

**CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH
HYDERABAD**

OA/021/0702/2015

Reserved on: 31.03.2021

Pronounced on : 23.04.2021



Hon'ble Mr. Ashish Kalia, Judl. Member
Hon'ble Mr. B.V. Sudhakar, Admn. Member

Smt. Nandigama Sreevali,
W/o. Suman Sripada,
Aged 31 years, Occ: Nursing Sister,
Occ: Nursing Sister, ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.

...Applicant

(By Advocate : Mr. K. Satyanarayana Rao)

Vs.

1. Employees State Insurance Corporation,
Rep. by its Director General,
Panchdeep Bhavan, CIG Marg,
New Delhi – 110 002.
2. The Medical Superintendent,
Employees State Insurance Corporation,
ESIC Model Hospital,
Nacharam, Hyderabad.
3. The Medical Superintendent,
ESI Corporation,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
4. The Deputy Director (Administration),
ESIC Model Hospital,
Nacharam, Hyderabad.
5. Lincy Joseph, W/o. Roy Philip,
Aged 36 years, Occ: Asst. Nursing Superintendent,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
6. C.K. Jebby, W/o. Rony Abraham,
Aged about 34 years, Occ: Asst. Nursing Superintendent,
ESIC Model Hospital,
Sanathnagar, Hyderabad.



7. Sadasiv B.M., S/o. Bheema Goud,
Aged about 34 years, Occ: Asst. Nursing Superintendent,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
8. Raghavendra Hegde, S/o. Mander Rao Hedge,
Aged about 30 years, Occ: Asst. Nursing Superintendent,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
9. Vipin Wilson, S/o. Wilson,
Aged about 29 years, Occ: Asst. Nursing Superintendent,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
10. Nanduri Jyothi, D/o. Ramalingappa,
Aged about 35 years, Asst. Nursing Superintendent,
ESIC Model Hospital,
Nacharam, Hyderabad.
11. M. Vasanthi,
Aged about 52 years, Occ: Asst. Nursing Superintendent,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
12. M. Sravani, W/o. C. Naveen,
Aged about 29 years, Occ: Asst. Nursing Superintendent,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
13. E. Hari Krishnan,
Aged about 35 years, Occ: Nursing Sister,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.
14. D.N. Dhanalakshmi, W/o. K. Sridhar,
Aged about 33 years, Occ: Nursing Sister,
ESIC Super Specialty Hospital,
Sanathnagar, Hyderabad.

....Respondents

(By Advocate : Mr. N. Srinivasa Rao, SC for ESIC
Mr. M. Srinivasa Rao)

ORDER
(As per Hon'ble Mr.B.V.Sudhakar, Administrative Member)

Through Video Conferencing:



2. The OA is filed in regard to grant of promotion to the applicant as Nursing Sister from June 2011 instead of January 2011 and for revising the seniority published on 10.10.2014 in the said cadre, by placing her above the respondents 5 to 14.

3. Brief facts of the case are the applicant was appointed as Staff Nurse in the respondents organization vide orders dt. 11.1.2008 i.e. at ESIC Nacharam. As per pre-revised recruitment rules promotion to the next cadre of Nursing Sister will be done from the Staff Nurses, who have rendered 3 years of service and is by 100% promotion, failing which, by direct recruitment. ESIC (Recruitment) Regulations, 2010 Group C (Nursing Cadre) Posts, were approved in November 2010 (for short “**Regulations 2010**”) prescribing 2 years service as Staff Nurse to be promoted as Nursing Sister and the existing vacancies are to be filled by 100% promotion as provided for in the pre-revised Regulations. The applicant was eligible to be promoted as Nursing Sister in January/ February 2010 as per Regulations 2010 after rendering 2 years service since 41 vacancies were available in October 2010 and the vacancies were increased to 63 by January 2011. Consequently, applicant was to be promoted by January 2011 in view of the availability of the vacancies. But she was promoted in June

