

(2014) 08 SHI CK 0050

In the High Court Of Himachal Pradesh

Case No : LPA No. 7 of 2012 and CWP No. 4952 of 2012

Ajay Kumar

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 07-08-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309

Citation : (2014) 08 SHI CK 0050

Hon'ble Judges : Mansoor Ahmad Mir, C.J.;V.K. Sharma, J

Bench : Division Bench

Advocate : Tek Chand Sharma, K.C. Sankhyan and S.C. Sharma, Advocate for the Appellant; Shrawan Dogra, Advocate General, Romesh Verma, V.S. Chauhan, Additional Advocate Generals, J.K. Verma and Kush Sharma, Advocate for the Respondent

Final Decision : Dismissed

Judgement

V.K. Sharma, J.—Since common questions of fact and law are involved in both these matters (LPA No. 7 of 2012 and CWP No. 4952 of 2012), as is also apparent from the common order dated 3.7.2014, recording statement of Mr. S.C. Sharma, learned counsel for the petitioners in CWP No. 4952 of 2012 that outcome of the said writ petition shall abide by the decision in LPA No. 7 of 2012, the same are being disposed of by a common judgment.

2. Being aggrieved by and dissatisfied with dismissal of their writ petition under Article 226 of the Constitution, the appellants have preferred the present letters patent appeal under clause 10 of the Letters Patent against the judgment dated 24.8.2011, rendered by a learned Single Judge of this court, in CWP No. 33/2010 along with CWP No. 234/2010, titled Dhani Ram Bharmota and others vs. State of H.P. and others and the batch matter. For the sake of convenience, the parties shall hereinafter be referred to by their status before the Single Bench, that is, petitioners and respondents, respectively.

3. The petitioners in CWP No. 4952 of 2012 are seeking the following substantive

reliefs:-

"(i) That the R & P Rules for the post of Ayurvedic Pharmacists (Class-III-Non-Gazetted) in Department of Ayurveda, at Annexure P-21 may kindly be struck down as violative of Articles 14 & 16 of the Constitution of India, that the provisions of Rules 15-A of the R & P Rules at Annexure P-21 to the extent it keeps the contract appointment out of the purview of HPSSSB may kindly be struck down as in violation of Articles 14 & 16 of the Constitution of India.

(ii) That the process of selection for making appointment to the posts of Ayurvedic Pharmacists on contract basis vide advertisement dated 4-12-2009, Annexure P-21 may also be struck down.

(iii) That the respondents may kindly be directed to fill up the posts of Ayurvedic Pharmacists as per the R & P Rules at Annexure P-5, 50% on batch wise and 50% on direct recruitment.

(iv) That if during the pendency of writ petition an selection/appointment is made to the post of Ayurvedic Pharmacists pursuant to advertisement dated 4-12-2009, Annexure P-22, in that event such selection and appointment may also be struck down".

4. The moot question involved in these matters is as to what is the scope of judicial review in policy matters, which is the exclusive domain of the executive. This question arises for consideration and decision against the factual matrix obtaining from the pleadings on behalf of the parties noticed by the learned Single Judge vide paras 2 to 4 of the judgment with reference to CWP No. 234 of 2010 as follows:-

"2. Petitioners are trained Ayurvedic Pharmacists. They have obtained diploma in Ayurvedic Pharmacy from Gujarat Ayurved University, Jamnagar. Respondent-State has framed Recruitment and Promotion Rules for the post of Ayurvedic Compounders on 20.12.1988. According to these Recruitment and Promotion Rules, the mode of recruitment for filling up the post of Ayurvedic Pharmacist, Class-III (Non-Gazetted) was 100% by way of direct recruitment. State has taken a policy decision vide Annexure A-2 for filling up 50% posts on batch-wise basis where the candidates have undergone professional training. Sr. No. 32 of Annexure P-2 include category of Ayurvedic Pharmacists (Class-III). The decision taken on 21.4.1998 was reiterated in subsequent notification Annexure P-3 dated 2.12.1998. The diploma from Gujarat Ayurved University, Jamnagar was recognized by the State Government for the purpose of public employment on 22.12.2005. Respondent-State framed Recruitment and Promotion Rules under Article 309 of the Constitution of India called "The Himachal Pradesh Department of Indian System of Medicine and Homeopathy (Ayurveda), Ayurvedic Pharmacist, Class-III (Non-Gazetted) (Non-Ministerial Services) Recruitment and Promotion Rules, 2006". These rules were notified on 27.6.2006 whereby the recruitment was to be made 100% by way of direct recruitment 50% by direct recruitment through the concerned recruiting agency and 50% by direct

recruitment on batch-wise basis at departmental level.

