

(2011) 07 KL CK 0049

In the High Court Of Kerala

Case No : Writ Petition (C) No. 17800 of 2010

Dr. Lekshmi Sivanandan

APPELLANT

Vs

Kerala Public Service Commission and Others

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Indian Medical Council Act, 1956 — Section 11, 11(1), 11(2), 33
Kerala Medical Officers Admission to Post Graduate Courses under Service Quota Act,
2008 — Section 5(4)

Citation : (2011) 07 KL CK 0049

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : T.P. Kelu Nambiar, for the Appellant; Alexander Thomas, SC, MCI, for the Respondent

Judgement

T.R. Ramachandran Nair, J.—The dispute herein concerns the alleged invalidity of the appointment of sixth Respondent, for want of required qualification. The sixth Respondent was appointed as Senior Lecturer in Obstetrics and Gynaecology, after a selection conducted by the Public Service Commission. Essential facts for the disposal of the writ petition, are the following:

2. The notification issued by the Public Service Commission is dated 14.10.2009 (Ext.P4). The qualifications for the post are: (i) Post Graduate Degree (Medical) in the respective discipline from a recognised University (Viz. MD/MS/DNB) and (ii) Permanent registration under the State/Central Medical Registration Act. The qualifications of the sixth Respondent is MBBS and DNB. The crux of the contention raised by the Petitioner is that DNB is not an equivalent qualification to MD and Ms.

3. Heard learned Senior Counsel for the Petitioner Shri T.P. Kelu Nambiar, Shri Kurian George Kannanthanam, learned Senior Counsel for the sixth Respondent, Shri P.C. Sasidharan, learned Standing Counsel for the Public Service Commission, Shri T.T. Mohamood, learned Govt. Pleader for Respondents 3 and

4, Shri Alexander Thomas, learned Standing Counsel appearing for the fifth Respondent and Shri P.C. Chacko, learned Central Govt. Standing Counsel for the Union of India.

4. Learned Senior Counsel for the Petitioner, Shri T.P. Kelu Nambiar submitted that even though in Ext.P4 notification issued by the Public Service Commission, DNB is shown as an equivalent qualification to MD/MS, as per Ext.P9 the Government Order, the qualification prescribed is "M.S. (Obstetrics & Gynaecology)/ M.D. (Obstetrics & Gynaecology) DNB (Obstetrics & Gynaecology)". It is further pointed out that even though the Central Government by a notification under the Indian Medical Council Act, brought in an amendment to the Schedule to the Indian Medical Council Act, as per Ext.P7, specifying that Diplomate National Board (DNB) qualification shall be treated as equivalent to MD, MS, D.M and M. Ch. qualifications of the respective speciality or super speciality, the same is without the consultation and concurrence of the Medical Council of India as required u/s 11 of the Medical Council Act. It is further pointed out that Ext.P8 resolution of the Postgraduate Medical Education Committee of the Medical Council of India, after considering the contents of the said notification, decided to move the Central Government to recall the notification Ext.P7.

5. Per contra, Shri P.C. Sasidharan, learned Standing Counsel for the Public Service Commission submitted that the notification issued by the Public Service Commission is in tune with the qualification prescribed in Ext.P9, which is the Government Order dated 7.4.2008, issued much prior to Exts.P7 and P8, wherein DNB is also treated as a qualification. It is therefore pointed out that Ext.P4 notification issued by the Public Service Commission cannot be held as illegal, especially since there is no specific challenge against Exts.P4 and P9. It is further pointed out that any subsequent decision by the Medical Council or its Committee cannot affect the validity of the appointment made as per the notification.

6. Shri Kurian George Kannanthanam, learned Senior Counsel appearing for the sixth Respondent submitted that the sixth Respondent was advised as per Ext.R6(a) Advice Memo dated 7.6.2010. The order of appointment of the sixth Respondent and the qualification prescribed as per Ext.P9 Govt. Order, are not specifically challenged in this writ petition. It is also pointed out that Ext.P4 notification is also not challenged to the extent of providing DNB along with MD and MS as the qualification. It is further pointed out that Ext.P7 statutory notification of the Government of India, has not been withdrawn and the resolution of the Committee of the Medical Council of India will not nullify the same. It is also submitted that if any decision of the Central Government is taken in future, that will not affect the appointment of the sixth Respondent. Accordingly, it is pointed out that the appointment is valid.