2011. The Medical Supdt., ESIC Model Hospital, Nacharam was declared as the controlling officer for A.P in respect of service matters of para-medical and nursing staff by the Dy. Director (M.A), ESIC HQs, New Delhi. Respondents 5 to 14 were appointed as Nursing Sisters in April 2011 as Direct Recruits violating the Regulations 2010 by the Medical Superintendent, ESIC Hospital, Sanathnagar, though he is not the competent authority to do so and the said Hospital was commissioned only in December 2011. The applicant was promoted as Nursing Sister vide order No. 23/2011 dt. 16.06.2011 instead of from January 2011, wherein she is at Sl. No.6. Representation submitted to consider promotion to be granted from Jan 2011 as there were clear vacancies, was rejected. Upon options were called for transfer from Nacharam Hospital to Sanathnagar Hospital, she was transferred to Sanathnagar on 27.02.2013. While working so, provisional seniority was issued on 02.09.2014 wherein she was shown at Sl. No.36. The Dy. Director, Nacharam Hospital has sought clarification from the DG, ESIC, New Delhi about the inter se seniority on 2.12.2013. Objections were raised by the applicants about the draft seniority list of the Nursing Sisters on 02.9.2014 and thereafter, the final seniority list was released on 10.10.2014. Objections raised by the applicants were rejected on 14.10.2014 and some of the private respondents were even promoted as Asst. Nursing Supdt. on 20.11.2014. Aggrieved over non grant of promotion from January 2011 and seniority list published, the OA is filed.



4. The contentions of the applicant are that the Regulations 2010 were approved by the Standing Committee and the Central Govt. in November 2010. The Medical Supdt. of Sanathnagar Hospital, an incompetent authority appointed the private respondents in April 2011 as Nursing Sister contrary to Section 17 of the ESIC Act, 1948/Regulations, 2010, for a Hospital which was commissioned in December 2011. The vacancies of the Nursing Sisters were to be filled up 100% by promotion failing which by direct recruitment as per old Regulations. The applicant was eligible to be promoted much before the selection of the private respondents in April 2011. DPC can meet 6 months in advance as per prevailing rules. The promotion of the applicant was purposefully delayed to deny them the seniority. Though the private respondents were recruited for Sanathnagar Hospital, they worked for Nacharam Hospital till the former hospital became functional in December 2011. Despite representations, the grievance of the applicant was not redressed and the private respondents were shown as senior to the applicant. Direct recruitment of Nursing Sister was not resorted to by any of the ESIC Hospitals in the Country and in case of Bangalore, notification was issued and later withdrawn. Respondents should have conducted review DPC and granted the promotion retrospectively. Objections raised against the seniority list in the Nursing Sister cadre were not objectively considered. The right of promotion accrued to the applicant cannot be denied. As per the Joint Director Letter dated 8.12.2012, the Medical Supdt. Nacharam



Hospital is the competent authority in regard to service matters of para medical reports.

5. Respondents 1 to 4 *per contra*, in the reply statement state that the applicant was appointed as Staff Nurses in January 2008 and was promoted as Nursing Sister in June 2011. The promotion of the applicant has to be based on the regulations in vogue prior to Regulations 2010, which specify rendering 3 years service in the Staff Nurse cadre to be promoted as Nursing Sister and not 2 years as claimed by the applicant, with cut-off dated as 1st January for counting the years of service as per DOPT memo dated 17.9.1998. Therefore, the applicant would be due for promotion as on 1.1.2012 and not in Jan 2011. However, with the Regulations amended in May 2011, reducing the period of service required from 3 to 2 years, applicants were given promotion in June 2011. The regulation was amended on 21.5.2011 by publishing it in the Gazette notification. Respondents 5 to 14 were selected based on a notification of 2010 issued by R-1 for the post of Nursing Sister from August 2011 onwards and provisional gradation list was issued on 2.9.2014 inviting objections, if any, to the same. After responding to the objections, the final seniority list of Nursing Sister was released on 10.10.2014 by placing the direct recruits comprising of the private respondents above the applicant who is a promotee, as per DOPT memo dated 4.3.2014 in terms of N.R. Parmar Judgment and other DOPT OM's 7.2.1986/3.7.1986. The process of initiating the recruitment process began in 2010 for the



