

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:-

The Hon'ble Justice Madhuresh Prasad

And

The Hon'ble Justice Supratim Bhattacharya

**W.P.S.T. 216 of 2024
With I.A. No.: CAN 1 of 2024**

**Dr. Abhishek Sengupta
Versus
The State of West Bengal & Ors.**

For the Petitioner	: Mr. D.N. Ray, Mr. S. Ghosh, Mr. M.N.Roy, Mr. B. Nandy.
For the State-respondents :	Mr. Swapan Kumar Banerjee, Ms. Sumita Shaw, Mr. Kanak Kiran Bandhopadhyay, Mr. Soumen Chatterjee
For the Respondent No. 5 :	Mrs. Susmita Saha Dutta Mr. Niladri Saha, Ms. Madhurima Basu.
Heard on	: November 20, 2024.
Judgment on	: November 26, 2024.

Madhuresh Prasad, J.:

1. The petitioner, a doctor serving in the State Government service, approached the West Bengal Administrative Tribunal (hereinafter referred to as 'the Tribunal') for a direction upon the respondents to grant a No Objection Certificate (NOC) for participating in a selection process for the post of Assistant Professor at All India Institute of Medical Science (AIIMS, Kalyani). The Tribunal did not pass any such

order. On the contrary, it has directed the Principal Secretary of the department to make an assessment of shortage of the doctors and the possibility in the near future of filling of such vacancies and to take a balanced and informed decision within the shortest possible time, preferably by 31.10.2024. The order of the Tribunal passed on petitioner's O.A. No. 388 of 2024 dated 24.09.2024.

2. The brief factual background is that the petitioner is serving as an Assistant Professor in the Calcutta School of Tropical Medicine, Kolkata. The AIIMS published an advertisement dated 10.07.2024 inviting online applications from the candidates desirous of participating in the recruitment process being conducted for recruitment of faculty positions mentioned in the advertisement. The petitioner was keen on applying for the post of Assistant Professor in the department of Micro-Biology. According to the petitioner, AIIMS would offer better career/ future prospects. The petitioner made his application in response to the advertisement dated 10.07.2024. The application was submitted on 29.07.2024 and as per the terms and conditions of the advertisement applicants like the petitioner who are already in Government service are required to produce NOC from their present employer at the time of interview.

3. The petitioner had already applied for issuance of NOC before the Director of Medical Education, Respondent No. 3 on 22.07.2024. The application was made through the proper channel, i.e. through the Director of Calcutta School of Tropical Medicine. The application did not evince any response. It is the undisputed case of the

petitioner that since he has completed more than 5 years of service tenure, there is no restriction under the extant service rules governing his service restricting his right to resign from service. It is also not in dispute that there is no departmental/ criminal proceeding pending against the petitioner. There is also no Government dues to be realized from the petitioner.

4. Since the authorities took no action on the request of the petitioner, he was compelled to approach the Tribunal by filing O.A. No. 388 of 2024. Before the Tribunal the State Government took a stand that they were not in a position to issue NOC. The reason for such inability has been stated to be the fact that there is at least 87 vacancies of Doctors against 211 sanctioned positions in the concerned department. Unavailability of doctors in requisite numbers has been made the basis of withholding the grant of NOC as it is submitted that the petitioner's retention in the State Government service is in the larger public interest for providing health services to the public at large.

5. Before the Tribunal, the petitioner relied upon decision of the Division Bench of this Court in the case of **Dr. Gaurab Ranjan Chaudhuri Vs State of West Bengal and Ors.** in **WPST No. 137 of 2023** submitted that he was ready and willing to file an affidavit to the extent that he will tender resignation and not seek the benefit of voluntary retirement. In the event he is selected by the AIIMS in the recruitment process. The petitioner in unequivocal terms submitted before the Tribunal that he is willing to file such affidavit, fully

understanding the consequences arising out of resignation simplicitor. He would not be claiming anything other than Provident Fund and group insurance in the event he is selected and tenders his resignation. In WPST No. 137 of 2023 a co-ordinate bench of this Court, taking on record such undertaking by the petitioner therein by way of affidavit has directed the authorities to issue no objection certificate forthwith so as to enable him to participate in the recruitment process for appointment to AIIMS. The learned Tribunal considering this stand of the parties as recorded above, passed the following order:

“From the submissions of Mr. Banerjee, it has become clear that due to acute shortage of doctors in the Department of Microbiology, the Director of Medical Education has refused to issue the NOC to the applicant. It has also been made clear that the Department has initiated steps in filling up the vacancies in different disciplines. However, in the light of a direction of Hon’ble High Court in WPST 137 of 2023, it is clear that the State Authorities cannot indefinitely withhold its decision of issuing NOCs or even refuse to grant such NOCs to the employees who have applied in prescribed format. In the opinion of the Tribunal, it would be prudent and imperative that the Principal Secretary of the Department makes an assessment on the shortages and possibility in the near future of filling up such vacancies and take an informed and balanced decision within the shortest possible time, preferably by 31.10.2024.

Accordingly, this application is disposed of.”

