

(2014) 01 MAN CK 0003
In the Manipur High Court
Case No : Writ Petition (C) No. 378 of 2013

Dr. Ak. Khamba Singh

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 15-01-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 01 MAN CK 0003

Hon'ble Judges : N. Kotiswar Singh, J

Bench : Single Bench

Advocate : M. Hemchandra, for the Appellant; S. Nepolean, Govt. Advocate, Mr. C. Komol, C.G.S.C. and Mr. S. Rupachandra, for the Respondent

Final Decision : Dismissed

Judgement

N. Kotiswar Singh, J.—Heard Mr. M. Hemchandra, learned counsel for the petitioner, Mr. S. Nepolean, learned Government Advocate for the State respondents, Mr. C. Komol, learned C.G.S.C. for the respondent No. 4 and Mr. S. Rupachandra, learned counsel for the private respondent No. 5. The present petition has been filed challenging the advertisement dated 25.3.2013 (Annexure-A/2) and subsequent recommendation of the respondent No. 4 pursuant to the said advertisement.

2. Mr. Hemchandra, learned counsel for the petitioner submits that the advertisement dated 25.3.2013 is contrary to the Terms of Reference (TOR) issued by the Central Government on which basis the said advertisement was issued, for as per the Terms of Reference, the post to be advertised and filled up was supposed to be Assistant Programme Officer/Epidemiologist whereas in the impugned advertisement dated 25.3.2013 only the post of Assistant Programme Officer has been advertised without including Epidemiologist which is not permissible in view of the fact that the present scheme is a 100% Centrally funded scheme and as such, the State respondents cannot deviate from the guidelines issued by the Central Government and any deviation by the State

Government without assigning any reason is arbitrary and liable to be interfered with.

Secondly, it has been submitted that the job responsibilities of the post of Assistant Programme Officer/Epidemiologist have been specifically mentioned in the Terms of Reference, which can be carried out by an officer having a special knowledge in the Public Health Programme. Therefore, if a person does not have the specialised knowledge in the Public Health Programme, the aforesaid job responsibilities cannot be discharged and in the present case, the respondent No. 5 who has been appointed as Assistant Programme Officer is merely an MBBS and he does not have the experience or knowledge of Public Health Programme. On the other hand, the petitioner is having diploma in Public Health Programme, thus imminently suited to hold the post.

Thirdly, learned counsel for the petitioner has submitted that since the petitioner is a Diploma holder in Public Health Programme, he possessed the preferential qualification mentioned in the advertisement as well as in the TOR which the respondent No. 5 does not have and as such the petitioner ought to have been naturally preferred to the Respondent No. 5. It is also stated that in the essential qualifications for the said post, the requirement of two years experience in public health programme has been mentioned which obviously could be acquired by a person having the Degree or knowledge of Public Health which the respondent No. 5 does not possess.

Further, learned counsel for the petitioner has submitted that the advertisement and Terms of Reference also specifically mentioned the age limit for appointment as 62 years. Therefore, there cannot be any bar from appointment of any person so long as he is within the age limit of 62 years. It has been contended that in the present case, since the petitioner is within 62 years, though he was already 61 years and two months at the time of issue of the advertisement, he was within the prescribed age limit of 62 years. Accordingly, the candidature of the petitioner could not have been rejected on the ground of age limit as it was specifically mentioned in the affidavit in opposition of the respondent authorities that the petitioner was having less than one year to reach 62 years, clearly indicating that it was one of the reasons for not selecting the petitioner. Learned counsel for the petitioner has submitted that once a person is eligible and within 62 year at the time of advertisement, he could be appointed as there was no bar on the extension of service beyond one year subject to very good performance, as mentioned in the TOR. Therefore, had the petitioner been selected, his service could have been extended in terms of the aforesaid provision mentioned in the Terms of Reference. Therefore, the rejection of the petitioner's candidature on the ground that he would have crossed 62 years after 10 months of appointment is arbitrary and unreasonable.

3. Mr. Hemchandra, learned counsel for the petitioner has placed reliance on the decision of the Hon"ble Supreme Court rendered in *Badrinath v. State of Tamil Nadu*, reported in (2000) 8 SCC 417 in which the Hon"ble Supreme Court had

stated that in certain situation and rare case if the assessment of the Selection Committee is proved to be malafide or if it is founded on inadmissible or irrelevant fact and trivial material or not giving weight to the positive aspects of one's career is strongly displayed, the powers of judicial review under Article 226 of the Constitution of India are not foreclosed.

