

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extra-Ordinary Jurisdiction)

SINGLE BENCH: BHASKAR RAJ PRADHAN, JUDGE.

W.P. (C) No. 70 of 2016

Miss Dibya Gurung, Petitioner.
 D/o Shri Kharka Bahadur Gurung,
 R/o Namnang, Gangtok,
 P.O. & P.S. Gangtok,
 East Sikkim.

versus

1. State of Sikkim
 Through the Chief Secretary,
 Government of Sikkim, Gangtok, East Sikkim.
2. The Secretary,
 Sikkim Public Service Commission,
 Government of Sikkim, Gangtok, East Sikkim.
3. The Secretary,
 Council of Architecture,
 (A statutory body of government of India under Architects
 Act, 1972)
 India Habitat Centre, Core – 6 A, 1st Floor,
 Lodhi Road, New Delhi-110 003.
4. Miss Oshin Rahul Gurung,
 D/o Shri P.M. Gurung (Divisional Engineer)
 Rural Management & Development Department,
 Sub-Division-Jorethang, Government of Sikkim,
 South Sikkim.

.... Respondents.

Application under Article 226 of the Constitution of India.

Appearance:

Mr. Rinzing Dorjee Tamang, Ms. Sonam Chhoden
 Bhutia, Advocates for the Petitioner.

Mr. Karma Thinlay, Senior Govt. Advocate with Mr.
 Thinlay Dorjee, Govt. Advocate and Mr. S. K. Chettri
 Assistant Govt. Advocate for Respondent No. 1.

Mr. Bhusan Nepal, Advocate for Respondent No.2.

Mr. Ajay Rathi and Ms. Phurba Diki Sherpa Advocates for Respondent No.3.

Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chhetri, Advocate for Respondent No. 4.

JUDGMENT

(10.04.2018)

Bhaskar Raj Pradhan, J

1. The Petitioner, an “*Architect*” by profession has preferred the present Writ Petition challenging the selection of Respondent No. 4 for the post of “*Assistant Architect*” by the Respondent No. 2 (Sikkim Public Service Commission) on the ground that at the time of selection of the Respondent No. 4 to the post of “*Assistant Architect*” she was not a registered “*Architect*” under the Architect’s Act, 1972 and therefore, ought not to have been selected by the Respondent No.2.

2. The factual matrix of the present dispute lies in a narrow compass. The Petitioner graduated in the Bachelor of Architecture in the year 2014. The Respondent No. 4 graduated in the Bachelor of Architecture with a First Class in the year 2015. The Petitioner registered herself as an “*Architect*” with the Respondent No. 3 (Council of Architecture) and possesses a valid certificate of registration effective from 20.06.2016. The Respondent No.4 applied for registration with the Respondent No.3 on 15.12.2016 and was duly registered vide registration No. AC/2016/60614 on 31.12.2016 six months after the Petitioner.

3. It is an admitted position that the Architects Act, 1972 has not been enforced in Sikkim. It is the categorical submission of the State of Sikkim (Respondent No.1) that it is so. Article 371 F of the Constitution of India is a special provision with respect to the State of Sikkim. Article 371 F (n) provides:

“Notwithstanding anything in this Constitution,- the President may, by public notification, extend with such restrictions or modifications as he thinks fit to the State of Sikkim any enactment which is in force in a State in India at the date of the notification;”.

4. Article 371 F of the Constitution of India was inserted by the Constitution (Thirty-sixth Amendment) Act, 1975 with effect from 26.04.1975. Thus, any enactment which is in force in a State of India at the date of the notification is required to be extended by the President by way of a public notification.

5. The Architects Act, 1972 was an enactment which was in force in a State of India at the date of the notification and thus, the said enactment was required to be extended by the President by way of public notification.

6. On 28.06.2001 the Department of Personnel, Administrative Reforms & Training, Government of Sikkim issued Notification No.42/GEN/DOP bringing into force the Sikkim State Architect Service Recruitment Rules, 2001 which was published in the Sikkim Government Gazette on 05.07.2001. Under Rule 3 thereof the Method of Recruitment, age limit, qualification and other matters relating to said post shall be as specified in Columns 5 to 9 of the Schedule. The Schedule prescribed a degree of a recognized University in

Architecture as the educational qualification required for direct recruitment to the post of “Assistant Architect”. There were 9 posts of “Assistant Architects” in the Sikkim State Architects Service in the year 2001 which was subsequently raised to 14 vide Notification No.J(80)/147/GEN/DOP dated 21.07.2008 published in the Sikkim Government Gazette on 19.08.2008.

