

(2019) 10 J&K CK 0037

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 585 Of 2007

Dr. Jameel Ahmad Mir

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 24-10-2019

Acts Referred:

Indian Medical Council Act, 1956 — Section 30(iii)

Citation : (2019) 10 J&K CK 0037

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Shah Aamir, Azhar-ul-Amin, J. A. Kawoosa, Hamza Prince, Nazir Ahmad Khan

Final Decision : Disposed Of

Judgement

Sanjeev Kumar, J

1. The vague statutory rules governing the recruitment of Deputy Medical Superintendents in the Health and Medical Education Department, equally poor understanding thereof and deliberate exploitation of uncertainty has led to the filing of this petitions, which is on the file of this Court since the year 2007. The aspirants for the posts are now nearing their age of superannuation.

2. The issue involved in this petitions pertain to the qualification of experience provided in the Jammu and Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979 (hereafter referred to as 'the Rules of 1979') for the post of Deputy Medical Superintendent. Vide Letter No. ME/GM-193/961 dated 21.06.2005 read with Letter No. ME/Legal/43/2005 dated 07.09.2005 and 26.09.2005, the respondent No.1 referred 8 posts of Deputy Medical Superintendents to the Jammu and Kashmir Public Service Commission for making selection with following break up:

Open: 03

RBA: 02

SC: 01

ST: 01

PHC: 01

3. The respondent No.2, vide advertisement notification No. 16-PSC of 2005 dated 13.10.2005 invited applications for the aforesaid posts. The cut off date, i.e. the last date for submission of application forms, was fixed as 28.11.2005. The respondent No.2 received 51 application forms for the posts advertised. The eligibility qualification and method of recruitment to the post is governed by the Rules of 1979. The requisite qualification prescribed under the Rules aforesaid is as under: -

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Administration of Colleges and Hospital

(b) Medical Superintendent of Teaching Hospital

(i) Same as given for item (i) against S. No. 27 above; and (ii) Post Graduate qualification in Surgery/ Gyneacology/ or Medicine and other clinical subjects/ hospital administration.

Atleast 5 years experience as Dy. Medical Superintendent.

(b) Dy. Medical Superintendent of Teaching Hospitals

-do-

3 years working experience of running a hospital after Post Graduation.

Method of Recruitment

II

Deputy Medical Superintendent

750-1350

By direct recruitment or by deputation from CMOs cadre of J&K Medical (Gazette) Service.

4. The post, in terms of the Rules, is required to be filled up, 100% by direct recruitment or by way of deputation of the Chief Medical Officers and equivalent of the Health Department. Out of 51 application forms received, the respondent No.2 found only 5 candidates conforming to the eligibility prescribed in the Rules. They were called for the interview scheduled to be held on 22.04.2006. In addition to these five candidates, one more candidate, namely, Mohan Singh Soodan, was also called for the interview on the basis of some order passed by this Court. The respondent No.2 rejected the candidature of the rest of the

candidates, which included the petitioners in this petition.

5. It may be noted that the interview could not be held on the scheduled date as some of the candidates, who had been declared ineligible by respondent No.2, represented for determining their eligibility afresh. The respondent No.2, taking no chance in the matter of interpretation of Rules pertaining to qualification, took up the matter with respondent No.1. Vide its communication No. ME-GM-193/96-II dated 14.03.2007 the respondent No.1 issued clarification as regards the working experience of running a hospital by the Registrar and also provided category wise break up of the posts notified for Government Medical College Jammu and Srinagar separately. So far as Medical College Jammu is concerned, one post in Open Merit category and one post in SC category was earmarked. Whereas for Government Medical College, Srinagar, 6 posts in the following breakup were allocated: -

