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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION ST. NO. 9195 OF 2021

Manoj Mohan Mahind & Ors.	.. Petitioners
Versus	
State of Maharashtra & Ors.	.. Respondents

**WITH
WRIT PETITION ST. NO. 1153 OF 2020**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Gaikwad Swapnil Satish & Ors.	.. Respondents

**WITH
WRIT PETITION ST. NO. 1154 OF 2020**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Namrata Nitin Dhumey & Anr.	.. Respondents

**WITH
WRIT PETITION ST. NO. 2220 OF 2020**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Roopchand Bhendarkar & Anr.	.. Respondents

**WITH
WRIT PETITION NO. 121 OF 2021**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Sachin Uttamrao Pawar & Ors.	.. Respondents

**WITH
WRIT PETITION ST. NO. 4472 OF 2020**

**Maharashtra Public Service
Commission** .. Petitioner
Versus
**Dr. Poonam Vinayakrao Gaikwad
& Ors.** .. Respondents

**WITH
WRIT PETITION ST. NO. 9856 OF 2022**

**Maharashtra Public Service
Commission** .. Petitioner
Versus
**Dr. Siddharth Bhalchandra Deshmukh
& Anr.** .. Respondents

**WITH
WRIT PETITION ST. NO. 9858 OF 2022**

**Maharashtra Public Service
Commission** .. Petitioner
Versus
Dr. Priyanka B. Thakare & Ors. .. Respondents

**WITH
WRIT PETITION ST. NO. 10037 OF 2022**

**Maharashtra Public Service
Commission** .. Petitioner
Versus
Dr. Mahendra Wankhade & Anr. .. Respondents

**WITH
WRIT PETITION NO. 7201 OF 2019**

Shri Milind Chattaranjan Bagul .. Petitioner
Versus
**Miss. Ruchita Vasant Somane @
Mrs. Ruchita Sandeep Rane & Ors.** .. Respondents

**WITH
WRIT PETITION NO. 9420 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner**
Versus
Dr. Kshitij Digambar Lohite & Ors. .. Respondents

**WITH
WRIT PETITION ST. NO. 27645 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner**
Versus
**Dr. Saiprasad Digambarrao Shinde
& Anr. .. Respondents**

**WITH
WRIT PETITION ST. NO. 27647 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner**
Versus
Dr. Sandip Dagadu Ahire & Anr. .. Respondents

**WITH
WRIT PETITION NO. 2985 OF 2020**

**Maharashtra Public Service
Commission .. Petitioner**
Versus
Dr. Archana Nanarao Bhingare & Ors. .. Respondents

**WITH
WRIT PETITION ST. NO. 28560 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner**
Versus
Dr. Swapnil Narendra Ghawade & Ors. .. Respondents

**WITH
WRIT PETITION ST. NO. 28562 OF 2019**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Bhupesh Mohanrao Dahat & Anr.	.. Respondents

**WITH
WRIT PETITION NO. 1993 OF 2020**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Pritee Prakash Sirsat & Ors.	.. Respondents

**WITH
WRIT PETITION ST. NO. 28567 OF 2019**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Pradeep Digambarrao Myakalwar & Ors.	.. Respondents

**WITH
WRIT PETITION ST. NO. 28568 OF 2019**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Pradeep Sonwane & Ors.	.. Respondents

**WITH
WRIT PETITION ST. NO. 28610 OF 2019**

Maharashtra Public Service Commission	.. Petitioner
Versus	
Dr. Arun Rathod & Ors.	.. Respondents

**WITH
WRIT PETITION ST. NO. 28651 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Amol Kute & Ors. .. Respondents**

**WITH
WRIT PETITION NO. 3063 OF 2020**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Manoj A. Margiya & Ors. .. Respondents**

**WITH
WRIT PETITION ST. NO. 28656 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Kundan Vasant Shegaonkar & Ors. .. Respondents**

**WITH
WRIT PETITION ST. N O. 28657 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Mandar Mohanchand Patil & Ors. .. Respondents**

**WITH
WRIT PETITION ST. NO. 28658 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Rohan Kamlakar Waychal & Ors. .. Respondents**

**WITH
WRIT PETITION ST. NO. 28701 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Sandip Pundlikrao Gophane & Ors. .. Respondents**

**WITH
WRIT PETITION ST. NO. 28749 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Yogesh Fegade & Anr. .. Respondents**

**WITH
WRIT PETITION ST. NO. 28751 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Jayesh Rupchand Tambe & Ors. .. Respondents**

**WITH
WRIT PETITION NO. 3068 OF 2020**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Rajaram Digambar Kolekar & Ors. .. Respondents**

**WITH
WRIT PETITION ST. NO. 28754 OF 2019**

**Maharashtra Public Service
Commission .. Petitioner
Versus
Dr. Ravindra Sharadchandra
Toshniwal & Ors. .. Respondents**

**WITH
WRIT PETITION ST. NO. 31323 OF 2019**

**Maharashtra Public Service
Commission**

.. Petitioner

Versus

Dr. Rajkumar A. Mundle & Anr.

