
(2010) 08 AHC CK 0220
In the Allahabad High Court

Dr. Alok Kumar Singh

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 05-08-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(1), 15(3), 16

Citation : (2011) 2 UPLBEC 1026

Hon'ble Judges : Sunil Ambwani, J; Kashi Nath Pandey, J

Bench : Division Bench

Judgement

1. The petitioner completed his MBBS course in the year 2003 and was selected, after internship, in the Post Graduate Medical Entrance Examination (PGMEE). On the basis of his merit he opted for and completed the course of Master of Surgery in "Obstetrics and Gynecology", in the year 2004. At present he is engaged in private practice in Obstetrics and Gynecology at Sultanpur.

2. By this writ petition the petitioner has questioned the discrimination caused by the advertisement dated 23.5.2009 published by the Public Service Commission U.P. at Allahabad for selections to 244 posts including 160 posts of specialist in Obstetrics and Gynecology in the State Medical and Health Services, reserved only for women specialist, excluding male specialist doctors. He has prayed for quashing the advertisement so far as it relates to reservation of the specialty for the post of Obstetrics and Gynecology only for women, and to hold fresh selections.

3. Heard Shri Amit Sthalekar for the petitioner. Shri Pankaj Saxena, Standing Counsel appears for the State respondents. Shri P.S. Baghel appears for the Public Service Commission, U.P. at Allahabad.

4. In the advertisement published in Employment News dated 23.5.2009 and 29.5.2009 published by the Public Service Commission, U.P. for appointment of Allopathic Medical Officers Specialist (Female) in Group-B of the State Medical and Health Services, Category-2 by direct recruitment 244 posts are proposed to

be filled up including 160 posts of specialist in Obstetrics and Gynecology (Stri Rog Visheshagya). The advertisement provides that only female candidates are required to apply.

5. It is contended by Shri Amit Sthalekar, learned Counsel for the petitioner that the petitioner is not aggrieved by the division of the cadre in male and female in Medical and Health Services U.P. His grievance is with regard to providing all the posts in the specialisation of Obstetrics and Gynecology in the female cadre. He submits that there is no post for the specialist in Obstetrics and Gynecology in male cadre.

6. Shri Sthalekar submits that there is no restriction for admission of the male doctors in MS course in Obstetrics and Gynecology . A number of male doctors prefer to specialise and practice in Obstetrics and Gynecology . The PG course in the specialty is open for both male and female candidate without any reservation except for 20% horizontal reservation for women in the State of U.P. Some of the best Gynecologist in the country are male doctors and thus reservation for the post of Specialist in Gynecology only for female doctors is illegal, irrational, arbitrary and violates petitioner's rights under Article 14 and 16 of the Constitution of India. By an interim order dated 13.7.2010 we protected the petitioner's rights by directing that one of the advertised post of Medical Officer, Obstetrics and Gynecology in female cadre shall not be filled up in pursuance to the impugned advertisement dated 23.5.2009. If the petitioner applies, the Public Service Commission shall not refuse to accept the application. His application, however, will be subject to result of the writ petition.

7. Shri Sthalekar has relied upon the judgment in Union of India and Ors. v. Premanand Singh 1999 SCC (L&S) 625 in which it was held by the Supreme Court that reservation on the post of Telephone Operators exclusively for women in the advertisement throwing open the posts only for female candidates under the Posts and Telegraphs (Telephone Operators) Recruitment Rules, 1968 is unconstitutional. There can be no discrimination based on sex. The State may u/s 15(3) make other provisions in favour of women, which includes reservation but that the provisions of reservation of all the posts exclusively for women is violative of Article 15(3).

8. In S. Renuka and Others Vs. State of Andhra Pradesh and Another, the Supreme Court considered a challenge to reservation for all the posts of Judges of Family Courts and Mahila Courts in State of Andhra Pradesh for women and held that there could not be 100% reservation for women. The posts were created for District and Sessions Judges. There were no separate post of Judges of Family Court and Mahila Courts.

