

(2019) 05 SHI CK 0061

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 627, 633, 635 Of 2019

Arpna Sharma

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 04-05-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2019) 05 SHI CK 0061

Hon'ble Judges : Tarlok Singh Chauhan, J;Chander Bhusan Barowalia, J

Bench : Division Bench

Advocate : Vivek Singh Attri, Abhinav Purohit, Amit Singh Chandel, Ajay Vaidya, Lokender Pal Thakur, B.C. Negi, Nitin Thakur

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J

1. The petitioners have filed these writ petitions wherein prayer clauses in two of the writ petitions being CWPs No. 627/2019 and 635/2019 are identical and read as under:

"(i) Issue a writ in the nature of certiorari/mandamus or any other appropriate writ of similar nature to direct the respondents to give 10% incentive marks to the petitioner for the service rendered in rural area upto maximum of 30% as per MCI Regulations, or, in the alternative,

(ii) to quash the prospectus of NEET-PG, 2019 and NEET-PG Policy of 2017, dated 20.03.2017 and PG & Super Speciality Policy dated 27.02.2019 being contrary and violative of clause 9 (IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018 for not granting 10% incentive marks to the petitioner serving in rural areas in Himachal Pradesh, or in the alternative,

(iii) and to further reschedule NEET-PG (MD/MS) Counseling 2019 to be conducted on dated 04.04.2019, 26.04.2019, 07.05.2019 & 08.05.2019 as

provided in the prospectus.

(iv) Issue a writ in the nature of mandamus or any other appropriate writ of similar nature thereby directing the respondents to quash the incentive marks issued on the basis of NEET-PG Policies 2017 and 2019 based on extraneous considerations and prepare fresh merit list after granting incentive marks of service to the petitioner posted in rural areas in terms of clause 9(IV) of Postgraduate Medical education (amendment) Regulation, 2018, dated 05.04.2018 and law laid down by the Apex Court of the Country or in the alternative,

(v) Issue a writ or order in the nature of mandamus or any appropriate writ of similar nature to prepare fresh NEET-PG policy based on the data collected by the Directorate of Health Services and to grant the incentive marks or in the alternative,

(vi) this Hon'ble Court may set up a committee directing to reframe the NEET-PG Policy as per data with the DHS to give benefit of service in rural area to the petitioner in terms of clause 9(IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018."

Whereas prayer clauses in CWP No. 633 of 2019 reads as under:

"(i) Issue a writ in the nature of certiorari or any other appropriate writ of similar nature to quash the prospectus of NEET-PG (MD/MS) 2019-22 Counseling as annexure P-7/A and PG Policy 2017 at appendix 7 of annexure P-7/A and PG Policy 2019 dated 27.02.2019 as annexure P-7 and to quash and set aside and reschedule NEET- PG(MD/MS) Counseling-2019-22 to be conducted on dated 04.04.2019, 26.04.2019, 07.05.2019 & 08.05.2019 pursuant to Prospectus as annexure P- 7/A being violative of clause 9(IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018 annexure P-11 for not granting 10% incentive marks to the petitioner serving in rural area in Himachal Pradesh or in alternative respondent State may be directed to allow 10% incentive marks per year subject to maximum of 30% to the petitioner for the services rendered in the rural area as per regulation 9(IV) of MCI regulation dated 05.04.2018 as annexure P-11 in the ends of law and justice.

(ii) Issue a writ or order in the nature of mandamus or any other appropriate writ of similar nature thereby directing the respondents to quash the incentive marks issued on the basis of NEET- PG Policies 2017 and 2019 based on extraneous considerations and prepare fresh merit list after granting incentive marks of service to the petitioner posted in rural area in terms of Clause 9(IV) of Postgraduate Medical education (amendment) Regulation, 2018, dated 05.04.2018 and law laid down by the Apex Court of the country.

(iii) Issue a writ or order in the nature of mandamus or any appropriate writ of similar nature to prepare fresh NEET-PG Policy based on the data collected by the respondent State vide annexure P-9 dated 12.10.2019 and to grant the incentive

marks as per data with respondent No. 4 for service rendered in rural area to the petitioner in terms of Clause 9(IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018."