private respondents and therefore, their seniority commences from 2010 whereas for the promotees, it is 2011 since the proposal for the DPC was sent on 16.6.2011. R-1 issued the notification for recruitment of the private respondents as per prevailing regulations which permit filling up posts of Nursing Sister by direct recruitment when there are no promotees eligible to be promoted and as such 29 were selected in April 2011. The notification was not challenged by the applicants and only after the selected candidates joined, representations were submitted. Representations received were disposed. The OA suffers from limitation because the applicant is questioning her date of promotion in June 2011 and the notification issued in 2010. Prior to 8.12.2010, R-1 was the appointing authority for Green Field Hospital of ESIC and on 8.12.2010 a circular was issued authorising the R-2 as the competent authority for recruiting Para Medical Staff in Andhra Pradesh.



Applicants filed rejoinder stating that Quota and Rota principle is not applicable for the post of Nursing Sister as per existing regulations. There is no resolution by the respondents adopting the letter 4.3.2014 of DOPT in regard to seniority in respect of Nursing Sister as was done in respect of Dy. Director cadre. The crucial date of promotion has no relevance since the promotion to Nursing Sister is 100% by promotion. The contention of the respondents that the notification for direct recruitment was not challenged is without substance since the grievance is about not granting promotion from the

date of occurrence of the vacancy to the applicants and conferring undue advantage to the private respondents though the year of recruitment of 2011 being one and the same. The OA is within limitation since the issues challenged pertain to pre-ponement of promotion, seniority and interdependent issues. She joined as Staff Nurse on 21.01.2008 and therefore, she became eligible for appointment as Nursing Sister by Direct Recruitment by 21.01.2020 as she had put in 2 years by then. Further, she was also eligible by 21.01.2011 with 3 years service, but the 2nd respondent promoted her juniors. The private respondents have to be recruited against the vacancies of Sanathnagar Hospital and not against vacancies of Nacharam hospital. The seniority of the private respondents was fixed from April 2011 though they were appointed in Aug 2011.



Some of the private respondents also filed reply statement, wherein they stated that the Regulations 2010 came into effect from 21.05.2011. Hence, the applicant cannot rely upon the said Regulations 2010. Recruitment was done as per Section 17(2) of ESIC Act. They stated that direct recruitment was conducted by the ESIC HQs in some other places as well.

Respondents filed written submissions stating that the applicant has not raised any point in the OA nor in the rejoinder about Section 97 of ESI Act. Section 97 empowers the corporation to make regulations required and section 97 (3) states that the regulations will

come into effect after being published in the official Gazette. The new Regulation 2010 were notified on 21.5.2011 with a clause that they will be effective from the date of notification. For direct recruitment, notification was issued in March 2010, Written exam was conducted in Aug 2010 and interviews held in Feb 2011. Recruitment was done as per Section 17(2) of ESIC Act. As Sanathnagar Hospital has to be commissioned in 2011 recruitment process was initiated in 2010. The crucial date for all promotion is 1st January as per DOPT, OM dated 17.9.1998. Till 21.5.2011 no staff nurse was eligible for promotion. The seniority was made state wise and not hospital wise.



