

Court No. - 5

AFR

Case :- SERVICE SINGLE No. - 262 of 2021

Petitioner :- Ashish Tyagi & Ors.

Respondent :- State Of U.P.Thru.Prin.Secy.Food Safety & Drug Admin.& Anr.

Counsel for Petitioner :- Vineet Kumar Pandey,Pradeep Kumar Tiwari

Counsel for Respondent :- C.S.C.,Ashok Shukla

Hon'ble Attau Rahman Masoodi,J.

“Heard learned counsel for the petitioners.

It is strange to note that the advertisement stated to have been issued on 10.08.2016 is in the teeth of full bench judgment rendered by this Court in a bunch of writ petitions leading case being W.P.No.46079 of 2010 decided on 10.04.2014.

The petitioners have asserted that their exclusion from the zone of consideration has occasioned on account of the incorporation of the condition of experience in the advertisement, although except petitioner no.1 the other petitioners have failed to apply. It is also stated that the Commission on account of this anomaly had not proceeded with the process of selection for about four years. The selection process through interviews adhering to the same conditions was reiterated and notified by letter dated 24.12.2020. The petitioners having come to know about the faulty process have thus approached this Court.

It is well settled that every advertisement for recruitment in public service must proceed strictly in accordance with the statutory rules. In the present case the full bench judgment which ought to have been adhered to for this purpose also seems to have been side tracked for no valid reason and thereby the zone of consideration is sought to be frozen. All the petitioners are possessed with the requisite eligibility since prior to the date of advertisement,therefore, it cannot be said that the requisite qualification was acquired by the petitioners after the date of advertisement.

The delay in approaching this Court is a circumstance unfavourable to the petitioners but an illegality going to the root of the process of selection cannot be viewed lightly by this Court.

In the circumstances of the case, the petitioners are permitted to make a representation to the opposite party no.1 within a period of ten days' from today. In case a representation is filed, the same shall be decided by the opposite party no. 1 passing a reasoned and speaking order. The order so passed be communicated to the petitioners without any delay.

Until decision on the representation filed by the petitioners, the selection held, if any, may not be acted upon.

The writ petition is accordingly disposed of.”

Before the aforesaid order could be signed, Sri Ashok Shukla, learned counsel for U.P. Public Service Commission brought to the notice to this Court an amendment made in the relevant Service Rules, 1995 notified on 18.11.2015 titled as U.P. Food and Drug Administration Department Gazetted Officers' (Drugs) Service (Third Amendment) Rules, 2015. This amendment brought in the parent rules has been promulgated in exercise of the powers under Article 309 of Constitution of India. The comparative position of the relevant provision i.e. Rule-8 is reproduced below.

COLUMN-1 Existing Rule	COLUMN-2 Rule as substituted
<p>8. Academic qualification</p> <p><i>A candidate for direct recruitment to the post of Inspector of Drugs must possess such qualifications as have been prescribed under Rule-49 of the Drugs and Cosmetics Rules, 1945 made by the Central Government in accordance with the provisions contained in section 21 of the Drugs and Cosmetics Act, 1940.</i></p>	<p>8. Academic qualification</p> <p><i>A candidate for direct recruitment to the post of Inspector of Drugs must possess the following qualification:</i></p> <p><i>(i) Degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialization in Clinical Pharmacology or Microbiology or equivalent from a recognized University;</i></p> <p><i>(ii) (a) Eighteen months experience in the manufacture of at least one of the substances specified in Schedule "C" to the Drug and Cosmetics Rules, 1945; or</i></p> <p><i>(b) Eighteen months' experience in testing of atleast one of the substances specified in Schedule 'C' to the Drugs and Cosmetics Rules, 1945 in a laboratory approved for this purpose by the licensing authority; or</i></p> <p><i>(c) Three years experience in the inspection of firms manufacturing any of the substances specified in Schedule 'C' to the Drugs and Cosmetics Rules, 1945 during the tenure of their services as Drug Inspector of any State Government or Central Government.</i></p>

It may be noted that the Central Government, in exercise of the powers vested by virtue of Section 33 read with Section 21 of the Drugs and Cosmetics Act, 1940, had promulgated the statutory rules in the year 1945 known as Drugs and Cosmetics Rules, 1945 whereunder Rule 49 reads as under:

“49. Qualifications of Inspectors.—A person who is appointed an Inspector under the Act shall be a person who has a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialisation in Clinical Pharmacology or Microbiology from a University established in India by law:-

Provided that only those Inspectors—

(i) who have not less than 18 months’ experience in the manufacture of at least one of the substances specified in Schedule C, or

(ii) who have not less than 18 months’ experience in testing of at least one of the substances in Schedule C in a laboratory approved for this purpose by the licensing authority, or

(iii) who have gained experience of not less than three years in the inspection of firm manufacturing any of the substances specified in Schedule C during the tenure of their services as Drugs Inspectors;

shall be authorised to inspect the manufacture of the substances mentioned in Schedule C:

Provided further that the requirement as to the academic qualification shall not apply to persons appointed as Inspectors on or before the 18th day of October, 1993.”

