

(2016) 07 BOM CK 0105
In the Bombay High Court
Case No : Writ Petition No. 6439 of 2014

Dr. Afaque Ahmed

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Medical Practitioners Act, 1961 — Section 25

Citation : (2016) 5 AIRBomR 68 : (2016) 5 ALLMR 745 : (2016) 6 BCR 667 :
(2016) LIC 4158

Hon'ble Judges : S.S. Shinde and Sangitrao S. Patil, JJ.

Bench : Division Bench

Advocate : Mr. N.E. Deshmukh, Advocate, for the Petitioner; Mr. V.S. Badakh, AGP, for the Respondent/State; Mr. B.B. Kulkarni, Advocate, for the Respondent No. 1

Final Decision : Disposed Off

Judgement

S.S. Shinde, J.—This Petition is filed with the following prayers:

A. To quash the order dated 19.07.2014 issued by the respondent No.6 (ExhQ) by issuing writ of certiorari or any other appropriate writ.

B. To hold and declare that the medical practitioners belonging to Ayush more particularly BUMS are eligible to be appointed as Medical Officers in the recruitment process of Medical Officers (National Child Health Team).

C. To direct the respondent to call medical practitioners belonging to Unani medical system for participating in the recruitment process for the post of Medical Officers (National Child health Team) to be held pursuant to the advertisement dated 19.07.2014.

2. It is the case of the petitioner that he completed his Bachelor of Unani Medicine and Surgery Degree from the Maharashtra University of Health Sciences, Nashik in the year 2011. He is a Medical Practitioner, duly registered

with the Maharashtra Council of Indian Medicine, Mumbai. According to him, it is well-settled that the Bachelors of Ayurved Medicine and Surgery and Bachelors of Unani Medicine and Surgery recognised under the Indian Medicine Central Council Act, 1970, ("Act of 1970" for short) are having equal status. The schedule appended to the Maharashtra Medical Practitioners Act, 1961 ("the Act of 1961" for short) does not denote any superiority or inferiority amongst the different systems of medicine. The above fact is evident from the communication dated 02.11.1993 which was made between the Registrar, Maharashtra Medical Council of Indian Medicine and the All India Unani Tibbi Conference, Aurangabad.

3. It is further the case of the petitioner that the Medical Education and Drugs Department, Mantralaya, Mumbai issued a Notification on 12.05.1999 and directed inclusion of the degree of Bachelor of Unani Medicine and Surgery in part D, after entry no.11 on the Schedule to the Maharashtra Medical Practitioners Act, 1961 so as to enable a person holding such degree to get registered his name in the register maintained under the Act of 1961. The Practitioners of Unani Tibb are at par with the practitioners of Ayurved, which is also evident from the Notification dated 19.05.2004 published by the Central Council of Indian Medicine, New Delhi. It is the case of the petitioner that the Government of Maharashtra, Public Health Department, issued a communication to the Chief Executive Officers of Zilla Parishads for implementation of School Health Programme under the National Rural Health Mission ("NRHM" for short) as sanctioned by the Government of India. The Secretary and Commissioner (Family Welfare), vide communication dated 28.12.2007, directed the Chief Executive Officers to start the selection process for recruitment for implementation of the NRHM programme by recruiting MBBS Doctors. If the MBBS Doctors are not available, then BAMS Doctors should be hired. It is the case of the petitioner that the Public Health Department of the Government of Maharashtra has prescribed the Recruitment Rules for the appointment of the Medical Officers in the Maharashtra Medical and Health Services, GroupA, vide Government Resolution dated 30.10.2000. The Recruitment Rules provide for appointment to GroupA services only to the candidate, who are MBBS or BAMS, more specifically it reserves 25% posts for the candidates or practitioners of Shuddha Ayurved.

4. It is the case of the petitioner that the Government of Maharashtra issued an advertisement, calling for applications from the candidates belonging to MBBS and BAMS medicine systems for recruiting 52 Doctors as Medical Officers in the Maharashtra Medical and Health Services GroupA. The candidates belonging to Unani or Homeopathic Systems of Medicine are barred from being considered for the appointment as Medical Officers. It is further the case of the petitioner that total 6 Colleges in Maharashtra are conducting the course of Unani. If the students of Unani Tibbi system would not find any scope or ray of hope in getting the Government jobs, then it would not only be discouraging, but also disheartening for them to take Unani, though their counterparts from Ayurved, who are at par with them would be recruited by the Government. The above fallacy would ultimately lead to closure of Unani Medical Colleges for want of

students and qualified Lecturers, since no one would be left to become qualified teachers.