7. Shri Alexander Thomas, learned Counsel appearing for the Medical Council of India, invited my attention to various notifications, viz. Exts.R4 (a) to R4(d) issued in terms of Medical Council of India (Minimum qualifications for teachers

in Medical Institutions) Regulations, 1998 and the subsequent amendments. It is pointed out that the legal position is well settled that any action of the State Government in prescribing the qualification against the provisions of the Medical Council Act and the Regulations, cannot survive. In that context, my attention was invited to the judgments of the Apex Court in Medical Council of India Vs. State of Karnataka and Others, , Dr Preeti Srivastava and Another Vs. State of M.P. and Others, and the Division Bench decision of this Court in Mohammed Riaz Vs. State of Kerala, .

8. A counter affidavit has been filed by the Central Government and the learned Central Govt. Standing Counsel Shri P.C. Chacko, appearing for the Union of India invited my attention to the averments in the counter affidavit and the notifications issued by the Central Government. The stand taken therein is that there are certain later developments and the Medical Council of India has issued a notification with previous sanction of the Central Government, dated 3.11.2010 making DNB qualification equivalent to MD/MS, subject to certain conditions. Consequently, Ext.P7 notification has been rescinded by the Central Government by Ext.R5(2) notification dated 4.2.2011. It is also pleaded in the counter affidavit that as per the provisions of MCI (Minimum Qualifications for Teachers in Medical Institutions) Regulations, 1998 the DNB qualifications along with one year research experience were treated as equivalent to PG medical qualifications. This was considered by a Committee of Experts who took a resolution in the matter on 15.9.2004 and in the light of the same, the Ministry decided to dispense with the present requirement of additional research experience in respect of holders of DNB qualifications. The MCI was not in favour of the decision of the Ministry to accept the equivalence. The Government felt that granting equivalence to DNB qualifications at par with MD/MS qualifications would also address the shortage of specialists in the country. It is in that background Ext.P7 notification dated 20.2.2009 was issued. But even thereafter, MCI did not recognise the DNB qualifications and the experience gained by these professionals and the Central Government has been discussing the matter with the MCI. Therefore, the present scenario as evident from the counter affidavit of the fifth Respondent is that the notification Ext.P7 issued by the Central Government, has been rescinded by Ext.R5(2) notification dated 4.2.2011. There are amendments to the MCI (Minimum qualifications for teachers in Medical Institutions) Regulations 1998 as per Ext.R5(1) and the DNB has been made as an equivalent qualification to MD/MS subject to certain conditions.

9. No counter affidavit has been filed on behalf of Respondents 2 and 3. The Petitioner's qualifications are: (1) MBBS in First Class; (2) MS in Obstetrics & Gynaecology; and (3) Diplomat of the National Board for Practice of Obstetrics & Gynaecology. She had also successfully completed Part I MRCOG Examination conducted by the Royal College of Obstetricians & Gynaecologists, London. Her experience in various fields has been explained in para 2 of the writ petition and certificates also have been produced as per Exts.P2 to P2C.

10. Evidently, this is a case where the Public Service Commission issued a notification in the light of the qualification fixed by the Government in Ext.P9. Ext.P9 is the order dated 7.4.2008 fixing DNB as a qualification which is earlier to Ext.P7 issued by the Central Government. The notification issued by the Public Service Commission is dated 14.10.2009. In between, the Central Government issued the notification by including DNB to the First Schedule to the Medical Council of India Act, 1956, by Ext.P7 dated 20.2.2009. As already noticed, Ext.R5(1) is dated 3.11.2010 and Ext.R5(2) is dated 4.2.2011. The sixth Respondent was already appointed in service prior to the issuance of Exts.R5(1) and R5(2), by Ext.R6(a) dated 7.6.2010 and Ext.R6(b) dated 8.7.2010.

11. Shri T.P. Kelu Nambiar, learned Senior Counsel appearing for the Petitioner placed reliance upon Section 11 of the Indian Medical Council Act to point out that the notification Ext.P7 goes against the specific stipulations provided therein. Sections 11(1) and 11(2) of the Medical Council of India Act are extracted below:

11 Recognition of medical qualifications granted by Universities or medical institutions in India.- (1): The medical qualifications granted by any University or medical institution in India which are included in the First Schedule shall be recognised medical qualifications for the purposes of this Act.