2. The specific case of the petitioners falls under Clause 3.9 (ii) of the prospectus, which reads as under:

"(ii) For the purpose of incentive, this Policy shall be applicable henceforth; meaning thereby the GDOs who have served in field postings in the past will be awarded incentive as per previous Notification dated 20.03.2017 (and amended from time to time) and any GDO who is serving/will serve in any field posting will be entitled for incentive as prescribed in this Policy from now onwards."

3. The petitioners after qualifying their MBBS examination have been appointed as Medical Officers and are serving in different rural areas of the State. In the National Eligibility-cum-Entrance Test (NEET) for post graduation that was conducted in the year 2017, the General Duty officers were held entitled for incentives of 10% and maximum 30% of the marks obtained for each completed year of service in any of the areas declared as difficult/remote/tribal/backwards by the State. However, the Medical Council issued a notification No. MCI-18(1)/2018-Med/100818, dated 05.04.2018, whereby the Postgraduate Medical Education Regulations, 2000, were further amended and were termed as Postgraduate Medical Education (Amendment) Regulations, 2018, whereby the rural areas were also included for giving incentives in marks.

4. The petitioners appeared and qualified the NEET for 2019 on 31.01.2019. The Government of Himachal Pradesh notified the Policy for regulating admissions to various Post Graduation and Super Specialty Courses in Medical Education applicable in the State of Himachal Pradesh, wherein for the first time incentives were provided to the General Duty Officers who had also served in the rural areas. However, for the purpose of incentive, this Policy was made applicable prospectively. Meaning thereby, that the incentive to the General Duty Officers is available only under the previous notification dated 20.03.2017, whereunder incentive was admissible only for remote and difficult areas.

5. Short reply has been filed on behalf of the respondents No. 1 to 3, wherein it is stated that the Medical Council of India has amended the "Postgraduate Medical Education Regulations, 2000" vide notification, dated 05.04.2018, wherein the procedure for selection of candidate for Post-graduation courses has been prescribed as under:

" The reservation of seats in Medical Colleges/Institutions for respective categories shall be as per applicable laws prevailing in States/Union Territories. An all India merit list as well as State-wise merit list of the eligible candidates shall be prepared on the basis of the marks obtained in National Eligibility-cum-Entrance Test and candidates shall be admitted to Postgraduate Courses from the said merit lists only.

Provided that in determining the merit of candidates who are in service of government/public authority, weightage in the marks may be given by the Government/Competent Authority as on incentive upto 10% of the marks obtained for each year of service in remote and/or difficult areas or Rural Areas upto maximum of 30% of the marks obtained in National Eligibility-cum-Entrance Test. The remote and/or difficult areas or Rural Areas shall be as notified by State Government/Competent Authority from time to time."

6. Relying upon the aforesaid notification, more particularly, the portion that is underlined by us, it is averred that it is the Government of Himachal Pradesh that alone is competent to decide for giving incentive in remote/difficult/rural areas, as such, the aforesaid regulations are not binding in nature upon the State Government and it is upto the State Government to decide which area(s) is to be included based on reasoning and the same view has been upheld by this Court in CWP No. 581 of 2017, titled Dr. Arti Dhatwalia vs. State of H.P, (2017) 3 ILR (HP) 27.

7. It is further averred that in the new Post Graduate Policy, dated 27.02.2019, the department in its wisdom has tried to differentiate difficult/remote/rural areas to a reasonable classification on the basis of difficult, topographical and geographical location of a particular institution.

8. As regards the retrospective application of the incentive, as contained in the new Post Graduate Policy, dated 27.02.2019, it is averred that in case it is made applicable with retrospective date, prejudice would be caused to several candidates, who are serving in the areas with 10% incentive as per the previous Policy, but the corresponding incentive to those areas has been reduced vide current Policy.