Learned counsel for the petitioner, relying on the judgment of Hon''ble Supreme Court in Pramod Kumar Vs. U.P. Secondary Education Services Commission and Others, where the Hon''ble Supreme Court had held that if any appointment is made contrary to the statute/statutory rules, the same would be void in law, has submitted that in the present case, the preferential qualification which was specifically laid down in the Terms of Reference and the advertisement dated 25.3.2013 had been ignored by the State authorities while making appointment of the respondent No. 5, which is not permissible. Learned counsel for the petitioner has also relied on the judgment of the Hon''ble Supreme Court rendered in the case of Dr. Basavaiah Vs. Dr. H.L. Ramesh and Others, to substantiate his contention.

4. Mr. S. Nepolean, learned Government Advocate, however, has raised a preliminary objection to the very maintainability of the present petition contending that the petitioner having voluntarily participated in the selection process in terms of the advertisement dated 25.3.2013, knowing fully well the terms and conditions and being not successful, is now turning around and challenging the same recruitment process which is not permissible as has been held by the Hon''ble Supreme Court in the case of Union of India (UOI) and Others Vs. S. Vinodh Kumar and Others, . Relevant paragraphs No. 18 and 19 of the said judgment relied upon are reproduced herein below:-

18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See Munindra Kumar and others Vs. Rajiv Govil and others,) (See also Ku. Rashmi Mishra Vs. Madhya Pradesh Public Service Comission and Others,).

19. In Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others, , it was held : (SCC p. 148, para 32)

32. In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhavan pertaining to the doctrine of estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/selection. It

is a remedy which stands barred and it is in this perspective in *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, a three-Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a petition challenging the said examination would not arise.

It was further observed: (SCC p.149, para 34)

34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable" to him, he cannot turn around and subsequently contend that the process of interview was unfair or there was some lacuna in the process.

Accordingly, it has been submitted that since the petitioner had voluntarily participated in the selection process fully knowing the terms and condition without any protest, he will be estopped from challenging the very recruitment process.

As regards the contention of the petitioner that there has been material deviation from the Terms of Reference because of which the impugned advertisement dated 25.3.2013 is liable to be interfered with, Mr. S. Nepolean has submitted that there has been no deviation from the Terms of Reference and he has submitted that in fact, the two posts of Assistant Programme Officer and Epidemiologist as mentioned in the Terms of Reference are same and one, having different names. This is very clear from the fact that both the posts have the same essential qualifications as well as the job responsibilities. Therefore, other than difference in the name, there is no difference in these two posts and as such it cannot be said that merely because the post of Epidemiologist was not mentioned in the advertisement dated 25.3.2013, it cannot be said that there has been deviation from the Terms of Reference. Apart from that, it has been submitted that before proceeding with the recruitment process, the authorities had taken the approval from the Central T.B. Division (CTD for short) before issuing the aforesaid advertisement and necessary recommendation was made on the basis of the said advertisement. Mr. S. Nepolean, learned counsel for the respondents also has submitted that the aforesaid Terms of Reference are merely guidelines and they are not mandatory in nature and therefore, even if it is assumed that the post of Epidemiologist was not mentioned in the impugned advertisement dated 25.3.2013, it would not amount to material deviation or departure from the Terms of Reference and it would not be of any material significance. In this regard, he has referred to a letter dated 10.10.2013 issued by the Directorate General of Health Services (Central TB Division) addressed to the State TB Officer, Directorate of Health Services, Government of Manipur relating to the present case in which it has been mentioned that the Central Government MOH&FW/Central TB Division merely issues guidelines which are

advisory in nature and the State/District TB Control Society is free to act on the guidelines as deemed fit. Accordingly, Mr. Nepolean has submitted that firstly, there was no deviation and secondly, even it is assumed that there was deviation, since the Terms of Reference was merely a guideline and advisory in nature, any deviation from the said Terms of Reference would not vitiate the selection process. Otherwise, also such a deviation, if held so, is not material, submitted Mr. Nepolean.

