

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH, KOLKATA

LIBRARY

No. O.A. 1129 of 2018
M.A. 683 of 2019Reserved on: 24.9.2019
Order dated: 27.9.2019Present : Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Dr. Alok Vajpayee,
 Son of Late Ganesh Prasad Vajpayee,
 Aged about 61 years,
 Director Professor, Public Health,
 All India Institute of Hygiene & Public Health,
 Under the Directorate General of Health Services,
 Office at 110, C.R. Avenue,
 Calcutta - 700 073,
 Residing at Flat No. 4A1,
 Gokul Dham
 956, JESSORE Road,
 P.O. Bangur,
 Dist. North 24 Parganas,
 Kolkata - 700 055

. Applicant

VSU

1. Union of India,
 Through the Secretary to
 The Government of India,
 Ministry of Health & Family Welfare,
 Nirman Bhawan,
 New Delhi - 110 011.
2. The Director General of Health Services,
 Office of Nirman Bhawan,
 New Delhi - 110 011.
3. The Secretary to the
 Government of India,
 Ministry of Health & Family Welfare,
 Nirman Bhawan,
 New Delhi - 110 011.
4. Dr. U.K. Chattopadhyay,
 Director,
 All India Institute of Hygiene of Public Health,
 Kolkata,
 110, C.R. Avenue,
 Kolkata - 700 073.
5. Dr. Nandini Sharma,
 Director Profession,
 Maulana Azad Medical College,
 Department of Preventive & Social Medicine,

Red

2, Bahadur Shah Zafar Marg,
New Delhi - 110 001.

6. Union Public Service Commission,
Through the Secretary,
Union Public Service Commission,
Dholpur House,
Sahajahan Road,
New Delhi - 110 069.
7. The Secretary to the Govt. of India,
Department of Personnel & Training,
North Block,
New Delhi - 110 001.

For the Applicant : Mr. S.K. Dutta, Counsel

For the Respondents : Mr. T.K. Chatterjee, Counsel
Mr. A.K. Chattopadhyay, Counsel
Mr. N. Roy, Counsel

ORDER

Per Dr. Nandita Chatterjee, Administrative Member:

The applicant has approached this Tribunal in the sixth stage litigation under Section 19 of the Administrative Tribunals Act, 1985 praying for the following relief:

- (a) An order holding that the applicant is entitled to be considered and appointed as the Director of All India Institute of Hygiene & Public Health, Kolkata.
- (b) An order holding that the appointment of the respondent No. 4 as the Director of All India Institute of Hygiene & Public Health, Kolkata is bad in law and the same may kindly be quashed and set aside.
- (c) An order holding that the constitution of the Selection Committee and its recommendations are bad in law and the same may kindly be quashed.
- (d) An order quashing and/or setting aside the appointment of the respondent No. 4 as the Director of All India Institute of Hygiene & Public Health, Kolkata made on the basis of the recommendation of the Selection Committee.
- (e) An order directing the respondent authorities to consider by holding a proper selection the case of the applicant for appointment to the post of Director of All India Institute of Hygiene & Public Health, Kolkata and to extend the appointment to the applicant as the Director of All India Institute of Hygiene & Public Health, Kolkata w.e.f. the date the respondent No. 4 was appointed as the Director with all consequential benefits.
- (f) An order directing the official respondents to produce/cause production of all relevant records.

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(g) Any other order or further order/orders as to this Hon'ble Tribunal may seem fit and proper."

2. Heard both Ld. Counsel. Both the official as well as private respondent No. 4 has filed their replies to the O.A. Further, the respondents have submitted clarifications in response to directions of the Tribunal dated 26.8.2019. Ld. Counsel of the applicant has filed his written notes of arguments.

3. The submissions of the applicant, as advocated through his Ld. Counsel is that,

(a) The applicant had joined the Central Health Services as an Assistant Professor in All India Institute of Hygiene & Public Health (referred to hereafter as AIH&PH) and that he is presently working as a Director - Professor in the sub-cadre of Public Health.

