

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: April 17, 2023

+ W.P.(C) 4193/2023, CM APPL. 16226/2023

CHIEF SECRETARY GNCTD & ORS.

..... Petitioners

Through: Mrs. Avnish Ahlawat, SC with
Ms. Tania Ahlawat, Mr. Nitesh
Kumar Singh, Mrs. Palak Rohmeta,
Ms. Laavanya Kaushik and Ms. Aliza
Alam, Advs.

versus

INDER KUMAR GROUP C POST & ORS.

..... Respondents

Through: Mr. Naresh Kaushik, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

V. KAMESWAR RAO, J. (ORAL)

1. The present petition has been filed by the Government of NCT of Delhi and its functionaries challenging the order dated October 31, 2022 whereby the Central Administrative Tribunal, Principal Bench, New Delhi ('Tribunal', hereinafter) has allowed the original application filed by the respondents herein and directed as under:-

"In the light of the facts and discussion detailed above, we cannot sustain the impugned orders which are accordingly set aside. The applicants shall be deemed to have been continuing to hold the post of Pharmacist from the date of their appointment. As far as the Applicant-no. 1 is concerned, the competent authority amongst the respondents shall pass an appropriate order reinstating

him with effect from the date his services were terminated and further specify that pursuant to reinstatement, he would be deemed to have been in continuous and uninterrupted service. He is entitled to all the consequential benefits subsequent to his reinstatement. These benefits, in the normal course, would have been awarded to the Applicant no.1 only on notional basis; however, we have to take into consideration the fact that the termination has been held to be illegal. Moreover, respondent nos. 2 & 3, who are identically placed, continue to hold the post by way of protection of an interim order and have been drawing all the financial and other benefits by virtue of the said interim order. Therefore, denial of the same benefits to Applicant no. 1 would amount to discriminatory treatment. Accordingly, the consequential benefits shall be on actual basis, subject to the condition that the Applicant no.1 shall furnish an appropriate certificate/affidavit to the respondents that during this period he has not been employed elsewhere. These directions shall be complied with within a period of four weeks from the date of receipt of a copy of this order.”

2. The challenge of the respondents, before the Tribunal, was primarily to the order of termination of their services on the ground that they did not possess the required qualification set forth in the relevant Recruitment Rules.

3. The case of the respondents before the Tribunal was, pursuant to the selection conducted by the Delhi Subordinate Services Selection Board ('DSSSB', hereinafter) for the post of Pharmacist, they were appointed in terms of offer of appointment dated July 10, 2020. Subsequently, they were issued a show cause notice as to why their services be not terminated on the ground that they did not possess the essential qualifications as per the

Recruitment Rules. The issue which fell for consideration before the Tribunal was whether the respondents were possessing the essential qualifications mentioned in the Recruitment Rules.

4. It was the case of the respondents before the Tribunal that they passed 10+2 in Science stream with Physics, Chemistry and Mathematics as the subjects, whereas, the case of the petitioners was that Biology is supposed to be one of the essential subjects in terms of the Recruitment Rules and which respondents did not possess. According to the petitioners, the Recruitment Rules mention Physics/Chemistry/Biology in brackets () after the words 10+2 with science stream, making it evident that science stream in the context of an essential qualification for the post of Pharmacist requires the candidate to have pursued all the three subjects in 10+2, i.e. Physics, Chemistry and Biology.

5. Concedingly, the respondents herein had stated that they studied Mathematics instead of Biology and possessed the essential qualifications. The issue had earlier been deliberated in detail before the Tribunal in O.A. 1310/2009, wherein the said O.A. was disposed by the Tribunal, holding that essential qualification for the post of Pharmacist, insofar as, it denies the candidates having Physics, Chemistry and Mathematics, the right to hold the post, is illegal, and had accordingly set it aside. The said judgment was set aside by this Court, not on the merits of the issue, but on technical grounds. It is submitted that in the said judgment, the Tribunal had also directed the petitioners herein to make suitable amendments in the Recruitment Rules, so that the said ambiguity with respect to

the interpretation of science stream, could be obviated, once and for all.