5. Learned Government Advocate has further submitted that the Terms of Reference has indicated the selection process and the criteria for selection in which it has been specifically mentioned that Selection Committee would short list the candidates after interviewing the candidates. In the present case, the Selection Committee, after examining various aspects including the essential qualifications, experience, etc. and the performances of the candidates in the interview, recommended the private respondent No. 5 for appointment to the post of Assistant Programme Officer on contract basis which is in conformity with the criteria as provided under the said Terms of Reference. It has been submitted that the guidelines specifically provides for overall examination of all the materials and also for considering the performance in the interview, and the recommendation was made accordingly. Therefore, there could not be any ground for interference and in this regard, has relied on the decision of the Hon'ble Supreme Court reported in National Institute of Mental Health and Neuro Sciences Vs. Dr. K. Kalyana Raman and others, in which the Hon'ble Supreme Court has reiterated the principles that the Court would not normally interfere with the selection process where the assessment of the relative merits of rival candidates was made by the Selection Committee and there was no necessity to record the reasons for making such a recommendation and the function of the Selection Committee is neither judicial nor adjudicatory.

6. Learned Government Advocate also has submitted that it is not correct on the part of the writ petitioner to contend that the respondent No. 5 does not possess the essential qualifications by referring to the requirement of 2 years experience in any public health programme as mentioned in the Terms of Reference as well as in the advertisement dated 25.3.2013. The petitioner had contended that such an experience could not have been obtained unless one possesses some educational qualification in the subject of Public Health. Learned Government Advocate contends that in the present case, what is required is the experience and not the educational or academic qualification in Public Health and since respondent No. 5 had already rendered 7 years service as the Director in the State Training & Demonstration Centre (STDC), the respondent No. 5 possessed more than the required experience in the field of Public Health. It has been stated that the respondent No. 5 had served as the Director of the State Training & Demonstration Centre (STDC) at the State T.B. Society before his retirement and as per the relevant guidelines, the activities of the STDC are similar to what has been indicated as the job responsibilities in the Terms of Reference and in the impugned advertisement dated 25.3.2013. It has been contended that the

respondent No. 5 as a Director of the State Training & Demonstration Centre (STDC) had discharged similar functions which have been indicated in the Terms of Reference as well as in the advertisement and as such, the question of respondent No. 5 not possessing any of the essential qualification does not arise. It has been submitted that both the petitioner as well as the respondent No. 5 possessed all the essential qualifications and selection and recommendation of the respondent No. 5 was done on the basis of the performance in the interview after considering all the relevant materials in this regard. It has been submitted that the assessment so made by the Selection Committee in absence of any violation of statutory rules or challenge on the ground of the malafide could not be interfered by this Court in exercise of power under Article 226 of the Constitution of India.

7. Coming to the other contention of the learned counsel for the petitioner that since the petitioner was within 62 years and as such, his candidature could not have been ignored on the ground that he is going to cross 62 years, it has been submitted by Nepolean, learned Government Advocate that age limit of 62 years as provided in the Terms of Reference as well as in the advertisement dated 25.3.2013 is to indicate the limit to which a person can serve as Assistant Programme Officer under the programme. It was submitted that in course of the selection process, it was found that the petitioner had already crossed 61 years and had only about 10 months left to attain the age limit of 62 years and as such, he could not have been given appointment for contractual period of one year as it would have gone beyond the age limit of 62 years. Further, if the petitioner had been appointed, he would have had to quit service on attaining 62 years, which would have necessitated initiating a fresh recruitment. Accordingly, it has been submitted that said consideration cannot be said to be arbitrary.

8. Mr. C. Komol, learned counsel for the respondent No. 4 has more or less endorsed the view taken by the State Government. However, he has submitted that whenever any advertisement is issued, such selection must be by strict compliance of the provisions of the advertisement and there could not be any deviation and in the present case, it is not known whether the Selection Committee had taken note of the desirable preferential qualification mentioned in the advertisement dated 25.3.2013.

9. Mr. S. Rupachandra, learned counsel for the respondent No. 5 has submitted that he possessed all the necessary qualifications and he was selected by the Selection Committee after necessary assessment. He has also submitted that there is no difference in the contents of the Terms of Reference with that of the impugned advertisement dated 25.3.2013 as to make any material difference in the recruitment process and accordingly, has submitted that no case has been made out by the petitioner for interference by this Court.