.. Respondents

**WITH
WRIT PETITION NO. 3519 OF 2020**

**Maharashtra Public Service
Commission**

.. Petitioner

Versus

**Dr. Prashant Mandanrao Deshmukh
& Anr.**

.. Respondents

Mr. A. A. Kumbhakoni, Senior Advocate a/w Mr. Ashutosh M. Kulkarni a/w Mr. Sarthak S. Diwan for petitioner/MPSC in all matters, except WP/7201/2019.

Mr. Mihir Desai, Senior Advocate a/w Ms. Gayatri Singh, Senior Advocate i/by Mr. Kranti L.C., Mr. Kaustubh Gidh for petitioners in WPST/9195/2021.

Mr. Anil V. Anturkar, Senior Advocate a/w Mr. Atharva Date a/w Mr. Ranjit D. Shinde for respondent nos.1 to 3 in WP/3068/2020.

Mr. B. V. Samant, AGP for State in all the matters.

Ms. Pradnya Talekar a/w Ms. Madhavi Ayyappan a/w Ms. Amruta Kharade i/by Talekar & Associates for respondent no.1 in WP/121/2021.

Mr. Ashutosh M. Kulkarni a/w Mr. Sarthak S. Diwan for respondent/MPSC in WPST/9195/2021.

Mr. Ajit V. Alange for respondent no.2 in WPST/28610/2019, for respondent nos. 1 and 2 in WPST/28685/2019 & for respondent no.5 in WPST/28701/2019.

Ms. Reshma Kurle for respondent Nos.7, 9, 17, 27, 30, 34, 40, 42, 50, 54, 84, 86, 94, 95, 105, 108, 120, 141, 144, 147, 149, 150 & 151.

Ms. Gayatri Singh, Senior Advocate i/by Mr. Sangram Chinnappa a/w Mr. Kartikya Bahadur for respondent nos.3 and 4 in WPST/28656/2019, for respondent no.1 in WPST/27656/2019, for respondent nos.1, 2 and 3 in WPST/28567/2019, for respondent nos.1 and 2 in WPST/28751/2019, for respondent no.1 in WPST/31323/2019, for respondent no.1 in WPST/28749/2019, for respondent nos.1, 3 and 4 in WPST/28754/2019, for respondent nos.1, 2 and 3 in WPST/28567/2019, for respondent nos.1 and 2 in WP/3063/2020 and for respondent nos.3 and 4 in WP/2985/2020.

Mr. Abhijeet Desai a/w Mr. Karan Gajra i/by Desai Legal for respondent no.1 in WP/9420/2019.

Mr. Sangram Chinnappa a/w Mr. Kartikeya Bahadur for respondent nos.3 and 4 in WPST/28656/2019, for respondent no.1 in WPST/27645/2019 and for respondent no.21 in WP/121/2021.

**CORAM: S. V. GANGAPURWALA, ACTING CJ. &
SANDEEP V. MARNE, J.**

**RESERVED ON: MARCH 10, 2023
PRONOUNCED ON: MARCH 20, 2023**

JUDGMENT [Per Sandeep V. Marne, J.]:

THE CHALLENGE

1. The challenge in this group of writ petitions is to the common judgment and order 8th May, 2019 passed by the Maharashtra Administrative Tribunal, Mumbai (**the Tribunal**) in Original Application No. 1091 of 2015 along with connected

original applications. In the impugned judgment, the Tribunal has held the action of Maharashtra Public Service Commission (**MPSC**) in shortlisting candidates on the strength of possession of higher educational qualification as unsustainable. The action of shortlisting adopted by MPSC is interpreted by the Tribunal as en bloc elimination of candidates holding lower qualification of bachelor's degree in dental surgery (**BDS**). The Tribunal has also held that candidates having experience in private hospitals/clinics could also be considered for determining eligibility. The Tribunal has directed MPSC to revise the list of selected candidates and send additional names by including therein names of Original Applicants meeting the minimum prescribed qualifications.

2. MPSC is aggrieved by the Tribunal's judgment to the limited extent of setting aside shortlisting criteria and treating shortlisting as en bloc elimination of candidates with BDS qualifications.

3. The contractual/temporary candidates already in service as clinical assistants (original applicants) are also aggrieved by the finding of the Tribunal accepting experience of candidates in private hospitals/clinics. Therefore, even though the operative portion of Tribunal's order is in their favour, they have filed Petitions challenging the Tribunal's order to that limited extent.

4. In short, neither MPSC nor the Original Applicants are aggrieved by direction of the Tribunal for revision of the list of selected candidates and sending of additional names by including their names therein.

FACTS

5. A brief factual narration as a prologue to the judgment would be necessary. MPSC published advertisement / recruitment notice on 31st July 2015 for filling up 189 posts of Dental Surgeon. The eligibility criteria prescribed is bachelor's degree in dental surgery (**BDS**) with one year's experience as clinical assistant or in a post equivalent or higher than the post of clinical assistant. Advertisement prescribed preference to candidates possessing Post Graduate qualification in Dental Surgery (**MDS**).

6. Under the National Rural Health Mission Program adopted in the State of Maharashtra, several individuals were engaged as Dental Surgeon in various government recognized hospitals on contract basis. They have been recruited with qualification of BDS. They submitted applications in pursuance of the advertisement issued by the MPSC for regular appointment on the post of Dental Surgeon in pursuance of possession of minimum prescribed qualification of BDS. Several outside candidates also submitted their applications in pursuance of the advertisement. Many such of candidates possessed higher qualification of Post Graduate Degree in Dental Surgery viz. MDS.