6. It was also the case of the respondents that, in terms of the Regulations of the Pharmacy Council of India framed under Section 10 of the Pharmacy Act, 1948, persons who have passed 10+2 stream with Mathematics instead of Biology are also eligible for obtaining Diploma in Pharmacy. It was their case that having science stream, irrespective of Biology or Mathematics, renders eligibility to a candidate to pursue Diploma in Pharmacy. Reliance was placed by the counsel for the respondents on the letter dated November 22, 2021 issued by the Delhi Pharmacy Council wherein it is clarified that for the purpose of the advertisement issued by the petitioners to the post of Pharmacist, science stream, irrespective of Biology or Mathematics, renders eligibility to a candidate to pursue Diploma in Pharmacy. In other words, it implies that while Physics and Chemistry would be the common subjects, a candidate could possess either Biology or Mathematics in 10+2 to qualify to pursue a Diploma in Pharmacy and subsequently would be qualified to hold the post of Pharmacist. The Tribunal while allowing the O.A. has in paragraphs 8 to 10 held as under:-

“8. We have heard the learned counsels for the parties and have gone through the voluminous pleadings and documents on record. It is not in dispute that the applicants have successfully completed 10+2 with science stream. It is also not disputed that all the three applicants possess a valid and recognised diploma in Pharmacy. It is also not disputed that they were found, at

the stage of scrutiny, to be eligible to appear in the examination for the selection to the post of Pharmacist and were successful in the said examination on their own merit. Subsequent to the selection, they were issued an offer of appointment which they accepted and joined their duties. However, at this stage, a show cause notice was issued to them as to why their services should not be terminated on the singular ground, as mentioned in the preceding paragraphs, that their 10+2 certificate did not mention their having studied Biology in 10+2 and, hence, they did not possess the requisite essential qualifications. Now a bare reading of the Recruitment Rules indicates that primarily it mentions 10+2 with science stream as the essential qualification. Following this is a bracket() and in bracket(), it mentions Physics/Chemistry/Biology. The issue before us is whether the slash (/) separating these three subjects is to be read as 'OR' or it is to be read as 'AND'. Another issue is whether the clarifications and the guidelines of the Pharmacy Council of India and the Delhi Pharmacy Council are to be ignored in favour of the interpretation of the Recruitment Rules done by the respondents. On a careful consideration, our answer to the question would be NO. Once the controversy with respect to the interpretation of rules has emerged, we are to be guided by what the apex regulatory body i.e. Pharmacy Council of India, states and the Pharmacy Council of India has unambiguously stated that a certificate of 10+2 in a science stream with Physics, Chemistry, and Biology or Mathematics would be the necessary qualification to hold the post of Pharmacist and also to pursue diploma in Pharmacy. There is no ground for the respondents to deny the same to the present applicants on the specious ground that having studied Mathematics instead of Biology does not qualify them for the post. Moreover, it is reiterated that in the judgment rendered in OA No. 1310/2009 which was delivered on 11.03.2010, this Tribunal had given a clear and categorical direction that to obviate the possibility of

different interpretation of the rules, the respondents should amend their Recruitment Rules to the extent that essential educational qualification for the post of Pharmacist should include 10+2 with Physics, Chemistry and Mathematics apart from Biology as the eligibility criteria. Even after a lapse of more than 12 years, there is no evidence that respondents have taken any steps in the directions of suitable amendment in the Recruitment Rules.

In the light of the facts and discussion detailed above, we cannot sustain the impugned orders which are accordingly set aside. The applicants shall be deemed to have been continuing to hold the post of Pharmacist from the date of their appointment. As far as the Applicant no. 1 is concerned, the competent authority amongst the respondents shall pass an appropriate order reinstating him with effect from the date his services were terminated and further specify that pursuant to reinstatement, he would be deemed to have been in continuous and uninterrupted service. He is entitled to all the consequential benefits subsequent to his reinstatement. These benefits, in the normal course, would have been awarded to the Applicant no.1 only on notional basis; however, we have to take into consideration the fact that the termination has been held to be illegal. Moreover, respondent nos. 2 & 3, who are identically placed, continue to hold the post by way of protection of an interim order and have been drawing all the financial and other benefits by virtue of the said interim order. Therefore, denial of the same benefits to Applicant no. 1 would amount to discriminatory treatment. Accordingly, the consequential benefits shall be on actual basis, subject to the condition that the Applicant no.1 shall furnish an appropriate certificate/affidavit to the respondents that during this period he has not been employed elsewhere. These directions shall be complied with within a period of four weeks from the date of receipt of a copy of this order.