(b) While according promotion to the post of Director - Professor, the applicant had earlier been superseded on the grounds that his ACR/APARs were below bench mark and consequently even the Review DPC did not consider the applicant fit for promotion. The applicant thereafter preferred an O.A. No. 116 of 2013 which was disposed of vide orders dated 1.9.2015 by directing as follows:-

"As such the cryptic administrative decision falls foul of the aforesaid decision of the Hon'ble Apex Court. It would be futile exercise if any direction is given to the Ministry once again to give a detailed representation. Instead we would like to direct the concerned authority to refer the matter to the Committee concerned responsible for recommending DACP benefits to re-consider the matter in the light of the representation dated 4.8.2011 made by the applicant, and that too in the wake of the criteria that are found set out in the said O.M.s dated 2008 and 2010 and also the minutes of the meeting of the Committee cited supra as expeditiously as possible, preferably within a period of 3 months from the date of receipt of a copy of this order and communicate the result to the applicant immediately thereafter."

(c) Thereafter, the applicant was granted his promotion as Director Professor w.e.f. 3.6.2010.

(d) As he was denied promotion w.e.f. 29.10.2008, the applicant filed a Contempt Petition bearing No. 64/2016 arising out of O.A. No. 116 of 2013, upon which, the Tribunal, having issued the show cause notice,

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the applicant was granted retrospective promotion but the benefits of such antedated promotion was not granted to him while assigning his seniority in the seniority list of Director – Professor in the Sub-cadre Teaching of Public Health dated 23.5.2017.

(e) As the applicant's representation thereon was not considered, the applicant once again approached the Tribunal in O.A. No. 1152 of 2017 which was disposed of by the Tribunal dated 17.8.2017 by directing the respondent authorities to consider the pending representation of the applicant and to extend benefits, if any, in case the applicant's grievance was found to be genuine.

(f) The respondent authorities, however, appointed a junior as Director, AIH&PH, Kolkata against which the applicant once again approached the Tribunal in O.A. No. 1468 of 2017. The purported junior so appointed as Director, AIH & PH, however, refused to accept the said appointment and thereafter the applicant's seniority list was rectified.

(g) Thereafter, respondent No. 4 in the instant O.A. was appointed as the Director of AIH & PH, Kolkata superseding the applicant upon which the applicant preferred O.A. No. 1600 of 2017 which was disposed of directing respondent No. 3 to pass a reasoned and speaking order and the speaking order was issued on 9.3.2018. As the said reasoned and speaking order had turned down the prayer of the applicant, the applicant was once again constrained to approach this Tribunal in the instant O.A.

The applicant has advanced, inter alia, the following grounds in support of his claim:-

(a) That, the appointment of respondent No. 4, purportedly junior to him, is the result of arbitrary, malicious and opaque decision making; and

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(b) That, the action of the respondent authorities are violative of the provisions of CHS Rules, 2014.

4.1. Both official as well as the private respondent have filed their replies to controvert the claim of the applicant, as follows:-

(a) The post of Director, AIIH & PH is a duty post in SAG Grade and is not a promotional post.

(b) That, a selection committee would be formed with the Chairman/ Member of UPSC as the Chairman and the Secretary, M/o. Health & Family Welfare and other members for recommending appointment in the posts of Special Director General of Health Services, Additional Director General of Health Service or Head of Institutions / Organization / National Programmes which are borne in HAG Grade.

(c) As the post of Director, AIIH & PH is in the SAG Grade, the Selection Committee to recommend his appointment would be chaired by the Secretary Health with DGHS and Additional Health Secretary as members along with recommendations on various administrative posts such as Medical Superintendent of Institutes.

Accordingly, the selection committee meeting dated 31.8.2017 for selection of a suitable officer for the post of Director of AIIH & PH was held under the Chairmanship of then Secretary, Health, the then DGHS as well as the then Additional Secretary Health as members and, that, such committee was formed as per CHS Rules, 2014 for selection of Director of AIIH & PH.

(d) That, according to the gazette notification dated 7.4.2014 (Schedule III of the CHS rules), the post of Director- Professor/Dean/Director/Medical Superintendent/Additional Medical Superintendent comes within the purview of SAG grade of Rs. 10,000/-. Hence, the post of AIIH & PH is a SAG grade post.

