
(1991) 05 SHI CK 0014
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 731 of 1990

Dr. Dev Raj Sharma

APPELLANT

Vs

Himachal Pradesh University and Others

RESPONDENT

Date of Decision : 13-05-1991

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 17, 26, 27, 27(1), 27(2)

Citation : (1994) ShimLC 44 Supp

Hon'ble Judges : V.K. Mehrotra, Acting C.J.; Bhawani Singh, J

Bench : Division Bench

Advocate : K.D. Shreedhar, for the Appellant; D.C. Jistu, for Respondent No. 1, Chhabil Dass, General, L.S. Panta, Dy. A.G. for Respondent Nos. 2 to 4 and Kuldip Singh, for the Respondent

Final Decision : Allowed

Judgement

V.K. Mehrotra, A.C.J.

1. Petitioner Dr. Dev Raj Sharma is working as General Duty Officer-II in the Directorate of Health Services Himachal Pradesh. He did his M.B.B.S. from the Indira Gandhi Medical College, Shimla in the year 1981. On September 10 of the year, he joined as G. D. O. II on ad-hoc basis. Later, he was selected for the post through the H.P. Public Service Commission and joined as G. D. O. on a regular basis on July 17, 1982, in continuation of his ad-hoc appointment. He has thus been working as a G. D. O. continuously since September 10, 1981.

2. The Indira Gandhi Medical College has post Graduate Degree and Diploma Courses in various Disciplines. Admission to these Courses is governed by the Prospectus issued by the Government of Himachal Pradesh in the Department of Health and Family Welfare. One such Discipline is Ear, Nose and Throat (for short, "ENT"). The admission, both to the Diploma and Degree Courses in it, is made on the basis of competitive examination from amongst the eligible candidates. The Prospectus (for 1990-91/92), in its relevant part, provides in paragraph 3 as

under:

3. Distributions and Restrictions:

GROUP A

3.1. 25% seats of Degree and Diploma Course shall be filled through All India Entrance Examination....

GROUP B.

3.2. 66.6% seats will be filled by in service regularly appointed G. D. O. I and G. D. O. II in Himachal Pradesh Health Services cadre and 33.3% seats will be available by open competition from amongst the graduates of Indira Gandhi Medical College. If sufficient number of candidates in one category is not available, the seats reserved for them will be allotted to the candidates of other category.

3.3. "To qualify for Degree or Diploma Course only such regular GD Os (HPHS) will be eligible who have five years service including ad-hoc service, if any, to their credit and out of this at least three years service should be rural.

3.4. G. D. O. (HPHS) who has been selected and has successfully completed a Diploma or Degree Course will not be eligible for applying again until he has served the State Government for five years after he has completed Diploma/ Degree Course:

Provided that such qualifying service will not be necessary if an officer wishes to follow a Diploma with a Degree course in the same speciality.

3.5. Distribution of seats in each speciality to G. D. Os. (HPHS) and direct candidate will be according to the following roster:

....

This roster will be repeated after every six seats.

3. The criteria and method of selection into Post-Graduate Course, provided in paragraph 5 says (in paragraph 5.3) that:

5.3. G. D. Os. (HPHS) will compete amongst themselves and open candidates will compete in their own group in the competitive examination conducted by the H.P. University.

4. The Prospectus for the Session 1988-89/90, which was in force immediately before the Prospectus for the year 1990-91/92, provided in paragraph 3.3 that:

only such G. D. Os. (HPHS) will be eligible who have at least five years regular service to their credit out of which three years should be in a rural area. For this purpose ad-hoc service shall be counted as rendered before 3-12-1983 provided that it is followed by regular service (Emphasis supplied)

5. The Petitioner says that an advertisement was issued by the H.P. University for holding examination for admission to the Post Graduate Degree and Diploma Courses on July 18, 1990. Two seats were reserved for the G. D. Os. (of General category) in the Speciality of E. N. T. Degree Course. The Entrance examination was held on August 30, 1990 in which, apart from the Petitioner, the fifth Respondent (Dr. Rakesh Verma) also appeared. There were other doctors also of the category of G. D. O. II who had taken Entrance examination for admission to that Speciality. The result of the examination was declared by the University in the first week of October 1990. In it, the names of the doctors, on the basis of merit, were arranged thus:

1. Dr, Som Nath;
2. Dr. Satish Sharma ;
3. Dr. Rakesh Verma (Respondent No. 5);
4. Dr. Kultar Dogra; and
5. Dr. Dev Raj (Petitioner).