5. It is further the case of the petitioner that respondent no.6 had issued an advertisement in all news papers on 17.02.2013, calling upon the candidates belonging to MBBS and BAMS medical systems to fill up 1270 posts of Medical Officers, 50% male and 50% female, apart from Pharmacists and Nurses to work on contract basis in National Child Health Scheme. Moreover, the guidelines issued by the National Child Health Programme ("NCHP" for short) provides for the establishment of mobile teams consisting of 2 Medical Officers (1 Male and 1 Female), more particularly related to Ayush (BAMS/BUMS/BHMS/Yoga) and 1 Pharmacist and 1 Nurse. It is further the case of the petitioner that he along with other persons related to Unani medical system gave representation to respondent no.6 pointing out the fact that the recruitment process conducted under the National Child Health Programme requires that the Medical Officers to be from Ayush (BAMS/BUMS/BHMS/Yoga/Siddha). It is the case of the petitioner that respondent no.6 had issued an advertisement dated 19.07.2014 calling upon the candidates to fill up the posts of Medical Officers (National Child Health Team) for the State Maharashtra wherein only the Medical Practitioners belonging to MBBS and BAMS are called. Although as per the programme of the National Child Health Programme, the mobile units should consist of 2 Doctors, 1 Male and 1 Female, belonging to Ayush.

6. The learned counsel appearing for the petitioner submits that the petitioner's claim so as to be considered for the post of Medical Officer (Rashtriya Bal Swastha Pathak) is based upon the grounds that the degree and training of BAMS and BUMS Doctors i.e. Bachelor of Ayurvedic Medicine System and Bachelor of Unani Medicine are equivalent for the reasons that both the degrees BAMS and BUMS are recognised by the Central Council of Indian Medicine i.e. CCIM, New Delhi. The duration of course study of 4 ? years followed by the 6 months internship and 3 months internship at Primary Health Centre, Zilla Parishad that too in remote area and 3 months internship at Civil Hospital at District place is one and the same for both BUMS and BAMS. For the BAMS and BUMS degrees, Modern Medicine Science (Allopathy) is being taught. Both BAMS and BUMS are affiliated to the Maharashtra University of Health Sciences, Nashik. Both BUMS and BAMS, after completion of medical course are registered under the Indian Medicine Central Council Act, 1970 and they can practise throughout India. BUMS degree holder Doctors are registered under the Act of 1961 and are included in Schedule appended to the aforesaid Act in Part D whereas the BAMS degree holders are also registered under the Act of 1961 and are included in Schedule appended in Part A, B and A1. The Central Council of India Medicine New Delhi long back, vide Notification dated 19.05.2004 has permitted the degree holders of BUMS and BAMS to practise modern scientific medicine including surgery also. The order dated 23.02.1999 issued by the Deputy Secretary to Government, under the Drugs and Cosmetics Rules, 1945, permits the graduates holding the qualifications for the time being mentioned in Part A,

A1, B (BAMS Ayurvedic) and D (BUMS Unani) under the Act of 1961 to practise modern scientific system of medicine i.e. allopathy. Therefore, he submits that it may safely be concluded that the status of Bachelor of Ayurved Medicine System and Bachelor of Unani Medicine System is equal in the eyes of law.

7. It is further submitted that the State of Maharashtra has amended Section 25 the Act of 1961, on 26th June, 2014. The learned counsel invites our attention to the said amendment and submits that the said amendment entitles the Doctors or Degree Holders of Bachelor of Unani Medicine System to practise allopathy in the State of Maharashtra since the training received by the BAMS and BUMS degree holders is the same, since the same subjects of Pharmacology and Toxicology are taught for both the courses. The contention of respondent nos.2 and 6 in their affidavit-in-reply in para 8 is made without ascertaining the present position of law i.e. the Maharashtra Medical Practitioners Act, 1961. It is further submitted that the contention that "Unani graduates are not allowed to practise Allopathy in Maharashtra at par with MBBS/BAMS", is not correct, but misleading also. The petitioner is not comparing himself with the MBBS, but only with the BAMS. Respondent nos.2 and 6 have not specifically pointed out the subjects covered for either MBBS and BAMS, leave aside the BUMS course, and therefore, their contention in para 9 of their affidavit-in-reply is baseless. The work of addressing 4 D's i.e. Defect, Disease, Deficiencies and Developmental Delays and Disabilities can very well be identified by the Doctors holding BUMS degree much as the same as Doctors holding BAMS degree.