7. It appears that there was confusion about the exact experience to be taken into consideration. MPSC, therefore, sought clarification from the Department of Health, Government of Maharashtra, as to whether candidates with experience in private hospitals/clinics could also be considered. On 1st October 2015, the Government of Maharashtra opined that private and academic experience

would also be considered by MPSC, which proceeded to consider candidates possessing experience in private hospitals/clinics. MPSC also applied the criteria of possession of higher educational qualifications (MDS) for shortlisting the candidates on the ground that the number of candidates, who applied, were quite large in number. This was apparently done under the provisions of the Maharashtra Public Service Commission Rules of Procedure, 2014 (**Rules of 2014**). It appears that the candidates who were already in service on contractual basis and possessing BDS qualification were not called for interview on account of shortlisting of candidates. They instituted series of original applications before the Tribunal for consideration of their candidatures in selection process. They also challenged Clause 4.6 of the advertisement as being contrary to the provisions of the recruitment rules. They also questioned the clarification issued by the State Government on 1st October 2015 qua the consideration of experience in private hospitals/clinics.

8. It appears that MPSC conducted interviews of shortlisted candidates and prepared a merit list on 18th November 2016. On the basis of merit list so prepared, MPSC recommended 188 names for being appointed on the post of Dental Surgeon. State Government issued appointment orders to such 188 candidates. However, only 122 out of said 188 candidates actually joined services, leaving behind several unfilled vacancies.

9. The Tribunal, by its interim order dated 1st March 2018 directed continuation of services of the original applicants. By further interim order dated 19th June 2018, the Tribunal

issued certain directions with regard to determination of eligibility of the selected candidates. The Tribunal by its interim order dated 21st December 2015 directed the MPSC and the State Government to interview the original applicants.

10. The Tribunal thereafter proceeded to decide the original applications by its judgment and order dated 8th May 2019. The Tribunal held that the action of MPSC in shortlisting candidates based on higher qualification of MDS to be unsustainable. It held that as the shortlisting amounts to en bloc elimination of candidates possessing BDS qualification. The Tribunal also upheld the action of the State Government and MPSC in consideration of candidates possessing experience in private hospitals/clinics. However, by the time the Tribunal passed the final judgment and order, 122 candidates had already joined, and 67 vacancies continued to remain vacant. Therefore, with a view to do justice in the matter, the Tribunal directed MPSC to revise the list of selected candidates and to send additional names by including names of the original applicants found eligible on the basis of minimum qualification. The Tribunal protected the services of original applicants till the exercise was conducted.

11. As observed above, MPSC is aggrieved by the finding of the Tribunal holding that shortlisting amounts to en bloc elimination. Though the operative part of the order passed by the Tribunal is in favour of the original applicants, they are also aggrieved by the judgment to the extent it permits consideration of experience in private hospitals/clinics.

RIVAL CONTENTIONS OF THE PARTIES

12. Appearing for MPSC, Mr. Kumbhakoni the learned senior advocate would submit that the Tribunal has erred in not appreciating the provisions of Rules of 2014. That Rule 9(v)(a) specifically provides for applying the criteria for shortlisting of candidates. That in the present case, the number candidates which could be called for interview far exceeded the limit of three times provided under Rule 9 and that, therefore, the MPSC has rightly resorted to shortlisting of eligible candidates. That Rule 9 of Rules of 2014 were not challenged by the original applicants before the Tribunal and that, therefore, the said Rules have correctly been applied to the selection. That the Tribunal has not even referred to the MPSC Rules of 2014 in its entire judgment, which suffers from complete non-application of mind.

13. Mr. Kumbhakoni would further submit that the Tribunal has erred in holding that the rule for preference would amount to en bloc elimination of eligible candidates. That the Tribunal has failed to appreciate the difference between shortlisting and preference. That the provisions of the advertisement read with Rules of 2014 permits shortlisting the candidates based on preferential higher qualification.

14. Mr. Kumbhakoni would further submit that the criteria of shortlisting is applied only for open, general and DT(A) categories. He would clarify that MPSC is aggrieved by the order of the Tribunal essentially to the extent of it setting aside application of shortlisting criteria.

15. In support of his contentions, Mr. Kumbhakoni would rely upon the following judgments: -

(a) **Maharashtra Public Service Commission, through its Secretary vs. Sandeep Shriram Warade & Ors.**¹.

(b) **Union of India & Anr. vs. T. Sundararaman & Ors.**²

(c) **Madhya Pradesh Public Service Commission vs. Navnit Kumar Potdar & Anr.**³

(d) **Maharashtra Public Service Commission vs. Kisan Tukaram More.**⁴

(e) **Mukulika S. Jawalkar & Ors. vs. State of Maharashtra & Anr.**⁵

16. Mr. Anturkar the learned senior advocate appearing for some of the original applicants would oppose the petitions filed by the MPSC by submitting that MPSC is merely an advisory agency and, therefore, there is no cause for MPSC to challenge the order of the Tribunal. That the State Government, who is the recruiting agency is not aggrieved by the order passed by the Tribunal and that, therefore, there is no occasion for MPSC to file the present petitions. That, therefore, MPSC has no independent locus standi to challenge the order of the Tribunal in the absence of challenge being raised by the State Government.