7. On 10.03.2016, much before the Petitioner as well as the Respondent No.2 became registered “Architects”, the Respondent No.2 issued an advertisement inviting applications from eligible local candidates for filling up four posts of “Assistant Architects” on temporary regular basis in four categories i.e., unreserved, Bhutia-Lepcha, Other Backward Classes (Central List) and Other Backward Classes (State List). A degree in Architecture from a recognized University was one of the conditions of eligibility under the requirement of minimum educational qualification. It was also provided that in accordance with Notification No.44/GEN/DOP dated 27.10.2015 candidates who are in the final/semester of the prescribed course shall be accepted provided such candidates have cleared all the previous semesters at the time of submission of application and subject to submission of the final year results on or before the dates specified by Respondent No.2 before the interview. It was provided that failure to submit the proof of essential educational qualification by prescribed date shall make the application of such candidates liable to be rejected without assigning any reason thereof. The duty of the said post of “Assistant Architect”

was also notified as “*designing of buildings*”. In paragraph 6 of the said advertisement it was provided that the candidates need not submit any documents; however, the candidate should ensure that they are qualified on the date of interview in all respect. This paragraph was repeatedly emphasized by the Learned Counsel appearing for the Petitioner. He submits under the said clause the requirement that the candidate should ensure they are qualified on the date of interview “*in all respect*” would only mean that the candidate must also be a registered “*Architect*” on or before the date of interview. This argument of the Learned Counsel appearing for the Petitioner would stem from his pivotal argument that although the Architects Act, 1972 has not been enforced in Sikkim it has been applied and followed and therefore a law which is binding and thus as per the definition of the term “*Architect*” as defined in Section 2(a) of the Architects Act, 1972 the use of the words “*Assistant Architect*” in the advertisement could only mean a person whose name is for the time being entered in the register maintained by the Respondent No. 3 prepared and maintained under Section 23 thereof. In such circumstances, a Division Bench of this Court in re: ***Dal Bahadur Lama v. Smt. Ratna Kumari Basnet***¹ had held the stringent provisions of the Act would not govern the case.

8. The application form was required to be filled up by the candidate and submitted in the office of the Respondent No. 2 on any working day between 10.30 a.m. to 3.30 p.m. along with the

¹ AIR 1986 Sikk 10

original bank receipt of State Bank of Sikkim, for Rs.150/- credited to '0051-SPSC'. The complete filled in application form was required to reach the Secretary of the Respondent No. 2 by hand or by post on or before 3.00 p.m. on 09.04.2016. No application submitted after 3.00 p.m. on 09.04.2016 would be accepted.

9. Those candidates who would qualify in the written examination were to be called for interview.

10. There was no requirement of the applicant to be a registered "*Architect*" in the advertisement. The very fact that in the conditions of eligibility one of the provisions permitted candidates who are in the final/semester of the prescribed course to participate in the examination provided that such candidates had cleared all the previous semesters at the time of submission of applications and subject to submission of the final year result on or before the date specified by the Respondent No.2 before the interview in accordance with Notification No.44/GEN/DOP dated 27.10.2015 would clearly reflect the intention of the Respondent No.2 that the eligibility condition for the post of "*Assistant Architect*" was as provided in the Schedule to the Sikkim Architect Service Recruitment Rules, 2001 and no more.

11. The Petitioner belonging to the "*Gurung*" Community and falling in the Other Backward Classes (Central List) reserved category submitted her application for the said post. So did the

Respondent No. 4 who also belongs to the same reserved category. On the date of submission of the application i.e. 09.04.2016 both the Petitioner as well as the Respondent No.4 had not registered themselves with the Respondent No.3 as an “*Architect*” since admittedly the Petitioner was registered only on 20.06.2016 and Respondent No.4 was registered on 31.12.2016. Even then the Petitioner without any hesitation or protest submitted her application. The Respondent No.4, oblivious of the future action that the Petitioner would take on the legal premise sought to be canvassed before this Court, also applied for the said post.

12. The Respondent No.2 vide Notice No. 143/SPSC/2016 dated 10.06.2016 fixed the date for written examination for the post of “*Assistant Architect*” under the Sikkim State Architect Service on 02.07.2016.