9. We have heard learned counsel for the parties and have gone through the records of the case.

10. The principle of incentivisation flows from Regulation 9(IV) of the Post Graduation Medical Education Regulation, as has been extracted below. This regulation was subject matter of decision in Dr. Arti Dhatwalia's case (supra) and this Court after placing reliance upon the judgment of State of U.P. and others vs. Dinesh Singh Chauhan, (2016) 9 SCC, 749, while granting incentive marks observed as under:

"11. In order appreciate the controversy in issue, it would be apt to refer to the relevant observations of the Hon'ble Supreme Court in Dinesh Singh Chauhan's case (supra) which read thus:-

"24. By now, it is well established that Regulation 9 is a self-contained Code regarding the procedure to be followed for admissions to medical courses. It is also well established that the State has no authority to enact any law muchless by executive instructions that may undermine the procedure for admission to Post Graduate Medical Courses enunciated by the Central Legislation and

Regulations framed thereunder, being a subject falling within the Entry 66 of List I to the Seventh Schedule of the Constitution (See: Preeti Srivastava v.. State of M.P.(1999) 7 SCC 120. The procedure for selection of candidates for the Post Graduate Degree Courses is one such area on which the Central Legislation and Regulations must prevail.

25. Thus, we must first ascertain whether Regulation 9, as applicable to the case on hand, envisages reservation of seats for in-service Medical Officers generally for admission to Post Graduate "Degree" Courses. Regulation 9 is a composite provision prescribing procedure for selection of candidates - both for Post Graduate "Degree" as well as Post Graduate "Diploma" Courses.

Clause (I) of Regulation 9 mandates that there shall be a single National Eligibility-cum- Entrance Test (hereinafter referred to as "NEET") to be conducted by the designated Authority.

Clause (II) provides for three per cent seats of the annual sanctioned intake capacity to be earmarked for candidates with locomotory disability of lower limbs. We are not concerned with this provision.

Clause (III) provides for eligibility for admission to any Post Graduate Course in a particular academic year.

Clause (IV) is the relevant provision. It provides for reservation of seats in medical colleges/institutions for reserved categories as per applicable laws prevailing in States/Union Territories. The reservation referred to in the opening part of this clause is, obviously, with reference to reservation as per the constitutional scheme (for Scheduled Caste, Scheduled Tribe or Other Backward Class Candidates); and not for the in-service candidates or Medical Officers in service. It further stipulates that All India merit list as well as State wise merit list of the eligible candidates shall be prepared on the basis of the marks obtained in the NEET and the admission to Post Graduate Courses in the concerned State shall be as per the merit list only. Thus, it is a provision mandating admission of candidates strictly as per the merit list of eligible candidates for the respective medical courses in the State. This provision, however, contains a proviso. It predicates that in determining the merit of candidates who are in-service of Government or a public Authority, weightage in the marks may be given by the Government/Competent Authority as an incentive at the rate of 10% of the marks obtained for each year of service in specified remote or difficult areas of the State upto the maximum of 30% of the marks obtained in NEET. This provision even if read liberally does not provide for reservation for in-service candidates, but only of giving a weightage in the form of incentive marks as specified to the class of in- service candidates (who have served in notified remote and difficult areas in the State).

26 to 32... XXX XXX XXX

33. As aforesaid, the real effect of Regulation 9 is to assign specified marks

commensurate with the length of service rendered by the candidate in notified remote and difficult areas in the State linked to the marks obtained in NEET. That is a procedure prescribed in the Regulation for determining merit of the candidates for admission to the Post Graduate "Degree" Courses for a single State. This serves a dual purpose. Firstly, the fresh qualified Doctors will be attracted to opt for rural service, as later they would stand a good chance to get admission to Post Graduate "Degree" Courses of their choice. Secondly, the Rural Health Care Units run by the Public Authority would be benefitted by Doctors willing to work in notified rural or difficult areas in the State. In our view, a Regulation such as this subserves larger public interest. Our view is reinforced from the dictum in *Dr. Snehelata Patnaik v. State of Orissa* (1992) 2 SCC 26. The three Judges' Bench by a speaking order opined that giving incentive marks to in- service candidates is inexorable. It is apposite to refer to the dictum in the said decision which reads thus: (SCC pp.26-27, paras1-2)