6. Heard both the counsel and perused the pleadings on record including the written submissions filed.

7. I. The issue is in regard to preponement of the promotion of the applicant in the cadre of Nursing Sister and revising the seniority in the said cadre. The applicant was appointed as Staff Nurse which is the feeder cadre for Nursing sister grade, on 1.2.2008. As per the prevailing recruitment rules for promotion to the cadre of Nursing Sister the applicant has to render 3 years of service and therefore, would be eligible for promotion in Jan 2011. However, the cut off date having been fixed as 1st Jan by DOPT vide letter dated 17.9.1998, the relevant para is extracted here under, the applicant would be eligible to be considered for promotion on 1.1.2012:

“2. The matter has been reconsidered by the Government and in supersession of the existing instructions it has now been decided that the crucial date of determining

eligibility of officers for promotion in case of financial year based vacancy year would fall on January 1 immediately preceding such vacancy year and in the case of calendar year based vacancy year, the first day of the vacancy year i.e. January 1 itself would be taken as the crucial date irrespective of whether the ACRs are written financial year-wise or calendar year-wise. For the sake of illustration, for the panel year 200-2001 (financial year) which covers the period from April 1 2000, to March 31, 2001 and the panel year 2000 (calendar year) which covers the period from January 1, 2000 to December 31, 2000 the crucial date for the purpose of eligibility of the officer would be January 1, 2000 irrespective of whether ACRs are written financial year-wise or calendar year-wise.”



The above was more or less reiterated by DOPT on 28.5.2014. Thus the applicant would be eligible for promotion to the cadre of Nursing Sister on 1.1.2012 as per the regulations existing prior to Regulations 2010.

II. However, the Regulations 2010 were published in the official Gazette on 21.5.2011, wherein the qualifying service to be promoted as Nursing sister was reduced to 2 years. Consequently applicant was promoted in June 2011 for having completed 2 years of service by then. The applicant's contention is that she is eligible to be promoted as Nursing Sister in January 2011 as per Regulations 2010 after rendering 2 years service since 41 vacancies were available in October 2010 and 63 by Jan. 2011. The regulation 2010 will be effective from the date it is published in the Official Gazette as per Section 97 (3) of the ESIC Act 1948 which is extracted hereunder:

97 Power of Corporation to make regulations.

(3) Regulations made by the Corporation shall be published in the Gazette of India and thereupon shall have effect as if enacted in this Act.

The applicant's contention that the Regulations were approved by the Standing Committee and the Central Govt in Nov 2010 and therefore, they are effective from the said month, would not stand to reason in view of



Section 97 (3) of the ESIC Act, as at above. Therefore, though the vacancies were available in October 2010 & Jan 2011, when they are filled up as per Regulations 2010 which came into effect in May 2011, the promotion have to be necessarily given from and after the Regulations were published in the Official Gazette ie 21.5.2011. Hence, the promotion to the applicant and similar other persons were granted in June 2011 as per their eligibility in terms of their joining the Staff Nurse cadre. If in case they were to be considered for October 2010 and Jan 2011 vacancies the earlier regulations would apply, which prescribe 3 years service and the cut off date having been fixed for promotion as 1st Jan, they would be eligible for promotion on 1.1.2012. The contention of the applicant that the promotion to the Nursing Sister cadre is by 100% promotion and hence the 1st Jan cut-off date would not apply, is contrary to the DOPT instruction dated 17.9.1998 and hence invalid. Thus, the decision of the respondents to promote the applicant in June 2011 is in order.

III. Further, the Private respondents responded to a notification issued in March 2010 by Director General, ESIC, for direct recruitment to the post of Nursing Sister, wrote the exam in Aug 2010 and appeared in the interview in Feb 2011. Thereupon, after being selected in April 2011 they started joining from Aug 2011 onwards. The applicant's contention that the Medical Supdt, Santhnagar Hospital has issued the notification, is incorrect. Further, as per the regulations prevailing prior to the revised Regulations of 2010, clearly spelt out that that the promotion to the Nursing Sister cadre would be by 100% promotion failing which was by direct recruitment. As the applicant was not eligible for promotion by 2010 in view of the

eligibility condition of 3 years, the respondents had to resort to direct recruitment by issuing a notification in March 2010 which is provided for in the relevant regulation. The selection was complete by April 2011 and the new Regulations 2010 came into effect in May 2011. Hence, the respondents have acted as per the prevailing regulation. Thus, there is no contravention of Section 17 (2) of the ESIC Act. 1948, extracted hereunder, as contended by the applicant, since there is no deviation from the Rules to seek the approval from the Central Govt. for any deviation if under taken.