13. The Petitioner as well as the Respondent No. 4 appeared in the said examination held on 02.07.2016 and qualified for the *viva-voce* as notified vide Notice No. 149/SPSC/Exam/2016 dated 04.08.2016. In the notice the roll numbers of all the candidates who had been short-listed in the written examination was notified. By the said Notice the short-listed candidates were required to report to the examination section of the Respondent No. 2 on 18.08.2016 along with the attested copies of all the required documents mentioned therein for the purpose of scrutiny and verification. Amongst others, the degree certificate and mark-sheet were also required to be scrutinized. Again there

was no requirement of the applicant submitting her/his registration certificate issued by the Respondent No.3 registering her/him as an “*Architect*”. On the date of scrutiny and verification of documents i.e. 18.08.2016 the Petitioner was a registered “*Architect*”. However, the Respondent No.4 was not. The learned Counsel for the Petitioner submits that the Respondent No.4 ought to have known that under the Architects Act, 1972 she must mandatorily register herself as an “*Architect*” and consequently ensure her registration prior to the date of verification of documents as was done by the Petitioner. There is a fundamental flaw in this argument which ignores the fact that the advertisement did not seek for the registration document at any stage and there was no requirement for the applicant to have been a registered “*Architect*” neither at the time of the application nor at the time of verification or scrutiny of documents. Even otherwise, the Petitioner did not protest against the short-listing of the Respondent No.4. It is difficult to appreciate that a graduate in Architecture would have the necessary legal acumen to appreciate that in spite of the Architects Act, 1972 not having been enforced and the advertisement not having asked for it, would know that the mandate of the said Architects Act, 1972 was applicable and consequently, ensured her registration as an “*Architect*” with the Respondent No. 3 prior to the date of scrutiny.

14. The post of “*Assistant Architect*” falls under the Sikkim State Architect Service Recruitment Rules, 2001 made under the

proviso to Article 309 of the Constitution of India. Under the Schedule thereto the 14 posts of “Assistant Architects” belongs to the junior grade in the scale of pay of Rs.7000-225-11500. The method of recruitment is 100% by direct recruitment. The eligibility condition required for direct recruitment, *inter-alia*, is a degree of a recognized university in Architecture. There is no requirement in the eligibility condition to be a registered “Architect”. The said Sikkim State Architect Service Recruitment Rules, 2001 is not under challenge.

15. In the meanwhile the Petitioner filed Right to Information (RTI) application with the Buildings & Housing Department, Government of Sikkim seeking certain information which would be replied on the same date by the said Department on 12.07.2017.

16. Both the Petitioner as well as the Respondent No. 4 appeared for the *viva-voce* held on 23.08.2016 whose result was notified vide Notice Reference No.154/SPSC/2016 dated 27.08.2016. The Respondent No. 4 along with three others was declared qualified and their names recommended for appointment as “Assistant Architect”. Admittedly, the Petitioner fell in the fifth place in the merit list as would be seen from the statement of marks obtained in written examination and *viva-voce* for the post of “Assistant Architect” filed by the Respondent No.4 and stood unqualified and was not recommended for appointment. The Petitioner has not challenged the merits of the selection process and admits her position in the merit list.

17. The Respondent No. 2 vide communication bearing reference No. 604/SPSC/2016 dated 31.08.2016 to the Commissioner-cum-Secretary, Department of Personnel Administrative Reforms & Trainings informed that 17 applications had been received and all the applicants had appeared in both sessions of written examination held on 02.07.2016. Out of them a total of 7 candidates had qualified at the ratio of 1:2 and call for interview. On the basis of the marks obtained in written examination and interview the following candidates had been declared qualified in the order of merit and the names of the selected candidates were recommended for appointment:

Roll No.	CANDIDATE NAME	ROSTER POINT ALLOTTED
16754009	NISHA LAMICHANEY	UR / 01
16754011	PENZANG DORJEE LEPCHA	BL / 02
16754013	SAMJANA PRADHAN	OBC (SL)/04
16754010	OSHIN RAHUL GURUNG	OBC (CL)/03

18. On 07.12.2016 the Petitioner issued a legal notice demanding justice to the Chief Secretary, Home Department, Government of Sikkim as well as the Respondent No.2. For the first time the Petitioner protested about the selection of the Respondent No.4 to the post of “Assistant Architect” as the Respondent No.4 was not a registered “Architect”. This solitary fact was also the sole ground for the demand for justice.