1. Open: 02
2. RBA category: 02
3. ST category: 01
4. PHC Category: 01

6. The respondent No.1, while clarifying the issue of qualification of experience, provided that the experience of running a hospital be considered only for such Doctors who have been assigned the charge of running the hospital by a formal order. The clarification, as is evident from its reading, instead of clearing the mist around the provision, created more confusion. The term used in the clarification 'formal order', however, remained un-explained nor the competent authority, who could issue such formal orders, was communicated in clarification. Unfortunately, the respondent No.2 also groped in the dark and went on to make the selection. Be that as it may, the respondent No.2 conducted the interviews for the post on 01.04.2007. Out of 51 applicants, only 12 candidates were called for the interview provisionally, which included 5 over aged candidates who were interviewed in terms of respondent No.1's letter No. ME(GAZ)177/2005 dated 28.03.2007. Over and above, three more candidates, who had interim directions in their favour issued by this Court, were also allowed to participate in the interview. In all, 15 candidates were ultimately interviewed by the selection committee of respondent No.2. The interviews were conducted with the assistance of subject expert Shri D. K. Sharma, Medical Superintendent, All India Institute of Medical Sciences, New Delhi. As is further clear from the minutes of the interview Committee, Dr. Manoj Kumar Chalotra and Dr. Manoj Kumar Bhagat figuring at serial Nos. 1 and 3 respectively, who have obtained their MHA Degrees from TATA Institute of Social Sciences, were held ineligible on the ground that their qualification was not recognized by the Medical Council of India. The candidates, namely, Satish Kumar, Mohd Khalil, Romesh Kumar Gupta, Rabinder Rattan Pal and Vinod Kumar Gupta, figuring at serial Nos. 6,7,8,9 and 10 respectively were found over aged. They did possess the required qualification

and were also assessed by the interview Board, however, in the absence of any outstanding attribute to their credit, the respondent No.2 did not recommend their candidature to the Government for relaxation. One of the candidates, namely, Madhu Khosla figuring at serial No. 11 of the short list also did not possess three years' experience and, therefore, was not found eligible to participate in the interview. Similar was the fate of Sunita Goel, who was not only over aged but also did not possess the minimum eligibility qualification.

7. The petitioners, along with two more candidates, namely, Jatinder Singh and Mohd Ashraf, were interviewed on the strength of court directions and their results were kept in sealed covers. On the basis of overall performance in the interview, the respondent No.2 selected respondent Nos. 5, 6 and 7 and recommended them to respondent No.1 for appointment vide communication No. PSC/DR/Medical Supt/05 dated 05.04.2007. The selected candidates, namely, Mushtaq Ahmad Rather, respondent No.6 in SWP No. 585/2007 was inadvertently recommended, as he participated in the interview on the strength of an order passed by Court, in which order this Court had put a specific rider that his result be kept in a sealed cover. The moment respondent No.2 realized its mistake, it, vide its order dated 16.01.2008 cancelled the selection of respondent No.6 and withdrew his recommendation for appointment. The respondent No.6 has assailed the aforesaid order of respondent No.2 separately in SWP No. 47/2008, in which the order of withdrawal of the recommendations has been stayed. This is how the respondent No.2 filled up two posts in open category, one each in GMC Jammu and Srinagar and one post under ST category in GMC, Srinagar. On re-consideration of the case of Dr. Manoj Kumar Chalotra and Dr. Manoj Kumar Bhagat under the SC category, the Public Service Commission held them eligible for the post and, accordingly, selected and recommended Dr. Manoj Kumar Chalotra for the post of Deputy medical Superintendent under SC category in GMC, Jammu. Therefore, in all, four posts, one in Open category, two in RBA category and one in PHC category remained unfilled.

8. It may be noted that those of the candidates who were found ineligible, had been issued the rejection orders in terms of the decision of the Board dated 05.04.2007. Aggrieved of cancellation of their candidature and selection of respondent Nos. 5, 6 and 7 as Deputy Medical Superintendents, the petitioners herein seek, inter alia, the following writs: -

"i. Certiorari, thereby quashing the recommendations made by respondents 2 and 3 to respondent No.1 requesting therein to appoint the persons mentioned in the said recommendations as Deputy Medical Superintendents bearing No.PSC/DR/Medical Supdt/05 dated 5-4-2007 and the Government order No.258-H&ME of 2007 dated 10-4-2007 (Annexure A and B) of the writ petition.

ii. Mandamus, commanding the respondents 1 to 3 to consider and appoint the petitioners to the post of Deputy Medical Superintendents with consequential benefits including the promotions to the next higher post.

iii. Quo-Warranto directing removal of respondents 5 to 7 from the post of Dy. Medical Superintendents and declare them vacant available posts with further directions to respondents 1 to 3 to select and appoint the petitioners as Dy. Medical Superintendents with all consequential benefits."

9. Initially this writ petition was filed by three petitioners but during the pendency of this petition, petitioner No.2 withdrew from the petition. This petition now survives only on behalf of petitioner Nos. 1 and 3.

10. There is another writ petition filed by one Dr. Nazir Ahmad Khan i.e. SWP No. 678/2009 in which he has challenged the notification of respondent No.2 issued vide No. PSC/Exam/09/15 dated 26.03.2009 whereby four posts of Deputy Medical Superintendents notified vide Notification No. 02 PSC of 2009 dated 30.01.2009, have been withdrawn. I shall deal with the aforesaid writ petition in detail a little later.