8. It is further submitted that the communication dated 01.09.2007 issued by the Registrar (I/c.), Maharashtra Council of Indian Medicine to Member of MCIM clearly states that the BUMS degree holders can practise modern system of medicine i.e. allopathy who are appended to Schedule Part D of the Maharashtra Medical Practitioners Act, 1961. It is further submitted that the Rashtriya Bal Swastha Karyakram under the National Rural Health Scheme is floated by the Central Government and the funds are received from the Central Government for the above scheme. It is further submitted that pursuant to filing the present petition, the Maharashtra Medical and Health Services, Group A, Recruitment Rules are amended inasmuch as the degree holders of BUMS are granted 10% reservation in the 25% quota allotted to BAMS graduates, which means that the Government of Maharashtra is appointing the graduates of BUMS as Medical Officers in District Health Services i.e. in Government Civil Hospitals.

9. It is further submitted that the Government of Maharashtra cannot discriminate between the degree holders of BAMS and BUMS since it would amount to violation of Article 16 (1) of the Indian Constitution. Moreover, there is no justification as to why the graduates holding degree of BUMS are not called even for the walk-in interviews to be conducted by the Civil Surgeon at District Civil Hospital at every District for the recruitment of Medical Officers (Rashtriya Bal Swastha Pathak) under the National Rural Health Mission when they are granted permission to practise allopathy and are even appointed in the

Government Civil Hospitals throughout Maharashtra. It is further submitted that the injustice caused to the graduates of BUMS in Maharashtra by the respondents is violation of their fundamental rights. The graduates of BUMS are equally qualified to practise modern scientific system i.e. allopathy as their counterpart in BAMS. Moreover, each year 11 months appointment are conferred by way of walkininterviews to the graduates of BAMS/MBBS (rarely MBBS Doctors approach for the walkininterviews). The graduates of BUMS deserve the opportunity to get employed as Medical Officers (Rashtriya Swastha Bal Pathak). Therefore, the learned counsel for the petitioner submits that the Petition deserves consideration.

10. On the other hand, the learned AGP appearing for respondent - State, relying upon the affidavit-in-reply and additional affidavit-in-reply made the following submissions. The contention of the petitioner that the degree in the medical fields i.e. BUMS, MBBS and BAMS are at par is not correct. These degrees are in the different streams of medicine and may not be treated as equivalent. It is submitted that the Medical Education and Drugs Department, Government of Maharashtra, vide Notification dated 25.11.1982, made an amendment in Section 25 of the Act of 1961 whereby the Ayurvedic Practitioners enrolled on the State Register of Practitioners of Indian Medicine holding qualification specified in Parts A, B and A1 of the Schedule appended to the said Act have been held eligible to practise modern system of medicine, which is known as Allopathic system, to the extent of training they receive in the system. The Unani graduates are not allowed to practise Allopathy Medicine in Maharashtra at par with MBBS/BAMS. The health is a State subject and the guidelines issued by the Government of India from time to time are only suggestive and it is for the State whether to adopt the guidelines as per local needs and circumstances. The Secretary and Commissioner (Family Welfare), Mumbai, being Recruiting Authority for all contractual posts falling under the purview of National Health Mission, exercised discretionary powers endowed upon him/her by the relevant Statute. Accordingly for serving the children who are in need of diagnosis and early treatment under NCHP, it was felt that the best resources should be made available to the beneficiaries of the scheme. The Government of Maharashtra has decided to appoint contractual Medical Officers having qualifications MBBS/BAMS. Further, the NCHP is a medical checkup programme based on Allopathic system of medicine and protocols prescribed thereunder. As per MCIM Act, only M.B.B.S./ B.A.M.S. graduates are authorised to practise Allopathic system of medicine. The recruitment Rules framed as per Government Resolution dated 30.10.2000 are keeping in view the delivery of quality services at the Government Health Centres operational in rural areas.