9. In the counter affidavit it is stated by Shri Raj Kishore Yadav, Special Secretary, Medical and Health Department, Government of U.P. Lucknow filed on 29th July, 2009 that the selections are not being made by reserving all the posts for female doctors. Pursuant to the reconstitution of the Provincial Medical and

Health Services Cadre, U.P. Provincial Medical and Health Services Rules, 2004 were notified on 11th August, 2004 and in pursuance thereof by Government Order dated 20th June, 2005 the posts under the Specialist Sub Cadre (Female) and Provincial Medical and Health Services Cadre were demarcated and thereupon the work was assigned. Accordingly for specialist wise selection against the vacancies of Special Sub Cadre (Female) requisition was sent to the Commission by Government vide letter dated 31.12.2008, and in pursuance thereof the Public Service Commission published the advertisement for making selections on the posts in question. After reconstitution of Provincial Medical and Health Services Cadre, 4 sub-cadres have been created viz. (1) General Sub Cadre (Male); (2) Specialist Sub Cadre (Male); (3) General Sub Cadre (Female) and (4) Specialist Sub Cadre (Female).

10. It is stated in para 7 of the counter affidavit that in the aforesaid sub-cadres separate specialty wise and level wise posts have been demarcated. For Community Health Centres 320 posts of Specialist Sub Cadre (Female) (Gynecologist, Radiologist, Pathologist, Anesthetist and Child Specialist) are marked and on the aforesaid posts selections have to be made through Public Service Commission under the Rules of 2004. The requisition was sent to the Commission vide letter dated 31.12.2008 for selection against previously created 146 posts and 98 posts created by the Government, total 244 posts of Medical Officers Group-II under Specialist Sub Cadre (Female) (Samuh-Kha). In this way, 244 posts are not reserved for female rather the same are demarcated under specialist Sub-cadre (Female). Since these posts are related to Specialist Sub-Cadre (Female), no point of reservation has been included in the selection. In the same manner the posts under Specialist Sub Cadre (Male) in the Provincial Medical and Health Services Cadre have been demarcated and the work has been assigned under the Government Order dated 20.6.2005. In the Specialist Sub Cadre (Male) there is no mention of any posts demarcated for Gynecologist.

11. In para 10 of the counter affidavit it is admitted that no post of Gynecologist has been demarcated in the Specialist Sub Cadre (Male) and that all the 320 posts of Gynecologist in the Specialist Cadre have been assigned to Sub Cadre (Female). Para 10 of the counter affidavit is quoted as below:

That in reply to the contents of paragraphs 13 and 14 of the writ petition, it is most respectfully submitted that certain provisions have been made in the aforesaid Rules of 2004 for direct recruitment on different post of Specialist Sub-Cadre (Male) and Specialist Sub-Cadre (Female), which are (1) MBBS Examination passed from any institution/ University duly recognized by the Indian Medical council alongwith Post Graduation Degree/ Diploma in Medical sciences from any institution/ University recognized by Indian Medical Council or State Medical Council. In the aforesaid rules, there is no provision for reservation of post for female. It is further relevant to mention here that vide Government Order dated 1.7.2009, General Sub-Cadre (Male) and Special Sub-Cadre (Male) has been merged into one cadre and similarly, general Sub-Cadre (Female) and

Specialist Sub-Cadre (Female) has been merged into another cadre and accordingly, necessary amendment is being made in the service rules. However, after reconstitution of the Provincial Medical and Health Services Cadre, the post under Specialist Sub-Cadre (Female) has been demarcated and their work has been assigned and in the Government relating to the same, 320 posts of Gynecologists have been demarcated in which there is no mention about the male. In the Government Order dated 20.6.2005, the post of Gynecologists/ Obstetrics has not been demarcated for male. Copy of the Government Order dated 1.7.2009 is filed herewith as Annexure-CA-5 to this affidavit.

12. The respondent-State has thus admitted that the Specialist Sub Cadre (Male) there is no post of Gynecologist and that all the 320 posts of Gynecologists have been placed and assigned in the Specialist Sub Cadre (Female), in the Medical and Health Services in U.P.

13. Shri Pankaj Saxena, learned Standing Counsel, Government of U.P. has placed before us a letter dated 2.4.2010 of Shri Raj Kishore Yadav, Special Secretary, Government of U.P., with reference to present writ petition that the State Government is contemplating the inclusion of male doctors on Obstetrics and Gynecology posts in the proposed U.P. Medical and Health Services (Third Amendment) Rules, 2009. Since it will take some time to amend the Rules, the Court may be requested for atleast one month's time for making necessary amendments.