Section 17 in The Employees' State Insurance Act, 1948

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⁷⁷ [(2) (a) *The method of recruitment, salary and allowances, discipline and other conditions of service of the members of the staff of the Corporation shall be such as may be specified in the regulations made by the Corporation in accordance with the rules and orders applicable to the officers and employees of the Central Government drawing corresponding scales of pay: Provided that where the Corporation is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters aforesaid, it shall obtain the prior approval of the Central Government*

Therefore, the contention of the applicant that respondents have violated the rules by going in for direct recruitment for the post of Nursing Sister stands invalid.

IV. The argument of the applicant that the date of publication of the Regulations 2010 in the official Gazette cannot be taken as the date of implementation as per Section 97 (2) (xxi) read with Section 97 (2A) of the Act, since the Regulations were approved by the Standing Committee/ Central Govt in Nov. 2010 would not hold good in view of the categorical clause of Section 97 (3) of the Act, wherein it is stated that the Regulations would come into effect from the date of publication in the official gazette. The Sections of the Act referred to are reproduced hereunder to affirm the

observation made above. Section 97 in The Employees' State Insurance Act, 1948:

97 Power of Corporation to make regulations.

*(1) The Corporation may,²⁵² [***] subject to the condition of previous publication, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation and for carrying into effect the provisions of this Act.*

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

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²⁶⁴ *[(xxi) the method of recruitment, pay and allowances, discipline, superannuation benefits and other conditions of service of the officers and servants of the Corporation other than the²⁶⁵ [Director General and Financial Commissioner];]*

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²⁶⁶ *[(2A) The condition of previous publication shall not apply to any regulations of the nature specified in clause (xxi) of sub-section (2).]*

(3) Regulations made by the Corporation shall be published in the Gazette of India and thereupon shall have effect as if enacted in this Act.

(4) Every regulation shall, as soon as may be, after it is made by the Corporation, be forwarded to the Central Government and that Government shall cause a copy of the same to be laid before each House of Parliament, which it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

Respondents, as per Section 97 (4), have forwarded the Regulations to the Central Govt. and on obtaining the approval of both the Houses of the Parliament, they were published in the Official Gazette as required under Section 97 (3) of the act in order to be implementable from 21.5.2011. Thus, the action of the respondents is as per the provisions of the ESIC Act. The regulations framed are in congruence with Section 97 (2) (xxi) of the Act, relied upon by the respondents and not otherwise, as claimed by the applicant.



A similar issue was also discussed by the Hon'ble High Court of Calcutta (Appellate Side) in Amar Nath Mukherjee And Others vs Union Of India And Others on 27 September, 2019 - FMA 34 of 2019 (MAT 1387 of 2014) and observed as under, by relying on the judgments of the Hon'ble Apex Court.



17. The petitioners next rely on a judgment reported at (1987) 1 SCC 658 (*B. K. Srinivasan v. State of Karnataka*) for the recognition therein that when the parent statute prescribes the mode of publication or promulgation, such mode must be followed. That matter pertained to an outline development plan of the Bangalore city planning area under the relevant Town and Country Planning Act. The petitioners also rely on another judgment reported at (2010) 1 SCC 730 (*Rajendra Agricultural University v. Ashok Kumar Prasad*). The issue in that case was whether a statute made under the *Bihar Agricultural University Act, 1987* providing for benefits to the teaching staff could be enforced in the absence of its publication in the Official Gazette. It was contended on behalf of the party seeking a benefit under the statute that the principle, that a subordinate legislation which was not published could not be enforced against any member of the public because of want of knowledge in the absence of publication, would not apply where a statute was made for the benefit of a specific and small class of persons and the beneficiaries thereunder sought the implementation of such statute. The Supreme Court repelled the contention with the observation that "once the law lays down that publication of a Statute in the Official Gazette is a part of the process of making a statute, the object of making such a provision for publication recedes into the background and becomes irrelevant, and on the other hand, fulfilment of the requirement to make public the Statute by publication in the Official Gazette becomes mandatory and binding."