17. Mr. Anturkar would submit that the experience of private hospitals/clinics cannot be even taken into consideration by MPSC. He would invite our attention to the provisions of Recruitment Rules and would lay stress on the words 'which in the opinion of the Government' to submit that none of the

¹ (2019) 6 SCC 362

² (1997) 4 SCC 664

³ (1994) 6 SCC 293

⁴ 2010 SCC OnLine Bom 624

⁵ 2007 (6) Mh.L.J. 368

clarificatory letters issued by the various officers can be said to have been issued by the Government of Maharashtra. He would invite our attention to Rule 12 of Chapter-I, the Rules of Business of the Government of Maharashtra providing that all orders passed by the Government are required to be described 'in the name of Hon'ble Governor'. That, therefore, the clarifications issued by various officials of the State Government cannot be treated as an opinion of the Government within the meaning of the Recruitment Rules.

18. Mr. Anturkar would further submit that the rule for preference would apply only in a case of a tie-breaker between equally situated candidates. That the rule of preference cannot be used for shortlisting and elimination of eligible candidates.

19. Lastly, Mr. Anturkar would contend that if candidates having experience from private hospitals/clinics are excluded, the number of eligible candidates available for interview would be less than the one prescribed under Rule 9 of the Rules of 2014 and that, therefore, there would be no occasion for shortlisting.

20. Mr. Desai the learned senior advocate appearing for some of the original applicants would also oppose the petitions filed by the MPSC. He would rely upon the judgment of the Apex Court in **Secretary, A.P. Public Service Commission vs. Y.V.V.R. Srinivasulu & Ors.**⁶ in support of his contention that preference does not mean en bloc elimination.

⁶ (2003) 5 SCC 341

21. Mr. Desai would strenuously object to the finding recorded by the Tribunal about acceptance of eligibility of candidates having experience in private hospitals/clinics. He would submit that the post of clinical assistant is available only in government hospitals or semi government hospitals. That the experience of candidates in private hospitals/clinics can never be treated on a post equivalent to or higher than clinical assistant.

22. Mr. Desai would lastly submit that though the original applicants are aggrieved by the finding of the Tribunal regarding acceptance of experience in private hospitals/clinics, they are not aggrieved by the ultimate order passed by the Tribunal and would be happy even if petitions filed by the MPSC are dismissed by upholding the operative portion of the order of the Tribunal.

23. Mr. Gayatri Singh the learned senior advocate appearing for some of the original applicants would adopt the submissions of Mr. Anturkar and Mr. Desai.

24. Ms. Talekar the learned counsel appearing for some of the original applicants would also question the observations made by the Tribunal regarding acceptance of experience of candidates in private hospitals/clinics. She would further submit that the original applicants having worked on the post of clinical assistant for number of years, are entitled to be regularized in service. The action of MPSC has resulted in a situation that they are not even allowed to participate in the selection process. That the original applicants have been

permitted to participate in the interviews in pursuance of interim order passed by the Tribunal and that, therefore, they deserve to be appointed against the available vacant posts.

25. The other learned counsels appearing for some of the original applicants support the above submissions.

26. Ms. Kurle, learned counsel appearing for the candidates who are already appointed in pursuance of the shortlisting criteria adopted by the MPSC would submit that her clients have already been appointed in December, 2017 and that their appointments need not be disturbed at such a distant date. She would submit that some of the candidates having higher qualification of MDS and who had already been appointed possessed experience of private hospitals/clinics which has rightly been taken into consideration by the MPSC and the State Government. That every candidate possessing BDS and MDS degrees are required to undergo one year internship, which involves clinical experience.

27. MPSC is respondent in the petitions filed by the original applicants challenging acceptance of experience in private hospitals/clinics. Mr. Ashutosh Kulkarni, learned counsel, represents MPSC in those petitions and he submits that MPSC acted on clarification issued by the State Government vide letter dated 1st October 2015 and that said clarification was rescinded by the State Government on 17th November 2016 only after finalization of selection. That therefore MPSC had requested the State Government on 31st January 2017 to keep in mind its directives in letter dated 17th November 2016 while issuing appointment orders to selected candidates.

28. Mr. Samant the learned AGP appearing for the State Government would oppose the petitions filed by the original applicants and submit that the experience in private hospitals/clinics can also be taken into consideration while filling up the posts of Dental Surgeon.

29. After hearing the learned counsels appearing for the original applicants, we put across to the learned counsel appearing for MPSC that in the event of the candidates possessing experience from private hospitals/clinics being declared ineligible, there would be no need for shortlisting of candidates. We, therefore, expressed that since MPSC has filed petitions challenging the finding of the Tribunal on the issue of shortlisting, it may be appropriate that MPSC also deals with the issue of the exact experience which could be taken into consideration. At our request, Mr. Kumbhakoni, learned senior advocate has made detailed submissions in rejoinder dealing with the aspect of experience. Mr. Kumbhakoni would submit that there are extremely limited (77) number of posts of clinical assistant in the State Government. That if candidates possessing experience on the post of clinical assistant in government hospitals alone are considered eligible, the State Government would not be in a position to find enough eligible candidates for filling up the posts of Dental Surgeon. He would further submit that as against 3526 intake capacity in Government of Maharashtra for the post of BDS, only 77 posts of clinical assistant are available. As against this, the total sanctioned strength of dental assistant in the State of Maharashtra is 884. That the post of clinical assistant is essentially akin to an intern. That

a candidate applying for the post of clinical assistant need to be a fresh dental graduate of not more than two years standing from the date of declaration of result of BDS examination. That, therefore, it is impossible for every candidate completing the course of BDS to get experer/experience on the post of clinical assistant.

