
(2006) 08 AHC CK 0220

In the Allahabad High Court

Case No : C.M.W.P. No"s. 33233, 44132 and 51666 of 1999

Akhilesh Mishra and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 19-08-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226, 309
Uttar Pradesh Homoeopathic Medical Service Rules, 1990 — Rule 8
Uttar Pradesh Public Service Commission (Procedure of Conduct and Business) Rules, 1976 — Rule 59
Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 — Section 3(6)

Citation : (2008) 6 AWC 5432

Hon'ble Judges : Sanjay Misra, J;R.K. Agrawal, J

Bench : Division Bench

Advocate : A.N. Tripathi and K.N. Misra, for the Appellant; R.K. Awasthi and Pushpendra Singh, S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.K. Agarwal, J.—As all the aforesaid three writ petitions raise common questions of law, they have been heard together and are being decided by a common judgment.

2. All the three writ petitions have been filed by persons having degree in Homeopathy, known as B.H.M.S. They had studied for a period of four and half years and after undergoing one year compulsory rotatory internship, they were awarded the degree. They are also registered with the U. P. Homeopathic Medical Board, Lucknow. For filling up 205 posts of the Homeopathic Medical Officer in the Government Homeopathic Colleges in Uttar Pradesh, the U. P. Public Service Commission, Allahabad (hereinafter referred to as "the Commission") issued an advertisement in the Hindi newspaper Dainik Jagran, published on 22.8.1998. The Petitioners being fully possessed with essential qualifications, applied. They were called for interview during the period 2.12.1998 to 29.1.1999. They

appeared before the Interview Board. The Commission, vide notification dated 23.7.1999, declared the result of recruitment of the Homeopathic Medical Officers. The result contained the names of 200 persons out of 205 vacancies notified. None of the Petitioners were selected. Having failed to qualify in the select list, they have approached this Court by invoking the jurisdiction under Article 226 of the Constitution of India seeking the following reliefs:

(i) a writ, order or direction in the nature of certiorari quashing the selection list dated 23.7.1999 (Annexure-2) which has been prepared in pursuance of advertisement dated 22.8.1998 (Annexure-1) and/or in the alternate seats equivalent to the number of Petitioners be reserved for the Petitioners during the pendency of the writ petition.

(ii) a suitable writ, order or direction in the nature of mandamus commanding the Respondents not to issue any further appointments in pursuance to the select list (Annexure-2) and if any person has already been issued appointment letter and has also joined, he should not be confirmed and his appointment should be subject to the result of writ petition.

(iii) a suitable writ, order or direction in the nature of declaration, declaring the Second Amendment Rule, 1997 as void, nullity and violative of Articles 14 and 16 of the Constitution of India.

(iv) a writ, order or direction in the nature of declaration, declaring the Section 3(6) of the Uttar Pradesh Public Service (Reservation of S.C./S.T. and Other Backward Class) Act, 1994 as ultra vires the Constitution and violative of Articles 14 and 16 of the Constitution of India.

(v) any other suitable writ, order or direction as this Hon'ble Court may deem fit.

(vi) award the cost of the Petitioners.

3. As the counter-affidavits and rejoinder-affidavits have been exchanged between the parties, with the consent of the learned Counsel for the parties, the writ petitions are being heard and finally disposed of at the admission stage itself in accordance with the Rules of Court.

4. We have heard Sri A. N. Tripathi, learned Counsel for the Petitioners, and Sri R. K. Awasthi, learned standing counsel, appearing for the State Respondents and Sri Pushpendra Singh, learned Counsel for the Commission.

5. At the outset Sri A. N. Tripathi, learned Counsel, submitted that he is not pressing the vires of Sub-section (6) of Section 3 of the U. P. Public Services (Reservation for Scheduled Caste, Scheduled Tribe and Other Backward Class) Act, 1994. Thus, we are not called upon to examine the validity of Sub-section (6) of Section 3 of the aforesaid Act.

6. He further stated that as the Petitioner No. 2, Dr. Gopalji Sinha, in Civil Misc. Writ Petition No. 33233 of 1999, has already been selected after the filing of the petition, therefore, his name be deleted in the array of parties. His name is

accordingly directed to be deleted from the array of parties.

7. Sri A. N. Tripathi, learned Counsel for the Petitioners, submitted that the majority of the members who comprised the Commission, were of the reserved category, i.e., the Backward Class or the Scheduled Caste, which heavily reflected in the selection as out of 200 candidates selected, the majority of them belonged to the Other Backward Class and the Scheduled Caste. Even though the averments have been made in the writ petition, we decline to go into this question as, in effect, it amounts to levelling mala fide against the members of the Commission and the members having not been impleaded personally, it would not be proper for us to adjudicate on this issue.