18. In the same vein, a judgment reported at (2014) 10 SCC 673 (*Gulf Goans Hotels Company Limited v. Union of India*) is cited since the Supreme Court observed therein that administrative orders and circulars can only be binding when published as per the mode of publication provided therefore.

Hence in view of the above legal principle, the Regulations 2010 would come into vogue only from the date of publication in the official Gazette and not earlier.

V. Besides, the private respondents after their joining the Nursing Sister cadre from Aug 2011 onwards and the promotion of the applicants in June 2011, a common seniority list was issued on 10.10.2014 based on DOPT letter dated 4.3.2014 released in pursuance to the judgment in N.R. Parmar. The applicant's contention that the letter dated 4.3.2014 was not adopted by

the Corporation will not be sustainable in view of the law laid by the Hon'ble Apex in N.R Parmar on 27.11.2012. Further, the contention of the applicant that since their issue pertains to the year 2011, N.R Parmar cannot be applied retrospectively would not hold water because legal principles have retrospective effect unless specified otherwise in the judgment. We take support of the observation of the Hon'ble Supreme Court in **Uttaranchal Jal Sansthan v. Laxmi Devi, (2009) 7 SCC 205**, as under, in stating, what we did.



it is worth mentioning that judicial decisions unless otherwise specified are retrospective.

As for example in Meghachandra Singh judgment, N.R.Parmar was modified but was made clear that the judgment would apply from the date of the delivery of the judgment ie 19.11.2019 and the seniority fixed earlier shall not be disturbed. Applicant was trying to take shelter under Meghachandra Singh but it would not apply for their case since their seniority was fixed in 2014. As per N.R. Parmar, the private respondents who were recruited against vacancies of 2010 by initiating the recruiting process in the said year will have their seniority reckoned from 2010 and the applicant who was promoted based on DPC in 2011 will get seniority from 2011. Besides, applicant raised the objection that rota quota principle would not apply to the Nursing Sister cadre on the assumption that the private respondents and the applicant was selected to the Nursing Sister cadre in the same year namely 2011, which is not maintainable because based on N.R.Parmar, the private respondents come on to the rolls of the respondents organisation in 2010 whereas applicant in 2011 in the Nursing Sister cadre. Besides, applicant has not enclosed any rule to affirm that the

roto quota does not apply to their case. Further, we also observe that the applicant has not challenged the notification/ appointments of the private respondents and hence, it is difficult to appreciate as to how their seniority could be fixed above the private respondents. Some of the private respondents have also been promoted to the next grade of Assistant Nursing Superintendent and therefore, as is settled in law, seniority settled shall not be disturbed.



VI. Going further, applicant claims that the private respondents were appointed for the Sanathnagar Hospital in Aug 2011 before it commenced operations in December 2011. The Sanathnagar Super Speciality Hospital was scheduled to function from 2011 and hence, the respondents initiated the recruitment process in 2010 which is understandable. Recruitment is a laborious and sensitive process which cannot be timed to arithmetical precision so that it is completed exactly by the date the Sanathnagar Hospital starts functioning. Practical aspects in administering an Organisation have to be kept in view. The private respondents were not kept idle but were engaged by the respondents in Nacharam Hospital from Aug 2011 onwards till the operationalisation of the Sanathnagar Hospital in Dec 2011. The notification issued by the Director General of the respondents office, indicates 21 vacancies in Nursing Sister cadre for ESIC Sanathnagar Super specialty Hospital and the private respondents have been selected for these posts and not for Nacharam Hospital as claimed by the applicant. The respondents have stated that a common seniority has been decided for the Nursing Sister cadre for all the hospitals together, which was not rebutted by the

applicants. Hence, the seniority list has been enlarged involving the interests of not just the applicant and the private respondents but of all those working in the cadre in the State. Hence, the moot point to be pondered is as to whether the applicant can raise the issue of seniority the way she did in the OA!