11. It is in the backdrop of these facts, three petitions have come to be filed.

12. In the instant petition the petitioners have called in question the selection and appointment of respondent Nos. 5 to 7 as Deputy Medical Superintendents in Government Medical Colleges, Jammu and Srinagar and also seek direction in the nature of mandamus to the respondents Nos. 1 to 3 to consider and appoint the petitioners to the posts of Deputy Medical Superintendents with consequential benefits, including promotion to the next higher post. Simultaneously, with the aforesaid writs, the petitioners also seek writ of quo-warranto for removal of respondent Nos. 5 to 7 from the posts of Deputy Medical Superintendents on the ground of their ineligibility.

13. The case set out by the petitioners in this petition is that, though initially the eligibility of the petitioners along with few others, was doubted by respondent No.2 and they were issued the rejection orders, purportedly pursuant to a decision by the Interview Board taken on 05.04.2007, yet the petitioners were later on permitted to submit the fresh experience certificates issued by the competent authority. The petitioners claim that they also approached this Court by way of two separate writ petitions, SWP No. 498/2006 and SWP No. 507/2006, in which the respondent No.2 was directed to interview the petitioner at their own risk providing further that their results shall not be declared till further directions from the Court. However, it is the positive case of the petitioners that they were interviewed by the respondent No.2, not in pursuance to the Court directions, but in view of their having submitted the fresh experience certificates issued by the competent authority i.e. Principal, Government Medical College, Jammu/Srinagar in response to the specific communication from the respondent No.2 dated 18.04.2006. It is the contention of the petitioners that the interview call letters sent to them also do not indicate that the participation of the petitioners in the interview was in pursuance to the directions passed by this Court. It may also be relevant to note that both the writ petitions aforesaid, in which interim directions came to be issued by this Court,

permitting the petitioners to participate in the interview provisionally, have been dismissed as having been rendered infructuous, leaving it open to the petitioners to agitate the issue of eligibility in the instant writ petition.

14. The other ground of challenge highlighted by the petitioners in the petition is with regard to the possession of similar nature of experience by the selected candidates. It is contended that experience possessed by respondent Nos. 5 to 7, which is accepted by respondent No.2, is also not the experience as prescribed in the recruitment Rules of 1979 and the clarification issued by the Government. It is thus submitted that in view of the respondent Nos. 5 to 7, not possessing the basic eligibility, their selection and appointment to the posts of Deputy Medical Superintendents amounts to usurpation of posts by incompetent and in-eligible persons. They claim that respondent Nos. 5 to 7 are liable to be removed from their office by issuing a writ of quo-warranto. The petitioners also assert that, in compliance to the communications issued by respondent No.2 with regard to the experience certificates initially submitted by the petitioners, the petitioners submitted fresh experience certificates issued by the competent authority i.e. Principal, Government Medical College, Srinagar, certifying that both the petitioners had more than three years working experience of running the hospitals. The petitioners, thus, submit that in view of the qualification and experience possessed by them coupled with the merit evaluated by respondent no. 2 in terms of the selection criteria, both the petitioners make the grade, and, therefore, are entitled to be selected and appointed against the post of Deputy Medical Superintendents in their respective categories i.e. Open and ST Category respectively. The selection and appointment of respondent No. 5 is also assailed on the additional ground that the expert, who was associated in the selection, was not only the batch mate of respondent No. 5 in the MD course, but has also co-authored a book with the respondent No. 5. It is thus submitted that the selection of respondent No. 5 is liable to be set aside on the ground of bias. There is, however, no specific challenge to his eligibility qualification.

15. The respondents, including respondent No. 2 & 3, the J&K Public Service Commission, have filed counter affidavit and have justified the selection and appointment of respondent Nos. 5 to 7 on the ground that they were the only candidates in the selection process who were conforming to the eligibility prescribed in the Rules of 1979. The claim of the petitioners, that they were not interviewed on the strength of interim directions of this Court but were permitted in the interview process after obtaining fresh certificates from them and after being satisfied about their eligibility, is also refuted by the respondents. Referring to the interim directions passed in SWP No. 498/2006 and SWP No. 507/2006, the respondent no. 2 claims that it was in pursuance of the directions passed in the aforesaid writ petitions that both the petitioner were permitted to participate in the interview. The selection Board considered the certificates submitted by them in the light of Rules of 1979 and the clarification issued by the government and found both of them ineligible, not possessing the requisite experience of three years in running the Administration of a Hospital. The private respondents

have also filed their objections and have justified their eligibility and selection on similar lines.