8. Likewise, the Petitioners have challenged the selection of certain candidates on the ground that they had inferior qualifications. As they have not been impleaded as Respondents in the array of parties, we decline to go into the selection of those persons.

9. Sri A. N. Tripathi, learned Counsel, submitted that the post of the Homeopathic Medical Officer in the State of U. P. is a Class II post and is covered by the Service Rules framed under the proviso to Article 309 of the Constitution of India, namely, the U. P. Homeopathic Medical Services Rules, 1990 (hereinafter referred to as "the Rules"). Academic qualifications have been prescribed under Rule 8 of the Rules which provides that the candidate must possess a recognised degree in Homeopathy with the duration of study not less than 5 years or a recognised diploma in Homeopathy the duration of which is not less than four years. It, however, provided that preference would be given to the degree holders. The aforesaid Rules was amended by the Second Amendment Rules, 1997 with effect from 21.1.1997 and the preference given to the degree holder was omitted. Challenging the validity of the deletion of the preference to be given to the degree holder as arbitrary, illegal, mala fide and colourable exercise of power, he submitted that it is well recognised that the degree in Homeopathy which is obtained after four and half years of study plus one year of internship, is a superior qualification as compared to diploma in Homeopathy, which is given after four years of study. According to him, admission to a degree course is given after the person appears in the competitive entrance examination whereas no such requirement exists for studying any diploma course. The diploma course in the State of U. P. had been abolished after 1981 whereafter only degree course are being offered. He further submitted that the degree holders and the diploma holders could not be placed on equal footings. Further, there is no nexus to the object which is sought to be achieved by the Second Amendment Rules, 1997. Thus, it is violative of Articles 14, 16 and 21 of the Constitution of India.

10. He further submitted that the selection, in the present case, has been made purely on the basis of interview which gives sufficient scope for manipulating the result and in the present case, looking to the persons who have been placed in the select list, there cannot be any doubt that the Commission had awarded the

marks arbitrarily according to their own choice and sweet will, which had vitiated the entire selection. In support of his various pleas, he has relied upon the following decisions:

1. The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others,
2. Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others,
3. Union Territory of Chandigarh Vs. Dilbagh Singh and others,
4. Krishan Yadav and another Vs. State of Haryana and others,
5. Union of India and Others Vs. O. Chakradhar,
6. V. Markendeya and Others Vs. State of Andhra Pradesh and Others,
7. Praveen Singh v. State of Punjab and others, AIR 2001 SC 152: 2001 (1) AWC 293 (SC);
8. Shankarsan Dash Vs. Union of India,
9. Dr. Sheo Narain and Ors. v. State of U. P. and another, (1996) 3 UPLBEC 2229: 1996 (3) AWC 1573;
10. Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another,
11. Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, and
12. Rajesh Kumar Gupta and Others Vs. State of U.P. and Others,

11. Sri R. K. Awasthi, learned standing counsel, on the other hand, submitted that the Petitioners have no locus standi to challenge the selection made by the Commission on the post of the Homeopathic Medical Officer for the reason that they themselves had appeared in the interview before the Commission and have failed to get selected. Having availed of the opportunity and appeared in the interview, they are estopped from challenging the mode of selection adopted by the Commission. He further submitted that the Petitioners have not made the selected candidates party in the writ petition and, therefore, their selection could not be questioned in the present case. According to him, the Rules have been framed under the proviso to Article 309 of the Constitution of India which has the statutory effect. There is a presumption regarding constitutionality of the provision and heavy burden lies upon the person who challenges the same. He further submitted that even though the degree in Homeopathy is obtained after four and half years of study and one year of internship whereas the diploma is obtained after four years of study, the person having obtained diploma in Homeopathy have sufficient experience so as to discharge the duties of a Homeopathic Medical Officer in the Government Homeopathic Colleges. Thus, there is no discrimination. He further submitted that prior to the amendment made in the Rules in the year 1997, the proviso to Rule 8 gave preference to the

degree holders which may have created inequality and resulted in hostile discrimination. The alleged inequality and discrimination has now been removed by omitting the proviso, thus, making it to conform to the constitutional scheme of equality. In support of his various pleas, he has relied upon the following decisions:

1. A.M.S. Sushant v. M. Sujatha, (2000) 10 SCC 197
2. Nilangshu Bhusan Basu etc. Vs. Deb K. Sinha and Others etc.,
3. Bibhudatta Mohanty Vs. Union of India (UOI) and Others, and
4. Public Services Tribunal Bar Association v. State of U.P. and Anr. 2003 ALJ 662: 2003 (2) AWC 968 (SC).