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(e) That, the Ministry of Health & Family Welfare had informed the applicant, vide letter dated 19.9.2019 (Annexure R-7 to the reply of official respondents) that, the appointment of respondent No. 4 to the post of Director, AIIH & PH, Kolkata has been made under standard practice and procedure.

4.2. Respondent No. 4, who is the private respondent herein, and who is the Director, AIIH & PH, Kolkata, has, in his reply dated 25.7.2019, reiterated the contentions of the official respondents that the post of Director, AIIH & PH is an SAG grade post and, that, the selection committee constituted to select the Director, AIIH & PH was indeed constituted as per rules.

4.3. Further, in response to the clarifications sought by the Tribunal on 26.8.2019, the respondent authorities have clarified as follows:-

"(i) In which category is the post of Director, AIIH&PH included in the schedule to the recruitment rules?"

In Schedule II of CHS Rules, 2014 under S. No. 4 under the heading Senior Administrative Grade

Other posts (PB-4 Rs. 37400-67000 with Grade Pay of Rs. 10,000/-)
(I) Teaching Specialist Sub-Cadre

Floating Posts

(Director Professor or Dean or Director or Medical Superintendent or Additional Medical Superintendent or Principal)

The post of Director, AIIH & PH, Kolkata is a duty post of Teaching sub-cadre of CHS in SAG as specified in Schedule II of Central Health Service Rules, 2014 and not a promotional post. Any SAG level officer or Teaching sub-cadre may be posted against the post.

(ii) Whether the post of Director, AIIH & PH is a selection post or a non selection post (as claimed by the applicant) to be filled up on the basis of seniority or suitability as mentioned in para 5 of the order dated 09.03.2018 of the respondent authorities.

The post of Director, AIIH & PH is a non-selection post at the level of SAG (Director Professor Level).

A Selection Committee under the Chairmanship of Secretary (Health) met on 31.8.2017 to decide heads of various institutes including the post of Director, AIIH & PH, Kolkata, wherein the name of Dr. Alok Vajpayee, Director Professor (Public Health) was also considered for the post of Director , AIIH&PH. The Selection Committee considered the names for appointment to the post of Director, AIIH&PH, Kolkata on the basis of:

[Signature]

- (a) Seniority of the officer;
- (b) Work and conduct;
- (c) Professional standing; and
- (d) Managerial capability.

(iii) Respondents shall clarify how the inter se seniority between different teaching cadre is maintained.

Central Health Service maintains seniority list of Teaching Specialist in their respective specialties. A combined list of officers in the order of their seniority was prepared for administrative convenience and placed before the Standing Committee.

(iv) That whether the appointment to the post of Director (selection/non selection) requires consultation of the UPSC.

No. The post of Director, AIIH&PH, is filled by posting a Director Professor at the level of SAG and does not require consultation of the UPSC."

5. The primary issue for adjudication in this context is whether the respondent authorities had abided by the CHS Rules, 2014 in selecting respondent No. 4 to the post of Director, AIIH & PH or whether the said selection was violative of rules and tainted with malice and opacity as claimed by the applicant.

6.1. At the outset, we refer to the CHS Rules, 2014 annexed as R-5 to the reply of the Private Respondent No. 4. The following is extracted therefrom:-

1. Short title and commencement - (1) These rules may be called the Central Health Service Rules, 2014

(2) **Definitions** - In these rules unless the context otherwise requires -

- (a) "Commission" means the Union Public Service Commission;
- (b) "Controlling Authority" means the Government of India in the Ministry of Health and Family Welfare;
- (c) "Departmental Promotion Committee" means a Group 'A' Departmental Promotion Committee specified in Schedule IV for considering cases of promotion on confirmation in Group 'A' posts of the Service;
- (d) "Duty Post" means any post, whether permanent or temporary, specified in Schedule II;
- (e) "Dynamic Assured Career Progression Scheme" means the scheme formulated by the Controlling Authority for time bound promotion of the officers of the Service without taking into account the vacancies, on such terms and conditions as may be specified by the Government from time to time;
- (f) "Government" means the Government of India;
- (g) "Grade" means any of the grades specified in Schedule I;
- (h) "Public Health Qualification" means a recognized public health qualification specified in any of the Schedule to the Indian Medical Council Act, 1956 (102 of 1956);
- (i) "Schedule" means a Schedule to these rules;
- (j) "Scheduled Castes" and "Scheduled Tribes" shall have the meanings respectively assigned to them in clauses (24) and (25) of Article 366 of the Constitution.
- (k) "Service" means the Central Health Service.

