

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

WP.ST 165 of 2023

with

IA No. CAN 1 of 2023

with

IA No. CAN 2 of 2023

Dip Sarkar &Ors.

Versus

The State of West Bengal &Ors.

with

WP.ST 170 of 2023

with

IA No. CAN 1 of 2023

**The Secretary and Controller of Examinations,
West Bengal Health Recruitment Board**

Versus

Dip Sarkar &Ors.

For the Petitioners WP.ST 165 of 2023 And Respondents in WP.ST 170 of 2023	:	Mr. Uday Narayan Betal, Mr. Mriganka Patra.
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For the Applicants in CAN 2 of 2023 of WP.ST 165 of 2023	:	Mr. Sadananda Ganguly, Mr. Sumit Ray, Mr. Sanjay Ghosh, Ms. Sarda Shaw.
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For the State respondents in WP.ST 165 of 2023	:	Mr. Tapan Kumar Mukherjee, Ld. A.G.P., Mr. Somnath Naskar.
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For the Sate respondents in WP.ST 170 of 2023	:	Mr. Tapan Kumar Mukherjee, Ld. A.G.P., Ms. Sangeeta Roy.
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For the Petitioners in : Mr. Jayanta Samanta,
WP.ST 170 of 2023 Ms. Indumouli Banerjee.

For the Respondent no. 2 : Mr. Amal Kumar Sen,
Ms. Sahina Sumi.

Hearing is concluded on : 29th August, 2024

Judgment On : 13th September, 2024

Partha Sarathi Chatterjee, J.

Preface:

1. Both writ petitions are presented seeking a judicial review of a common order dated August 23, 2023 passed by the learned Tribunal in an original application (in short, OA), being OA 173 of 2022 and as such, both writ petitions are heard analogously. The order dated 23.08.2023 adjudicated the OA with the following order:

“ In view of the above observations, it is the finding of this Tribunal that the Reasoned order passed by the Secretary and Controller of Examination, West Bengal Health Recruitment Board dated 02.03.2022 is not in conformity with any rules and thus, void in law and quashable. Accordingly, the Reasoned order is quashed and set aside with the following directions to the respondent no. 5, Secretary and Controller of Examination, West Bengal Health Recruitment Board:

- 1) *Initiate the process of selection for the post of Medical Technologist (Lab) Grade-III within four (4) weeks from the communication of this order.*
- 2) *Allow the applicants to participate in the said selection process if they are found to be otherwise eligible, and*
- 3) *Allot one mark each year upto maximum 5 weeks if the certificates produced by them are found to be from the recognised private sector and are acceptable.*

Accordingly, the application is disposed of.”

Key facts:

2. Although the issue at hand lies within a narrow compass, for the sake of elucidation and a comprehensive appreciation of the same, it is imperative to outline the salient facts that have given rise to these writ petitions.
3. A selection process was initiated by the West Bengal Health Recruitment Board (hereinafter referred to as the "Board") to fill the posts of Medical Technologist Grade III (All categories) under the West Bengal Subordinate Health Services. In this regard, an advertisement No. R/MT (VARIOUS)/02/2021, dated January 21, 2021, was issued inviting online applications from eligible candidates for the posts. The deadline for submission of the online application was 6.02.2021.
4. To get to the heart of the matter, it is pertinent to examine the distribution of marks, as outlined in the advertisement, is as follows:

“a) Higher Secondary (10+2) or its equivalent examinations in Science Subjects [Physics, Chemistry and Biology] – 25 marks

b) Diploma/Bachelor Degree in Medical Technology in concerned subject – 50 marks.

c) Experience as Medical Technologist in State Govt. service (Permanent/Contractual) – 02 marks/year - 10(Max)

[Maximum last 5 years' tenure of experience will be taken into account]

d) Interview - 15 (Max)".