12. In reply, Sri A. N. Tripathi, learned Counsel, submitted that as the Petitioners had challenged the entire selection made by the Commission, they are not required to implead all the successful candidates as party to the writ petition and further, they are entitled to challenge the selection process even though they had appeared in the interview held by the Commission.

13. We have given our anxious consideration to the various pleas raised by the learned Counsel for the parties.

14. Taking up the objection raised by the learned standing counsel regarding maintainability of the present writ petitions, we find that in the case of Rajesh Kumar Gupta (supra) the Apex Court relying on the Constitution Bench decision in the case of Shankarsan Dash (supra) has held that the writ petition is maintainable even though the selected candidates were not made parties to the writ petition. In paragraph 12 of the report, the Apex Court has held as follows:

12. With regard to the first point, the impugned judgment of the Division Bench holds that full effect of the result would be given only after verification of the testimonials, certificates and documents mentioned in the application and mere publication of the selection list on 31.11.2001 did not result in accrual of any right in favour of the candidates, whose names had found place in the select list. Relying on the judgment of this Court in I.J. Divakar and Others Vs. Government of Andhra Pradesh and Another, and Shankarsan Dash Vs. Union of India, and the statement made by the Chief Standing Counsel on behalf of the State made at the Bar, the Division Bench held that even though the candidates, whose names appeared in the select list, were not made parties to the writ petitions, the writ petitions could not be summarily dismissed on the said ground. We are inclined to agree with this finding of the Division Bench, which is supported by the authority of the Constitution Bench in Shankarsan Dash v. Union of India (supra) and several other judgments of this Court.

15. In the case of Kavelappara Kottarathil Kochunni alias Moopil Nayar (supra) the Apex Court was considering the question of maintainability of a writ petition under Article 32 of the Constitution of India. It is of no help to the Petitioners.

16. In the case of Krishan Yadav (supra) the Apex Court has held that where the process of selection is stinking and perceived in fraud and delivered in deceit, the entire selection is liable to be set aside.

17. In the case of A.M.S. Sushanth (supra) the Apex Court has held that the principle of natural justice demanded that any person who was going to be adversely affected by an order, should have an opportunity of being heard.

18. In the case of Dilbagh Singh (supra) the Apex Court has held that a candidate who finds a place in select list as a candidate selected for appointment to a civil post, does not acquire an indefeasible right to be appointed in such post in absence of any specific rule entitling him for such appointment and he could be aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no bona fide reasons, it follows as a necessary concomitant that such candidate even if has a legitimate expectation of being appointed in such posts due to his name finding a place in the select list of candidates, cannot claim to have a right to be heard before such select list is cancelled for bona fide and valid reasons and not arbitrarily. The Apex Court has further held that affording of an opportunity of hearing to the members of a Selection Board before cancelling a dubious select list of candidates for appointment to civil posts prepared by such Selection Board is not and cannot be a requirement of either law or any principle of natural justice.

19. It is not necessary to go into the various decisions, referred to above, as we had already declined to go into the selection of various candidates as they have not been impleaded herein as well as the plea of mala fide raised against the members of the Selection Committee/ Board inasmuch as they have not been impleaded.

20. However, we are of the considered opinion that as the Petitioners have challenged the validity of the Second Amendment Rules, 1997 as violative of Articles 14 and 16 of the Constitution of India, which plea cannot be raised by the Petitioners before any other forum except the High Court or the Hon'ble Supreme Court, the writ petitions filed by them are maintainable.

21. Now coming to the question of fairness of selection, we find that in the case of Praveen Singh (supra) the Apex Court was considering the recruitment to the post of the Block Development and Panchayat Officer. It was of the view that neither the job required mature personality nor the recruitment should be on the basis of interview only, having regard to the nature and requirement of the job. The Apex Court has held that the interview should not be the only method of assessment of the merits of the candidate. The vice of manipulation cannot be ruled out in viva voce test. In paragraph 9 of the report, the Apex Court has held as follows:

9. What does Kulshreshtha's case (supra) depict? Does it say that interview should be only method of assessment of the merits of the candidates? The answer obviously cannot be in the affirmative. The vice of manipulation, we are

afraid cannot be ruled out. Though interview undoubtedly a significant factor in the matter of appointments. It plays a strategic role but it also allows creeping in of a lacuna rendering the appointments illegitimate. Obviously it is an important factor but ought not to be the sole guiding factor since reliance thereon only may lead to a "sabotage of the purity of the proceedings". A long catena of decisions of this Court have been noted by the High Court in the judgment but we need not dilate thereon neither we even wish to sound a contra note. In Ashok Kumar's case, Ashok Kumar Yadav and Others Vs. State of Haryana and Others, this Court however in no uncertain terms observed: There can therefore be no doubt that the viva voce test performs a very useful function in assessing the personal characteristics and traits and in fact test the man himself and is therefore, regarded as an important tool alongwith the written examination.