The first seat went to Dr. Som Nath. The second Code was not given to Dr. Satish Sharma, who was at serial No. 2, inasmuch as, he was already doing Diploma in E. N T. and had not completed it on the date when he applied for the Degree Course. This was because of Clause 3.9 of the Prospectus which say that:

3.9. Once a candidate has been admitted in a particular course he/she will not be allowed to change the course until completion

Dr. Sharma filed a writ petition (CWP No. 589 of 1990) against the refusal to give him admission but the petition was dismissed on November 19, 1990. The fifth Respondent (who was at serial No. 3) was, therefore, given admission in that and the joined it on December 7, 1990.

6. The case of the Petitioner is that the fifth Respondent could not be given the second seat meat for G. D O. II because he was not eligible for it. The reason, according to the Petitioner, for the ineligibility was this.

7. After doing his M.B.B.S. in the year 1984 the fifth Respondent joined as G. D. O. II on ad-hoc basis on June 15, 1984. There was an advertisement for admission to the Diploma Course in E. N. T. and the fifth Respondent applied for it on September 25. 1987. He took the examination on October 6, 1987. Through letter dated November 2, 1987 he was intimated that he had been selected for the Diploma Course. As such, he resigned on November 14, 1987 as G. D. O. after having worked as such till November 13, 1987. The resignation was accepted by the State Government on March 24, 1988. The fifth Respondent thus did his diploma in E. N. T. as a direct candidate completing it in October 1988.

8. Prior to it, the fifth Respondent had made a prayer for study leave. This was refused to him through a communication dated August 10, 1988.

9. The Director of Health Services, in his reply affidavit filed in the present writ petition, says (in paragraph 6") that:

...While undergoing the PG Diploma Course in ENT in Medical College, Shimla, Respondent No. 5 (Dr. Rakesh Verma) represented that the study period be regularised by granting him leave of the kind due and extra ordinary leave. But this request of Respondent No. 5 (Dr Rakesh Verma) was considered by the Government and rejected vide letter dated 10-8-1988 from the Deputy Secretary (Health) to the Government of Himachal Pradesh addressed to the Director of Health Services, Himachal Pradesh....

10. The fifth Respondent joined as G. D. O. Grade II on regular basis on December 10, 1988 after his appointment as such through the H.P. Public Service Commission through memorandum dated March 31, 1988.

11. According to the Petitioner, the fifth Respondent did not have to his credit five years service, including ad hoc service, so as to be entitled to qualify for admission to the two year Degree course in E. N. T. and seek admission there to by appearing in the examination for which advertisement was made on July 18, 1990. The benefit of the service rendered by the fifth Respondent as G. D. O. Grade II on ad hoc basis from June 15, 1984 to November 13, 1987 was not available to him because there was a break In his service thereafter and the fifth Respondent re-commenced his service as a G D. O. Grade II on regular basis only from December 10, 1988 At the time when he took the Entrance test he did not have a total of five years service to his credit as required by paragraph 3.3 of the prospectus.

12. The fifth Respondent has, however, taken the stand that he was eligible and was rightly held qualified to take the Entrance test because the period of his service on ad hoc basis from June 15, 1984 to November 13, 1987, together with the period of regular service put in by him after December 10, 1988, exceeded the period of five years. In fact, his service on ad hoc basis would have to be counted till March 24, 1988 when his resignation was accepted by the State Government.

13. The legal position that in the case of a Government servant, subject to any rule to the contrary, resignation becomes effective when it is accepted by the Government, is not in doubt. See Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others, But that would not enure to the benefit of the fifth Respondent because, admittedly, he re-commenced service as G. D. O. Grade II on a regular basis with effect from December 10, 1988 and appeared at the Entrance examination for admission to the two year Degree course in E. N. T. in consequence of the advertisement therefore on July 18, 1990, unless it is held that the relevant paragraph of the Prospectus envisages that the period of five years service, including ad hoc service, can be made up of service rendered by a candidate even with interruption thereof in the main thrust of the submissions made on behalf of the Petitioner has been that paragraph 3.3 of the Prospectus

contemplates that to qualify for a Degree course only such regular G. D. Os. would be eligible who have five years service, including ad hoc service, without a break therein. It does not envisage a case where the total period is made up of two periods of service rendered with interruption. Counsel for the fifth Respondent, however, says that this interpretation is ruled out by omission of the word "if followed by a regular service", from paragraph 3.3 in the Prospectus for the Session 1990-91/92.