16. Heard petitioner in person, learned counsel appearing for the respondents and perused the record. Dr. Nazir Ahmad Khan, who has been impleaded as respondent No. 9, is also heard in the matter.

17. Before proceeding to discuss the grounds of challenge urged by the petitioners in this petition to assail the selection and appointment of respondent Nos. 5 to 7, the core issue involved in this petition as to the eligibility of a candidate for the post of Deputy Medical Superintendent in the Health and Medical Education Department, needs to be determined.

18. From the extract of relevant rules reproduced herein below, it is clear that for the post of Deputy Medical Superintendent of a teaching hospital, a candidate must possess recognized medical qualification indicated in I or II schedule (other than licentiate qualification) to the Indian Medical Council Act, 1956 and the Holders of educational qualification included in part II of the III schedule should fulfill the conditions stipulated in section 30 (iii) of the Indian Medical Council Act 1956. A candidate for the post must also possess the following qualifications:

" (i) Post graduate qualification in Surgery/Gynecology/or medicine and other clinical subjections/hospital administration should have three years working experience of running a hospital after Post Graduation.

(ii) three years working experience of running a hospital after Post Graduation."

19. There is no controversy so far as the first two qualifications are concerned. The petitioners and respondent Nos. 5 to 7 all possess the first two qualifications. There is, however, serious dispute with regard to 3rd qualification, which pertains to the experience required for the post. A plain reading of the 3rd qualification would project a very vague and hazy picture. It speaks of working experience of three years of running a hospital, without specifying the nature of hospital, Government or Private, associated hospital of the Medical College or otherwise, nor does it indicate the standard and the size of the hospital. It could be two bedded hospital; it could be 100 bedded hospital or could be 500 bedded hospital. There is absolutely no clarity in this regard. The Government clarification, strongly relied upon by the parties to this litigation also does not throw any light on this aspect, except providing that a person who claims to have acquired working experience of running a hospital must demonstrate that he was involved in the administration of the hospital by a formal order. The clarification, as is apparent from its plain reading, has been issued in the context of the claim of the Registrars, that during their Registrarship, they were involved in running the administration of the hospital. Interestingly, the respondent No.1, in its clarification, also does not indicate that who should be the competent authority to issue the formal order, entrusting administration of a hospital to a Registrar, Demonstrator or a Resident Medical Officer etc. etc. It is in view of vagueness of the relevant Rule, coupled with lack of clarity by respondent No.1, the petitioners

herein and many others have been forced to litigate in this Court. Had the respondents been vigilant and realized this uncertainty in the Rule and taken remedial measures, a lot of litigation could have been prevented, which would, in turn, have saved the precious time of the Courts.

20. It is true that during the process of selection, the respondent No.2 realized the difficulty in this regard and took up the matter with respondent No.1 to supplement the Rule by issuing some clarification, but, as noticed above, respondent No.1 failed in the performance of its duty and instead of clarifying the position and supplementing the Rule, it introduced further confusion.

21. It may also be pertinent to note here that the post of Deputy Medical Superintendent under the Rules of 1979 has to be filled up either by way of direct recruitment or by way of deputation of the Chief Medical officers and equivalent from the Health Department. Hardly any Chief Medical Officer or equivalent, serving in the Department of Health, have been brought on deputation to serve as Deputy Medical Superintendent in the teaching hospitals. The respondent No.1 has all along adopted a method of pick and choose for assigning the job of Deputy Medical Superintendent to different Medical officers in sheer violation of Rules of 1979. The association of Doctors/ Medical officers of different ranks in the administration of the Medical Colleges/Teaching Hospitals has always been at the sweet will of the people at the helm of affairs. There has never been any rationale criteria or yardstick to pick up a Medical officer for running a hospital. Those, who have say in the corridors of the power that be, manage their posting and get themselves associated some how with the administration of running a teaching hospital, and, it is on the basis of this illegitimately acquired experience, they stake claim for the post of Deputy Medical Superintendent in teaching hospitals. This has exactly happened in the instant case as well.