10. The O.A. is disposed of in the aforesaid terms. There shall be no order as to costs.”

7. The submission of Mrs. Avnish Ahlawat, learned Standing Counsel for the petitioners is that the order of the Tribunal is perverse as it has not considered the Recruitment Rules in proper perspective. According to her, none of the respondents possess the criteria as prescribed in the Recruitment Rules. She relies upon the judgment of the Tribunal in O.A. 1310/2009 to contend that in the said judgment, the Tribunal had observed that the Recruitment Rules requires amendment. It is also her contention, that the Tribunal has simply not considered the judgment of the Division Bench of this Court in the case of ***GNCT of Delhi & Ors. v. Naresh Kumar, W.P.(C) 4769/2010*** which has subsequently been upheld in the case of ***GNCT of Delhi & Ors. v. Sandeep Chikkara, W.P.(C) 4809/2010*** dated November 12, 2010, which according to her, has upheld the Recruitment Rules which stipulates Biology as a subject and not Mathematics in order to be eligible for appointment to the post of Pharmacist. It is also her case that this Court did not disturb the relief granted to the petitioner therein, in light of the peculiar facts of that case, and also invoking the *doctrine of legitimate expectation*, which is not the case here.

8. She submits that the Recruitment Rules being clear, the Tribunal has failed to appreciate that the appointment to the post of Pharmacist has to be made strictly as per the Rules and since none of the respondents fulfill the essential criteria, the question of them

continuing as Pharmacist does not arise. She states that the judgment of the Tribunal is required to be set aside.

9. It is her submission that Regulations of the Pharmacy Council of India stipulates the eligibility for diploma in Pharmacy with Physics, Chemistry, and Biology or Mathematics. In the said regulation Physics, Chemistry are compulsory with a choice between Biology or Mathematics. It does not mean that for appointment of Pharmacist as per Recruitment Rules, the same qualification need to be prescribed. In the advertisement for Pharmacist, a candidate should have studied Physics, Chemistry, and Biology and the choice of Mathematics has been negated.

10. According to her, the petitioners only wanted a person, who has studied Physics, Chemistry, and Biology and not Physics, Chemistry, and Mathematics to be considered for the post Pharmacist. She submits, prerogative to frame the Rules is with the petitioners and the petitioners having prescribed Biology for the purpose of recruitment as a Pharmacist, the said Rules are valid.

11. On the other hand, Mr. Naresh Kaushik, learned counsel for the respondents would justify the order passed by the Tribunal. According to him, the Tribunal rightly held that the clarification given by the Pharmacy Council of India cannot be ignored as the same is in favour of the respondents.

12. According to him, once the issue with respect to interpretation of rules has emerged, the same shall be guided by apex regulatory body i.e., the Pharmacy Council of India. The

Pharmacy Council of India has unambiguously stated that a certificate of 10+2 in science stream with Physics, Chemistry, and Biology or Mathematics would be the necessary qualification to pursue diploma in Pharmacy which is essential to hold the post of Pharmacist. He also states that the judgment rendered by the Tribunal in O.A. 1310/2009 delivered on March 11, 2010, is a categorical direction that, to obviate the possibility of different interpretation of the Rules, the petitioners should amend their Recruitment Rules to the extent that essential educational qualification for the post of Pharmacist should include 10+2 with Physics, Chemistry and Mathematics apart from Biology as the eligibility criteria.

13. He states that this Court in the petitions decided on November 12, 2010 did not disturb the judgment of the Tribunal. In fact, the Coordinate Bench of this Court has clearly stated that in the absence of pleadings with respect to Pharmacy Act, 1948 and any contention on the issue as to whether the government can prescribe eligibility conditions at the Senior Secondary level for Pharmacists contrary to the eligibility conditions recognised by a statutory authority constituted under law i.e. the Pharmacy Council, the Court shall refrain from rendering any opinion on the *vires* of the amended Recruitment Rules. But it also observed that, on the reasoning of the Tribunal it would not be permissible to hold the same as arbitrary. Thus, leaving the question of *vires* open, this Court set aside the decision of the Tribunal that the amended Recruitment Rules are *ultra-vires* to the Constitution, by

upholding the final direction issued by the Tribunal. According to Mr. Kaushik, this Court has not held that the Recruitment Rules are intra-vires. He seeks the dismissal of the petition.