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(1) "Sub-Cadre" means any of the four streams of the Service, namely, General Duty, Public Health, Non Teaching Specialist and Teaching Specialist, as the case may be;

(3) **Composition of the Service** - All duty posts, included in the Service shall be classified as Central Civil Service Group 'A' and the Grades, Pay Band, Grade Pay or Pay Scale, non-practicing allowance and other matters connected therewith shall be as specified in Schedule-I.

(4) **Authorised strength of the Service** - (1) The authorized strength of the duty posts included in the various grades of the Service on the date of commencement of these rules shall be specified in Schedule-II.

(2) After the commencement of these rules, the authorized permanent strength of the duty posts in the various grades shall be such as may, from time to time, be determined by the Government.

(3) The Government may make temporary addition to, or reduction in, the strength of the duty posts in the various grades as deemed necessary from time to time.

(4) The Government may, in consultation with the Commission, include in the Service any post other than those included in Schedule - II or exclude from the Service a post included in the said Schedule.

(5) The Government may, in consultation with the Commission, appoint an officer whose post is included in the Service under sub-rule (4), to the appropriate grade of the Service in a temporary capacity or in a substantive capacity, as may be deemed fit, and fix his seniority in the grade after taking into account continuous regular service in the analogous grade.

(6) Ten percent of the total number of posts in each Sub-Cadre of Service shall be included in the Service as "training or leave or deputation reserve."

5. Members of the Service - (1) The following persons shall be members of the Service, namely:

(a) persons appointed under sub-rule (5) of rule 4;

(b) persons appointed to duty posts under rule 6; and

(c) persons appointed to duty posts under rule 7.

(2) A person appointed under clause (b) of sub-rule (1) shall, on such appointment be deemed to be the member of the Service in the appropriate grade applicable to him as specified in Schedule - II.

(3) A person appointed under clause (c) of sub-rule (1) shall, be the Member of the Service in the appropriate grade applicable to him in Schedule - II from the date of such appointment.

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8 (1) Seniority - The relative seniority of members of the Service appointed to a grade in the respective Sub-Cadres or in the respective specialty of the Sub-Cadre of the Service, as the case may be, on the date of commencement of these rules shall be as determined by the Government:

Provided that if the seniority of any such member had not been specifically determined on the said date, the same shall be determined on the basis of the rules governing the fixation of seniority as were applicable to the members of the Service prior to the commencement of these rules.

(2) The seniority of officers appointed to the Service other than those appointed under rule 5 shall be determined in accordance with the general instructions issued by the Government in the matter from time to time.

(3) The seniority of persons appointed to the Service in accordance with sub-rule (5) and rule 4 shall be fixed in the manner provided therein.

(4) The seniority of a person in all the Sub-Cadres who are promoted to the posts upto the level of Senior Administrative Grade shall be same as the relative seniority in the lower grade within Sub-Cadre from which they are promoted;

(5) In cases not covered by this rule, seniority shall be determined by the Government in consultation with the Commission."