5. It is important to note that marks for experience were allotted only to the candidates who had served as Medical Technologists in State Government service, whether as permanent or contractual employees. Consequently, no marks were allotted to the candidates who gained experience through service in private organizations. This constitutes the central issue of contention.
6. Some candidates who are aspiring for the posts and have gained experience in private organizations raised their grievances regarding the allocation of marks for experience to candidates who have gathered experience in government service by making a joint representation on February 01, 2021 i.e. prior to the deadline for submission of the online applications. However, since their representation did not receive a response from the concerned authorities, they were compelled to approach the learned Tribunal with OA 169 of 2021. This OA was disposed of by an order dated August 6, 2021, directing the respondent no. 5 to take a reasoned decision on the representation after affording a hearing to either the applicant no. 1 or a representative of the applicants.
7. Following this direction, the respondent No. 5 provided an opportunity of hearing to the applicant No. 1 and the representative of the

Director of Health Services, but ultimately, rejected the appeal to allocate marks for experience to candidates who had gained such experience through employment in the private sector, by issuing a reasoned order dated 02.03.2023. For clarity and convenience, it would be apposite to quote the operative part of the order, which is as follows:

“ With the object getting preferable candidates and WBHRB, having prerogative to determine the qualifying standards of the applicants, fix the relative weightage to be given for academic career and experience for preparing the final order of merit, have provided weightage to the candidates who have working experience in the State Government Sector by allotting 10 marks under experience category. Applicants after accepting the stipulations of the advertisement cannot turn around and dispute the same later on.

Considering the prerogative of the Board of WBHRB in fixing marks distribution pattern and keeping in view the submission of Dr. Tapan Kumar Sahar ADHA(Admin), the prayer of the applicants for allotting marks for having working experience in private sector cannot be considered. Above all, if the prayer of the applicants is considered the same may amount to change in the rules in selection procedure.

Hence, the representation dated 1st February, 2021 is disposed of.”

8. Since the reasoned order rejected the appeal of the petitioners in OA 169 of 2021 to allocate 10 marks for experience gained in the private sector, those petitioners challenged this decision before the learned Tribunal in OA 173 of 2023. As noted previously, the order under scrutiny

in this writ petition indicates that the learned Tribunal disapproved the reasoning provided by respondent No. 5 in his order dated March 2, 2023. However, in that order, the Tribunal directed respondent No. 5 to allocate one mark for each year of experience, up to a maximum of five marks, provided the certificates produced by them are from recognized private sector and are acceptable.

9. This direction from the Tribunal has led to the filing of two writ petitions. The first, being, WP.ST 165 of 2024, has been presented by the candidates with experience in the private sector, seeking to advance their claim for the allocation of 10 marks for experience, whereas the second, being, WP.ST 170 of 2024, has been filed by the Secretary and Controller of Examinations, West Bengal Health Recruitment Board to challenge the decision to award marks for experience to candidates who obtained such experience in private organizations.
10. Therefore, the limited issue that we are tasked to resolve is whether the candidates who have gained experience in the private sector are entitled to receive any marks for their experience, and if so, whether the appropriate allocation should be 5 marks or 10 marks.

Submissions:

11. Mr. Betal, learned advocate representing the petitioners in WP.ST 165 of 2023, argues that the petitioners are aggrieved by the concluding part of the order challenged in both writ petitions, whereby the learned Tribunal directed the Board to allot 5 marks for experience to candidates from the private sector. He contends that according to the advertisement issued by the Board for the post, 10 marks were allotted for experience as a Medical

Technologist in State Government Service (Permanent/Contractual). According to him, such allotment of marks towards experience only for the candidates who gained experience as Medical Technologist in State Government Service is illegal, as the extant Recruitment Rules does not empower the Board to allot any mark towards experience.

12. He seeks to clarify the petitioners' stand, contending that the petitioners do not object to the allotment of marks for experience to candidates from Government Service (permanent or casual). However, the sole intention of the petitioners in pursuing this action is to ensure that the same marks are also allotted for experience to candidates from the private sector.
13. His main argument is that, even if Board had such power to specify marks under different heads, it cannot differentiate between candidates with experience in the government sector and those with experience in the private sector, since such practice is discriminatory. He contends that the advertisement shows that not only the candidates with experience in private sector but the candidates who gathered experience in Central Government Service are also not to be awarded any mark towards experience. He submits that in 2018 and 2022 also, selection processes were initiated to fill the posts of same cadre but in both selection processes, there was no such classification. According to him, such a classification cannot be sustained.
14. He argues that the Private Medical Service Providers are governed by the provisions of the West Bengal Clinical Establishment (Registration, Regulation and Transparency) Act, 2017 (in short, the 2017 Act), and are

required to maintain high standard and transparency in their operations. He contends that although the learned Tribunal found this classification to be illegal, it misguided itself by directing the respondents to allocate only 5 marks instead of 10 marks for experience to candidates from the private sector. To embolden his contention, Mr. Betal places reliance on the decisions, reported at (1987) 4 SCC 646 (Shri Durgacharan Misra v. State of Orissa & Ors.) and (1995) 6 SCC 1 (Krushna Chandra Sahu v. State of Orissa & Ors) for the proposition that a commission or authority empowered to conduct selection process cannot prescribe additional requirements for selection.

