

02.02.2024
rpan /14

WPST 199 of 2023
Subhadip Roy
– *Versus* –
The State of West Bengal & Others

Mr. Gangadhar Das,
Mr. Tanmoy Chattopadhyay,
Ms. Munmum Das
... for the Petitioner.

Mr. Tapan Kumar Mukherjee,
Ms. Tuli Sinha
.... for the State/Respondents.

Ms. Shraboni Sarkar
... for the Respondent no.6.

1. The present writ petition has been preferred challenging an order dated 13th December, 2023 passed by the learned Tribunal in the original application being OA 73 of 2022 by which the cancellation of candidature of the petitioner for appointment to the post of Junior Engineer (Civil) was held to be fair and reasonable.

2. Shorn of unnecessary details, the facts are that the petitioner is a physically disabled person with hearing impairment of 40% disability as certified *vide* memo no. ENT/10 dated 19th January, 2017 by a Medical Board at the Lalbagh Sub-Divisional Hospital. In response to an advertisement published by the Public Service Commission, West Bengal (in short, PSC) in the month of December, 2017 being advertisement No. 25/2017, the petitioner applied for participation in

the recruitment process for appointment to the post of Junior Engineer (Civil). He emerged to be successful and *vide* memo dated 1st October, 2019 he was recommended for appointment by the PSC. Thereafter *vide* memo dated 18th November, 2019 issued by the respondent no. 3 he was requested to submit duly filled in verification roll, which he duly furnished. Thereafter by a memo dated 19th December, 2019 issued by the respondent no. 5 he was directed to appear before the standing Central Medical Board, Medical College and Hospital on 27th December, 2019. The petitioner duly appeared before the Medical Board on the said date. Upon examination he was handed over a document signed by the Board members dated 27th December, 2019 and a document referring him to attend Dr. D Mukherjee of the ENT Department on 14th January, 2020 '*for verification of the degree of disability*'. The petitioner duly appeared before the said doctor and he was examined but no report of such medical examination was provided to him. As the respondents thereafter the maintained a deceptive silence, the petitioner submitted two successive representations on 8th February, 2021 and 12th March, 2021 but in vain and as such, he submitted an application under the Right to Information Act, 2005 on 19th of June, 2021 and in response thereto, he was handed over letters dated 24th January, 2020 issued by the respondent no.

5 and a letter dated 14th October, 2020 issued by the respondent no. 3. In the midst thereof, the petitioner filed a writ petition being WPA 19259 of 2021 and during pendency of the same, the petitioner was served a memo dated 10th December, 2021 issued by the respondent no. 3 enclosing a memo dated 1st December, 2021 issued by the respondent no. 6 in which it was stated *inter alia* that the petitioner could not fulfil the percentage (40%) disability to avail the facilities/concession admissible to the handicapped as per Women & Child Development notification dated 27th September, 1989 and that his candidature stands cancelled. In view thereof, the writ Court by an order dated 7th February, 2022 dismissed the writ petitioner with liberty to the petitioner to ventilate his grievance before the jurisdictional Tribunal. Pursuant thereto the original application was filed and the same was admitted with direction upon the parties to exchange their reply and rejoinder and pursuant thereto the parties exchanged their pleadings.

3. Drawing our attention to the impugned order dated 13th December, 2023 passed by the learned Tribunal, Mr. Chattopadhyay, learned advocate appearing for the petitioner submits that in the medical certificate in the form prescribed, annexed at page 63 of the writ petition it was stated that unfit on account of *'the percentage of the disability is 7 (seven) percent*

(not eligible to avail handicap Quota)'. However, none of the three doctors, who signed the said form was an ENT specialist and as such they referred the petitioner to Dr. Mukherjee, ENT Department for verification of the degree of the disability, as would explicit from the document annexed at page 53 of the writ petition. The petitioner duly appeared before the said ENT specialist on the specified dated but no final report was prepared and accordingly in the memo dated 24th January, 2020, annexed at page 62 of the writ petition it was stated that '*previously this name is reported as pending vide our No. MB/10 dated 8th January, 2020*'. In the said conspectus, the learned Tribunal erred in law in refusing the petitioner's prayer treating the memo dated 24th January, 2020 to be sacrosanct though the final medical report was still awaited.