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SCHEDULE II
 [See rule 2(d) and rule 4]

HIGHER ADMINISTRATIVE GRADE

S. No.	Designation	Number of posts (2014)
	MINISTRY OF HEALTH AND FAMILY WELFARE	
1.	Director General of Health Service	01
2.	Special Director General of Health Service (Public Health and Medical Education of Medical Services)	02
3.	Additional Director General of Health Services or Head of Institutions and Organizations or National Programmes	16* (Out of these 6 are floating posts)
4.	Senior Administrative Grade Other Posts (PB-4 Rs. 37,400-67,000 with Grade Pay of Rs. 1000/-) (i) Teaching Specialist Sub-Cadre Floating Posts (Director - Professor or Dean or Director or Medical Superintendent or Additional Medical Superintendent or Principal)	78

(emphasis supplied)

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SCHEDULE - III
 [see rule 6(2)]

S. N. o.	Name of the post	Method of recruitment for promotion	Field of selection and minimum qualifying service
II.	Teaching Specialist Sub-Cadre Posts (a) Senior Administrative Grade (b) Professor	<p>Promotion by selection without taking into account the vacancies failing which by direct recruitment</p> <p>Promotion by selection without taking into account the vacancies failing which by direct recruitment</p>	<p>Professors in Pay Band-4, Rs. 37,400-67,000 with Grade Pay of Rs. 8700 with seven years regular service in the grade</p> <p>Associate Professor in Pay Band -3, Rs. 15,600-39,100 with Grade Pay of Rs. 7600 with four years' regular service in the grade.</p> <p>Note - the period of Senior residency before joining as Assistant Professor in the Service shall be counted towards computing the total experience required for the post of Professor or Associate</p>

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			professor in accordance with the regulations made by Medical Council of India
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SCHEDULE - IV

[See rule 2(c) and 6(3)(i) and 6(5)]

II. TEACHING SPECIALIST SUB-CADRE POSTS

(a) For the post of Senior Administrative Grade

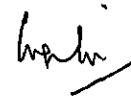
(i)	Secretary, Ministry of Health and Family Welfare	Chairman
(ii)	Director General of health Services or his nominee	Member
(iii)	Any Additional Secretary in the Ministry of Health And Family Welfare	Member"

(emphasis supplied)

From the perusal of the CHS Rules, 2014 read with the clarifications offered by the respondents on 26.8.2019, it is established that the post of Director – AIIH & PH is a floating post, meaning thereby the post is not settled permanently with reference to a particular post, but could be equated variably with the posts of Director Professor/Dean/Director/Medical Superintendent/ Additional Medical Superintendent or Principal. It has also been categorically affirmed by the respondents that the post is not a promotional post and, that, being in the nature of a floating post, any SAG level officer of the Teaching Staff cadre may be posted against the said post of Director AIIH & PH.

Consequently, the post not being a promotional one, the issue of seniority per se cannot be the primary criteria in deciding on selection to the said post. The basic principle, as affirmed in the supplementary reply of the respondents, is that the selection committee would recommend the name to the post of Director, AIIH & PH, Kolkata on the basis of "seniority-cum-suitability".

6.2. The respondents have clarified both in their speaking order dated 9.3.2018 as well as in their reply, that, the selection committee which was constituted as per the provisions of Schedule IV to the CHS Rules,



2014 was correctly constituted comprising the Secretary, Ministry of Health and Family Welfare as Chairman and the Director General of Health Services as well as Additional Secretary in the Ministry of Health and Family Welfare as members.

The said selection committee also decided ab initio, the criteria to decide on the seniority cum suitability of the incumbents in the zone of consideration. Such criteria, as revealed in the speaking order dated 9.3.2018, were as follows:-

- (a) Seniority of the officer;
- (b) Work and conduct;
- (c) Professional standing; and
- (d) Managerial capability.

Upon an analysis of findings in paras 6.1 & 6.2 above, we arrive at the following conclusions:

- (i) The provisions of CHS 2014 were followed appropriately by the respondent authorities as reiterated in their communication dated 19.9.2018 at Annexure R-7 to the reply of the official respondents.
- (ii) The selection committee was constituted correctly in terms of Schedule IV of CHS Rules, 2014.
- (iii) The post, being non-promotional, had to be filled up by an incumbent, who would be the best among those in the Zone of consideration on the grounds of seniority cum suitability.
- (iv) The selection committee had decided on a set of criteria to be applied to all incumbents within the zone of consideration to make proper recommendations for the post of Director, AIIH & PH, Kolkata. Hence, the allegations of opacity and malice, are not substantiated.

