

(2015) 06 TP CK 0056
In the Tripura High Court
Case No : Writ Petition (C) 73 of 2011

Satyabrata Bhattacharjee	Vs	APPELLANT
State of Tripura and Others		RESPONDENT

Date of Decision : 24-06-2015

Acts Referred:

Constitution of India, 1950 — Article 309
Drugs and Cosmetics Act, 1940 — Section 20, 33F

Citation : (2015) 06 TP CK 0056

Hon'ble Judges : Deepak Gupta, C.J.; S.C. Das, J

Bench : Division Bench

Advocate : D.K. Biswas and G.K. Nama, for the Appellant; S. Chakraborty, Addl. Govt. Advocate, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Deepak Gupta, C.J.

1. By means of this writ petition, the petitioner has challenged the constitutional validity of the Recruitment Rules for the post of Senior Scientific Officer on the ground that they are violative of the stipulations laid down under the Drugs and Cosmetics Act, 1940 (hereinafter referred to as "the Act"). The petitioner has also prayed for quashing of the Advertisement (Annexure-2) whereby applications have been invited for filling up the post of Senior Scientific Officer by direct recruitment.

2. The case of the petitioner is that the Senior Scientific Officer performs the jobs of Government Analyst and, therefore, the appointment of Government Analyst being governed by statute, i.e. the Drugs and Cosmetics Act, there can be no qualifications other than those prescribed under the Act.

3. On the other hand, it is urged on behalf of the State that the post of Senior Scientific Officer is not the post of Government Analyst. According to the State, this is a post created by the State in exercise of the powers vested in it under

Article 309 of the Constitution of India. The further case of the State is that the State may appoint either a Junior Scientific Officer or a Senior Scientific Officer, as the case may be, as Government Analyst. According to the State, when a notification is issued appointing such an officer as Government Analyst, at that stage it has to ensure that the said officer is qualified to hold the post of Government Analyst.

4. The Drugs and Cosmetics Act, 1940 defines "Government Analyst" as follows:--

"3(c). "Government Analyst" means--

(i) in relation to Ayurvedic, Siddha or Unani drug, a Government Analyst appointed by the Central Government or a State Government under section 33F; and

(ii) in relation to any other drug or cosmetic, a Government Analyst appointed by the Central Government or a State Government under section 20;"

5. Thus, the Act contemplates of two different types of Government Analyst; one appointed under section 33F who shall be the Government Analyst appointed in relation to Ayurvedic, Siddha or Unani drugs and the other Government Analyst appointed under section 20 who have the powers in relation to all other drugs.

6. Reference may also be made to Sections 20 and 33F which read as follows:--

"20. Government Analysts.--(1) The State Government may, by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Government Analysts for such areas in the state and in respect of such drugs or classes of drugs or such cosmetics or classes of cosmetics as may be specified in the notifications.

(2) The Central Government may also, by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Government Analysts in respect of such drugs or classes of drugs or such cosmetics or classes of cosmetics as may be specified in the notification.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), neither the Central Government nor a State Government shall appoint as a Government Analyst any official not serving under it without the previous consent of the Government under which he is serving.

(4) No person who has any financial interest in the import, manufacture or sale of drugs or cosmetics shall be appointed to be a Government Analyst under sub-section (1) or sub-section (2) of this section.

33F. Government Analysts.--(1) The Central Government or a State Government may, by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Government Analysts for such areas as may be assigned to them by the Central Government or the State Government, as the case may be.

(2) Notwithstanding anything contained in sub-section (1), neither the Central Government nor a State Government shall appoint as a Government Analyst any official not serving under it without the previous consent of the Government under which he is serving.

(3) No person who has any financial interest in the manufacture or sale of any drug shall be appointed to be a Government Analyst under this section."

7. Rule 44 of the Drugs and Cosmetics Rules, 1945 prescribes the qualifications of Government Analyst and reads as follows:--

"44. Qualifications of Government Analyst. _____

A person appointed as a Government Analyst under the Act shall be a person who _____

(a) is a graduate in medicine or science or pharmacy or Pharmaceutical Chemistry of a University established in India by law or has an equivalent qualification recognized and notified by the Central Government for such purpose and has had not less than five years" post-graduate experience in the testing of drugs in a laboratory under control of (i) a Government Analyst appointed under the Act, or (ii) the head of an Institution or testing laboratory approved for the purpose by the appointing authority or has completed two years" training on testing of drugs, including items stated in Schedule C, in Central Drugs Laboratory, or

(b) possesses a post-graduate degree in medicine or science or pharmacy or Pharmaceutical chemistry of a University established in India by law or has an equivalent qualification recognized and notified by the Central Government for such purpose or possesses the Associateship Diploma of the Institution of Chemists (India) obtained by passing the said examination with "Analysis of Drugs and Pharmaceuticals" as one of the subjects and has had after obtaining the said post-graduate degree or diploma not less than three years" experience in the testing of drugs in a laboratory under the control of (i) a Government Analyst appointed under the Act, or (ii) the head of an Institution or testing laboratory approved for the purpose by the appointing authority or has completed training on testing of drugs, including items stated in Schedule C, in Central Drugs Laboratory:

Provided that-

(i) for purpose of examination of items in Schedule C,-

(ia) the persons appointed under clause (a) or (b) and having degree in Medicine, Physiology, Pharmacology, Microbiology, Pharmacy should have experience or training in testing of said items in an institution or laboratory approved by the appointing authority for a period of not less than six months;

(ib) the person appointed under clause(a) or (b) but not having degree in the above subjects should have experience or training in testing of said Schedule C

drugs for a period of not less than three years in an institution or laboratory approved by the appointing authority or have completed two years training on testing of drugs including items stated in Schedule C in Central Drugs Laboratory;"

8. We are dealing here mainly with sub-rule (a) and (b) but we shall also be clarifying the law on the other aspects. Sub-rule (a) lays down the qualifications of a graduate who has to be appointed as a Government Analyst. Only that person who is a graduate in Medicine or Science or Pharmacy or Pharmaceutical Chemistry can be appointed as a Government Analyst. He must have either of the three following experiences:--

"(i) He must have worked for five years under the control of a Government Analyst; or

(ii) He should have been the head of an Institution or testing laboratory approved for the purpose by the appointing authority which would obviously mean the State Government or the Central Government, as the case may be; or

(iii) The candidate must have completed two years" training on testing of drugs including drugs mentioned in Schedule C in a Central Drugs Laboratory."

Therefore, the Act contemplates that if the person is a graduate in the four subjects mentioned, then he either must have five years" experience of working under a Government Analyst or must have worked as head of an approved laboratory or Institution for a period of two years or should have completed two years training on testing of drugs including Schedule C drugs in the Central Drugs Laboratory.

9. Sub-clause (b) deals with those candidates who are post-graduates. As far as the second and third educational qualifications, i.e. being head of an Institution or having completed two years training on testing of drugs including items mentioned in Schedule C in a Central Drugs Laboratory are concerned, the experience provided both under sub-clause (a) and (b) is identical. The only difference is that in cases of post-graduates, the minimum experience of working under a Government Analyst is three years as against five years prescribed in the case of graduate candidates.

10. The proviso to this rule clearly lays down that where drugs or other items mentioned in Schedule C are the subject matter of examination or testing, no person can be appointed as a Government Analyst unless he had an experience of testing Schedule C items in an institution or laboratory approved by the appointing authority for a period of not less than six months. Therefore, if a graduate has five years" experience or a postgraduate has three years" experience but has never worked in a laboratory or institution entitled to analyze and test items falling in Schedule C, then such person cannot be given the power to analyze Schedule C items. Furthermore, only those persons are to be appointed for examination of Schedule C who are graduates in Medicine,

Physiology, Pharmacology, Microbiology or Pharmacy. Therefore, every graduate of Science or Pharmaceutical Chemistry would not be eligible under the first part of the proviso.

Under the second part of the proviso (ib), if the person does not have a degree, then the experience or training in testing Schedule C drugs should be for a period of not less than three years in an approved institution or laboratory or the person must have completed two years training on testing of drugs including items mentioned in Schedule C in a Central Drugs Laboratory.

11. As far as the present case is concerned, the Recruitment Rules provide promotion as the main basis of filling up the post of Senior Scientific Officer. Rule 11 provides the eligibility criteria for promotion from amongst Junior Scientific Officers and the relevant portion of rule 11 reads as follows:--

"11. In case of recruitment by promotion/deputation/transfer/grades from which promotion/deputation/transfer to be made.

Promotion:

From the post of Junior Scientific Officer with 5(five) years" experience in the grade and having experience prescribed in column No. 7 above.

Deputation:

From analogous post/grades in the State/Central Government having qualification prescribed in the column No. 7."

12. In case post cannot be filled up by promotion, then the same has to be filled in by direct recruitment and there the criteria is as follows:--

"7. Education and other qualification required for direct recruits. Essential:

(i) Education: Graduate degree in Pharmacy from a recognized University.

(ii) Experience: Fulfils the experience for appointment of Government Analyst as laid down under rule 44 of the Drugs and Cosmetics Rules, 1945, as amended from time to time."

13. According to the State, none of the officials in the department, i.e. the Junior Scientific Officer fulfilled the necessary criteria of five years" experience in the grade and, therefore, they had to go in for direct recruitment.

14. The case of the petitioner is that he had a legitimate expectation that the post of Government Analyst would be filled by taking into consideration the educational qualifications provided for a Government Analyst in rule 44 and he being a post-graduate in the case of promotion post-graduates with three years" experience in the grade should be considered for promotion. The main thrust of the argument of the petitioner appears to be that since the work of Government Analyst has to be done by the Senior Scientific Officers, the qualifications by the State Government should be those prescribed for a Government Analyst and no

other conditions could be prescribed.