14. In paragraph 33 of the Prospectus for Session 1988-89/90 we found a mention about ad hoc service to be counted as rendered before 31-12-1983. Our quest for the reason for mention of this date led the learned Advocate General to produce some documents throwing light on this aspect. One such document was copy of a letter (No. 1-12/73-DP. II) Vol. IV Government of Himachal Pradesh, Department of Personnel (AP-II) dated April 1, 1987, addressed by the Secretary (Personnel) to various other functionaries in the State, It related to service requirement for promotion, confirmation and grant of Selection Grade etc. In this letter the Secretary (Personnel) says:

It am directed to say that the existing Rules provide for an incumbent having prescribed years of service for promotion, confirmation, grant of Selection Grade etc, and instructions also exist that ad hoc service rendered upto 31-12-1983 is also to be taken into account for these purposes, subject, of course, to usual other conditions. In this context a question was raised as to whether the minimum service requirement would mean continuous service in the feeder category concerned or the broken service rendered in the said category could also be taken into account for computing minimum service requirement .it has been decided that the minimum service requirement would mean continuous regular or regular combined with ad hoc (rendered upto 31-12-1983) and the broken period of any service prior to continuous appointment will not be taken into account....

15. The question in regard to eligibility of doctors for Post Graduate Degree/ Diploma Courses was examined by the State Government for purposes of giving approval to the Prospectus as well as while considering the demand of in service doctors for grant of study leave. This was in the year 1985. The relevant notings in the file read:

...it is proposed that the policy framed by the Government vide pages 23-24/c may be amended by substituting the following against item No. 1 and the said provisions may also be incorporated in the Prospectus against item No. 2,3: in order to make uniformity.; 1. Only such GDO's will be eligible who have at least five years service to their credit out of which "two years should be in rural areas". For this purpose ad hoc service shall only be counted as rendered before 31-12-1983, and if followed by a regular service.

Before the above provision is changed accordingly, as mentioned at Note 18 ante, approval of Hon''ble Health Minister is solicited....

16. The policy decision was preceded by a letter (No. Swa-Kha (12) 6/79 Government of Himachal Pradesh Health and F. W. Department) dated August 20, 1983 from the Deputy Secretary (Health) to the Government of Himachal Pradesh, inter alia, to the Director, Health Service and Director-Principal, H.P. Medical College, Shimla. The subject of this letter was: "N. O. C /Sponsorship for doing Post-graduation-Framing of a fresh policy". The letter, in its material part, said that:

...the matter legarding framing of a fresh policy for issuing No Objection Certificate/Sponsorship to doctors/officers for doing post-graduation outside the State has been under consideration of the Government and it has now been decided to allow doctors/officers of this department to do post-graduation in various specialities who fulfil the following conditions:

1. Doctors should have put in at least five years service in category A or 3 years service in B and C Or 2 years service in D and E Stations.

2....

3....

4. N. O. C./Sponsorship will be issued only in those specialities for which facilities do not exist in H.P. Medical College, Shimla.

5....

You are requested to send proposal for the grant of N. O. C / Sponsorship keeping in view the fresh policy in future....

17. It is clear that the Government felt that a continuous period of five years service should be put in by an inservice candidate for admission to Post-Graduate Degree /Diploma Course in a Medical College either in the State or outside it in the same manner in which regular service was to be rendered for promotion, confirmation and grant of Selection Grade etc. In computing the period of five years, the benefit of ad hoc service rendered by a candidate was also to be granted. The requirement of five years service, thus, implied requirement of a continuous period of service for that period. That is implicit in the policy of the Government, reflected in the prospectus.

18. The words "provided that it is followed by regular service" contained in paragraph 3.3 of the prospectus for the Session 1988-89/90 only re-emphasised and made explicit what was implicit in the policy of the Government. These words were clearly clarificatory in nature. Their deletion from Clause 3.3 as occurring in the Prospectus for the Session 1990-91/92, cannot be read, as was canvassed with some emphasis by Shri Kuldeep Singh on behalf of the fifth Respondent, as indicating a departure from the policy of the entire period of five years service being continuous in nature. The policy decision by the Government is consistent with the concept of continuity in service jurisprudence. We may only refer to the Central Civil Services (Pension) Rules, 1972.

19. Rule 26, relating to forfeiture of service on resignation, provides that except in the circumstances mentioned in the various sub-rules, resignation from a service of" a post, unless it is allowed to be withdrawn in the public interest by the appointing authority, entails forfeiture of past service.