19. The Petitioner, aggrieved by the fact that although the legal notice demanding justice had been duly received no action was taken by the State-Respondents approached this Court by filing the present Writ Petition on 28.10.2017 seeking to quash the selection of Respondent No.4 for the post of “Assistant Architect” and further for the Petitioners’ selection to the said post. Again, the failure to register herself as a registered “Architect” is the sole ground of attack on the Respondent No.4 by the Petitioner in the present Writ Petition.

20. The Sikkim State Architect Service Recruitment Rules, 2001 is not under challenge in the present proceedings, nor is the advertisement or the Office Order No. 2422/G/DOP dated 28.12.2016 appointing the Respondent No. 4 as “Assistant Architect” in the junior grade of the Sikkim State Architect Service Recruitment Rules, 2001. All that the Petitioner seeks is the quashing of the selection of the Respondent No.4 and the selection of the Petitioner to the post of the “Assistant Architect” not on the ground of merit but on the sole ground that the Respondent No. 4 was not a registered “Architect” on the date of scrutiny.

21. Mr. Karma Thinlay, Learned Senior Government Advocate would raise a preliminary objection on the *locus standi* of the Petitioner to approach this Court challenging the selection of Respondent No.4 after having consciously participated in the selection process without any protest and having failed in the said selection. Mr. Karma Thinlay would submit, and quite

correctly, that it is settled law that when a candidate appears at an examination without objection and is subsequently found to be not successful a challenge to the process is precluded. Mr. Karma Thinlay would rely on the judgment of the Supreme Court in re: **Ramesh Chandra Shah & Ors. v. Anil Joshi & Ors.**² in which it was held:

“18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

19. One of the earliest judgments on the subject is Manak Lal v. Prem Chand Singhvi [AIR 1957 SC 425]. In that case, this Court considered the question whether the decision taken by the High Court on the allegation of professional misconduct levelled against the appellant was vitiated due to bias of the Chairman of the Tribunal constituted for holding inquiry into the allegation. The appellant alleged that the Chairman had appeared for the complainant in an earlier proceeding and, thus, he was disqualified to judge his conduct. This Court held that by not having taken any objection against the participation of the Chairman of the Tribunal in the inquiry held against him, the appellant will be deemed to have waived his objection. Some of the observations made in the judgment are extracted below: (AIR pp. 431-32, paras 8-9)

“8. ... If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time. ...

9. From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for a fresh enquiry and thus gain time. ... Since we have no doubt that the appellant knew the material facts and must be deemed to

² (2013) 11 SCC 309

have been conscious of his legal rights in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.”

20. *In G. Sarana v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] , this Court held that the appellant who knew about the composition of the Selection Committee and took a chance to be selected cannot, thereafter, question the constitution of the Committee.*

21. *In Om Prakash Shukla v. Akhilesh Kumar Shukla [1986 Supp SCC 285 : 1986 SCC (L&S) 644] , a three-Judge Bench ruled that when the petitioner appeared in the examination without protest, he was not entitled to challenge the result of the examination. The same view was reiterated in Madan Lal v. State of J&K [(1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603] in the following words: (SCC p. 493, para 9)*

“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. In Om Prakash Shukla v. Akhilesh Kumar Shukla [1986 Supp SCC 285 : 1986 SCC (L&S) 644] it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.”

22. *In Manish Kumar Shahi v. State of Bihar [(2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256] , this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16)*

“16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

23. *The doctrine of waiver was also invoked in Vijendra Kumar Verma v. Public Service Commission [(2011) 1 SCC 150 : (2011) 1 SCC (L&S) 21] and it was held: (SCC p. 156, para 24)*

“24. When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.”

24. *In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.”*

22. In re: **Ashok Kumar v. State of Bihar**³ the Supreme Court would examine the various judgments rendered by it earlier and ultimately hold thus:-

“12. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.

13. *The law on the subject has been crystallised in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla [Chandra Prakash Tiwari v. Shakuntala Shukla, (2002) 6 SCC 127 : 2002 SCC (L&S) 830] , this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is*

³ (2017) 4 SCC 357

precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India v. S. Vinodh Kumar* [*Union of India v. S. Vinodh Kumar*, (2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792], this Court held that: (SCC p. 107, para 18)

“18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See *Munindra Kumar v. Rajiv Govil* [*Munindra Kumar v. Rajiv Govil*, (1991) 3 SCC 368 : 1991 SCC (L&S) 1052] and *Rashmi Mishra v. M.P. Public Service Commission* [*Rashmi Mishra v. M.P. Public Service Commission*, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345].)”