15. We had on 05.11.2014, in view of the controversy involved, directed the Deputy Secretary, Government of Tripura, to file a fresh affidavit mentioning what are the duties of a Junior Scientific Officer and Senior Scientific Officer. An affidavit was filed and thereafter, on 14.01.2015 we had passed the following order:--

"The petitioner has alleged that the Senior Scientific Officer was virtually performing the job of the Government Analyst which is a statutory post under the Drugs and Cosmetics Act. This allegation of the petitioner was denied by the State in the affidavit-in-opposition. We had vide our order dated 05.11.2014 directed the Deputy Secretary, Government of Tripura to file a fresh affidavit stating what are the duties to be performed by Junior Scientific Officers and Senior Scientific Officers respectively.

Affidavit has been filed in which it is stated that there is virtually no difference in the duties but these are two administrative posts at different levels to carry out tests. Again it is stated that the post of Government Analyst is different from that of Senior Scientific Officers/Junior Scientific Officers.

The petitioner was recruited in service on 13.12.2007. Therefore, the Secretary to the Government of Tripura, Health and Family Welfare Department is directed to file an affidavit stating who were the officers holding the post of Government Analyst w.e.f. 13.11.2007 till date. The necessary notifications, in this regard shall also be filed along with the affidavit.

List on 11.02.2015."

16. What we find is that there are virtually no differences between the duties performed by a Junior Scientific Officer and a Scientific Officer but they are two administratively distinct posts in separate grades. From the latest affidavit which has been filed, we find that on many occasions Junior Scientific Officers have also been appointed Government Analyst. It is not correct that only Senior Scientific Officers are appointed Government Analysts.

17. Mr. D.K. Biswas, learned counsel for the petitioner, has also laid emphasis on the note of the then Secretary, Health Department in which it is mentioned that none of the Junior Scientific Officers is eligible to fill up the promotional post. The promotional post is of Senior Scientific Officer and not of Government Analyst. In the Recruitment Rules framed by the State Government there is no post of Government Analyst. The posts are of Junior Scientific Officer, Senior Scientific Officer and other posts. Out of these posts, the Government is free to appoint any person as a Government Analyst so long as that person fulfills the qualifications for being appointed as Government Analyst in terms of rule 44. We find nothing wrong in the action of the Government in appointing Junior Scientific Officers as Government Analyst as long as they fulfill the qualifications prescribed under rule 44.

18. Coming to the promotion to the post of Senior Scientific Officer. Once we have held that these are two different posts in different grades but have nothing directly to do with the post of Government Analyst though some officers may have been appointed as Government Analyst, the question that arises is whether the action of the State in prescribing five years' experience in the grade of Junior Scientific Officer for being considered for promotion to the post of Senior Scientific Officer is in any way violative of the Constitution.

19. We are of the considered view that it is for the employer to lay down the conditions relating to educational qualifications and experience as to when a person should be considered for higher post. The State in its wisdom has decided that only those Junior Scientific Officers shall be considered for promotion who have five years' experience in the grade and in addition thereto have experience prescribed in column No. 7 in relation to direct recruitment. Therefore, any Junior Scientific Officer who has to be considered for promotion to the post of Senior Scientific Officer must not only have five years' experience in the grade but he also must fulfill all the criteria of experience as laid down in rule 44 of the Act. The only exception is that as per the State, it will only consider graduates who have a degree in Pharmacy from a recognized institution. We are not going into this question whether the State could debar other graduates like graduates in Medicine from this post because that is not the issue before us but what we find is that the qualifications laid down for Senior Scientific Officer encompass within themselves, the experience and qualifications laid down for a Government Analyst and, therefore, they cannot be held violative of the Constitution.

20. Having held so, we would like to clarify that in the case of direct recruitment in case, the educational qualifications are fulfilled and the person is a post-graduate, then he will only be required to have three years' experience under the first Clause of working under a Government Analyst and not five years' experience. Similar will be the position even with respect to rule 11 because in addition to having worked for five years in the grade, the person to be considered must fulfill the experience prescribed in column No. 7 against direct recruitment.

21. We have now clarified the position and the writ petition is disposed of accordingly and the State shall ensure that any promotions or direct recruitment to the post of Senior Scientific Officers are made strictly in accordance with the law laid down above. We also make it clear that the State should ensure that only those officers whether Junior Scientific Officers or Senior Scientific Officers should be appointed as Government Analyst who fulfill the necessary criteria prescribed in rule 44 of the Act. As far as the petitioner is concerned, at the relevant time he did not even have five years' experience in the grade. Therefore, he was not eligible to be considered for promotion. Though there was no stay order by this Court, we have been informed that the direct recruitment process was stopped. If that be a fact and no action pursuant to the advertisement has taken place, the State shall first reconsider whether there are

any eligible candidate as on date in the cadre of Junior Scientific Officer who are eligible to be promoted and if they are available, then they should be first considered for promotion and if none is found suitable for promotion, then only direct recruitment shall be resorted to.

22. The writ petition is disposed of in the aforesaid terms.