22. Though, respondent No.1 has not specified as to who is the competent authority to issue a formal order in favour of the Registrars to look after the administration of a teaching hospital. The clarification issued by it, is as vague as anything, yet no authority other than the Government in the Health and Medical Education Department could be said to be a competent authority to confer the administration duties of running a teaching hospital on the Registrars. Registrar and Demonstrator is a tenure post and would end with the expiry of three years term. During the course of Registrarship or Demonstratorship, the candidate performs the assigned duties, like OPD/Ward duty/ night duty/ wait duty and deliveries, depending upon their specialization. Given the duties the Registrar is obliged to perform, it cannot be said that he, by virtue of being a Registrar, also acquires the working experience of running a hospital.

23. The post of Deputy Medical Superintendent is a post to be filled up by direct recruitment and persons, who are not in Government service, are also entitled to be considered for the post provided they possess the requisite eligibility. They can always rely upon the experience of running a hospital, if any, gained by them

in running the administration of a Private hospital. The doctors serving in the Department of Health, who are serving as Chief Medical Officers in the District and Medical Superintendent in the District hospitals may also claim to have acquired the said experience. It would thus be travesty of justice if the only candidates, who have somehow remained associated with some aspects of administration of Medical College Hospital alone, are considered for the post, that too, on the basis of certificates issued either by the Head of the Department concerned or the Principal of the Government Medical College, with which the teaching Hospital is associated. Viewed from this angle and looking to the fluidity and flexibility of the interpretation that can be put on the recruitment Rule, it is a case where all are either eligible or all are ineligible for the post. The respondent No.2 cannot be permitted to accept the certificate of some as valid and reject almost similar certificates possessed by the other. The certificate of experience, whether issued by the Head of Department or the Principal or even by the Government, stand on the same footing insofar as the recruitment Rules in question are concerned. Merely, because some Registrar or a Medical Officer, has come to be associated with some aspects of administration of a hospital does not mean that such person has a working experience of running a hospital. The term 'working experience of running a hospital' is required to be given meaningful interpretation. The Medical Superintendent or a Deputy Medical Superintendent in a teaching hospital runs the administration in all its aspects. Maintaining roster of para- medical staff, ensuring sanitation of the hospital, providing requisite men and supplies to cater to the needs of the patients, acting as Drawing and Disbursing officer for payment of emoluments of the staff working in the hospital and looking after so many other aspects associated with the administration of a hospital. The Casualty Medical officer looking after the emergency of the hospital or a Resident Medical Officer, looking after the ward, cannot be said to be persons responsible for running the administration of the hospital. True it is that the vagueness in the recruitment Rules and lack of efforts on the part of respondent No.1 to supplement the Rule by requisite clarification, the respondent No.2 always had a field day. I am not doubting the wisdom of respondent No.2. It, in the given circumstances, has perhaps acted in the best possible manner but that does not satisfy the requirement of Rules.

24. Under these circumstances, if the Court holds all the candidates including the selected candidates, except respondent No.5, ineligible, not possessing the requisite experience, I have to quash the whole selection. But, at the same time this Court cannot lose sight of the fact that the selected candidates, after having been appointed, have been continuously working and have got further promotion to the post of Medical Superintendents in the teaching hospitals of the Health and Medical Education Department. Accordingly, the only way out, in these circumstances, is to grant the relief to the petitioners who have been litigating in this Court for the last more than 11 years.

25. Accordingly, I propose to dispose of this petition by providing as under:-

(i) The selection of Respondent Nos. 5 to 7 shall remain intact and is not interfered with.

(ii) The petitioners shall also be entitled to be appointed as Deputy Medical Superintendents in the Health and Medical Education Department, with effect from the date respondent Nos. 5 to 7 have been appointed retrospectively with all consequential benefits minus the monetary benefits. However, the petitioners shall be entitled to the monetary benefits from the date of their actual appointment.

(iii) The respondent No.1 is directed to take note of the observations made herein above and to take immediate remedial measures to set right the Rule prescribing qualification for the post of Deputy Medical Superintendents so that un-necessary litigation on the subject is avoided and the posts of Deputy Medical Superintendents are filled up in time.

(iv) It shall be appropriate for the respondent No.1 to do away with the practice of making temporary / adhoc or contractual appointments against the posts of Deputy Medical Superintendents and instead fill up the same by way of deputation of Chief Medical Officers/Medical Superintendents or equivalent from the Department of Health as provided in the existing Recruitment Rules.

26. Ordered accordingly.

27. Respondents to comply the above directions within four weeks from the date they are served with the certified copy of this judgment.

28. Registry to forward a copy of this judgment to the Chief Secretary of the State for taking a call in the matter so that future un-necessary litigation on the issue is avoided.