14. Having heard the learned counsel for the parties, at the outset, we may submit that the advertisement issued by the DSSSB with regard to the post of Pharmacist reads as under:-

“Essential:- (a) B. Pharmacy from a recognized institute.

Or

(b) 10+2 with science stream (Physics/Chemistry/ Biology) from a recognized Board.

Technical Qualification:-

(i) Approved Diploma in Pharmacy from the institute recognized by the pharmacy council of India and registered as Pharmacist under Pharmacy Act, 1948.”

15. The notification issued by the Pharmacy Council of India on October 09, 2020 prescribing minimum qualification for admission to Diploma in Pharmacy contemplates 10+2 examination (Science Academics Stream) with Physics, Chemistry and Biology or Mathematics. This Diploma in Pharmacy is considered, in terms of the Recruitment Rules issued by the petitioners, as the technical qualification required for being appointed as a Pharmacist in the Health and Family Welfare Department, Government of NCT of Delhi.

16. The short question that needs to be decided by this Court is whether the Recruitment Rules of the petitioners can prescribe only Physics, Chemistry and Biology as necessary qualification for

appointment as a Pharmacist excluding Mathematics as a subject in the 10+2 examination. The answer to the same has to be in the negative. This we say so, for the reason that when the minimum qualification required for admission to diploma in Pharmacy is 10+2 examination (Science Academic Stream) with Physics, Chemistry, Biology or Mathematics, then the Recruitment Rules to the extent it excludes Mathematics from the purview of educational qualification required along with technical qualification for the post of Pharmacist, then the same has to be held to be contrary to the minimum standards laid down by the Pharmacy Council of India. The communication of the Pharmacy Council dated February 25, 2022 to the DSSSB on which reliance has been placed by Mr. Kaushik during the course of his arguments, reads as under:-

“In continuation of your letter No. F.4(379) P&P/DSSSB/2021/105-111 Dated 25.01.2022. In this context, I would like to Thank you for making the amendments in the O.M. mentioned above. In this context I would further like to add that I have also recommended you to Please mention the Qualification 10+2 (Physics, Chemistry, Biology/Maths). You are requested to incorporate the same.”

17. It is clear that even the Delhi Pharmacy Council has impressed upon the DSSSB to mention the qualification of 10+2 (Physics, Chemistry, Biology / Mathematics). The argument of Mrs. Ahlawat to justify the recruitment in terms of the Recruitment Rules of the petitioners is misplaced. Surely, the recruitment rules notified by the petitioners cannot be at variance with the

regulations prescribed by the Pharmacy Council of India. The plea of Ms. Ahlawat that eligibility to do a course in pharmacy is different from eligibility for appointment as pharmacist though appealing on a first blush, but on a deeper consideration, it is seen, if such a plea is accepted, it shall mean that a candidate with Mathematics, though eligible to do Diploma in Pharmacy, cannot be appointed as Pharmacist because the Recruitment Rules exclude the said subject. Such cannot be the position in law, when the basic qualification required for doing Diploma is Biology or Mathematics. The plea that it is the prerogative of the employer to exclude Mathematics from the Recruitment Rules is unmerited, as the employer is required to maintain the minimum standards prescribed by the Pharmacy Council of India, otherwise, it shall mean that the Diploma which a candidate has secured with Mathematics as subject, shall lose its relevance as it gets excluded as eligibility to the post of Pharmacist.

18. It must be held that the Recruitment Rules as framed by the petitioners surely are *ultra-vires* to the Regulations as the Recruitment Rules cannot be at variance with Regulations framed by the Pharmacy Council of India for prescribing essential qualifications for admission to the course of Diploma in Pharmacy, which is the relevant technical qualification required by a candidate for appointment.

