

(2021) 08 SHI CK 0126

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition (Original Application) No. 108 Of 2019

Dr. Arun Singh Thakur

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 12-08-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

Himachal Pradesh Medical Education(Dental) Services Rules, 2006 — Rule 9

Citation : (2021) 08 SHI CK 0126

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Sanjeev Bhushan, Rajesh Rajesh Kumar,. Ajay Vaidya, Dilip Sharma, Manish Sharma

Final Decision : Dismissed

Judgement

Sandeep Sharma, J

1. This petition coming on for orders this day, the court passed the following:

2. Being aggrieved and dissatisfied with the decision taken by respondents, as contained in annexure A-12, whereby special secretary health to the

Government of Himachal Pradesh approved the proposal to fill up one post of Assistant Professor (Dentistry) by way of direct recruitment, petitioner

approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 280 of 2019, which now stands transferred to this Court after

abolishment of erstwhile Himachal Pradesh Administrative Tribunal and stands registered CWPOA No. , praying therein for following main reliefs:

â??i. That impugned decision taken by the respondents as contained in Annexure A-12, whereby the approval has been granted to fill up the post by

way of direct recruitment on 20.12.2028 may kindly be quashed and set aside.

ii. That directions may very kindly be given to the respondents to fill up the post of Assistant Professor (Public Health Dentistry) by way of promotion

from amongst the eligible candidates, by further granting the seniority and consequential benefits from the date when post became available i.e.

26.09.2018 in the interest of law and justice, by following the Rules 2006.â??

3. For having birdâ??s eye view of the matter, certain undisputed facts, as emerge from the pleadings adduced on record by parties to the lis are that

as per Himachal Pradesh Medical Education(Dental) Services Rules, 2006 (hereinafter, â??Rules 2006â??) (Annexure A-1), post of Assistant

Professor being a Class I Gazetted post is to be filled in the following manner:

(i) 50% by promotion failing which by direct recruitment or on contract basis in the manner specified in Column No. 11-A.

(ii) 50% by direct recruitment or on contract basis in the manner specified in Column No. 11-A.

4. At the time of framing of Rules 2006, there were 9 posts of Assistant Professors, out of which one post fell to the Department of Dentistry, but

subsequently vide Notification dated 2.3.2009 (Annexure A-2), 20 more posts were created, out of which, 06 fell to the share of Assistant Professors

and consequently one more post of Assistant Professor came to the share of Public Health Dentistry. As of today, there are two posts of Assistant

Professors in the discipline of Public Health Dentistry. According to the petitioner, after framing of Rules 2006, respondent Department is to fill up

posts of Assistant Professors in the Department of Public Health Dentistry by following roster provided in Chapter XIII of Handbook on Personnel

Matters, whereby first post is to be filled up by way of promotion from amongst the feeder category of Lecturers and second post by way of direct

recruitment. Since the first post falling to the share of promotional quota in the case at hand, could not be filled up on account of interim stay granted

by Honâ??ble Supreme Court, first post, which as per chapter XIII of Handbook on Personnel Matters, was meant for promotees came to be filled

up on 1.9.2017 by way of direct recruitment by one Mr. Vinay Kumar Bhardwaj, however, second post which was to be filled by direct recruitment,

came to be filled by one Ms. Shelly Fotedar on 2.12.2013, on his promotion. Since Dr. Vinay Kumar Bhardwaj, who was recruited against the first

post meant for promotees, stood further promoted to the post of Professor, one

post of Assistant Professor, Public Health Dentistry/Community

Dentistry fell vacant. Precisely the case of the petitioner is that since as per roster, first post was to go to promotees and second to direct recruits,

post falling at point No.3 of roster, shall fall to the share of promotees and as such, he being borne on feeder cadre for promotion to the post of

Assistant Professor, ought to have been considered for promotion to the post of Assistant Professor especially when he was otherwise fully eligible.