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6.3. Selection and promotion are basically different concepts. Government, as the employer, is the sole judge to decide on the method of selection to be adopted for filling up a selection post, so as to decide who is the most suitable candidate for being so appointed.

In ***Dr. Jai Narayan Misra v. State of Bihar, AIR 1971 SC 1318***, the Hon'ble Apex Court ruled that since the post is admittedly a selection post, seniority was not relevant in making the selection.

In ***State of West Bengal v. Manas Kumar Chakraborty, (2003) 2 SCC 604***, it was held that where the post is a selection post, selection should be on merit cum seniority and when merit is considered on the basis of past record, credibility and confidence as well as the sensitive nature of the post, the selection of such a person cannot be faulted.

More particularly, after discussing decisions in ***Govt. of India v. C. Dinakar, 1999 SCC (L&S) 966*** and ***Vineet Narain v. Union of India, 1998 (1) SCC 226***, the Hon'ble Court held as follows:-

“.....We are, therefore, unable to accept the contention of the respondent that deployment of an incumbent in such a post can go only by seniority. Merit in the nature of past record, the credibility and confidence which one is able to command with the Government of the State must play a predominant role in selection of an incumbent to such a post. In the opinion of the appointing authority, the second respondent was the most suitable one. It is not open to the courts to sit in appeal over the view taken by the appointing authority in such a case or substitute its own view for that of the duly constituted authority.”

In ***Indian Airlines Corporation v. Capt. K.C. Shukla, (1993) 1 SCC 17***, the Hon'ble Apex court has ruled that where the post should be filled up by promotion or by selection is a matter to be governed by promotion and recruitment rules, and, as long as the rules are valid, the Courts will have little jurisdiction to interfere with it.

In the instant matter, the applicant has not challenged the rules of CHS, 2014 which continues to retain its validity.

In his written notes, Ld. Counsel for the applicant tried to reason (with reference to DOPT instructions) that consultation with UPSC was

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mandatory as promotion to revised pay scale of Rs. 12,000-16,900/- and above are by way of selection and not seniority cum fitness. A reference was also made to para 7 (page 852) of Swamy's Establishment & Administration, as follows:-

"7. Where the promotions are to be made on 'non-selection' basis according to Recruitment Rules, the DPC need not make a comparative assessment of the records of officers and it should categorize the officers as 'fit' or 'not yet fit' for promotion on the basis of assessment of their record of service. While considering an officer 'fit' guidelines in Para 6.1.4 should be borne in mind. The officers categorized as 'fit' should be placed in the panel in the order of their seniority in the grade from which promotions are to be made."

This logic is not convincing. Once, the Recruitment Rules specifies the post as 'floating' as against 'promotional' and, as the RR remains unchallenged, we would continue to hold that the post is not a promotional post.

7. It has been established undisputedly that the post being an SAG post of a nature of floating category; hence over dependence on seniority is ruled out. We do not find that there has been any violation in abiding by the recruitment rules by the respondent authorities. Hence, following the ratio in *Indian Airlines (supra)* we are of the considered view that there is no scope of interference with the orders of the respondent authorities in selecting respondent No. 4 as the Director of AIIH&PH, Kolkata.

8. In his rejoinder, the applicant has raised the issue that, despite being senior, he would have to report to respondent No. 4 as his Director and that respondent No. 4 would be the reporting officer of the applicant while his ACR/APARs are being finalized. In *State Bank of India v. Kashinath Kher AIR 1996 SC 1326*, it has been ruled that confidential reports should be written by a superior officer who supervises the performance of employer reported upon and, that, the reporting authority should be the immediate superior officer.

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Admittedly, respondent No. 4 is not the immediate superior officer of the applicant.

Accordingly, although we are of the considered view that the claim fails, we would direct the respondent authorities that the respondent No. 4 should not be entrusted as the reporting officer of the applicant and that the reporting officer of the applicant ought to be the next higher level authority and his next immediate superior.

With these directions, the O.A. is disposed of. There will be no orders on costs.

*(Dr. Nandita Chatterjee)
Administrative Member*

*(Bidisha Banerjee)
Judicial Member*

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