In the light of the statutory rule reproduced above, the question that crops for consideration is as to whether the power of the State for prescription of essential qualifications to fill up the posts of Drug Inspector stands denuded otherwise than what has been prescribed under Rule 49 of

Drugs and Cosmetics Rules, 1945 framed under Section-21 read with Section 33 of the Act, 1940.

A question to this effect previously cropped up before this Court which on a reference being made to the Full Bench was decided in a bunch of writ petitions leading case being **Civil Misc. Writ Petition No. 46079 of 2010 (Kuldeep Singh and others v. State of U.P. and another)**. The questions referred to the Full Bench read as under:

"(1) Whether the experience required in the proviso to Rule 49 of the Drugs and Cosmetics Rules, 1945 is only a bar of authorization to inspect the manufacture of substances, or is an essential qualification under Rule 49 for direct appointment as Drug Inspector under Rule 5 (4) of the U.P. State Drug Control Gazetted Officers' Service Rules, 1995.

(2) Whether the Division Bench judgment in State of U.P. Vs. Zunab Ali & Ors.1 has been correctly decided."

On a consideration of the matter, the Full Bench of this Court answered the reference by observing as under:

"27. We, accordingly, answer the questions referred to the Full Bench as follows:

(i) The experience referred to in the first proviso to Rule 49 of the Drugs and Cosmetics Rules, 1945 has not been made an essential qualification for appointment as a Drug Inspector. The effect of the first proviso is that only an Inspector who holds the experience as specified in it is authorized to inspect the manufacture of a substance specified in Schedule C to the Rules.

(ii) The judgment of the Division Bench in Zunab Ali (supra) has been correctly decided.

28. The reference is answered accordingly."

Learned counsel for the petitioner has also placed before this Court a Division Bench judgement of Delhi High Court rendered in a bunch of writ petitions instituted by Union Public Service Commission, the leading case being **Writ Petition(c) 2475 of 2019 (Union Public Service Commission v. Nidhi Pandey and another)**.

In the controversy decided by the Delhi High Court, the relevant Service Rules providing for additional eligibility

criteria framed in exercise of powers under Article 309 of the Constitution of India being in conflict with the provisions of Rule 49 of Drugs and Cosmetics Rules, 1945 came under consideration. The Delhi High Court on an elaborate consideration of the issue has clearly opined that the rule making power of the Government under Article 309 of the Constitution of India, whether Central or State, is transitory and the rules so framed cannot be interpreted in a manner which may have a conflicting impact of overreach as against the primary legislation made by the Central Government in furtherance of the objects of Section 33 read with Section-21 of the Drugs and Cosmetics Act, 1940. The position of legislative exercise of powers under Article 309 of Constitution of India was thus clarified and this Court is in full agreement with the opinion expressed by the Delhi High Court on this aspect of the matter.

A similar question has now come up before this Court looking to the advertisement made by the U.P. Public Service Commission which has prescribed eligibility qualifications as per the amended Rule-8 reproduced above.

The rule making power in the present case has also been exercised by the State Government under Article 309 of the Constitution of India. The precise question is as to whether such a rule can be operated by the U.P. Public Service Commission insofar as the recruitment on the post of Drug Inspector is concerned

It is true that the advertisement was made as far back as on 10.8.2016 but the selection, for the reasons best known to the Commission, could not progress any further. In furtherance of the advertisement made, when the schedule of selection through interview was notified by letter dated

24.12.2020, the petitioners came to know about the selection process and have thus come up before this Court assailing the advertisement and process of selection. The ground that the advertisement made by the Commission does not stand in conformity with the eligibility qualifications prescribed under Rule 49 of the Drugs and Cosmetics Rules, 1945 is the main argument put forth by the learned counsel for the petitioners.

On a close scrutiny of the advertisement, it is gathered that the experience postulated under the amended rules w.e.f. 18.11.2015 framed under Article 309 of the Constitution of India has been set out. The prescription of such a qualification is not sanctified under Rule 49 of Drugs and Cosmetics Rules, 1945, hence a grievance excluding the petitioners from the zone of consideration is thus manifested on the face of advertisement. The petitioner no. 1 who has applied for appointment is excluded on account of the prescription of qualifications and rest of the petitioners have averred that they stood deprived of applying against the posts due to the untenable qualifications prescribed in the advertisement.

It is argued that right of equal consideration for selection in public service is guaranteed under Article 14 of the Constitution of India and such a right cannot be taken away under the garb of a principle which has no sanctity under law. In support of the arguments advanced, the petitioners have heavily relied upon the Full Bench judgement rendered by this Court as well as the Division Bench judgement of Delhi High Court mentioned above.