(2) Any University or medical institution in India which grants a medical qualification not included in the First Schedule may apply to the Central Government to have such qualification recognised, and the Central Government, after consulting the Council, may, by notification in the Official Gazette, amend the First Schedule so as to include such qualification therein, and any such notification may also direct that an entry shall be made in the last column of the First Schedule against such medical qualification declaring that it shall be a recognised medical qualification only when granted after a specified date.

The qualifications provided in the First Schedule shall be recognised medical qualifications for the purpose of the Act. Any amendment of the same can be made by conforming the stipulations in Sub-section (2). What is pointed out is that the Central Government could not have, on its own, issued Ext.P7 providing DNB as an equivalent qualifications. Evidently, Ext.P7 was issued by the Central Government u/s 11(2) of the Act, which has been rescinded by them by Ext.R5(2) dated 4.2.2011. It is stated therein that the decision thereon will be except as respects things done or omitted to be done before such rescission.

12. Learned Standing Counsel appearing for the Medical Council of India submitted that the Medical Council of India which is functioning under the Indian Medical Council Act, 1956, is empowered to fix the qualifications, and the legal position is evident from the decision of the Apex Court in Medical Council of India Vs. State of Karnataka and Others, . It was a case where the State Government increased the number of pupils in Medical Colleges without the permission of the Medical Council of India. The Apex Court held that the Indian Medical Council Act

prevails over any State enactments which is repugnant to the provisions of the Indian Medical Council Act. The legal position was laid down in para 24 thus:

The Indian Medical Council Act is relatable to Entry 66 of List I (Union List). It prevails over any State enactment to the extent the State enactment is repugnant to the provision of the Act even though the State Acts may be relatable to Entry 25 or 26 of List III (Concurrent List). Regulations framed u/s 33 of the Medical Council Act with the previous sanction of the Central Government are statutory. These regulations are framed to carry out the purposes of the Medical Council Act and for various purposes mentioned in Section 33. If a regulation falls within the purposes referred u/s 33 of the medical Council Act, it will have mandatory force. Regulations have been framed with reference to Clauses (fa), (fb) and (fc) (which have been introduced by the Amendment Act of 1993 w.e.f. 27.8.1992) and Clauses (j), (k) and (l) of Section 33.

It was held therein that any Regulations framed u/s 33 of the Medial Council Act with the previous sanction of the Central Government are statutory.

13. In a later decision, viz. Dr Preeti Srivastava and Another Vs. State of M.P. and Others, , a Constitution Bench of the Apex Court reiterated the legal position by a majority in para 35 thus:

In view of Entry 25 of List III of the Seventh Schedule to the Constitution, both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education, because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

It was held that the State Government has the right to control education including medial education so long as the field is not occupied by any Union legislation and the State cannot, while controlling education in the State, impinge on standards in institutions for higher education, because this is exclusively within the purview of the Union Government.

14. A Division Bench of this Court in Mohammed Riaz Vs. State of Kerala, considered the validity of Section 5(4) of the Kerala Medical Officers' Admission

to Postgraduate Courses under Service quota Act, 2008. The contention raised therein was that Section 5(4) of the said Act is in violation of the regulations issued by the Medical Council of India who is the competent authority under the Medical Council of India Act, 1956 when the field was already occupied by inservice candidates. The Division Bench, by relying upon the judgment of the Apex Court in Dr Preeti Srivastava and Another Vs. State of M.P. and Others, and other decisions, held thus in para 8:

The principles of law emanating from the above include that the prescription as to the requirement of an entrance examination with a minimum eligibility bench mark to be acquired in that entrance test for postgraduate medical education is within the field covered by Entry 66 in List I and the competence of the State Legislature to make a law with reference to Entry 25 in List III would not enable it to make any such law encroaching on the field occupied by Entry 66 in List I. The M.C.I. Regulations framed u/s 33 of the IMC Act is insulated from any contradiction by any State legislation. Therefore, the State cannot make a law doing away with the requirement, for in-service candidates, to participate in the common entrance test for admission to postgraduate medical courses and obtaining the minimum eligibility requirement prescribed by the M.C.I. in the Regulations.

15. Shri Alexander Thomas, learned Standing Counsel for the Medical Council of India placed before me for perusal the Regulations, viz. "Minimum qualifications for Teachers in Medical Institutions Regulations, 1998" which was published in the Gazette of India dated 5.12.1998. Schedules I and II contain the norms to be followed by the appointing authority for making appointment to a teaching post and the qualifications to be treated at par with MD/MS awarded by Indian Universities. It is specified in Rule 3 that "minimum qualifications for appointment as a teacher in various departments of a medical college or institution imparting graduate and post-graduate education shall be as specified in the Schedules I and II annexured with these regulations."