3. A memorandum was put up before the Cabinet for consideration for filling up the posts of Ayurvedic Pharmacists. According to the memorandum, 110 posts were to be filled up on 50:50 basis batch-wise and direct from amongst the trained candidates available in the Pradesh from Gujarat Ayurved University, Jamnagar (the only institution recognized for this purpose by the Department) who fulfill the required educational qualification as per Recruitment and Promotion Rules. 111 posts were to be filled up from the open market from in service training candidates from the Rajiv Gandhi Government Post Graduate Ayurvedic College, Paprola.

4. As far as 110 posts were to be filled up, the recruitment process was to be undertaken by the Himachal Pradesh Service Selection Board, Hamirpur and 110 successful candidates were to be offered specific contracts for pre-notified locations and choice to them were to be based on their merit ranking as per their marks in diploma/recruitment examination. The memorandum was approved by the Cabinet in its meeting held on 11.4.2008. Thereafter, respondent No. 1 sent a communication to respondent No. 2 to initiate process for filling up of vacant posts of Ayurvedic Pharmacists. In sequel thereto, the Director, Ayurveda, Himachal Pradesh sent a requisition to all the Employment Officers in Himachal Pradesh on 26.5.2008. However, the fact of the matter is that the decision to fill up the posts in the manner above was deferred. Thereafter, again the matter was put up for consideration of the Cabinet for recruitment of 200 posts of Ayurvedic Pharmacists on contract as per procedure laid down under para 7 of the memorandum (Annexure P-12). The Government of Himachal Pradesh during 2005 had only recognized two years diploma obtained from Gujarat Ayurved University, Jamnagar. There were more than 3000 candidates in the State, who had obtained two years Pharmacist training course diploma from various Boards and Universities of the country, i.e. off campus course of deemed university J.R.N. Rajasthan, Punjab Technical Board, Haryana Board, Bihar and some other Boards and universities besides the Technical Education Board of Himachal Pradesh through SCVT. It was proposed as per para 6 of the memorandum to seek one time relaxation from clauses (ii) and (iii) of the Recruitment and Promotion Rules. The selected candidates were to undergo one year compulsory apprenticeship/training, including both theory and attachment with Pharmacies, Hospitals and dispensaries. Thereafter, final test was to be conducted by an appropriate external agency before their posting/appointment. The Cabinet approved the proposal on 18.8.2008. In sequel to the approval by the Cabinet in its meeting held on 18.8.2008, the Principal Secretary (Ayurveda) sent a communication to the Director Ayurvedic on 26.8.2008 regarding imparting pharmacist training. The Director of Ayurveda sent a requisition for selection of candidates to impart one year Ayurvedic Pharmacist training through Himachal Pradesh Subordinate Service Selection Board, Hamirpur on 5.9.2008. Respondent-State framed new Recruitment and Promotion Rules called "The Himachal Pradesh Department System of Medicine and Homeopathy (Ayurveda)

Ayurvedic Medical Officers, Class-I (Gazetted) Recruitment and Promotion Rules, 2009". According to Rule 10, posts of Ayurvedic Medical Officer was to be filled up 50% by direct recruitment on regular or contract basis and 50% by batch-wise on regular or contract basis. Thereafter, on the basis of Annexure P-17 dated 17.2.2009, a requisition was sent. However, the fact of the matter is that the State Government has decided to discontinue the process for training/recruitment of Ayurvedic Pharmacist vide letter dated 21.5.2009 (Annexure P-19). Thereafter, the respondent-State framed new Recruitment and Promotion Rules called "The Himachal Pradesh Ayurveda Department (Indian System of Medicine and Homeopathy) Ayurvedic Pharmacist, Class-III (Non-Gazetted) (Non-Ministerial Services) Recruitment and Promotion Rules, 2009" (hereinafter referred to as "Rules" for brevity sake). These Rules were notified on 26.8.2009. The Rules notified on 27.6.2006 were repealed. According to rule 10, the posts of Ayurvedic Pharmacists were to be filled up 100% by direct recruitment on regular basis or by recruitment on contract basis, as the case may be. According to rule 15-A, the Director (Ayurveda), after obtaining the approval of the Government to fill up the posts of Ayurvedic Pharmacists on contract basis, is required to issue advertisement in two leading newspapers and invite applications from candidates having the prescribed qualifications and fulfilling the other eligibility conditions as prescribed in the Rules. The selection was to be made in accordance with eligibility conditions prescribed in the Recruitment and Promotion Rules. Respondent No. 2 issued advertisement whereby applications were invited for filling up the posts of Ayurvedic Pharmacists on contract on year to year basis, vide Annexure P-22. The last date of receipt of applications was 2.1.2010".