VII. It is important to note that the letter of promotion issued to the applicant contains the condition that their promotion to the cadre of Nursing Sister has been made on a temporary basis and is subject to such terms and conditions of the service as are applicable to similar class of officials as laid down in the ESIC (Staff & Condition of Service) Regulations 1959 as amended from time to time. After accepting the promotion, it would imply that they shall accept the amendments made.

VIII. One another contention made by the applicant is that she was eligible for promotion to the cadre of Nursing Sister by Jan 2011 as per the old regulations would not cut ice, since as on the crucial cut off date of 1.1.2011, she did not render 3 years of service. In fact, as per the old regulation, her promotion would have to be considered on 1.1.2012, but due to the new regulations 2010 after being brought into vogue in May 2011, got preponed to June 2011. Hence, the contention that there was delay in conduct of DPC and thereby promotion was delayed is incorrect, when she was ineligible to be considered by the crucial date. The other contention made by the applicant that nowhere in the country direct recruitment for Nursing Sister cadre was adopted by the ESIC Hospitals is not maintainable since when the Rules provide for such recruitment, one cannot prevent the respondents to act as per the Rules. When the whole gamut of the OA was

about the recruitment of the private respondents vide notification in March 2010 against rules as per the applicant's contention, it was expected of her to legally challenge the notification. The reasons given for not making the challenge are not convincing. Representations submitted by the applicant was replied. The averment of the applicant that the ESIC (Staff & Conditions of Service) Regulations 1959 came into force in 16.12.1959 though the same were published later in the official Gazette on 26.12.1959 is banking on a wrong precedent which apparently is violative of the provision of the ESIC Act. A wrong cannot be used to wrong the right as is furthered by the applicants.



IX. The respondents have commenced the game by issuing the open notification in March 2010 to recruit Nursing Sisters and they cannot change the rules enroute as observed by the Hon'ble High Court of Rajasthan in **Lalit Kishor vs State of Rajasthan & Ors on 23 October, 2020** in S.B. Civil Writ Petition No. 8908/2020, by relying on Manjusree and Hemani Malhotra verdicts of the Hon'ble Apex Court as under:

12.1 In K. Manjusree Versus State of Andhra Pradesh & Anr., reported in (2008) 3 SCC 512, the Supreme Court held that the rule of game cannot be changed. In K. Manjusree (supra), the Supreme Court held as under:

"27. But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier resolutions dated 24.7.2001 and 21.2.2002 and held that what was adopted on 30.11.2004 was only minimum marks for written examination and not for the interviews. Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules

of the game after the game was played which is clearly impermissible. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them [P.K. Ramachandra Iyer v. Union of India](#) MANU/SC/ 0395/1983 : (1984)ILLJ314SC , [Umesh Chandra Shukla v. Union of India](#) MANU/SC/0050/1985 : AIR1985SC1351 , and [Durgacharan Misra v. State of Orissa](#)."

(137 of 142) [CW-8908/2020] 12.2 The aforesaid view was reiterated in Hemani Malhotra Versus High Court of Delhi, reported in (2008) 7 SCC 11 by the Supreme Court holding as under:



"15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and vive-voce, but if minimum marks are not prescribed for vive-voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at vive-voce, test was illegal."

Respondents having declared that they would fill up 21 posts of Nursing Sister Cadre in the notification of March 2010 cannot go back and state that they would fill them by promotion after the process was set in motion and that too against the Regulations prevalent at the time of the issue of the notification. Therefore, the respondents as per the legal principle stated above have to complete the recruitment process to fill up the Nursing Sister posts on direct recruitment basis without changing the rules of the game.

X. Thus, viewed from any angle, the OA is devoid of merit, merits dismissal and hence is dismissed. No costs.

(B.V.SUDHAKAR)
ADMINISTRATIVE MEMBER

(ASHISH KALIA)
JUDICIAL MEMBER

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