Rule 27 deals with the effect of interruption in service and says that except for the cases mentioned in Clauses (a) to (e) of Sub-rule (1) an interruption in service of a Government servant entails forfeiture of his past service. Sub-rule (2) empowers the appointing authority to commute the periods of absence without leave as extraordinary leave retrospectively.

Rule 28 permits condonation of interruption in service.

20. The observations of the Bombay High Court in Vishwanath Sadashiv Deshpande and Ors. v. Comptroller and Auditor General of India, 1976 LIC 934, (in paragraph 18), upon, which reliance was placed by Shri Kuldip Singh as part of his submissions, have to be confined to the circumstances in which they were made. The Bench was dealing with Fundamental Rule 17, contained in the Financial Handbook, forming part of general conditions of service. The proviso to F. R. 17 (1) provides that an officer who was absent from duty without any authority would not be entitled to any pay and allowances during the period of such absence. The Petitioners, who were Upper Division Clerks (later designated as Auditors) absented from duty on May 10, 1974 because of the call of general strike by the Central Government employees. The next two days were holidays. The Petitioners resumed their duties on the 13th. Initially, all the three days were treated as absence from duty but eventually pay for 11th and 12th was released but no pay or allowances were paid for May 10, 1974. The Respondents placed reliance, inter alia, upon the Central Civil Services (Pension) Rules for saying that the unauthorised absence amounted to interruption in service resulting in the forfeiture of past service of the Petitioners. As such, the Petitioners could not claim any salary on that basis. It is in this context that the learned Judges of the Bombay High Court observed that the Pension Rules dealt with a distinct and different subject-matter and could not be mixed up while considering the matter of pay and allowances when the civil servant was actually serving his tenure. We may also notice some observations made by the learned Judges when they say that:

...In fact we would for ourselves think that break in service involves forfeiture of the past service and should be expressly provided for...

And, that:

By introducing tenure attached to post, a time dimension holds the post and service rendered by the incumbent having relation to his entitlement of benefits having a quid pro quo of rendering good and honest personal services. Result of forfeiture would efface all that is so earned. In law to achieve such a state when the matters are of tenure as well of status express terms would of necessity must be available....

21. We have analysed the Scheme underlying the Prospectus and the background in which paragraph 3.3 thereof to be included. We feel that what was in contemplation was a continuous period of five years service made up, inter alia, of ad-hoc service and not a total period of five years of service with interruption.

22. Thus viewed, it would appear that on the facts of the present case, Respondent No. 5 cannot be said to be eligible for admission to the Post Graduate Degree Course in E. N. T. as an "in-service G. D. O." In granting admission to him the Respondent University and the Medical College have misdirected themselves in law.

23. The effect of the discussion should be that the admission given to the fifth Respondent should be quashed. . That, we feel, is not called for in the circumstances of this case. The fifth Respondent was permitted to appear in the Entrance test obviously on the basis that he was considered eligible by the University. He was given admission by the Medical College on the view that he had rightly been selected for admission. The fifth Respondent actually joined the two year course on December 7, 1990 and has been attending it thereafter. It would not be equitable, in these circumstances, now to ask him to discontinue the course of study which he Ashok Chand Singhvi Vs. University of Jodhpur and Others, We, therefore, direct the first four Respondents to create a seat for his continuance with the approval of the Medical Council of India, and permit the fifth Respondent to continue his studies in the mean-while.

24. The direction aforesaid shall be without prejudice to the right of the Petitioner to get admission to the two year Degree Course in E .N . T. in the seat at present occupied by the fifth Respondent. Nothing has been brought to our notice to hold that the Petitioner is not eligible for or entitled to that seat, in case the admission of the fifth Respondent is held to be invalid except for the fact that above the Petitioner in the list of successful candidates is one Dr. Kultar Dogra. In respect of Dr. Kultar Dogra, however, there is no dispute before us that he suffers from the same disability as Dr. Satish Sharma. In other words, Dr. Kultar Dogra is also ineligible to join the Course on account of the provision contained in paragraph 3.9 of the Prospectus as he had still, like Dr. Satish Sharma been under going studies for one year Diploma Course in E. N. T.

25 In conclusion, the writ petition shall stand allowed as aforesaid The Petitioner shall be admitted in the two year Degree Course in E. N. T. forthwith in the seat at present occupied by the fifth Respondent who shall however, be permitted to continue his studies pending creation of an additional seat for him with the approval of the Medical Council of India

Costs on parties.