19. In this regard, we may refer to the Judgment of the Division Bench of Madras High Court in case titled ***V. Lekha v. Chairman University Grants Commission and Others, 2021 SCC***

OnLine Mad 2946, wherein in paragraphs 108, 120, 121, 122 and 123 it has held as under:-

“108. The trajectory of the main judicial discourse thus far is with regard to the main challenge in the writ petitions. As outlined in the earlier portion of the decision, there are two other issues that need to be decided in the paramount interest of maintaining exemplary standard in the field of legal education. There are two worrying scenarios that are portrayed in the course of submissions by the learned counsels. Some of the candidates have obtained their post graduate degree, though in the relevant subject as per the Notification, but had obtained their degrees through Distance Education mode. This Court, of course, cannot have any quarrel, as degrees obtained through Distance Education mode, are recognised, as held by the Apex Court as well as the Full Bench of this Court referred to supra. Despite the recognition of the degrees, this Court has a strong misgiving as to the suitability of such candidates for appointment as faculty members. Although the validity of a degree is beyond the pale of any doubt, and yet the appointments as faculty with degrees obtained through Distance Education mode or correspondence required to be clarified.

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120. For all the above said reasons, the qualifications, viz., M.L., degree and enrollment as advocate, as prescribed in the impugned Notifications, in addition to the postgraduate degree in the relevant subject for appointment to the post of Assistant Professor for pre law course in the Government Law Colleges in the State of Tamil Nadu are declared as illegal, as the same suffer from patent irrationality, unreasonableness and arbitrariness.

121. More importantly, the disputed qualifications are in effect inconsistent with the Legal Education Rules, 2008 which have been framed by the Bar Council of India in

terms of the powers of the Advocates Act, 1961 and therefore, the Government Orders, viz., G.O.Ms.No.1349 and G.O.Ms.No.264 dated 19.11.1985 and 20.12.2005, are hereby declared as illegal and unconstitutional as the same are repugnant to the minimum standards laid down by the BCI in the Legal Education Rules, 2008, in terms of Section 7(1)(h)(i) read with Section 49(af) and (d) of the Advocates Act, 1961.”

(emphasis supplied)

20. We note, before the Tribunal the petitioners had relied upon the judgment of the Gauhati High Court at Agartala Bench in *Surat Sarkar & Ors. v. State of Tripura & Anr.*, 2010 SCC OnLine Gau 501. We have seen that judgment. In the said case, the challenge is to the Recruitment Rules, which were framed for appointment to the post of Pharmacist (Allopathy) in the year 1991. The same stipulated Madhyamik or equivalent as one of the qualifications apart from the Diploma in Pharmacy for appointment to the post of Pharmacist. In the year 2004, the Recruitment Rules were amended and instead of Madhyamik or its equivalent, 10+2 (Science Stream) was prescribed as one of the qualifications for appointment to the post of Pharmacist. The amendment to the said Rules was upheld by the Gauhati High Court.

21. The petitioners cannot take a plea that for the purpose of recruitment as Pharmacist, Biology is the only relevant subject. This we say so because such a plea would be contrary to the minimum standards laid down by the Pharmacy Council of India which depict Mathematics as a relevant subject. In this regard, we

may reproduce the judgment of the Supreme Court in the case of *Osmania University Teachers' Association v. State of A.P.*, (1987) 4 SCC 671, wherein the Supreme Court in paragraph 14 has held as under:-

“14. Entry 25 List III relating to education including technical education, medical education and Universities has been made subject to the power of Parliament to legislate under Entries 63 to 66 of List I. Entry 66 List I and Entry 25 List III should, therefore, be read together. Entry 66 gives power to Union to see that a required standard of higher education in the country is maintained. The standard of Higher Education including scientific and technical should not be lowered at the hands of any particular State or States. Secondly, it is the exclusive responsibility of the Central Government to co-ordinate and determine the standards for higher education. That power includes the power to evaluate, harmonise and secure proper relationship to any project of national importance. It is needless to state that such a coordinate action in higher education with proper standards, is of paramount importance to national progress. It is in this national interest, the legislative field in regard to 'education' has been distributed between List I and List III of the Seventh Schedule.”

(emphasis supplied)

22. In view of the above discussion, we do not see any merit in the petition. The petition and connected application (s) are dismissed. No costs.

V. KAMESWAR RAO, J.

ANOOP KUMAR MENDIRATTA, J.

APRIL 17, 2023/ds