5. It is not in dispute that as per Rules 2006, petitioner, who was working as Lecturer in the Department since 19.5.2014 became eligible on 19.5.2017

for promotion to the post of Assistant Professor, but since his claim for promotion to the post of Assistant Professor was not being considered after

promotion of Dr. Vinay Kumar Bhardwaj to the post of Professor, he repeatedly filed representations as contained in Annexures A-5 to A-7,

however, respondents did not bother to respond to the same, as such, petitioner was compelled to serve the Department with legal notice dated

26.12.2018 (Annexure A-8).

6. After issuance of aforesaid legal notice, representations having been filed by the petitioner as well as respondent No.3 Dr. Shelja Vashisth, came to

be dealt with by the Department concerned as is evident from information supplied to the petitioner under Right to Information Act, 2005, vide

communication dated 7.1.2019 (Annexure A-12). Respondents having taken note of the provision contained in Chapter III of Handbook on Personnel

Matters, Vol. I, wherein provision for maintaining roster, based on reservation in Rules 2006 is provided and instructions of DOP. No. Per(AP-IIA(3)-

2/80 dated 7.11.2001, wherein method of recruitment has been provided whether by direct recruitment or by promotion, deputation, transfer and the

percentage of posts to be filled in the various method, concluded that since Dr. Vinay Kumar Bhardwaj, who had vacated the post of Assistant

Professor was appointed as direct recruit, vacancy occurred on account of his promotion is also required to be filled up by way of direct recruitment.

While taking aforesaid decision, respondents also took into consideration ratio of 50:50 as provided under Rules 2006 inter se promotees and direct

recruits. However, record reveals that the petitioner as well as respondent No.3, who was also working as Lecturer (Public Health Dentistry) on

regular basis since 29.5.2014 and had also completed three years service

prescribed for appointment to the post of Assistant Professor, were designated as Assistant Professor (Public Health Dentistry/Community Dentistry) vide Notification dated 5.1.2018 (Annexure A-4).

7. Since respondents vide decision contained in Annexure A-12, decided to fill up post of Assistant Professor vacated by Dr. Vinay Kumar Bhardwaj

on account of his promotion to the post of Professor by way of direct recruitment, petitioner approached erstwhile Himachal Pradesh Administrative

Tribunal, by way of aforesaid application, praying therein for reliefs as reproduced herein above.

8. Respondents Nos. 1 and 2 in their replies, while justifying their decision to fill up post of Assistant Professor (Public Health Dentistry) by way of

direct recruitment have claimed, that the incumbent (Assistant Professor), who has vacated the post from the category of direct recruitment his post

has to be filled up by way of the same method of recruitment i.e. direct recruitment and in case the post in question that falls vacant due to promotion,

the same has to be filled up by way of promotion only. Respondents have further claimed in the reply that since in the case at hand, post came to be

vacated by Dr. Vinay Kumar Bhardwaj, a direct recruit, on account of his promotion on 25.9.2018, same can be filled up by way of direct recruitment

only and not by way of promotion.

9. Besides above, respondents Nos. 1 and 2 have claimed in their reply that the Rules 2006, otherwise provide for filling up posts of Assistant

Professors 50% by direct recruitment and 50% by way of promotion. Since one post falling to the share of promotees, is already occupied by Dr.

Shelly Fotedar, who is a promotee, second post of Assistant Professor vacated by Dr. Vinay Kumar Bhardwaj cannot be filled up by way of

promotion because in the event of second post of Assistant Professor being filled up by way of promotion, entire cadre of Assistant Professors in

Public Health Dentistry would be represented by promotees, which would be in violation of Rules 2006 which provide for filling up posts of Assistant

Professors, 50% by direct recruitment and 50% by way of promotion.

10. Respondent No.3 in her reply has claimed that in the cadre of two posts of Assistant Professors, one post is to be filled up by direct recruitment

and another by promotion. Hence posts were occupied by candidates from two sources i.e. direct recruitment and promotion in the ratio of 50:50 and

since Dr. Vinay Kumar Bhardwaj coming from the line of direct recruitment stands promoted to the post of Professor, post vacated by him in the cadre of Assistant Professors, can only be filled up direct recruitment and not by promotion, especially when one person from the category of promotees is already occupying the post of Assistant Professor in the cadre of two posts.