15. In rebuttal, Mr. Mukherjee, learned Additional Government Pleader representing the petitioners in WP.ST 170 of 2023 and the respondents in WP.ST 165 of 2023, argues that the provisions of the 2017 Act do not apply to clinical establishments maintained by or under the control of the State Government, Central Government, Local Self-Government, or any local authority. Therefore, according to him, the candidates with experience in State Government Service cannot be equated with those who have gained experience in the private sector. He further argues that, since the Recruitment Rules were framed by the Hon'ble Governor under the power conferred by Article 309 of the Constitution of India, and the Board, which holds a status similar to that of a Public Service Commission constituted under Article 320 of the Constitution of India, can prescribe additional requirements for the selection process. He asserts that the Board's power in this regard is not amenable to judicial review.

16. He further argues that an employer has the prerogative to determine the qualifying standards for candidates in any selection process. In his view, a court or tribunal should not dictate how the employer should set qualifications for a particular post. He asserts that the candidates with experience from State Government Service are better qualified and as such, to identify the better and/or preferable candidates for the posts, 10 marks are allotted only to the candidates with experience from State Government Service. He contends that the Board did not commit any mistake in allotting 10 marks to candidates with experience in State Government Service and that the learned Tribunal erred in directing the respondents to allot only 5 marks to candidates with experience in the private sector.
17. Mr. Betal was quick to respond to Mr. Mukherjee's contention, arguing that it is unclear on what basis candidates with experience in State Government Service are being deemed better qualified than those with experience in the private sector.

Analysis:

18. Indisputably, setting eligibility criteria falls within the exclusive domain of an employer and cannot be subject to judicial review unless it is found to be arbitrary, unreasonable, or not aligned with the nature of the services for which the appointments are to be made. If the eligibility criteria lack a rational relation to the objectives of the statute, or if they are deemed arbitrary or unreasonable, they are liable to be quashed as they contravene Article 14 of the Constitution of India, which guarantees equality before

the law and equal protection under the law. (See, the judgment delivered in case of State of Jammu & Kashmir v. Shiv Ram Sharma, reported in AIR 1999 SC 2012 and Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, reported at (2002) 5 SCC 111).

19. Admittedly, in the case at hand, the Recruitment Rules prescribes that the posts shall be filled up by selection (direct recruitment) through the Board and the Director of Health Services, West Bengal would be the appointing authority. However, apart from prescribing educational qualifications, no other qualifications have been prescribed for the post.
20. There cannot be any quarrel in accepting the proposition of law expounded in the judgements delivered in cases of Shri Durgacharan Misra (supra) and Krushna Chandra Sahu (supra) that if the relevant recruitment rules do not empower, a selection body cannot prescribe additional qualification for any post. However, since it has been clarified that the petitioners' sole intention in pursuing this action is to ensure that same 10 marks are also allotted to candidates from private sector also, we restrain ourselves from making any further deliberation on this particular issue.
21. Article 14 of the Constitution of India forbids only class legislation and not reasonable classification. A classification is considered reasonable when the twin tests laid down in the celebrated decision, reported at AIR 1975 SC 75 (State of W.B –vs- Anwar Ali Sarkar) are fulfilled. The twin tests are follows:

‘(i) The classification must be based on an *intelligible differentia* that distinguishes persons or things within the group from those excluded from it; and

(ii) The differentia must have a rational relationship to the objective sought to be achieved by the statute’.

22. Therefore, it must be examined whether the differentia is reasonable and intelligible. If the answer is affirmative, it is then necessary to determine whether such differentia has any nexus with the object of the scheme. It goes without saying that the term ‘intelligible’ refers to ‘what can be understood.’

23. The reasoned order dated 2.3.2022 issued by the respondent no. 5 indicates that the classification was made with ‘the objective of selecting preferable candidates’, and since the Board, **as the employer**, has the prerogative to determine the qualifying standards for the post.