4. Referring to the advertisement No. 25/2017 and the averments made in the reply filed by the respondents before the learned Tribunal, Mr. Chattopadhyay argues that the certificate of disability from '*a Medical Board constituted at Government Medical College Hospitals in Kolkata, District Hospitals and Subdivisional Hospitals*' was an essential requirement for participation in the recruitment process. The petitioner applied on the basis of the disability certificate dated 19th January, 2017 issued by a Medical Board at the Lalbagh Sub-Divisional Hospital

on. The authenticity of the said certificate has not been challenged by the respondents. It is also not a case that the said certificate was obtained by practicing fraud. The percentage of disability was ascertained to be 40% by the competent Medical Board and as such there can be dispute that the petitioner was eligible to avail handicap quota and accordingly, he was recommended as a Schedule Caste candidate under PH-HI quota. The Central Medical Board had no jurisdiction to sit in appeal over the assessment of disability made by the competent authority being Lalbagh Sub-Divisional Hospital.

5. Drawing our attention to the clause of '*medical examination*' in the advertisement, Mr. Chattopadhyay submits that the function attributed to the Medical Board was for issuance of certificates to the candidates '*of their fitness for Government service in form prescribed for the purpose*'. In exercise of such jurisdiction the Central Medical Board could not have altered the percentage of disability as determined earlier by the competent authority, as reviewable after a period of 10 years. As such, on the date the petitioner submitted his *online* application, which commenced from 13th December, 2017, he was having a certificate issued by the competent authority stating that his percentage of disability was 40% and in view thereof,

the petitioner was recommended as a physically handicap quota candidate.

6. He contends that in the memo dated 1st December, 2021 at page 75 of the writ petition, the respondent no. 6 erroneously observed that the petitioner could not fulfill the percentage (40%) of disability to avail the facilities/concession admissible to the handicapped, as per Women and Child Development and Social Welfare Department notification dated 27th September, 1989. Referring to the said memo as well as the amendment notification dated 18th July, 1999, Mr. Chattopadhyay submits that in the event of any dispute regarding recognizing any person with disability under the Act or any dispute regarding the percentage of any disability as certified by medical authority, it was incumbent to the Medical Board to refer the matter to the Appellate Medical Board. However, no such steps have been taken by the Central Medical Board which had no ENT specialist. The petitioner was, however, referred to an ENT specialist and before obtaining final report his candidature was cancelled in a most illegal and arbitrary manner and that too without grant of any opportunity of hearing. Such arguments, as advanced, were glossed over by the learned Tribunal and no finding was returned on the same.

7. Mr. Mukherjee, learned Additional Government Pleader appearing for the State respondents denies and disputes the contention of the petitioner submits that the Central Medical Board had every jurisdiction to ascertain the fitness of the candidate and to quantify his fitness percentage. In support of such contention, he has placed reliance upon rule 10 of the West Bengal Service Rules.

8. Drawing our attention to the medical certificate in the prescribed proforma annexed at page 63 of the writ petition, Mr. Mukherjee argues that the petitioner was found to be unfit on account of the percentage of the disability, which was determined to be 7% and as such the Medical Board rightly observed that the petitioner was not eligible to avail handicap quota.

9. He further submits that the certificate dated 19th January, 2017 at page 44 was issued to the petitioner under the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation Act) 1995 Act (hereinafter referred to as the 1995 Act) which stood repealed by the Rights of Persons with Disabilities Act of 2016 (hereinafter referred to as the 2016 Act). Referring to Section 102 of the 2016 Act he submits that as on the basis of the certificate dated 19th January, 2017 no steps regarding employment of the petitioner was taken during subsistence of the old

Act, the issuance of the said certificate cannot be deemed to have been done or taken under the corresponding provision of the new Act and that as such the said certificate had no force on the date he appeared before the Central Medical Board.