11. I have heard the parties and gone through the records of the case.

12. Mr. Sanjeev Bhushan, learned senior counsel representing petitioner, duly assisted by Mr. Rakesh Chauhan, vehemently argued that since posts

were to be filled up on the basis of roster, provided in Chapter XIII of Handbook on Personnel Matters, third post would definitely go to the promotees

and not to the direct recruits. He argued that since the first post which was otherwise meant for promotees came to be filled by way of direct

recruitment on account of non-availability of candidate from feeder cadre, third post which has fallen vacant on account of promotion of one of the

Assistant Professors, who had consumed first post of promotee, can only be filled up by way of promotion and not by way of direct recruitment. Mr.

Bhushan, learned senior counsel, while referring to the Rules 2006 argued that the method of recruitment of posts of Assistant Professors in HP

Dental College, is 50% by direct recruitment and 50% by promotion but while giving effect to aforesaid provision made in Rules 2006, roster as

prescribed under Chapter XIII of Handbook on Personnel Matters is to be followed, whereby, first post would go to promotee and second to the direct

recruit, third to promotee and again fourth post to direct recruit. As per Mr. Bhushan, learned senior counsel, first post was meant for promotee but on

account of non-availability of candidate from feeder cadre, post came to be filled up by way of direct recruitment but that does not mean that post

meant for promotee shall be deemed to have been consumed by promotee though against that post, person by way of direct recruitment was

appointed, rather, in that case, person occupying the post shall be deemed to have consumed the post meant for promotee, as a consequence of which

post vacated by him, on account of promotion can only be filled by promotee and not by direct recruitment. Lastly Mr. Bhushan, learned senior

counsel while referring to certain reply-affidavits filed by respondents in other litigations, contended that in the case at hand, respondents have taken

altogether contrary stand by stating that the post vacated from the category of direct recruitment is to be filled up by way of same method i.e. direct

recruitment in terms of instructions of Department of Personnel, dated 7.11.2001, whereas in some other cases, respondents claimed before the court

that 13 point roster is to be made applicable, while filling up the posts of Assistant Professors in the Department of Dental Education. In support of his

contention, Mr. Bhushan, learned senior counsel placed reliance upon judgment rendered by Hon'ble Apex Court in State of Punjab v. Dr. R.N.

Bhatnagar, (1999) 2 SCC 330, to claim that since first roster point fell to share of promotee and second to direct recruit, hence, present vacancy falling

at third roster point has to be offered to the promotee.

13. Mr. Ajay Vaidya, learned Senior Additional Advocate General and Mr. Dilip Sharma, learned senior counsel representing respondents Nos. 1 and

2 and respondent No.3, respectively, supported the decision taken by the respondents in filling up the post fallen vacant on account of promotion of Dr.

Vinay Kumar Bhardwaj, by way of direct recruitment. Above named counsel vehemently argued that since expression used in Rules 2006 is

“posts” the quota has to be applied to the posts and not to the vacancies. Mr. Dilip Sharma, learned senior counsel argued that statutory Rules

2006 prescribe ratio of 50:50 for direct recruitment and promotees and Chapter XIII of Handbook on Personnel Matters is by way of administrative

instructions. He argued that mandate of statutory quota is that the posts available in the cadre may be filled up 50% by direct recruitment and 50% by

promotion, but if the roster is applied in filling up posts in violation of statutory quota, it would be in complete defiance to the mandate of rules. Lastly

Mr. Dilip Sharma, learned senior counsel, argued that since there are only two posts of Assistant Professor (Public Health Dentistry), one is required

to be filled up by promotion and another by direct recruitment and in case prayer of petitioner is accepted, both the posts of Assistant Professors

(Public Health Dentistry) would come to be filled by way of promotion, which would be in complete violation of Rules 2006 and otherwise would

amount to 100% reservation to promotees in the cadre of two.

14. Having heard learned counsel for the parties and perused the pleadings adduced on record by respective parties, vis-à-vis prayer made in the

petition, this court finds that following question falls for consideration of this court

Whether the ratio of 50:50 prescribed for promotees and direct recruitment in rules 2006, annexure A-1 applies to the posts as contended

by respondents or to the vacancies as asserted by the petitioner.

15. Having carefully perused judgment rendered by Hon'ble Apex Court in R.N. Bhatnagar (supra), this court finds force in the submission of Mr.