24. In the order challenged in the writ petitions, the learned Tribunal observed that the word ‘Technologist’ used in the nomenclature of the post suggests that the candidates have to be familiar with functioning of medical devices and machineries. In other words, they are required to handle or operate the machines/apparatus used for therapeutic purposes. However, ultimately, the learned Tribunal strongly criticised such classification, finding it to be premeditated bias towards the candidates with experience in government sector. It concluded that disregard for the experience gained in private organizations is arbitrary, contrary to the

principles of natural justice, and not supported by the relevant recruitment rules.

25. Admittedly, the objective underlying any selection process is to find best candidate for the post. The phrase 'the objective of selecting preferable candidate', as used in the reasoned order, is somewhat confusing. If the State and its functionaries completely disregard the experience gathered in private organisation, it undermines the standard maintained in private sector. Such action shall convey a message that experience in operating medical device can only be acquired in government sector. It has an effect of devaluing the experience of the technologist employed in private sector. It is not clear on what basis the respondents had reached such a conclusion.
26. The advertisement did not prohibit candidates with experience from the private sector or other government services from applying for the posts. However, it specified that candidates with experience in the private sector or other government services would compete out of a total of 90 marks, while candidates with experience in State Government Service would compete with a total of 100 marks. This is a clear example of discrimination and, therefore, violates the principles enshrined in Article 14 of the Constitution of India. Moreover, such discrimination undermines the standards maintained by private medical service providers and creates an unjust class distinction, which should be avoided.
27. It is well-settled that a legislation should not only to be assessed on its proposed aims but rather on the implications and the effects. [see, the judgment delivered in case of Anuj Garg v. Hotel Assn. of India, reported at (2008) 3 SCC 1].

28. In the judgment delivered in the case of ‘Press Trust of India v. Union of India’, reported in (1974) 4 SCC 638, it was ruled that even where legislative action or any action is taken under any law affecting a single individual or thing, or several individuals or things, and no reasonable basis for classification appears in the face of it or is deducible from the surrounding circumstances, such action is liable to be struck down as discriminatory. Since we did not find any basis for the classification made in the advertisement between candidates with experience from State Government Service (permanent or casual) and those with experience from the private sector, we cannot approve the allotment of 10 marks exclusively to candidates from State Government Service. In our considered opinion, the same marks should also be allotted to candidates from the private sector.
29. The court cannot ignore the fact that, to manage the pressure of providing medical treatment in this highly populated country, the State has adopted a public-private model. Even the Health Department of each State is resorting to outsourcing many services to the private sector. The reality is that the State is unable to provide medical facilities to all its citizens, and a significant portion of the population depends on private medical service providers for life-saving treatment.
30. As observed previously, no authority can get unfettered prerogative or discretion to act according its whims and caprice. The scope of judicial review is based on the grounds of illegality, procedural impropriety and irrationality (Wednesbury’s unreasonableness). The doctrine of proportionality can serve as an additional ground. A decision can be

deemed to be irrational, if it is so outrageous in its defiance of logic or accepted moral standards that no sensible person, having applied his mind to the question to be decided, could have arrived at it. If any administrative action is found to be illegal, improper or irrational, the court or tribunal has sufficient authority to address such mischief and rectify the wrong.

Conclusion:

31. Therefore, in view of discussion made hereinabove, we do not find that the classification as was made by the respondents between the candidates with experience in the government sector and those with experience in the private sector is based on *intelligible differentia* and therefore, cannot be upheld. The learned Tribunal also reached the same conclusion but it erred by directing the respondents to allot 5 marks instead of 10 marks towards experience which has resulted in further discrimination and even inconsistent with the Tribunal's own observation.

Order:

32. In such conspectus, the writ petition WP.ST 165 of 2023 is allowed, while writ petition WP.ST 170 of 2023 is dismissed. The operative order of the learned Tribunal dated 23.08.2022 passed in OA 173 of 2022 is modified to the extent that the respondents shall allocate 10 marks for experience to the petitioners in WP.ST 165 of 2023, who have gained experience in the private sector. However, the respondents in WP.ST 165 of 2023 retain the authority to conduct a thorough inquiry to verify the authenticity of the certificates submitted from recognized private medical

organizations and to assess whether the candidates have actually acquired the required experience for the post. The period as fixed by the learned Tribunal for initiation of the selection process for the post is extended for a period of 4 (four) weeks from date. The other portions of the order under assail in these two writ petitions are left unaltered.

33. There shall be no order as to the costs.
34. Urgent photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)