14. We had adjourned the case to enable learned Standing Counsel to produce the amended Rules. It appears that the State Government is taking its own time and has not amended the Rules. We are, therefore, compelled to decide the legal questions, pending selections.

15. Article 15(1) prohibits the State from discriminating any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. Special provisions can be made for women and children under Clause (3) of Article 15. These special provisions, however, should not provide 100% reservation in favour of women on any post in public employment, if it causes invidious, uninformed and hostile discrimination to males. Article 16 restricts discrimination in employment and thus whittles down the reservation of post for women under Article 15(3). The distribution of posts between male and female has not been held to be arbitrary or unjustified in *Vijay Lakshmi Vs. Punjab University and Others*, and reservation for women in direct recruitment upto the extent of 30% in Andhra Pradesh has also been upheld within the ambit of Article 15(3) vide *Government of Govt. of Andhra Pradesh Vs. P.B. Vijaykumar* and another, The reservation of all the posts for women without any valid and compelling reason or classification, however, does not stand the scrutiny of Article 14, 15(1) and 16 of the Constitution of India.

16. In *Vijay Lakshmi's* case the Supreme Court upholding Rule 5, 8 and 10 of Punjab University Calender Vol. III providing for appointment of lady Principal in

Women's College and lady Superintendent for Girls Hostel, observed that there could be classification between male and female for certain posts without any arbitrariness. The discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. It is for the respondents to establish that classification is unreasonable and bears no rational nexus with the purported object. Certain posts may be left for only lady officers at the discretion of the State Government for special jobs which may be performed only by women.

17. The medical studies in the specialisation of Obstetrics and Gynecology are not restricted only to female doctors. The male doctors are given admissions in MD (Obstetrics and Gynecology). Some of the best Gynecologists in the country are male doctors. A lady in need of specialised medical care, does not ordinarily refuse to be treated by a male doctor. If a male specialist is competent, he commands the same respect in treatment as female doctors, by his patients.

18. We are of the opinion that reservation of all the posts in the specialist cadre for Gynecologist having post graduate degree in Obstetrics and Gynecology for female doctors to the total exclusion of male doctors specialising in the same subject and completely depriving them of a chance to compete is violative of fundamental rights of the male specialist in Obstetrics and Gynecology. The reservation of 100% posts in such case is not preferential or special treatment. It amounts to violation of Article 14, Article 15(1) and Article 16, and cannot be treated as an exception under Clause (3). It amounts to discrimination on the ground of sex in public employment or appointment on posts without reasonable basis.

19. In the present case the State Government has neither pleaded or placed any material to establish that the job of Gynecologist can be performed only by lady doctors, or that a conscious decision was taken after deliberations to include all the posts of Gynecologists in Female Sub Cadre. There is no reservation for the posts for female doctors. On the contrary the State Government appears to have realised the error and has stated that it is going to amend the Rules appropriately.

20. The writ petition is allowed. The reservation for all the posts of Gynecologists in the specialist cadre of Medical and Health Services in the U.P. Provincial Medical and Health Services Rules, 2004 and vide notification dated 11.8.2004 and 20.6.2005 in the Specialist Sub Cadre of Female is held to be illegal, irrational and violative of Article 14, 15(1) and 16(1) of the Constitution of India. The State Government is directed to either bifurcate the posts of Gynecologist with specialisation in Obstetrics and Gynecology in the Specialist Sub Cadre of Male and Female, or to allow preference on such posts for women in such a manner that it may not result into total exclusion of the male doctors specialising in "Obstetrics and Gynecology".

21. By interim orders we had directed the Public Service Commission not to fill

up one out of 160 advertised post of Medical Officer "Obstetrics and Gynecologist" and had allowed petitioner to apply for the vacancy. The Public Service Commission will interview the petitioner for the post. If he is found eligible, qualified and suitable, he shall be recommended and appointed in the batch.

22. The petitioner shall be entitled to costs of the writ petition from the State Government.