10. In response, Mr. Hemchandra, learned counsel for the petitioner has submitted that it is admittedly clear that even though in the Terms of Reference, the post of Epidemiologist is mentioned, it does not find place in the impugned

advertisement dated 25.3.2013 for which no reason had been assigned by the authorities. Further, by drawing attention to various annexures showing the qualifications and experience possessed by the petitioner, petitioner has contended that if compared to that of the private respondent No. 5, it is clearly evident that the petitioner is more experienced and possesses better educational qualifications apart from possessing the preferential qualification and as such, the petitioner is far superior in terms of experience and qualifications and as such, recommendation of the respondent No. 5 who is merely an MBBS degree holder with limited work experience is quite arbitrary and the same is liable to be interfered with. Learned counsel for the petitioner, advertent to the contentions raised by the State respondents that a person who has voluntarily taken part in the recruitment process cannot turn back and question the validity of the selection process, by relying on the decision of the Hon'ble Supreme Court in the case of Raj Kumar and Others Vs. Shakti Raj and Others, , has submitted that if there are glaring instances of irregularity in the recruitment process, any aggrieved person though may have participated in the recruitment process, would not be debarred from challenging the said recruitment process. In the present case, it has been submitted that the irregularities are so glaring and apparent in that the advertisement issued was plainly contrary and not in conformity with the guidelines issued by the Central Government as contained in the Terms of Reference, and as such, the petitioner would have a right to challenge the selection process.

From the rival contentions what comes out is that the main grievance of the petitioner is that the advertisement dated 25.3.2013 is not in conformity with the Terms of Reference issued by the Central Government and as such, the same is liable to be interfered with. In this regard, it is to be noted that what is material is the advertisement dated 25.3.2013 and not the Terms of Reference. The Terms of Reference as also contended by the respondents are merely the guidelines and not do not have any statutory force. The petitioner also has not been able to show that it has statutory force, which would have disentitled anyone to deviate from the same. The mere fact that the said advertisement dated 25.3.2013 was issued in respect of the scheme which is wholly funded by the Central Government cannot endow the said Terms of Reference with any statutory attribute. Further, even if there be any deviation from the guidelines by the Central Government, it is for the Central Government to take appropriate actions against the concerned Government and any such deviation cannot vest any right to a candidate to assail the same as bad unless it caused serious prejudice to the rights of the candidates. In the present case, nothing has been shown by the petitioner that by the alleged departure from the Terms of Reference in the advertisement, the petitioner has suffered any disadvantage or was prejudiced. The mere fact that the advertised post was Assistant Programme Officer only and not Assistant Programme Officer/Epidemiologist as mentioned in the Terms of Reference would be of no significance in as much as the petitioner was also eligible to apply for Assistant Programme Officer for which he also applied and

was considered by the Selection Committee. Merely because the post of Epidemiologist was omitted from the advertisement dated 25.3.2013 cannot be said to have caused any prejudice to the petitioner. It has been also submitted by the State respondents that the nature of duties and functions of the Assistant Programme Officer and Epidemiologist are more or less the same, which has not been controverted by the petitioner. This Court would not normally examine such issues regarding the equivalency of post unless the discrepancy is patently apparent on the face of it.

As regards the requirement of 2 years of Public Health Programme, neither the Terms of Reference nor the advertisement insisted on having any particular academic or educational qualification. Therefore, the contention of the respondents that it does not refer to any qualification but the experience in Public Health Programme cannot be brushed aside. The contention that the respondent No. 5 had experience in activities relating to Public Health Programme by the dint of his appointment as Director of State Training & Demonstration Centre (STDC) at State TB Society for 7 years can be said to be unreasonable and he can be said to have possessed the said two years experience in Public Health Programme and as such, it cannot be said that the respondent No. 5 does not possess the essential qualification.