22. In the case of O. Chakradhar (supra) the Apex Court has held that the nature and the extent of illegalities and irregularities committed in conducting a selection will have to be scrutinized in each case so as to come to a conclusion about future course of action to be adopted in the matter. If the mischief played is no widespread and all pervasive, affecting the result, so as to make it difficult, to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, in such cases it will neither be possible nor necessary to issue individual show cause notices to each selectee. The only way out would be to cancel the whole selection. Motive behind the irregularities committed also has its relevance.

23. In the case of Nilangshu Bhushan Basu (supra) the Apex Court has held that in the absence of any rule to the contrary, it would be an administrative function of the appointing/appropriate authority to take a decision as to which method should be adopted for recruitment to any particular post. It may depend on various factors relevant for the purpose, e.g., status of the post, its responsibility and job requirement, the suitable qualifications as well as the age as may be desirable may also be taken into consideration while making such an administrative decision.

24. We, however, find that the Commission has framed its own Rules for adopting the procedure of selection. In paragraph 11 of the counter-affidavit filed by Sri G. C. Upadhaya, Section Officer, U. P. Public Service Commission, Allahabad, it has been stated that in all 1860 candidates had applied against this advertisement out of which 1256 were found otherwise eligible and all of them had been called for interview. The question of holding written examination for short listing the candidates did not arise in the present circumstances. The select list has been prepared after interviewing the candidates. It has further been stated that under Rule 59 of the U. P. Public Service Commission (Procedure of Conduct and Business) Rules, 1976, the Technical Advisors who are commonly known as Expert, have also been appointed on the panel to assist the Commission in the selection. In paragraph 13 it has been stated that the Technical Advisors drawn from various Medical Colleges or from State Directorate

were invited as Advisor in the Interview Board which took advice as to the evaluation of each and every candidate and awarded marks accordingly. The Presiding Member of the Board did not give mark as per his sweet will or in arbitrary manner. In paragraph 14 of the counter-affidavit it has been stated that as soon as the interview is over, the marks are awarded to each candidate and the marks sheet prepared in duplicate is placed in separate sealed cover. The duplicate marks sheet is immediately sent to the Secretary for safe custody and the original is retained by the Member presiding over the Board. The entire business is accomplished in the presence of the Technical Advisor/Experts and any Member cannot do anything of his own. The selection is fair and free in accordance with the terms and conditions of the advertisement. The Petitioners have failed to point out any defect in the procedure adopted by the Commission in making the selection. We, therefore, do not find any force in the argument of Sri Tripathi that the selection made purely on the basis of the interview, is vitiated. It is to be remembered that the Commission comprises of members who are appointed by the Governor under Article 316 of the Constitution of India and they hold a constitutional office. Further, looking to the nature of the duties which a person has to perform, it is for the Commission to decide as to whether the selection has to be made by the written examination and interview or by interview alone. The discretion exercised by the Commission in this regard for making selection only by interview, thus, cannot be faulted.

25. This leaves us to the question of the vires of the Second Amendment Rules, 1997 insofar as it has omitted the proviso regarding preference to degree holders. In the case of Public Services Tribunal Bar Association (supra) the Apex Court has held that the judicial system has an important role to play in our body polity and has a solemn obligation to fulfil. In such circumstances it is imperative upon the Courts while examining the scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. The burden of proof is upon the shoulders of the incumbent who challenges it.

26. In the case of Mohammad Shujat Ali (supra) the Apex Court has held that the question in regard to equivalence of educational qualifications is a technical question based on proper assessment and evaluation of the relevant academic standards and practical attainments of such qualifications and where the decision of the Government is based on the recommendation of an expert body which possesses the requisite knowledge, skill and expertise for adequately discharging such a function, the Court, uninformed of relevant date and unaided by the technical insights necessary for the purpose of determining equivalence could not lightly disturb the decision of the Government. It is only where the decision of the Government is shown to be based on extraneous or irrelevant considerations or actuated by mala fides or irrational and perverse or manifestly wrong that the Court would reach out its lethal arm and strike down the decision of the Government.