30. Mr. Kumbhakoni would further submit that the Recruitment Rules use the words "have experience for not less than one year as a clinical assistant" and that word "post" is consciously not used before or after words "clinical assistant". That, therefore, what is required is an experience as clinical assistant and not on the post of clinical assistant. He would further submit that the Recruitment Rules also consciously do not use the word "government hospitals" with reference to the experience as clinical assistant. That, therefore, the correct reading of the Recruitment Rules would mean that the experience other than on the post of clinical assistant in government hospitals can also be taken into consideration. He would further submit that candidates having experience in private hospitals/clinics would be governed by the category of institutes recognized by Dental Council. That, therefore, the State Government and MPSC has rightly considered candidates having experience in private hospitals/dental clinics.

REASONS AND ANALYSIS

31. As observed above two issues fall for our consideration in this batch of petitions (i) whether action of MPSC in resorting to shortlisting is justified and (ii) whether experience

in private hospitals/clinics can be taken into consideration while determining eligibility. First, we deal with the issue of application of shortlisting criteria of higher preferential qualification of MDS by MPSC for limiting the number of candidates for interviews, thereby eliminating candidates with BDS degree from the scope of selection.

32. The Recruitment Rules provide that the post of Dental Surgeon is to be filled up in the following manner: -

“3. Appointment to the post of Dental Surgeon in the Directorate shall be made either: -

- (a) by transfer of a suitable Class II Officer from any other services under the Directorate, possessing the qualification and experience prescribed for appointment by nomination in sub-clause (b) of this rule, or
- (b) by nomination from amongst the candidates who,
 - (i) unless already in the service of the Government are not more than thirty-five years of age;
 - (ii) **possess a degree of Bachelor of Dental Surgery as included in Part I or III of the Schedule to the Dentists Act, 1948 (16 of 1948); and**
 - (iii) **have experience for not less than two years as a Clinical Assistant in any equivalent to or higher than, the post of Clinical Assistant, gained after acquiring the qualification mentioned in sub-clause (ii) above.**

Provided that, the age limit may be relaxed by the Government on the recommendation of the Commission in favour of candidates possessing exceptional qualifications or experience or both;

Provided further that, preference may be given to candidates possessing post-graduate qualification in Dental Science."

33. Rule 3 was amended vide notification dated 6th March, 1992 as under: -

"2. In rule 3 of the Dental Surgeon Class II, in the Directorate of Health Services Recruitment Rules, 1990, (hereinafter referred to as "the principal rules"), -

- (1) in clause (a), for the words "of this rule, or" the words "of this rule; or" shall be substituted;
- (2) in clause (b), in sub-clause (iii) for the words "two years as a Clinical Assistant post, which in the opinion of the Govt. is in any" the words "one year as a Clinical Assistant or in any post, which in the opinion of the Government is", shall be substituted."

34. The advertisement issued by the MPSC prescribed the following eligibility criteria: -

"४.६ शैक्षणिक अर्हता व अनुभव : -

Candidate must:

- (i) possess a degree in Bachelor of Dental Surgery as included in Part-I or Part-III of the Schedule to the Dentists Act, 1948 (16 of 1948) and thereafter
- (ii) have experience of not less than one year as a Clinical Assistant or in any post which in the opinion of the Government is equivalent to or higher than, the post of Clinical Assistant, gained after acquiring the qualification mentioned in sub-clause (i) above.

Provided that, preference may be given to candidates possessing post-graduate qualification in Dental Sciences."

35. Thus, both under the Recruitment Rules as well as in the advertisement, the essential qualification for filling up the

posts of Dental Surgeon is bachelor's degree in dental surgery. The Recruitment Rules and the advertisement provided for preference to be given to candidates possessing post-graduate qualification in Dental Sciences. If Recruitment Rules are to be read in isolation, then all candidates possessing essential qualification of BDS would be required to be permitted to participate till the last stage of selection. Only in the event of two candidates securing same marks, preference would be given to candidate possessing higher degree of MDS.

36. However, MPSC has notified the Rules of 2014. Rule 9 thereof provides as under: -

"9. Direct Recruitment. – (i) The number of candidates to be shortlisted for the interview shall be as follows: -

No. of posts advertised	No. of candidates to be Called for interview
1	5
2	8
3 and more	3 times

However, in cases of isolated posts at the State level i.e. Directors of field department etc. which are equivalent to the grade of Joint Secretary in Mantralaya or above, the Commission may decide from time to time, the number of candidates to be called for the interview. The number of candidates to be shortlisted for interview shall not exceed 10 times the number of such vacancies, in any case.