"1. We have already dismissed the writ petition and special leave petitions by our order dated December 5, 1991. We would however, like to make a suggestion to the authorities for their consideration that some preference might be given to in-service candidates who have done five years of rural service. In the first place, it is possible that the facilities for keeping up with the latest medical literature might not be available to such in- service candidates and the nature of their work makes it difficult for them to acquire knowledge about very recent medical research which the candidates who have come after freshly passing their graduation examination might have. Moreover, it might act as an incentive to doctors who had done their graduation to do rural service for some time. Keeping in mind the fact that the rural areas had suffered grievously for non-availability of qualified doctors giving such incentive would be quite in order. Learned counsel for the respondents has, however, drawn our attention to the decision of a Division Bench of two learned Judges of this Court in *Dr. Dinesh Kumar v. Motilal Nehru Medical College*, (1986) 3 SCC 727. It has been observed there that merely by offering a weightage of 15 per cent to a doctor for three years' rural service would not bring about a migration of doctors from the urban to rural areas. They observed that if you want to produce doctors who are MD or MS, particularly surgeons, who are going to operate upon human beings, it is of utmost importance that the selection should be based on merit. Learned Judges have gone on to observe that no weightage should be given to a candidate for rural service rendered by him so far as admissions to post-graduate courses are concerned (see *Dinesh Kumar case*, SCC para 12 at page 741).

2. In our opinion, this observation certainly does not constitute the ratio of the decision. The decision is in no way dependent upon these observations. Moreover, those observations are in connection with all India Selection and do not have equal force when applied to selection from a single State. These observations, however, suggest that the weightage to be given must be the bare minimum required to meet the situation. In these circumstances, we are of the view that the authorities might well consider giving weightage up to a maximum

of 5 per cent of marks in favour of in-service candidates who have done rural service for five years or more. The actual percentage would certainly have to be left to the authorities. We also clarify that these suggestions do not in any way confer any legal right on in- service students who have done rural service nor do the suggestions have any application to the selection of the students up to the end of this year." (emphasis supplied)

34. The crucial question to be examined in this case is: whether the norm specified in Regulation 9 regarding incentive marks can be termed as excessive and unreasonable? Regulation 9, as applicable, does not permit preparation of two merit lists, as predicated in *State of M.P. v. Gopal D.Tirthani* (2003) 7 SCC 83 . Regulation 9 is a complete Code. It prescribes the basis for determining the eligibilities of the candidates including the method to be adopted for determining the inter se merit, on the basis of one merit list of candidates appearing in the same NEET including by giving commensurate weightage of marks to the in-service candidates.

43. Presumably, realizing this position writ petition has been filed to challenge the validity of proviso to Clause IV of Regulation 9. According to the writ petitioners, the prospectus provided for 30% reservation in favour of in-service candidates for admission to post- graduate medical courses. The application of Regulation 9 results in an absurd situation because of giving weightage to specified in-service Medical Officers in the State. There is neither any committee set up nor guidelines made as to which area can be notified as remote and difficult area. The power vested in the State is an un-canalized power and disregards the settled position that for consideration after the graduate level, merit should be the sole criteria. Further, there is no nexus with the object sought to be achieved for providing weightage to the extent of 10% of the marks obtained by the candidate in the common competitive test and to the extent of maximum of 30% marks so obtained.

44. Dealing with this contention, we find that the setting in which the proviso to Clause (IV) has been inserted is of some relevance. The State Governments across the country are not in a position to provide health care facilities in remote and difficult areas in the State for want of Doctors. In fact there is a proposal to make one year service for MBBS students to apply for admission to Post Graduate Courses, in remote and difficult areas as compulsory. That is kept on hold, as was stated before the Rajya Sabha. The provision in the form of granting weightage of marks, therefore, was to give incentive to the in-service candidates and to attract more graduates to join as Medical Officers in the State Health Care Sector. The provision was first inserted in 2012. To determine the academic merit of candidates, merely securing high marks in the NEET is not enough. The academic merit of the candidate must also reckon the services rendered for the common or public good. Having served in rural and difficult areas of the State for one year or above, the incumbent having sacrificed his career by rendering services for providing health care facilities in rural areas, deserve incentive