14. The same view was reiterated in *Amlan Jyoti Borooah* [*Amlan Jyoti Borooah v. State of Assam*, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] wherein it was held to be well settled that the candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

15. In *Manish Kumar Shahi v. State of Bihar* [*Manish Kumar Shahi v. State of Bihar*, (2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256], the same principle was reiterated in the following observations: (SCC p. 584, para 16)

“16. We also agree with the High Court [*Manish Kumar Shahi v. State of Bihar*, 2008 SCC OnLine Pat 321 : (2009) 4 SLR 272] that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in *Madan Lal v. State of J&K* [*Madan Lal v. State of J&K*, (1995) 3 SCC 486 : 1995 SCC (L&S) 712], *Marrupati Nagaraja v. State of A.P.* [*Marrupati Nagaraja v. State of A.P.*, (2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68], *Dhananjay Malik v. State of Uttaranchal* [*Dhananjay Malik v. State of Uttaranchal*, (2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005 : (2008) 3 PLJR 271], *Amlan Jyoti Borooah v. State of Assam* [*Amlan Jyoti Borooah v. State of Assam*, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] and *K.A. Nagamani v. Indian Airlines* [*K.A. Nagamani v. Indian Airlines*,.”

16. In *Vijendra Kumar Verma v. Public Service Commission* [*Vijendra Kumar Verma v. Public Service Commission*, (2011) 1 SCC 150 : (2011) 1 SCC (L&S) 21], candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

17. In *Ramesh Chandra Shah v. Anil Joshi* [*Ramesh Chandra Shah v. Anil Joshi*, (2013) 11 SCC 309 : (2011) 3 SCC (L&S) 129] , candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18)

“18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.”

18. In *Chandigarh Admn. v. Jasmine Kaur* [*Chandigarh Admn. v. Jasmine Kaur*, (2014) 10 SCC 521 : 6 SCEC 745] , it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In *Pradeep Kumar Rai v. Dinesh Kumar Pandey* [*Pradeep Kumar Rai v. Dinesh Kumar Pandey*, (2015) 11 SCC 493 : (2015) 3 SCC (L&S) 274] , this Court held that: (SCC p. 500, para 17)

“17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted.”

This principle has been reiterated in a recent judgment in *Madras Institute of Development Studies v. K. Sivasubramaniyan* [*Madras Institute of Development Studies v. K. Sivasubramaniyan*, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164 : 7 SCEC 462] .

“19. In the present case, regard must be had to the fact that the appellants were clearly on notice, when the fresh selection process took place that written examination would carry ninety marks and the interview, ten marks. The appellants participated in the selection process. Moreover, two other considerations weigh in balance. The High Court noted in the impugned judgment that the interpretation of Rule 6 was not free from vagueness. There was, in other words, no glaring or patent illegality in the process adopted by the High Court. There was an element of vagueness about whether Rule 6 which dealt with promotion merely incorporated the requirement of an examination provided in Rule 5 for direct recruitment to Class III posts or whether the marks and qualifying marks were also incorporated. Moreover, no prejudice was established to have been caused to the appellants by the 90 : 10 allocation.”

23. In the present case on the date of the advertisement dated 10.03.2016 the Petitioner was admittedly not a registered “*Architect*”. The advertisement dated 10.03.2016 also did not prescribed any requirement for the applicant to be a registered “*Architect*”. Nevertheless, the Petitioner admittedly submitted her application for the post of “*Assistant Architect*” on or before 09.04.2016 (i.e. the last date of submission of application as per the advertisement dated 10.03.2016) knowing well that she was even by then not a registered “*Architect*”. Between the date of advertisement and the date of submission of application there was a gap of one whole month for the Petitioner to take recourse to the law and challenge the advertisement which was not done. The Petitioner appeared in the written examination held on 02.07.2016 on which date she was a registered “*Architect*” knowing well that the advertisement had not prescribed any requirement for the applicants to be a registered “*Architect*” for the post of “*Assistant Architect*” as well as the fact that therefore there would have been other applicants who may not have been a registered “*Architect*” on the date of the advertisement or on the date of submission of the applications. On 04.08.2016 after a month of the written examination when the names of the successful candidates in the written examination were notified by the Respondent No.2 it was clear that both the Petitioner as well as the Respondent No. 4 had cleared the written examination. Even then the Petitioner participated in the subsequent *viva-voce* held on 23.08.2016 nearly a month

thereafter along with other applicants including the Respondent No. 4 who had succeeded in the written examination. The Petitioner did not object to the participation of the Respondent No.4 in the written examination as well as the *viva-voce*.