Since no direction was issued by the Tribunal for grant of NOC, the petitioner filed the present writ petition assailing the Tribunal’s order and seeking a direction for issuance of NOC so as to enable him to appear at the interview.

6. Subsequent to filing of the writ petition the respondents have rejected the petitioner’s application for NOC in the following terms:

“As directed, in connection with above referred solemn order dated 24/09/2024, passed by Ld. West Bengal Administrative Tribunal (copy enclosed), this is to inform you that, in the light of the lesser number of Medical Teachers/ Tutors involved with the increased number of Government Medical Colleges and Hospitals, under the administrative control of Government of West Bengal, this office is of the considerate opinion that in the larger public interest, it may not be appropriate, at this critical point of time, to grant you the NOC for appearing before the interview board at AIIMS, Kalyani for the post of Assistant Professor in the Department of Microbiology, in order to ensure, the smooth and effective functioning of Government Medical Colleges and Hospitals under the Government of West Bengal.

Therefore, your prayer for NOC, required for appearing for interview, to participate in the selection process for the post of Assistant Professor, Department of Microbiology at AIIMS, Kalyani stands rejected.”

7. The rejection order has also been put to challenge by way of an application bearing No. CAN 1 of 2024. The stand taken and grounds urged in the present proceedings by both the parties is the same which was urged before the Tribunal, as noted above. The State Authorities continue to take the plea of insufficient number of doctors in the State Health Services, and the larger public interest being served by retaining the petitioner in State Government service. The petitioner contends that there is no statutory rule under which he can be forcibly retained and made to serve in the State Government service, there was no criminal proceeding, no departmental proceeding or Government dues pending/ outstanding against him.

8. The learned Counsel for the State has also raised an issue regarding maintainability of the instant writ petition since the reasoned order dated 25.10.2024 was passed subsequent to the

Tribunal's directions. It is submitted by Mr. Swapan Kumar Banerjee learned State Counsel that since the reasoned order has been passed the same gives rise to a fresh cause of action. The Tribunal's order having been complied, the present writ petition has become infructuous. If the petitioner wants to challenge the reasoned order dated 25.10.2024 then he is required to first approach the Tribunal. He should not be permitted to assail the order directly in a writ petition, without exhausting the remedy available to him before the Tribunal. Referring to the decision of the Apex Court in the case of **L. Chandra Kumar vs Union of India And Ors.** reported in **(1997) 3 SCC 261** he submits that the Apex Court has laid down the law in the said report that though the power of judicial review under Article 226 cannot be ousted by Article 323 B of the Constitution of India, the Tribunal shall continue to be the 'Court of first instance' in such service matters as has been raised in the present writ proceedings. Only after such consideration by the Tribunal, the petitioners can invoke the writ jurisdiction. It is thus submitted that this Court should not entertain the writ petition and relegate the writ petitioner to avail his remedy before the Tribunal in terms of the decision in **L. Chandra Kumar** (supra).

9. Learned Counsel for the writ petitioner, however, submits that the respondent State cannot take such a stand in these proceedings. The self same issue of maintainability of the writ petition was raised by them in the two writ proceedings arising out of WPST 127 of 2023 and WPST 137 of 2023. In spite of such objection being raised a co-

ordinate bench of this Court has exercised writ jurisdiction and found The self same issue of maintainability of the writ petition was raised by them in the two writ proceedings arising out of WPST 127 of 2023 and WPST 137 of 2023. In spite of such objection being raised a co-ordinate bench of this Court has exercised writ jurisdiction and found the self same reason for refusing grant of NOC to be unsustainable, and also directed the authorities to issue NOC in favour of the two petitioners by a common order and judgment dated 29.09.2023 passed in WPST 127 of 2023 and WPST 137 of 2023. The same issue of maintainability having been rejected in the said proceeding, and the NOC having been issued in favour of the two writ petitioners by the respondents in compliance of the writ Court order, State authorities should not raise such objections in the present proceedings.

10. We have considered the rival submissions. We first take note of the fact which is not in dispute. There is no rule/statutory provision coming in the way of grant of NOC or permission to the petitioner to resign from service. There is no criminal or departmental proceeding pending against him. There is also no Government dues pending against the petitioner.

11. In so far as the issue of maintainability of the present writ proceedings is concerned, it is also not in dispute that the same objection has been rejected and relief granted to the writ petitioners in WPST 127 of 2023 as well as WPST 137 of 2023. It, therefore, in our opinion, does not behove the State, as a model employer to resist the claim of the petitioner on the same ground of maintainability, having

suffered a judgment overruling the same objection in the case of another Government servant. Moreso, since it is also not in dispute that the petitioners of WPST 127 of 2023 and WPST 137 of 2023 have in fact been issued NOCs in compliance of the direction issued in the said writ proceedings. This by itself is sufficient to overrule the objection regarding maintainability of the writ proceedings.

