of Madrasah Education. In so far as the compulsory subjects are concerned, she obtained 457 marks out of 1000 i.e. 45.7%. The sixth respondent took the Madhyamik Examination conducted by the West Bengal Board of Secondary Education and in the compulsory subjects, she obtained 425 marks out of 900 i.e. 47.22%.

4. The Selection Committee, based on the marks obtained in the compulsory subjects by the petitioner and the sixth respondent, selected the latter for engagement as Auxiliary Nurse and Midwife.

5. It is, however, noticed that the petitioner had appeared in an additional subject. In terms of the relevant examination regulations of the Madrasah Education Board she is entitled to addition of marks obtained in the additional subject with her total marks obtained in the compulsory subjects after deducting the pass marks of 30. Since she obtained 49 in the additional subject, she claimed that the additional 19 marks ought to be added to her total of 457. If 19 marks is added, her total would be 476 marks out of 1000 i.e. 47.6% which is more than that obtained by the sixth respondent and, therefore, she should have been selected for engagement.

6. The petitioner had lodged an objection before the Block Development Officer, Domkal, complaining that though she had secured more marks than the sixth respondent, yet, she had not been selected. However, such representation was not considered.

7. Feeling aggrieved thereby, the petitioner had the occasion to approach this Court by filing a writ petition. That was disposed of on 18th May, 2007 by a learned Judge of this Court with a direction upon the District Magistrate, Murshidabad, to look into the grievances of the petitioner and to take an appropriate decision in accordance with law within a period of 6 weeks from date of receipt thereof.

8. In compliance with the order of this Court, the District Magistrate heard the parties and has passed an order dated 8th August, 2007. After noticing the marks obtained by the petitioner and the sixth respondent, the District Magistrate considered it prudent to refer the matter to the Mission Director, National Rural Health Mission in the Department of Health and Family Welfare to offer his clarification "as to whether the matter of securing marks in the Madhyamik Examination and the equivalent examination would be calculated on the basis of compulsory subjects only".

9. The petitioner again represented before the District Magistrate, based on a Division Bench decision of this Court (to be referred hereafter), that in determining the inter se merit of the candidates, marks obtained in the additional subject could not have been ignored. A request was made to pass appropriate order in terms of the Division Bench decision.

10. Since no result yielded, this petition was presented before this Court on 10th February, 2009. By order dated 31st, March, 2009, this Court had called for affidavits.

11. Mr. Islam, learned advocate appearing for the petitioner, submits that the applicable guidelines do not lay down that the marks obtained by a candidate in the additional subject would be ignored while determining the merit of the rival candidates. In support of his submission, he has relied on the Division Bench decision of this Court in Dilip Kumar Mondal v. Union of India, reported in (2007) 3 C.L.T. 477 (H.C.). According to him, in somewhat similar circumstances, the Division Bench had held that excluding the marks obtained by a candidate in the

additional subject while determining inter se merit was not proper and there was no reason as to why the marks obtained by a candidate in the additional subject, after deduction of the pass marks, should not be taken into consideration for determination of merit. He, accordingly, prays for relief as claimed in the petition.

12. Mr. Ghosh, learned counsel appearing for the State respondents, contends that a clarification has been issued by the Principal Secretary to the Government of West Bengal, Department of Health and Family Welfare on 21st July, 2008. In terms of such clarification the norms of selection now are as follows:

The selection would be purely on merit, based on the aggregate of marks obtained by the candidates in the compulsory subjects in the Madhyamik or equivalent examination. If two or more candidates secure the same highest total marks in compulsory subjects, then the candidate who secures higher marks in the additional paper will be have to be selected.

13. By relying on such clarification, he submits that the selection of the sixth respondent for engagement as Auxiliary Nurse and Midwife cannot be faulted and the petition is liable to be dismissed.

14. None has appeared for the sixth respondent to oppose the petition

No affidavit in opposition has been filed by her despite liberty granted by order dated 31st March, 2009.

15. This Court has heard learned counsel for the parties. Upon consideration of the clarification issued on 21st July, 2008 by the Principal Secretary, this Court is unable to uphold the selection of the sixth respondent. The clarification dated 21st July, 2008, on which reliance has been placed by Mr. Ghosh, was non-existent at the time recruitment process was undertaken to engage Auxiliary Nurse and Midwife in pursuance whereof the petitioner and the sixth respondent had offered their candidature. At that point of time, selection was to be based on merit and merit only. Without doubt, the clarification in question would operate prospectively. The petitioner had taken the extra burden of appearing in an additional subject and secured marks more than the pass marks. If in terms of the relevant examination regulations of the Board conducting the examination she is entitled to addition of marks secured in excess of the pass marks and such marks are to be added to the total of marks obtained in the compulsory papers for the purpose of determining division on merit, there is no plausible reason as to why such marks should have been ignored by the Selection Committee while determining the inter se merit of the petitioner and the sixth respondent. The applicable guidelines did not say that marks obtained in the additional subject would be ignored. Merely because a particular column in the prescribed application form for engagement required a candidate to mention the marks obtained in the compulsory subjects cannot be construed as a guideline authorising the selection committee to make selection on the basis thereof. Had the clarification been in existence at the time the candidature of the petitioner and the sixth respondent were being considered, the situation would have been

otherwise, in the absence of any challenge thereto, The factual situation, as it presently stands, is that there was nothing in the applicable guidelines similar to the one as issued vide clarification dated 21st July, 2008 and, therefore, the extra marks over and above the pass marks secured by the petitioner in the additional subject could not have been ignored for determining the inter se merit of the rival candidates.

16. The decision in Dilip Kumar Mondal (supra) is one directly on the issue and this Court has no reason not to follow the ratio thereof.

17. For the reasons aforesaid, this Court holds that since the petitioner who was entitled to be placed at the first position of the panel was wrongly Excluded, the process of selection suffers from the twin vices of illegality and Irrationality warranting review of such action by this Court for setting things right. The selection of the sixth respondent stands set aside. Since the petitioner is otherwise qualified for engagement as Auxiliary Nurse and Midwife, the panel shall be recast by placing her at the first position. She shall, thereafter, be deputed for training and if she ultimately succeeds in "the training, she shall be considered for engagement.

18. The aforesaid exercise shall be conducted as early as possible but positively within 4 weeks from the date of receipt of copy of this order.

The writ petition stands allowed. However, parties shall bear their own-costs.

Urgent xerox certified copy of this order if applied for, be furnished to the parties within 4 days from date of putting in requisites therefore.