27. In the case of Shankarsan Dash (supra) the Apex Court has held that the classification on the basis of educational qualification was permissible. It has further held that it is for the authorities, if they so desire, taking into consideration the nature of work, the requisite qualification for the work and necessity for making such a classification, equality could be prescribed on the basis of educational qualification.

28. In the case of Triloki Nath Khosa (supra) the Apex Court has held that classification on the basis of educational qualification made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.

29. In the case of V. Markendeya (supra) the Apex Court has held that the higher qualification and experience based on length of service are valid consideration for prescribing different pay scale for different cadres. This case is of no help to the Petitioners.

30. In the case of Basheshar Nath (supra) the Apex Court has held that on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution.

31. There cannot be any dispute that the degree in Homeopathy is a superior qualification than the diploma. However, it is always open to the Governor to provide two alternate qualification as the essential qualifications for a particular post while framing the Rules under the proviso to Article 309 of the Constitution of India. Rule 8 of the Rules as original framed and after its substitution by the Second Amendment Rules, 1997, is reproduced below for ready reference.

Original Rule:

8. Academic qualification.--A candidate for direct recruitment to the service must possess:

(1) a recognized Degree in Homeopathy, the duration of study of which is not less than five years according to its syllabus or course OR A recognized Diploma in Homeopathy in the duration of which is not less than four years according to its syllabus or course. Provided that preference will be given to degree holders:

Amended Rule 8

32. From a perusal of the aforesaid provisions, we find that in the original rule which was framed in the year 1990, the person holding the degree, the duration of which was not less than five years, or diploma in Homeopathy the duration of which was not less than 4 years were eligible for the post of the Homeopathic Medical Officer. However, preference was to be given to the degree holders. After

its amendment in 1997, the preference to the degree holders have been omitted or dispensed with. The real grievance of the Petitioners appears only in respect of the omission of the clause providing preference to the degree holders and nothing more. It is always open to the State to give preference to one class of person or other. No body can claim as a matter of right that he should be given preference. In our considered opinion, prescribing two alternate qualification as essential qualification for the post of the Homeopathic Medical Officer and omitting the preference clause to the degree holders does not create any hostile discrimination. It is, therefore, not violative of the provisions of Article 14 of the Constitution of India.

33. What is the meaning of the word "preference" has been considered and laid down by the Apex Court in several decisions. In the case of Bibhudatta Mohanty (supra) the Apex Court while dealing with a case of preferential qualification has held that when an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference should be given for higher qualifications, the only meaning it conveys is that some additional weightage has to be given to the higher qualified candidates. But by no stretch of imagination it can be construed to mean that a higher qualified person automatically is entitled to be selected and appointed.

34. In the case of Dr. Sheo Narain (supra) this Court was considering the provision of Rule 8 and unamended Rules which provided preference to the degree holders. It came to the conclusion that preference clause was not followed by the Commission while making selection and instead of quashing the selection made by the Commission pursuant to the advertisement issued on 22.3.1984, directed for issuance of appointment letter to the Petitioners therein as the Homeopathic Medical Officers.

35. The Apex Court in the case of State of U.P. and Another Vs. Om Prakash and Others, , has held as follows:

17. This Court has consistently held that when selection is made on the basis of merit assessed through the competitive examination and interview, preference to additional qualification would mean other things being qualitatively and quantitatively equal, those having additional qualification would be preferred. It does not mean en bloc preference irrespective of inter se merit and suitability.

.....

20. In the instant case, the requisite academic qualification for the post of homeopathy as prescribed in the advertisement was a recognized degree in Homeopathy or a recognized diploma in Homeopathy. A proviso has been added that preference will be given to degree holders. This would mean that a recognized diploma in homeopathy prescribed in the advertisement is also a required minimum educational qualification with which they are entitled to compete with those candidates possessing the degree. The word preference would mean that when the claims of all candidates who are eligible and who

possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-a-vis others in the merit list prepared by the Commission. But preference does not mean en bloc preference irrespective of inter se merit and suitability.

36. It has held that no such direction can be issued for appointment of persons holding degree in homeopathy by relying upon the proviso to Rule 8 (before its omission by the amendment made in 1997) in cases where they have not been selected by the Commission.

37. Sri A. N. Tripathi, learned Counsel, placing reliance upon the decision of this Court in the case of Dr. Sheo Narain (*supra*) submitted that similar directions be also issued in the present case as the vacancies exist.

38. In view of the settled legal position, as mentioned above, we are not inclined to accept the plea of Sri Tripathi and issue any such direction in the present case.

39. In view of the foregoing discussions, we do not find any merit in these petitions. They are hereby dismissed. However, the parties are left to bear their own costs.