12. We, however, venture to consider the issue of maintainability raised with reference to the decision of the Apex Court in the case of **L. Chandra Kumar** (supra). There can be no two opinions regarding the submission that the mandate of the Apex Court decision is that the Tribunal shall continue to be the “Court of first instance” in such matters as has been raised by way of the present writ proceedings. Having considered the legal position we venture to examine whether in the facts and circumstances of the present case the petitioner has approached the “Court of first instance” in the present matter, before coming to this Court, or not.

13. It is not in dispute that O.A. No. 388 of 2024 was filed by the petitioner seeking direction/s against the respondent for issuance of NOC, since NOC was not being issued in his favour. It is also not in dispute that the State resisted his claim for NOC by raising the issue of larger public interest due to unavailability of sufficient number of doctors to deny the petitioner the grant of NOC. It is also not in dispute that the stand of the State Government was contrary to the decision of a co-ordinate bench of this Court in WPST 127 of 2023. Considering all these aspects, as quoted above, the tribunal, however,

has refused to pass any order for issuance of NOC in favour of the petitioner and directed the authorities to make an assessment on the shortage and possibility in the near future of filling up such vacancies. Thus, the reason assigned by the State Government before the Tribunal to reject NOC, in sum and substance has been upheld by the said order of the Tribunal, since it has allowed the State authorities to make an assessment of the extent of unavailability and the expected time for overcoming such shortage so as to enable the authorities to form an opinion regarding grant, or refusal of NOC based on the existing vacancy position. Viewed thus, the reasoned order dated 25.10.2024 passed by the OSD & Special Secretary is only as a consequence or pursuant to the order of the Tribunal, which as noted above has in sum and substance accepted and sustained the reason being assigned by the State Government before the Tribunal to refuse grant of NOC to the petitioner.

14. The petitioner, therefore, could not challenge the reasoned order dated 25.10.2024, without challenging the order of the Tribunal in O.A. No. 388 of 2024, since the reasoned order is compliance, or as a consequence of the Tribunal's order. It is trite law that when an order is issued in compliance, or as a consequence of an earlier order, being the basic order, one cannot assail the consequential order without challenging the basic order.

15. In this connection, we would refer to the decision of the Apex Court in the case of ***Edukanti Kistamma (Dead) through LRS. And Ors. Vs. Venkatareddy (Dead) through LRS. And Ors.*** Reported in

(2010) 1 SCC 756, para 22 of judgment is relevant for the present consideration, which reads:

“22. It is a settled legal proposition that challenge to consequential order without challenging the basic order/statutory provision on the basis of which the order has been passed cannot be entertained. Therefore, it is a legal obligation on the part of the party to challenge the basic order and only if the same is found to be wrong, consequential order may be examined (vide P. Chitharanja Menon v. A. Balakrishnan [(1977) 3 SCC 255 : 1977 SCC (L&S) 378 : AIR 1977 SC 1720] ; H.V. Pardasani v. Union of India [(1985) 2 SCC 468 : 1985 SCC (L&S) 482 : AIR 1985 SC 781] ; and Govt. of Maharashtra v. Deokar's Distillery [(2003) 5 SCC 669 : AIR 2003 SC 1216]).”

16. The basic order in the present case is the order passed by the Tribunal in O.A. No. 388 of 2024, which can only be challenged before this Court as per the decision of the Apex Court in the case of **L. Chandra Kumar** (supra). Therefore, relegating the petitioner to assail the reasoned order dated 25.10.2024 would be an exercise in futility. The reasoned order being a consequential order has rightly been assailed in the present proceedings, in view of the above noted facts and circumstances of the present case. We, therefore, have no hesitation in rejecting the objection regarding maintainability of the present writ proceedings raised by the respondents.

17. In so far as the relief claimed in the present proceedings, there is no dispute that the facts and circumstance of the present case are similar, if not identical to the facts and circumstances of the case of the petitioners in WPST 127 of 2023 and WPST 137 of 2023. The petitioner in those proceedings also are doctors serving the State Government and were seeking NOC as they are desirous of participating for the same recruitment process being conducted by the

AIIMS. We, therefore, find the petitioner to be entitled to the same relief as has been granted to the writ petitioners in WPST 127 of 2023 and WPST 137 of 2023.

18. We take note of the undertaking given on behalf of the petitioner in the representation dated 22.07.2024 that he would tender resignation and not seek the benefit of voluntary retirement in the event he is selected to any post in the recruitment process being conducted by the AIIMS, and also that he will not seek any benefit in the event such a resignation is submitted, other than his Provident Fund and Group Insurance from the State Government. The petitioner is bound by such undertaking, thus, subject to such condition/s the authority is directed to forthwith issue an NOC to the writ petitioner enabling his participation in the selection process being conducted by AIIMS under Advertisement No. 678/E-12011/12/24-(FAC) dated 10.07.2024.

19. The order of the Tribunal dated 24.09.2024 passed in O.A. No. 388 of 2024 is set aside; and the reasoned order dated 25.10.2024 Passed in compliance thereof is also quashed.

20. The writ petition and pending CAN 1 of 2024 is allowed.

(Madhuresh Prasad, J.)

I agree.

(Supratim Bhattacharya, J.)