marks to be reckoned for determining merit. Notably, the State Government is posited with the discretion to notify areas in the given State to be remote, tribal or difficult areas. That declaration is made on the basis of decision taken at the highest level; and is applicable for all the beneficial schemes of the State for such areas and not limited to the matter of admissions to Post Graduate Medical Courses. Not even one instance has been brought to our notice to show that some areas which are not remote or difficult areas have been so notified. Suffice it to observe that the mere hypothesis that the State Government may take an improper decision whilst notifying the area as remote and difficult, cannot be the basis to hold that Regulation 9 and in particular proviso to Clause (IV) is unreasonable. Considering the above, the inescapable conclusion is that the procedure evolved in Regulation 9 in general and the proviso to Clause (IV) in particular is just, proper and reasonable and also fulfill the test of Article 14 of the Constitution, being in larger public interest."

12. It would be evidently clear from a perusal of the aforesaid extracted portion that regulation 9 of the regulations has been held to be a self- contained code and the admissions to the Medical Courses have to be made strictly in accordance with the procedure prescribed therein. Indisputably, the present scheme of regulations do not provide for reservation to the in-service candidates in Post Graduate Degree Courses and the same only postulates giving weightage of marks to the "specified in-service candidates" who have worked in notified remote and/or difficult areas in the State, both for the Post Graduate Degree Courses as also Post Graduate Diploma Courses. It is also evidently clear that the proviso added to the Clause 4 of Regulation 9 further envisages that while determining merit of the candidates, who are in-service of government/public authority, weightage in marks has to be given as incentive @ 10% of the marks obtained for each year of the service in remote and/or difficult areas upto 30% of the marks obtained in NEET Examination. As regards question as to which is the difficult areas, the same has been left open for the State Government/competent authority to define from time to time with a rider that the declaration is made on the basis of decision taken at the highest level; and is applicable for all the beneficial schemes of the State for such areas and not limited to the matter of admissions to Post Graduate Medical Courses.

13. Adverting to the facts of the case, learned counsel for the petitioners would vehemently argue that once the Hon'ble Supreme Court has categorically held the regulation 9 to be a self- contained code, then the expression therein has to be strictly construed. It is vehemently argued that the expressions used in regulation 9(IV) are limited or rather are confined to "difficult, and/or remote areas" and not to any other areas like hard, difficult etc.

14. We are afraid that keeping in view the avowed and laudable object of the regulations, such a hyper construction is not permissible. What is the object of having such a provision has clearly been underlined by the Hon'ble Supreme Court in its judgment in Dinesh Singh Chauhan's case in paras 30 to 33 (supra)

wherein it has been categorically held that the imperative of giving some incentive marks to doctors working in the State in the notified areas cannot be under-scored for the concentration of doctors is in urban areas, whereas, the rural areas are neglected.

11. Thus, it would be noticed that the issues raised in the instant writ petitions are no longer res integra in view of the judgment of the Hon'ble Supreme Court in Dinesh Singh Chauhan's case and followed by this Court in Dr. Arti Dhatwalia's case.

12. Additionally, it would be noticed that the petitioners have qualified the NEET on 31.01.2019 and at that relevant time, they were entitled for incentive as per notification, dated 20.03.2017, as the present Policy has been notified much later, i.e. on 27.02.2019.

13. As observed earlier, in so far as present writ petitions are concerned, the issues involved therein are no longer res integra in view of the judgment passed by the Hon'ble Supreme Court in State of U.P. and others vs. Dinesh Singh Chauhan, (2016) 9 SCC 749 and the judgment rendered by this Court in batch of petitions lead being CWP No. 581 of 2017 titled Dr. Aarti Dhatwalia vs. State of H.P. and, thus, are squarely covered by the ratio laid down therein.

14. Therefore, the petitioners cannot claim notification dated 27.02.2019 be applied to their cases retrospectively. The petitioners having qualified the examination knowing fully well that the incentive would be granted as per notification dated 20.03.2017, cannot now turn around and insist that incentive be granted as per the subsequent Policy notified on 27.02.2019.

15. However, learned counsel for the petitioner(s) would argue that the State is not adopting the uniform standards and is granting incentive contrary to the aforesaid judgment(s).

16 If that be so, it is always open to the petitioner(s) to assail such action of the State by filing separate writ petition(s).

17 Accordingly, the writ petitions are dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands dismissed.