24. Admittedly, the Petitioner had filed a Right to Information application on 12.07.2017 with the Buildings & Housing Department, raising three questions which were all answered by the said Department on the same date. The said questions and answers were as follows:-

“a) Is the Council of Architecture regulations under the Architects Act, 1972 followed in the State of Sikkim?”

Ans: Yes, it is being followed.

b) Is adherence to the said norms and registration with the Council of Architecture mandatory for functioning as an Architects in the State of Sikkim?”

Ans: Yes, it is mandatory.

c) Is Registration with the Council of Architecture mandatory to be recruitment as an Architect under the Government of Sikkim?”

Ans: Since the regulations under the Council of Architecture are being followed, registration is mandatory.”

25. Significantly, therefore, on 12.07.2017 much before the names of successful candidates had been notified on 04.08.2016 and *viva-voce* held on 23.08.2016 the Petitioner was informed that the Council of Architecture Regulations under the Architects Act, 1972 had been followed in the State of Sikkim and that adherence to the said norms and registration with the Council of “Architecture” was mandatory for functioning as an “Architect”. In spite of the same, the Petitioner participated in the *viva-voce* without any protest with the Respondent No. 4 on 23.08.2016

and was declared unsuccessful in the combined selection merit list of the written examination as well as the *viva-voce* on 27.08.2016. In such circumstances, the law which is well settled by the Supreme Court that a candidate who participates in the selection process knowing well the procedure set down therein is not entitled to question the same upon being declared unsuccessful, would squarely apply to the Petitioner.

26. From the chronology of the events as set out hereinabove it is quite evident that the Petitioner started the exercise of seeking and gathering information about the requirement of registration of “Architects” in Sikkim after having appeared in the written examination on 02.07.2016. The Petitioner has nowhere averred in the Writ Petition that she had submitted her registration certificate at the time of submission of documents on 18.08.2016 along with the attested copies of all the required documents mentioned in Notice No. 149/SPSC/Exam/2016 dated 04.08.2016 for the purpose of scrutiny and verification. Evidently, the objection of the Petitioner against the Respondent No. 4 that she was not a registered “Architect” was an afterthought solely for the purpose of taking advantage of her being registered as an “Architect” six months prior to the Respondent No.4’s registration to the Petitioner’s benefit and to the detriment of the Respondent No. 4. To allow such an objection to succeed would result in nullifying the merit of the Respondent No. 4 in the written examination as well as *viva-voce* and permitting the Petitioner to dislodge the Respondent No. 4 in

the merit list although admittedly the Petitioner was below the Respondent No. 4 in merit. This would be impermissible as the principal of *waiver* would also operate against the Petitioner. Further, it is quite evident that there is no fault of the Respondent No.4 in this entire situation.

27. The matter could have rested at that but the Petitioner also contends that although the Architects Act, 1972 has not been enforced in Sikkim, the State-Respondents have all along applied the said Act in Sikkim and thus the use of the word “*Assistant Architect*” to define the post in the advertisement could only mean a registered “*Architect*” as defined in Section 2(a) of the Architects Act, 1972. This plea, weighty as it seems, in the fact of the present case, need only be mentioned to be rejected in *limine*. If that be so, the Petitioner ought not to have applied for the post of “*Assistant Architect*” when admittedly on the date of the application the Petitioner was not a registered “*Architect*”. Thus, although the Learned Counsel appearing for the Petitioner has made extensive and impressive arguments basing his plea under the Architects Act, 1972 this Court shall refrain from venturing any finding on the same and leave the question open to be decided appropriately in another case. It is seen that the Respondent No.4 is now a registered “*Architect*” falling within the definition of the said term in Section 2(a) of the Architects Act, 1972 and as such there would be no impediment for her to hold the post of “*Assistant Architect*”.

28. The Writ Petition is dismissed. Parties to bear their respective costs.

(Bhaskar Raj Pradhan)
Judge
10.04.2018

Approved for reporting: yes.
Internet: yes.

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