Dilip Sharma, learned senior counsel appearing for respondent No. 3 that aforesaid judgment has no applicability in the case at hand, for the reason

that in the case before Hon'ble Apex Court, roster was prescribed as per Recruitment and Promotion Rules, however, in the case at hand, there is no

mention of roster in statutory rules.

16. Mr. Bhushan, learned senior counsel, while referring to para-9 of the aforesaid judgment vehemently argued that when posts in cadre are to be

filled in from two sources, whether candidates come from departmental promotees or by way of direct recruitment, once both enter common cadre,

their birth mark disappears and they completely get integrated in a common cadre.

17. As per aforesaid judgment, direct recruits and promotees lose their birth-marks on fusion into a common stream of service and they cannot

thereafter be treated differently by reference to the consideration that they were recruited from different sources. Their genetic blemishes disappear

once they are integrated into a common class and cannot be revived so as to make equals unequal once again.

18. However, in the case at hand, where there is cadre of only two posts, posts are to be filled in the ratio of 50:50 in terms of Rules 2006, meaning

thereby, one post would go to the promotee and another to the direct recruit.

19. Admittedly as per respondents, first post in the cadre of two posts of Assistant Professors was to be filled up by way of promotion in terms of

Rules 2006, post meant for promotee could not be filled by way of promotee on account of some interim stay granted by Hon'ble Apex Court, post

otherwise meant for promotee came to be filled up by direct recruitment, meaning thereby direct recruit consumed its quota of 50% in the cadre of

two posts. Since after appointment of direct recruits against the post meant for promotees, second post falling to the share of direct recruit, came to be

filled up by promotee i.e. Dr. Sheilja Fotedar, meaning thereby that 50% quota meant for promotee in terms of Rules 2006 also stood consumed. Since

there were only two posts, 13 point roster as provided under Chapter XIII of Handbook on Personnel Matters otherwise could not be made applicable

in the instant case.

20. If the submission made by learned senior counsel for the petitioner is accepted that roster was to be applied while filling up two posts of Assistant

Professors in the discipline of Public Health Dentistry/Community Dentistry, even then roster stood completely applied with the appointment of

promotee against second post and direct against first post. In such eventuality, otherwise, post vacated by direct recruit is to be filled up by way of

direct recruitment and not by promotion.

21. Otherwise also, till the time, one post of Assistant Professor (Public Health Dentistry) is occupied by promotee, second post which fell vacant on

account of promotion of incumbent, who was a direct recruit, cannot be filled up by way of promotion, because that would amount to 100%

reservation to the promotees in the cadre of two, which if permitted shall be in complete violation of law laid down by Hon'ble Apex Court and against

the mandate of Rules 2006 governing the field.

22. If judgment rendered by Hon'ble Apex Court in R.N. Bhatnagar (supra), is read in its entirety, it clearly reveals that in the case before Hon'ble

Apex Court, percentage for recruitment of Assistant Professor from departmental candidate was 75% and 25% reserved for direct recruitment and

there was dispute with regard to 16th vacancy at roster point No. 16. Since in that case, roster was prescribed by statutory Rules, Hon'ble Apex Court

while elaborating upon working of roster point, regulating the recruitment from two sources i.e. promotees and direct recruits observed that the word

â?postâ? as used in rule 9 of rules, may or may not refer to the total number of posts in the cadre and may not exclude vacancies. Hon'ble Apex

Court further held that recruitment to fill up vacancies from time to time is controlled by quota or percentage of posts meant for promotee and direct

recruits, meaning thereby posts are definitely to be filled up as per quota/percentage prescribed in the Recruitment and Promotion Rules.

23. Mr. Dilip Sharma, learned senior counsel appearing for respondent No.3, while inviting attention of this court to judgment rendered by Hon'ble

Division Bench in Ram Sarup Kalia & others Vs. State of H.P. and others, Latest HLJ 2005 (HP)(DB) 520, argued that wherever there is roster and

once quota is filled up, then roster must not be applied any further.