(ii) If the number of candidates found eligible after scrutiny are less than the proportion mentioned herein above in clause (i) all such eligible candidates shall be called for the interview.

(iii) If some of the candidates having called, either do not turn-up for the interviews or are found ineligible on verification of their original documents or fail to produce

relevant documents and hence do not qualify for the interview, it shall not prevent the Commission from conducting the interviews of only the eligible candidates from amongst those called for the interview.

(iv) If the candidates once called for the interview, fail to produce the original documents for verification or are found to have made false, incorrect, excessive, misleading claims in their application, on the basis of which they were called for the interview, they shall be liable to be debarred from appearing in any of the examinations or applying for any vacancy published by the Commission.

(v) In case, the response to the advertisement exceeds the proportion laid down in Rule 9(i) above, the Commission may apply criteria for shortlisting of the candidates for interview as follows: -

(a) Whenever there is a provision for a preferential academic qualification or experience in the rules of recruitment of the post it shall be accorded the highest priority while shortlisting the candidates for interview."

37. It is common ground that the MPSC has conducted the selection by applying the provisions of Rules of 2014. Rule 9 provides for shortlisting of candidates for interview. If the posts advertised are three or more, the number of candidates who can be called for interview is only three times. In the present case, 189 posts of Dental Surgeon were advertised and, therefore, applying Rule 9, only 567 candidates were required to be called for interview. Rule 9 (v)(a) provides for application of criteria of preferential academic qualification for shortlisting. The Recruitment Rules provide for preference to be given to candidates possessing MDS degree. Therefore, under Rule 9 (v) (a) of Rules of 2014, the MPSC is entitled to

shortlist the candidates on the basis of higher preferential qualification. In the present case, since only 567 candidates were to be interviewed from amongst 9420 candidates, who had applied in pursuance of the advertisement, MPSC was entitled to resort to shortlisting. In our view, therefore, MPSC has rightly applied the criteria of possession of higher and preferential qualification of MDS for shortlisting the candidates for interview.

38. The Tribunal has completely lost sight of the provisions of Rules of 2014 while passing the impugned judgment. The Tribunal has not taken into consideration the provisions of Rules of 2014. We have perused the affidavit-in-reply filed by the MPSC before the Tribunal and find that the provisions of Rule 9 were specifically brought to the notice of the Tribunal by MPSC. The Tribunal has, however, proceeded to completely ignore them while passing the impugned judgment. To that extent, the finding recorded by the Tribunal about en bloc elimination of candidates possessing BDS degree are unsustainable. The Tribunal has relied on the judgment of the Apex Court in **Y.V.V.R. Srinivasulu** (Supra). This is not a simple case of grant of preference but a case of application of shortlisting criteria. Therefore, the judgment in **Y.V.V.R. Srinivasulu** (Supra) would have no application to the facts and circumstances of the present case.

39. It is trite that the employer is entitled to prescribe additional or desirable qualifications and even provide for grant of preference. The Courts cannot lay down conditions of eligibility nor can determine desirable qualification to be on par with the essential eligibility criteria. The law with regard

to shortlisting is also well settled. The employer or selection agency is entitled to apply shortlisting criteria for limiting the number of eligible candidates for consideration of their cases in the selection. In **Sandeep Shriram Warade** (Supra), the Apex Court has held in para 9 as under: -

"9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being at par with the essential eligibility by an interpretive rewriting of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the Court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same.

40. In **T. Sundararaman** (Supra), the Apex Court has upheld application of shortlisting criteria by holding in para 4 as under: -

"4. The Tribunal has clearly erred in doing so. Note 21 to the advertisement expressly provides that if a large number of applications are received the Commission may shortlist candidates for interview on the basis of higher qualifications although all applicants may possess the requisite minimum qualifications. In the case of *M. P. Public Service Commission v. Navnit Kumar Potdar* (1994) 6 SCC 293 this Court has upheld shortlisting of candidates on some rational and reasonable basis. In

that case, for the purpose of shortlisting, a longer period of experience than the minimum prescribed was used as a criterion by the Public Service Commission for calling candidates for an interview. This was upheld by this Court. In the case of Govt. of A.P. v. P. Dilip Kumar (1993) 2 SCC 310 also this Court said that it is always open to the recruiting agency to screen candidates due for consideration at the threshold of the process of selection by prescribing higher eligibility qualification so that the field of selection can be narrowed down with the ultimate objective of promoting candidates with higher qualifications to enter the zone of consideration. The procedure, therefore, adopted in the present case by the Commission was legitimate. The decision of the Tribunal is, therefore, set aside and the appeal is allowed. There will, however, be no order as to costs."

41. In Madhya Pradesh Public Service Commission (Supra), the Apex Court has held that process of shortlisting is a part of process of selection and that the Public Service Commission is entitled to evolve any rational and reasonable basis on which list of the applicants can be shortlisted. In that case eligibility criteria was five years of experience but the Public Service Commission had shortlisted the candidates by applying the criteria of 7 ½ years. Such action of the Public Service Commission is upheld by the Apex Court.