9. In reply Mr. Chattopadhyay, learned advocate argues that in view of the provisions of the Rule 20 of the 2017 Rules framed under the 2016 Act, the validity of the certificate of disability issued under the repealed Act shall continue to be valid after commencement of the new Act for a period specified therein and that as such the disability certificate was valid on the date the advertisement was published.

10. We have heard the learned advocates appearing for the parties at length and we have given our anxious consideration to the facts and circumstances of the case.

11. Indisputably, the PSC upon consideration of all records and on the basis of the certificate dated 19th January, 2017 issued by the competent Medical Board recommended the petitioner after he emerged to be successful in the written examination and personality test. The recommendation memo dated 1st October, 2019 reveals that the number of reported vacancies was 635 out of which there were 7 vacancies in PH(HI) quota. No fresh selection process has been initiated thereafter and no averment has been made in the reply

filed before the learned Tribunal that there is no existing vacancy under the PH(HI) quota.

12. The perusal of the order impugned would reveals that the learned Tribunal dismissed the original application placing reliance upon the memo dated 1st December, 2021 issued by the respondent no. 6 being oblivious the fact that the medical examination on 27th December, 2019 was not completed since the petitioner was referred to an ENT specialist and his report was still awaited. On the basis of an incomplete report, the petitioner's candidature was mechanically rejected without any application of mind. The learned Tribunal dismissed the application by a cryptic order and the same, in our opinion, is not sustainable in law.

13. The argument of Mr. Mukherjee that as on the basis of the certificate dated 19th January, 2017 no steps regarding employment of the petitioner was taken during subsistence of the old Act, the said certificate had lost its force on the date he appeared before the Central Medical Board and that the Central Medical Board had every jurisdiction to reassess the fitness of the candidate and to quantify his fitness percentage afresh, is not acceptable to this Court.

14. The advertisement clearly specified that the disability certificate required for participation must be a certificate from a *'a Medical Board constituted at Government Medical College Hospitals in Kolkata,*

District Hospitals and Subdivisional Hospitals'. The certificate dated 19th January, 2017 on the basis of which the petitioner applied was issued by a Medical Board of a Sub-Divisional Hospital, an authority competent under the 1995 Act. The percentage of disability assessed by the competent authority could not have been reviewed or altered by the Central Medical Board through the remarks made on 27th December, 2019, moreso when the same was an incomplete one. Accordingly, on the basis of the said remarks the petitioner candidature could not have been cancelled.

15. The clause of '*medical examination*' in the advertisement runs as follows:

'Candidates who will be selected for appointment will be required to appear before a Medical Board for certificates of their fitness for Government service in the form prescribed for the purpose'.

The examination was thus for ascertainment of fitness and not for quantification of percentage of disability. Such quantification of disability has already been made by the competent authority. The respondents have not challenged the said certificate dated 19th January, 2017 and that as such the remark that the petitioner was not eligible to avail handicap quota is not acceptable. It is not a case that the petitioner is unfit to perform normal duties on account

of debility resulting from illness or other factors. The document dated 27th December, 2019 does not say that the petitioner is unsuitable or is having ill health. A scrutiny of the said document would reveal that the petitioner was stated to be unfit on account of *'the percentage of the disability is 7 (seven) percent (not eligible to avail handicap Quota)'* after recording under column (c)- *'Hearing Almost normal'*. The remarks are thus pertaining to the petitioner's disability percentage when such percentage had already been determined earlier by the competent authority.

16. For the reasons discussed above, the order impugned in the present writ petition is set aside and the respondents are directed to appoint the petitioner to the post in which he had been recommended by the PSC *vide* memo dated 1st October, 2019, within a period of four weeks from the date of communication of the order.

17. With the above observations and directions the writ petition is disposed of.

18. There shall however no order as to costs.

19. Urgent Photostat 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.)