24. Having carefully perused aforesaid judgment relied upon by learned senior counsel for respondent No.3 this court finds that the proposition that,

whether quota can be applied to vacancies or to the posts, came to be considered in the aforesaid judgment passed by Hon'ble Division Bench of this

court. In the case *supra*, Recruitment and Promotion Rules for the post of Assistant Engineer in Public Works Department initially used word

“vacancies” while prescribing method of recruitment but subsequently same was changed by amending the rules and substituted word,

“posts”. Hon'ble Division Bench has specifically taken note of the judgment of Hon'ble Apex Court in *R.N.*

Bhatnagar (supra) in its judgment in *Ram Sarup Kalia (supra)*. It would be apt to take note of the para 29 and 30 of the judgment rendered by this

court.

29. From a perusal of the various judgments of the Apex Court the position which clearly emerges, is that the State can lay down a policy with

regard to promotion. The State also has the power to amend the policy with regard to promotion. The State also has the power to amend the policy

even if it to the detriment of certain class of employees. The only valid ground to challenge such a policy is that the same violates the mandate of

Articles 14 and 16 of the Constitution of India.

30. The judgments relied upon by the petitioners turned on the words of the rules, which were to be interpreted in each of those cases. From a perusal

of the judgments of the Apex Court cited above, it cannot be said that the Supreme Court has held that in every case, where quota is prescribed for

recruitment from two or more sources, it should always be related to vacancies and in no case can it be applied to post. This would depend on the

rules in each case and the circumstances under which the rule has been framed. In fact, the Supreme Court itself in *RK Sabharwal's* case has

deprecated the practice of operating a roster ever after the quota has been reached. It has also stated that concept of vacancies has no reliance in

operating the percentage of reservation. The argument of the petitioners is that this judgment only relates to cases of reservations and not to cases of

recruitment from two different sources. The answer to this argument lies in the observation of the Apex Court case in *All India Judges's*

Association case wherein the Supreme Court has again, in no uncertain terms stated that wherever, there is a roster once the quota is filled then the roster should not be applied any further.

25. It is not in dispute that aforesaid judgment has attained finality on account of dismissal of Civil Appeal No. 3606 of 2008 having been filed by respondent State in the Hon'ble Apex Court.

26. Careful perusal of aforesaid judgment passed by Hon'ble Division Bench of this Court, reveals that that Hon'ble Division Bench while

distinguishing the judgment rendered by Hon'ble Apex Court in R.N. Bhatnagar (supra), ruled that it cannot be said that in every case, where quota is

prescribed for recruitment from two or more sources, it should always be related to vacancies and in no case can it be applied to post, rather, this

would depend on the rules in each case and the circumstances under which the rule has been framed. In Ram Sarup Kalia (supra), Hon'ble Division

Bench has observed that, in fact, the Supreme Court itself in RK Sabharwal's case has deprecated the practice of operating a roster ever after

the quota has been reached.

The argument of the learned senior counsel appearing for the petitioner that R.K. Bhatnagar (supra) only relates to cases of reservations and not to

cases of recruitment from two different sources, is not tenable in view of findings rendered by Apex Court case in All India Judges Association and

Ors. v. Union of India and Ors., (2002) 4 SCC 247, wherein the Supreme Court has again, in no uncertain terms has held that wherever, there is a

roster once the quota is filled then the roster should not be applied any further.

27. It would be also relevant to take note of judgment passed by Hon'ble Apex Court in All India Judges Association vs. Union of India, wherein

Hon'ble Apex Court has held that one of methods of avoiding litigation and bringing about certainty in this regard by specifying quotas in relation to

posts and not in relation to vacancies.

28. The respondents also placed reliance on All India Judges Association and others V. Union of India and others. In this case, the Supreme

Court in para 29 placing reliance on R.K. Sabharwal's case supra held thus:

29. Experience has shown that there has been a constant discontentment amongst the members of the Higher Judicial Service in regard to their

seniority in service. For over three decades a large number of cases have been instituted in order to decide the relative seniority from the officers

recruited from the two different sources, namely, promotees and direct recruits. As a result of the decision today, there will, in a way, be three ways

of recruitment to the Higher Judicial Service. The quota for promotion which we have prescribed is 50 per cent by following the principle

“merit-cum-seniority”, 25 per cent strictly on merit by limited departmental competitive examination and 25 per cent by direct recruitment.