42. In Kisan Tukaram More (Supra), a Division Bench of this Court has upheld the right of MPSC to shortlist the candidates and has held in para 20 as under: -

"20. The Petitioner is therefore entitled to short-list the candidates by applying the aforesaid procedure. The Tribunal in the impugned judgment and order has also found fault with the Petitioner on the ground that as per the Rules of Procedure the Petitioner could have enhanced the requirement of experience or requirement of higher educational qualification but could not have adopted the criteria of an additional qualification for

short-listing. Therefore, the question that also arises is, whether the degree of LL.B. for the purpose of short-listing can be said to be an additional educational qualification in the context of the aforesaid issue.”

43. In **Mukulima S. Jawalkar** (Supra), a Division Bench of this Court has held that providing of a shortlisting criterion is a part of process of selection and squarely falls in the domain of selecting authority.

44. We accordingly hold that MPSC has correctly applied shortlisting criteria of higher preferential qualifications in accordance with Rules of 2014. Therefore, all the findings recorded by the Tribunal holding as illegal the application of shortlisting criteria by MPSC and also holding shortlisting as en bloc elimination of candidates with BDS degree are unsustainable and deserve to be set aside. This this extent, the petitions filed by MPSC must succeed.

45. Now we turn to the petitions filed by the original applicants challenging the finding recorded by the Tribunal about acceptance of experience in private hospitals/clinics. The Tribunal has held in para 12 of its judgment as under: -

“12. The State has brought on record copy of communication issued way back on 30.03.2009 wherein experience gained by the candidates as clinical assistance in approved private institute was regarded as adequate. Similarly validity and acceptability of experience in private hospital/clinic has been reiterated in earlier communication dated 03.12.2003 and 04.11.2008 (copy whereof is at page 235 and 234 respectively of the paper book of O.A.).”

46. Thus, finding recorded by the Tribunal in para 12 do seem to suggest that the experience of candidates in private

hospital/clinic can also be taken into consideration for filling up the posts of Dental Surgeon. We have reproduced the Recruitment Rules and the relevant clause of advertisement above. Both use the expression "*experience of not less than one year as clinical assistant or in any post which in the opinion of the government is equivalent to or higher than the post of clinical assistant*". There was some degree of confusion about acceptance of experience in private hospitals/clinics. It appears that MPSC sought clarification from the State Government by its letter dated 3rd September 2015. By letter dated 1st October 2015, the Deputy Secretary to the Government of Maharashtra answered the query raised by the MPSC as under: -

3	For the post of Dentist which experience should be considered.	For the post of Dentist the experience of having worked as a Clinical Assistant in any Government, semi-Government Institution as well as private health institution approved by the Maharashtra Dental Council should be considered. Also the experience of having worked in the post of Houseman, Asst. Lecturer, Lecturer, Asst. Principal Houseman, Asst. Lecturer, Lecturer, Asst. Principal in the aforesaid institutions be considered as equivalent to the post of Clinical Assistant. Not that it will be possible for every Dental Surgeon degree-holder to get experience from Government/semi-Government institutions and if experience of
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		private/individual clinic is not considered it will be discriminatory. Therefore even the experience of private/individual clinic should be considered.
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47. Thus, as per the clarification given by the Deputy Secretary, the experience of private/individual clinic was also required to be taken into consideration. MPSC acted on the clarification issued vide letter dated 1st October 2015 and while applying shortlisting criteria under Rule 9 of Rules of 2014, considered candidates having preferential qualification of MDS and experience of both Government as well as private hospitals/clinics and prepared a select list. However, the State Government later changed its opinion, and the Deputy Secretary addressed a letter dated 17th November 2016 to MPSC stating that the letter dated 1st October 2015 was reconsidered and this time, opined that consideration of experience in private hospitals/clinics was inconsistent with the provisions of Recruitment Rules and that, therefore, such experience should not be taken into consideration. It appears that by the time the State Government issued second clarificatory letter dated 17th November 2016, MPSC had already prepared the select list and recommended the names of candidates to the State Government.

48. MPSC, therefore, communicated to the State Government by its letter dated 31st January 2017 that its modified opinion was received after finalization of the selection and was therefore meaningless. MPSC, however, requested the State Government to take into consideration its

revised opinion while issuing appointment orders to the recommended candidates. MPSC thus left the issue of acceptance of experience in private hospitals/clinics to be decided by State Government while issuing appointment orders to recommended candidates.

49. It is in the light of the aforesaid factual background, where the State Government has changed its stand with regard to acceptance of experience in private hospitals/clinics that the MPSC has included and recommended names of candidates possessing preferential higher qualification of MDS but possessing experience both in Government as well as private hospitals/clinics. It is also common ground that even though MPSC had requested the State Government by its letter dated 31st January 2017 to apply its revised opinion about experience while issuing appointment orders to recommended candidates, the State Government has appointed some of the recommended candidates even though they possessed experience in private hospitals/clinics.

50. Detailed submissions have been made by rival parties on acceptance of experience in private hospitals/clinics. There can be no matter of doubt that Recruitment Rules do not specifically bar consideration of experience in private hospitals/clinics. However, at the same time, Recruitment Rules prescribe possession of experience as 'clinical assistant or on a post equivalent or higher than clinical assistant'. It is submitted that the post of clinical assistant is available only in Government hospitals/semi-Government hospitals. We could have delved further in this issue to record our findings about exact experience which could be accepted. However, the

selection has already been finalized and the State Government has appointed candidates having experience in private hospitals/clinics, who have been serving since the year 2017. It would be too late now to disturb them. Also, in the situation that prevails now, the main thrust of the original applicants is on getting themselves appointed against 67 unfilled vacancies rather than unseating the candidates with private experience who are already appointed. Considering the language employed in the recruitment rules, changing stand of the State Government and factum of appointment of some of the candidates posing private experience, we refrain ourselves from recording any conclusive finding on the issue of acceptance of experience in private hospitals/clinics and leave the same to be decided in an appropriate case.