5. We have heard the learned counsel for the petitioners and the learned Advocate General assisted by team of Law Officers for the respondents and gone through the record.

6. The petitioners are trained Ayurvedic Pharmacists from Gujrat Ayurveda University, Jamnagar, which is the basic qualification for appointment as Ayurvedic Compounders, now re-designated as Ayurvedic Pharmacists. Earlier as per the existing Recruitment and Promotion Rules (in short, "R & P Rules"), Annexure-"A", issued vide notification dated 20.12.1988, Annexure P-1, recruitment to the post of Ayurvedic Compounders was 100% by direct recruitment. However, later on the State Government vide letter dated 21.4.1998, Annexure P-2 took a policy "Decision regarding 50% batch-wise recruitment of posts where the candidates have undergone professional training", including the category of Ayurvedic Pharmacists (Class-III), which finds mention at Sr. No. 32 of the list annexed with Annexure P-2.

7. 1988 R & P Rules were replaced by 2006 Rules, Annexure P-5, retaining 50% direct recruitment. Then came 2009 Rules, Annexure P-21, doing away with 50% batch-wise recruitment.

8. The law relating to the scope of judicial review in matters of policy falling in the exclusive forte of the executive, being very limited and that too in given

situations, has been succinctly laid down by the Hon''ble Apex Court in a catena of pronouncements noticed by the learned Single Judge, particularly Ekta Shakti Foundation Vs. Govt. of NCT of Delhi, , laying as under vide para 11 of the report:-

"11. 5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in (the matter) of policy or to sermonize qua any matter which under the Constitution lies within the sphere of the Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory powers". (See Asif Hameed and others Vs. State of Jammu and Kashmir and Others, , M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, .

The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or (is violative of) the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. The policy decision must be left to the Government as it alone can adopt (sic decide) which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental rights is not shown the courts will have no occasion to interfere and the court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.

8. The Court should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theatre Co. v. City of Chicago (1912) 57 L Ed 730.

"The problems of Government are practical ones and may justify, if they do not require, rough accommodations,- illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is the best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review". [See: State of Orissa and Others Vs. Gopinath Dash and Others,]."

9. It is also by now fairly settled that any recruitment process is to be governed by the R & P Rules holding the field at the relevant time and the old Rules would not apply, as has been held by the Hon''ble Supreme Court in Deepak Agarwal

and Another Vs. State of Uttar Pradesh and Others, . To the similar effect is the law laid down by this court in Full Court decisions, in State of Himachal Pradesh and Others Vs. Harbans Lal and Others, and Berojgar Shastri Sangh Welfare Society Vs. State of H.P. and Others, .

10. The outcome of the above discussion is that there is no lawful cause or basis for any interference with the impugned judgment except the passing remarks based on the following observations made by the Hon"ble Apex Court in para 33 of the judgment in Deepak Agarwal vs. State of Uttar Pradesh and others (supra), that the petitioners and other similarly situate persons in their individual capacity or as a group may beseech the State Government by way of appropriate means, such as submission of representations to look into and redress their grievance(s) in the matter in accordance with law, particularly keeping in view the fact that at the relevant time there was no educational institution in the State imparting education in Ayurvedic Pharmacy and that the petitioners and their similarly situate fellow beings might have crossed the upper age limit for entry into Government service, which perhaps in the case of batch-wise recruitment is relaxable in accordance with Rules and further that the State Government has taken a conscious decision to introduce batch-wise recruitment in various departments, including for the post of Ayurvedic Chikitsa Adhikari in this very department:-

"33. It may be that the removal of the two posts from the feeder cadre would lead to some stagnation for the officers working on the two aforesaid posts. In fact, the Government seems to recognize such a situation. It is perhaps for this reason that the posts have been upgraded to the post of Deputy Excise Commissioner. However, mere upgradation of the post may not be sufficient compensation for the officers working on the two posts for loss of opportunity to be promoted on the post of Deputy Excise Commissioner. In such circumstances, the Government may be well advised to have a relook at the promotion policy to provide some opportunity of further promotion to the officers working on these posts. With these observations, the impugned judgment is affirmed and the appeal is dismissed with no order as to costs".

11. In the result, the appeal is dismissed with the above observations.

CWP No. 4952 of 2012

12. In view of dismissal of the LPA, the present writ petition would also go the same way and is accordingly dismissed.