In items 4 and 5 of Schedule I it is provided as follows:

4. The appointing authority may consider the holders of equivalent postgraduate qualifications, which may be approved by the Medical Council of India from time to time, to have the requisite recognised qualification in the subject concerned.

5. The Medical Council of India shall determine equivalent qualification referred to in these regulations.

Therefore, the appointing authority may have to consider the equivalent postgraduate qualifications which may be approved by the Medical Council of India from time to time, to have the requisite recognised qualification in the subject concerned. Item 14 of Schedule II is relevant for the purpose of this case, which is extracted below:

M.A.M.S./M.N.A.M.S./D.N.B. qualifications when granted or after 1st June, 1976

granted by National Board of Examinations, New Delhi after due examination and fulfilling one year research experience.

The Note therein is also important, which is stated as follows:

Other qualifications will be evaluated by the Council as and when reference is received.

Evidently, the field was occupied by the said Regulations.

16. Exts.R4(a) to R4(d) are the copies of notifications effecting amendments to the said Regulations, by the Medical Council of India. Exts.R5(1) and R5(2) are the copies of notifications produced by the fifth Respondent. Ext.R5(1) is important for the purpose of this case. In the said notification certain additions, deletions and modifications have been made in the Regulations. With regard to DNB qualifications, paragraphs 3, 4(i) to 4(iii) and 4(vi) are relevant which are extracted below:

3. In the "Minimum qualification for Teachers in Medical Institutions Regulations, 1998", in SCHEDULE-I, the following clause shall be added after Sl. No. 9:

10. A person possessing DNB in the concerned broad-speciality, is eligible for admission in the Super-Speciality/Higher course (DM/M. Ch.)

11. Persons possessing DNB qualification on the basis of which they have already been promoted as Associate Professor/Professor in the concerned department, may be treated at par with MD/MS in the broad-speciality and DM/M. Ch. in the Super-Speciality without any further teaching/research experience

4 (i) In the "Minimum Qualification for Teachers in Medical Institutions Regulations, 1998". in "TABLE-1", under the heading "REQUIREMENTS OF ACADEMIC QUALIFICATIONS, TEACHING AND RESEARCH EXPERIENCE", as amended vide notifications dated 21/07/2009, 28/10/2009 and 15/12/2009, in the column of "Academic qualifications" for all the specialities, the following shall be inserted:

DNB()

"concerned speciality"

(ii) In the "Minimum Qualification for Teachers in Medical Institutions Regulations, 1998", in "TABLE-I" under the heading "REQUIREMENTS OF ACADEMIC QUALIFICATIONS, TEACHING AND RESEARCH EXPERIENCE", as amended vide notifications dated 21/07/2009, 28/10/2009 and 15/12/2009, in the column of "Teaching Experience" against the post of "Associate professor/Reader", for all the specialities, the following shall be inserted:

If a DNB qualified candidate is working as Assistant Professor in a M.C.I. recognised college medical/Central institute, he/she would require one more year of teaching/research experience to be promoted as Associate professor over and above the minimum time frame for MD/MS candidate.

(iii) In the "Minimum Qualification for Teachers in Medical Institutions Regulations, 1998", in "TABLE-I" under the heading "REQUIREMENTS OF ACADEMIC QUALIFICATIONS, TEACHING AND RESEARCH EXPERIENCE", as amended vide notifications dated 21/07/2009, 28/10/2009 and 15/12/2009, the "Teaching Experience" against the post of "Assistant Professor/Lecturer", for all the specialities shall be substituted as under:

(i) For the candidates possessing MD/MS Degree from M.C.I. Recognised medical college

Three years teaching experience in the subject as Resident/Registrar/Demonstrator/Tutor in a recognised medical college either during the post-graduation course or after obtaining postgraduate degree in the subject.

(ii) For the candidates possessing DNB Qualification from MCI recognised medical colleges/central institutes where there are no MD/MS courses running.

Three years teaching experience in the subject in a recognised medical college either during the DNB course or after possessing DNB qualification. The concerned candidate would also require one year of additional teaching/research experience in the concerned subject in a recognised medical college after obtaining DNB qualification."