51. We thus have before us a unique case where we have upheld MPSC's action of shortlisting, which would throw all the originals applicants possessing qualifications of BDS out of interview process. However, they have already been interviewed in pursuance of interim order passed by the Tribunal. We have not recorded any conclusive finding on the exact experience which could be accepted. If private experience is to be excluded, the shortlisting itself would be rendered erroneous. In the light of the position that now emerges before us, we proceed to determine the exact course of action that can be adopted to balance the equities.

52. As observed by the Tribunal, out of 188 names recommended by the MPSC, only 122 candidates joined the service, thereby leaving 67 vacancies of Dental Surgeon vacant. In the event we accept the contentions of the original

applicants that experience in private hospitals/clinics cannot be taken into consideration, the action of MPSC in resorting to shortlisting would be rendered meaningless as the number of eligible candidates with experience on the post of clinical assistant would be less than 567. Thus, we have a unique situation where MPSC has already adopted shortlisting criteria and have recommended names of candidates having experience in private hospitals/clinics. The State Government has opined vide its letter dated 17th November 2016 that experience in private hospitals/clinics cannot be considered. The Recruitment Rules provide some degree of jurisdiction on the State Government to determine the exact nature of experience which can be taken into consideration as the words used in the Recruitment Rules are "which in the opinion of the Government is equivalent or higher than the post of clinical assistant". 67 posts of Dental Surgeon still continue to remain vacant, despite issuance of appointment orders to all 188 recommended candidates. The advertised vacancies were 189. In these circumstances, in our view, though the Tribunal has erred in criticizing the action of MPSC in resorting to shortlisting, the ultimate direction issued by the Tribunal to send the names of the original applicants for being appointed need not be disturbed. The original applicants have already been interviewed by MPSC in pursuance of the interim orders passed by the Tribunal. In these circumstances, we are of the considered view that the ends of justice would meet if the MPSC is directed to recommend the names of only those original applicants who are already interviewed against 67 unfilled vacancies of Dental Surgeon, based on their performance in the interview. We are conscious of the fact

that there are several other candidates who may possess the experience on the post of clinical assistant but did not approach the Tribunal and who are similarly situated to the original applicants. However, considering the peculiar facts and circumstances of the present case, we are restricting the relief only to the original applicants who had approached the Tribunal and who have been litigating since the year 2015 and pursuant to the order of Tribunal are interfered. In these peculiar circumstances, the benefit of the present judgment cannot be extended to those similarly situated candidates who did not move the Tribunal.

53. After considering the entire conspectus of the matter, we proceed to dispose of all the petitions by passing the following order: -

(i) Writ Petition St. Nos. 1153/2020, 1154/2020, 2220/2020, Writ Petition No. 121/2021, Writ Petition St. Nos. 4472/2020, 9856/2022, 9858/2022, 10037/2022, Writ Petition No.9420/2019, Writ Petition St. Nos. 27645 of 2019, 27647/2019, Writ Petition No. 2985/2020, Writ Petition St. Nos. 28560/2019, 28562/2019, Writ Petition No. 1993/2020, Writ Petition St. Nos.28567/2019, 28568/2019, 28610/2019, 28651/2019, Writ Petition No. 3063/2020, Writ Petition St. Nos. 28656/2019, 28657/2019, 28658/2019, 28701/2019, 28749/2019, 28751/2019, Writ Petition No. 3068/2020, Writ Petition St. Nos. 28754/2019 & 31323/2019 and Writ Petition No. 3519 of 2020 filed by MPSC are allowed and findings recorded by the Tribunal with regard to the shortlisting

criteria adopted by the MPSC in the impugned judgment are set aside.

(ii) However, directions issued by the Tribunal in para 30 of the judgment are not disturbed and are modified to the extent as directed below.

(iii) Writ Petition St. Nos. 9195/2021 and Writ Petition No.7201/2019 filed by the original applicants are disposed of with a direction to MPSC to consider the names of original applicants who are already interviewed in pursuance of interim order of the Tribunal for being recommended to the State Government based on their performance in the interview against 67 unfilled vacancies of Dental Surgeon. This exercise be carried out by MPSC within a period of six weeks from today. In the event of such original applicants being recommended by the MPSC, the State Government shall consider their names for being appointed against 67 unfilled posts of Dental Surgeon prospectively. They shall not be entitled to any benefits from an earlier date. The State Government to complete this exercise within a period of four weeks from the date of receipt of recommendations from the MPSC.

(iv) Until the exercise in direction (iii) above is completed, services of the original applicants, who are already in service, shall not be disturbed.

54. With the above directions, all the writ petitions are disposed of. No costs.

(SANDEEP V. MARNE, J.)

(ACTING CHIEF JUSTICE)