The contention of the petitioner that the petitioner is a diploma holder in Public Health Programme thus, he possessed the preferential qualification mentioned in the advertisement dated 25.3.2013 as well as in the Terms of Reference whereas the respondent No. 5 does not possess such a qualification cannot make any difference in as much as the preferential qualification can come into play only when the candidates are otherwise similarly placed in other respects. In other words, only when the candidates are placed at par in respect of general qualification and other parameters, a person having preferential qualification would steal a march over other candidates. In the present case, it is not the case that the petitioner and respondent No. 5 were equally placed in which event the petitioner could have been given a preference by virtue of possessing the preferential qualification. In the present case, it has been categorically stated by the State respondents that the respondent No. 5 was found to have performed better in the interview and as such, the question of giving preference to the respondent No. 5 does not arise. It is now well settled that Courts would not normally interfere with the recommendation of a Selection Committee unless such recommendation is challenged on the ground of malafide or made in violation of statutory rules. In the present case, no such allegation of malafide is alleged except by stating that the petitioner is claiming to have possessed better educational qualifications as well as the preferential qualification. There is no allegation of any malafide act on the part of the authorities or the Selection Committee. As already discussed above, merely because the advertisement dated 25.3.2013 may have deviated from the Terms of Reference, which this Court has held not to be so, it cannot be said that the statutory provisions have been violated. Accordingly, the challenge raised by the petitioner on these two

counts, must fail.

We will deal with the next contention of the petitioner that since the age limit provided in the advertisement dated 25.3.2013 was 62 years and the petitioner had not yet reached 62 years, he was entitled to be considered for appointment and his candidature could not have been rejected on the ground that he had already crossed 61 years and two months at the time of issue of the advertisement.

As regards this contention, it is to be noted that the advertisement dated 25.3.2013 and Terms of Reference had specifically mentioned the age limit for appointment as 62 years which means that the service of any person appointed to the said post would come to an end on attaining the age of 62 years. Therefore, even if the petitioner was technically entitled to be considered and appointed to the advertised post of Assistant Programme Officer till he attained the age of 62 years, since the said post was a contractual one for only one year, it would have necessitated the appointment of another person in place of the petitioner after he attained the age of 62 years. Thus, either the Selection Committee would have been required to select another person in reserve for appointment after the petitioner completes 62 years or proceed to hold another recruitment process for appointment of another person after completion of 62 years by the petitioner. To obviate the aforesaid difficulties, the authorities in their wisdom had decided not to recommend the petitioner as he was having less than 1 year of service in the event of his being appointed. Thus, the decision of the authorities cannot be said to be arbitrary or against public interest. On the contrary, it would rather serve public interest if only one recommendation is made for the said post and not to resort to another fresh recruitment process.

Thus, on consideration of the rival contention as well as the records, it can be said that there has been no material departure or deviation in the advertisement dated 25.3.2013 issued for appointment to the post of Assistant Programme Officer, vis-à-vis the Terms of Reference issued by the Central Government. The Central Government itself also clarified vide their letter dated 10.10.2013 that the Terms of Reference was in the nature of guidelines and respective State/District TB Society were free to act on the guidelines as deemed fit and since the Terms of Reference did not have a statutory force, even if there be any deviation, as alleged by the petitioner, this would not vitiate the recruitment process. Further, as discussed above, there is no material deviation from the Terms of Reference while issuing the advertisement.

It may be also stated that the petitioner had, pursuant to the impugned advertisement dated 25.3.2013, participated in the Selection process fully knowing the terms and conditions of the said advertisement and as such, he cannot turn around and challenge the same on the ground that the said advertisement is contrary to the Terms of Reference based on the principle of estoppel and the decision of the Hon'ble Supreme Court in *Union of India & ors. vs. S. Vinodh Kumar & ors.* (supra) will be applicable in the present case.

Further, the Selection Committee, on consideration of various aspects and parameters, had made the necessary recommendation and the petitioner has not been able to show any breach of statutory provision while making the recommendation or any malafide act on the part of the Selection Committee which has caused prejudice to the petitioner. The petitioner was assessed by the Selection Committee, so also the respondent No. 5 and the Selection Committee found the respondent No. 5 to be more suitable regarding which this Court cannot examine such assessment as if sitting on appeal, in absence of violation of any statutory rules or any malafide act as has been held by the Hon''ble Supreme Court in a catena of decisions including in National Institute of Mental Health & Neuro Sciences (supra).

In view of the above, this Court is of the opinion that no case has been made out by the petitioner for interfering with the recruitment process. Accordingly, the writ petition stands dismissed.