Per contra, Sri P.K. Singh and Sri Ashok Shukla, learned counsel appearing for the State and U.P. Public Service Commission have argued that the State Government,

by virtue of Entry 41 List-II Schedule VII of the Constitution of India, is competent to legislate with respect to public services under the State and any additional qualification prescribed in the rules made under Article 309 of the Constitution of India, unless challenged before this Court, is bound to be complied with by the Public Service Commission, therefore, the advertisement issued by the U.P. Public Service Commission stands wholly in conformity with law. In support of the argument put forth by the State Government as well as by U.P. Public Service Commission, the judgement rendered by the apex court in the case of **Jaspal Reddy v. State of Andhra Pradesh** reported in **(1994) 4 SCC 391**, has been placed reliance upon.

This Court may note that the rule making power for prescription of the essential eligibility qualifications to appoint Drug Inspectors is traceable to Section 21 read with Section 33(1) and (2)(b) of the Drugs and Cosmetics Act, 1940, which for ready reference may be reproduced below:

"21. Inspectors.—(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 Inspectors for such areas as may be assigned to them by the Central Government or the State Government, as the case may be.

(2) The powers which may be exercised by an Inspector and the duties which may be performed by him, the drugs or classes of drugs or cosmetics or classes of cosmetics in relation to which and the conditions, limitations or restrictions subject to which, such powers and duties may be exercised or performed shall be such as may be prescribed.

(3) No person who has any financial interest in the import, manufacture or sale of drugs or cosmetics shall be appointed to be an Inspector under this section.

(4) Every Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860), and shall be officially subordinate to such authority having the prescribed qualifications, as the Government appointing him may specify in this behalf."

“33. Powers of Central Government to make rules.—(1) The Central Government may after consultation with, or on the recommendation of the Board and after previous publication by notification in the Official Gazette, make rules for the purpose of giving effect to the provisions of this Chapter:

Provided that consultation with the Board may be dispensed with if the Central Government is of opinion that circumstances have arisen which render it necessary to make rules without such consultation, but in such a case the Board shall be consulted within six months of the making of the rules and the Central Government shall take into consideration any suggestions which the Board may make in relation to the amendment of the said rules.

(2) Without prejudice to the generality of the foregoing power, such rule may—

(a)

(b) prescribe the qualifications and duties of Government Analysts and the qualifications of Inspectors;”

A conjunctive reading of the above provisions on its plain reading would show that the Central Government within its concurrent domain of legislation has exhausted the legislative power on the aspect of prescribing the essential eligibility qualifications for selection. There is no scope open to the State Government for fixing a different or additional recruitment criteria of Drug Inspectors. Once the area of primary legislation is exhausted by the Central Government and rules are made, the legislative competence of the State or its rule making authority stands eclipsed to the extent of inconsistency. A contrary attempt made by the State would be clearly repugnant to the very objects of the law made by the Central Government. Section 33(1) and (2)(b) read with Section 21 of the Act clearly postulate that the essential conditions of recruitment i.e. qualifications shall be prescribed by the Central Government and this power once exercised in consultation with the Board leaves no scope for the State Government to legislate at variance. The State irrespective of the powers under Article 246 read with Entry-41 of List-II Schedule-VII or Article 309 of the Constitution of India loses

its base and any law framed thereunder contrary to the Central legislation would be void. Moreover, the consultative process envisaged under Section 33(1) of the Act, 1940 cannot be done away with by the State Government even if there existed a scope.

This position is elaborately discussed in the judgements rendered by the Full Bench of this Court as well as by Delhi High Court in the judgements mentioned above. The position of law put forth on the strength of decision in **Satpal Reddy** case is distinguishable for the reason that in the case of **Satpal Reddy**, the provisions of the Transport Act stood at variance and left enough scope for the State to legislate within the scope of Section 213 mentioned therein. The situation in the present case looking to the mandate of Section 21 read with Section 33 of the Act, 1940 is different. In the present case, the Parliament has firstly exhausted the legislative power on the subject of prescription of eligibility qualifications and secondly the law makes the Central Government a repository of such a power leaving no scope for the State Government to step in so long as Rule-49 is amended.

In my humble consideration, therefore, the advertisement issued by the U.P. Public Service Commission on 10.8.2016 as per amended Rule-8 of the Service Rules lacks authority and being inconsistent with Rule-49 of the Drugs and Cosmetics Rules, 1945, the same is liable to be set aside and is accordingly set aside. The selection held in pursuance thereof is also set aside with the liberty open to the State to issue a fresh advertisement or corrigendum inviting applications from the eligible candidates having regard to the prescribed qualifications as per Rule 49 of the

Drugs and Cosmetics Rules, 1949. The U.P. Public Service Commission being the selection body, is also expected to proceed in accordance with law, as applicable.

The writ petition is accordingly allowed with no order as to cost.

Order Date :- 08.1.2021

Fahim/-