(iii) For the candidates possessing DNB qualification from MCI recognised medical colleges/central institutes where there are MD/MS courses running.

Three years teaching experience in the subject in a recognized medical college either during the DNB course or after obtaining DNB qualification.

(iv) For the candidates possessing DNB Qualification from Centers other than of MCI recognized medical colleges/central institutes.

Three years teaching experience in the subject either during the DNB course or after possessing DNB qualification. The concerned candidate would require two years additional teaching experience as Sr. Resident/Research Associate (CSIR) in a MCI recognised medical college/central institute.

4 (vi): In the "Minimum Qualification for Teachers in Medical Institutions Regulations, 1998", in "TABLE-I" under the heading "REQUIREMENTS OF ACADEMIC QUALIFICATIONS, TEACHING AND RESEARCH EXPERIENCE", as amended vide notifications dated 21/07/2009, 28/10/2009 and 15/12/2009, the "Research Experience" against the post of "Assistant Professor/Lecturer", for all the specialities, the following shall be inserted:

For the candidates obtaining DNB qualification from centres other than MCI recognized medical colleges/central institutes, the concerned candidate should have minimum two publications (accepted/published) in the index journal (national/international as first/second author). In case, the concerned candidate does not have the required publication, he/she must have a total of three years teaching experience in a recognised medical college/central institute after

possessing DNB qualification.

17. Evidently, therefore, as far as equivalency of DNB qualification is concerned, various stipulations have been provided therein. It is explained in the counter affidavit filed by the Union of India that equivalency is prescribed subject to certain conditions. Paragraphs 3 and 4 substitute the qualifications for the post of Assistant Professor/Lecturer and sub paragraphs 4(i) to 4(iv) provide for various different conditions regarding the equivalency. Those conditions will show that for the candidates possessing DNB qualification acquired from MCI recognised medical colleges/central institutes where there are no MD/MS courses running; for the candidates possessing DNB qualification from MCI recognised medical colleges/central institutes where there are MD/MS courses running; and for the candidates possessing DNB qualification from Centres other than of MCI recognised medical colleges/central institutes, separate conditions have been made for making the qualification equivalent. Sub para (vi) also prescribes a particular experience qualification for candidates having DNB qualification from centres other than MCI recognised medical colleges/central institutes.

18. Evidently, in the light of Section 5(2) of the notification, Ext.P7 is no longer there, as already noticed. The question therefore, is whether the appointment of the sixth Respondent could be treated as valid and whether the regulations as amended, will have impact on the same.

19. It is not evident whether the State Government has examined the prescription of qualification in Ext.P9, viz. DNB along with MD/MS for appointment to the post of Senior Lecturer in Obstetrics and Gynaecology in tune with the Regulations framed by the Medical Council of India. Therefore, an examination of the same by the State Government is required in the light of the legal position emerging, as already discussed. The scope of the power of the State Government to prescribe qualifications in such matters, is only as laid down by the decisions of the Apex Court and that of a Division Bench of this Court noted above. It is up to the State Government to take a decision in the matter in the light of the unamended and amended notifications issued by the Medical Council of India which are produced along with the counter affidavit filed by the Central Government as Ext.R5 (1) amending the Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998, and after assessing the qualifications of the 6th Respondent. A decision on this aspect is necessary, since they have impact upon various appointments made or notified. Detailed grounds have not been raised to challenge Exts.P4 and P9, even though in the relief sought for, the Petitioner seeks to quash Exts.P4 and P9 also as far as prescription of DNB is concerned. Evidently, the sufficiency of DNB qualification for appointment as Senior Lecturer, is the issue to be considered. In that view of the matter, the only option is to direct the State Government to assess the entire thing in the light of the findings rendered in this judgment. While doing so, the views of the Medical Council of India also will be ascertained by the State Government.

20. Therefore, the writ petition is disposed of with the following directions:

There will be a direction to the State Government, viz. the second Respondent herein to take a decision as directed above, after hearing the Petitioner and the sixth Respondent on various aspects pointed out in the writ petition and in the light of the documents referred to by the parties. The Regulations issued by the Medical Council of India as originally stood and amended from time to time, and its impact on the qualifications prescribed as per Ext.P9 by an executive order of the State Government, and the appointment of the sixth Respondent, will be specifically considered and appropriate orders will be passed within a period of four months from the date of receipt of a copy of this judgment, in the light of the observations made by this Court as above. No costs.