11. It is submitted that the advertisement which was issued as per the Recruitment Rules framed by the Government of Maharashtra, it is open for the Appointing Authority to lay down the requisite qualification for the recruitment of the Government service and also to lay down preconditions of appointment, and accordingly, the Government has fixed the norms for recruitment. The

advertisement was published by the Mission Director of National Rural Health Mission, Mumbai. It is submitted that for proper implementation of the newly launched NCHP (Operational Guidelines in February 2003), for which in the initial phase the recruitment of human resource is a very crucial step. The courses i.e. M.B.B.S., B.H.M.S., B.A.M.S., B.U.M.S., Yoga and Siddha are studied after 12th standard. On scrutiny of all subject textbooks, the subjects are covered in more detail for MBBS and integrated BAMS courses. In view of this, MBBS was considered in respect of common subjects being taught, and was prioritized for recruitment of Medical Officers and second priority is given to BAMS in case MBBS candidates are not available. Admittedly, the present petitioner is holding Bachelors Degree of Unani Medicine and Surgery and as per the advertisement the qualification prescribed is MBBS or BAMS. Therefore, the petitioner cannot claim appointment to the post advertised.

12. It is submitted that the State Government, vide Government Order, Medical Education and Drugs Department, bearing No.CIM.1099/122/C.R.25/99/Acts, dated 23.02.1999, published in the Maharashtra Government Gazette, dated 25.03.1999, in pursuance to the provisions of sub-clause (iii) of clause (ee) of Rule 2 of the Drugs and Cosmetics Rules, 1945, declared the persons holding the qualifications for the time being mentioned in Parts A, A1, B and D of the Schedule appended to the said Act of 1961, to be the persons practising the modern scientific medicine for the purposes of the Drugs and Cosmetics Act, 1940 (23 of 1940). It is pertinent to note that the said Part D contains qualifications in the Unani system of medicine. Therefore, the learned AGP submits that when the qualification possessed by the petitioner is not mentioned in the advertisement, the question of considering the candidature of the petitioner for the appointment to the said posts which are advertised, does not arise.

13. We have given consideration to the submissions of the learned counsel appearing for the petitioner, the learned AGP appearing for the respondent - State and also the learned counsel appearing for respondent no.5. With their able assistance, perused the pleadings and grounds taken in the petition, annexures to the Petition, written notes of argument submitted by the learned counsel for the petitioner, reply and additional reply filed by respondent nos. 2 and 6 and also the reply filed by respondent no.5. Admittedly, the qualification possessed by the petitioner does not find mention in the advertisement. The main bone of contention of the petitioner appears to be that the status of Bachelor of Ayurvedic Medicine System and Bachelor of Unani Medicine System is equal in the eyes of law. It is further the contention of the petitioner that though the Government jobs are offered to the degree holders from Ayurved; the same are denied to the petitioner and the similar persons possessing Unani degree amounts to discrimination. It is the bone of contention of the petitioner that the Government of India itself recommends to engage the Doctors belonging to AYUSH (Ayurveda, Yoga, Unani, Shiddha, Homeopathy). Therefore, calling applications by the State Government from the candidates belonging to only

MBBS and BAMS amounts to discrimination. In our opinion, in this respect, the State Government is the Competent Authority and the said subject would exclusively fall within the sphere of the Legislature/Executive, either to include or exclude any particular qualification for the appointment to the post of Medical Officer. The respondents have tried to justify the inclusion of MBBS and BAMS qualification for the appointment to the posts, which are advertised, and make distinction why the candidates possessing Unani Degree cannot be considered.

14. As rightly contended by the learned AGP appearing for the respondent - State that the health is a State subject and upon comparative status/account, the State decided to invite applications from the candidates possessing MBBS/BAMS degrees. In the circumstances, we are of the considered view that while exercising the judicial review, it is not desirable to enter into exercise of finding out the equivalence of the qualifications and then direct the State to include the particular qualification in the advertisement for the appointment to the post of Medical Officers. Therefore, the petitioner will be at liberty to approach the State Government by filing comprehensive representation raising all the issues/points raised in this Petition. In case such comprehensive representation is preferred by the petitioner, the State Government should consider it keeping in view all the legal provisions and also practical implications of adding/nonadding BUMS qualification for the appointment to the post of Medical Officers. The State Government should also keep in view the contention of the petitioner that under National Rural Programme the BUMS Doctors are appointed as Medical Officers on contract basis. However, we are not inclined to grant any stay to the recruitment process initiated on the basis of the advertisement dated 19th July, 2014. We clarify that respondent nos. 1 to 3 can go ahead with the recruitment process initiated pursuant to the advertisement and make appointments as scheduled.

15. The Writ Petition stands disposed of in the above terms. No costs.