Experience has also shown that the least amount of litigation in the country, where quota system in recruitment exists, insofar as seniority is

concerned, is where a roster system is followed. For example, there is, as per the rules of the Central Government, a 40-point roster which has been

prescribed which deals with the quotas for Scheduled Castes and Scheduled Tribes.

Hardly, if ever, there has been a litigation amongst the members of the service after their recruitment as per the quotas, the seniority is fixed by the

roster points and irrespective of the fact as to when a person is recruited. When roster system is followed, there is no question of any dispute arising.

The 40 point roster has been considered and approved by this Court in *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745. One of the methods of

avoiding any litigation and bringing about certainty in this regard is by specifying quotas in relation to posts and not in relation to the vacancies. This is

the basic principle on the basis of which the 40 point roster works. We direct the High Courts to suitably amend and promulgate seniority rules on the

basis of the roster principle as approved by this Court in *R.K. Sabharwal* case as early as possible. We hope that as a result thereof there would be no

further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant rules seniority is

to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be

protected but the roster has to be evolved for the future. Appropriate rules and methods will be adopted by the High Courts and approved by the

States, wherever necessary by 31-3-2003.”

28. Otherwise also, in *Ram Sarup Kalia* (supra), Hon'ble Division Bench of this Court has held that State can lay down a policy with regard to

promotion. The State also has the power to amend the policy, with regard to promotion. The State also has the power to amend the policy even if it is to the detriment of certain class of employees. The only valid ground to challenge such a policy is that the same violates the mandate of Articles 14 and 16 of the Constitution of India.

29. Interestingly, in the case at hand, neither there is challenge to policy of State to fill up posts from two sources, by applying quota neither learned senior counsel for petitioner has been able to demonstrate that on account of filling up to posts of from two streams i.e. 50% by direct recruitment and 50% by promotion, in the cadre of two, prejudice if any can be said to be caused to category of promotee who at present is otherwise occupying one post of Assistant Professor in the cadre of two posts.

30. Though there is no specific mention with regard to applicability of roster as prescribed in Chapter XIII of Handbook on Personnel Matters in the Rules 2006 occupying the field, but otherwise also petitioner on the strength of administrative instructions, if issued under Chapter XIII of Handbook on Personnel Matters cannot be permitted to claim that action of the respondents is illegal. Petitioner has not been able to make out a case that by initiating process for filling up present vacancy by direct recruitment, respondents, in any manner, violated the mandate of 50:50 between direct recruits and the promotees.

31. Judgment of Hon'ble Apex Court in RN Bhatnagar has no applicability in the case at hand, for the reason that in that case, Recruitment and Promotion Rules itself provided for roster but as has been observed above, there is no mention of word "roster" in the Rules 2006 while filling up two posts of Assistant Professors in the Department of Public Health Dentistry,

32. Having perused the replies, Annexure A-9 and A-10 filed in some other petitions, this court finds that in Department of paedontrics, there were three posts of lecturer and as such, ratio of 50:50 as prescribed under Rules 2006 cannot be maintained unless roster is applied. But in the cadre consisting of two posts, ratio of 50:50 can be maintained between direct recruits and promotees by giving one share to each category. Since in the cadre of 3 posts ratio of 50:50 cannot be maintained, posts are offered by rotation so as to obey the mandate of rules.

33. Leaving everything aside, after having taken note of the fact that at present

one post of Assistant Professor is already occupied by a promotee, this court is of the view that second post, which otherwise has been vacated by direct recruit, must go to the same category, i.e. direct recruit and not to the promotee category.

34. Since both the categories stood represented in the cadre of Assistant Professors, as such, now the posts are to be filled up from the category, which vacated the same i.e. post occupied by direct recruit would go to direct recruit and the post vacated by a promotee would be filled up by way of promotion, so as to maintain the ratio of 50:50 for both the categories in terms of Rules, 2006.

35. In view of detailed discussion made supra, present writ petition is dismissed being devoid of merit. All pending applications are also disposed of.

Interim directions, if any, stand vacated.