

(2012) 09 SHI CK 0149

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 6698 of 2012-J

Dr. Manmohan Bramta

APPELLANT

Vs

State of Himachal Pradesh and others

RESPONDENT

Date of Decision : 27-09-2012

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2012) 3 ShimLC 1784

Hon'ble Judges : Sanjay Karol, J

Bench : Single Bench

Advocate : N.S. Chandel, for the Appellant; Rajinder Dogra, Additional Advocate General for the Respondents No. 1 to 3, Ms. Shikha Gupta, Advocate, vice Mr. Shrawan Dogra, Advocate for the Respondent No. 4 and Ms. Jyotsna Rewal Dua, Advocate, for the Respondent No. 5, for the Respondent

Judgement

Sanjay Karol, J.—Petitioner Sh. Manmohan Bramta was appointed as Lecturer in the Department of Oral and Maxillofacial Surgery (hereinafter referred to as O & M Surgery), vide notification dated 3.1.2009 (Annexure R-4/2) for a period of six months or till such time the post was filled up on regular basis. His appointment was purely on temporary basis. This arrangement was continued for a further period of six months each, vide communications dated 4.1.2012 and 7.7.2012. At the time when petitioner was appointed as a Lecturer, Government of Himachal Pradesh, in exercise of their powers conferred by virtue of proviso to Article 309 of the Constitution of India had framed Rules, which stood notified on 21.12.2006 (Annexure R-4/1), known as the "Himachal Pradesh Medical Education (Dental) Services Rules, 2006 (hereinafter referred to as the Rules). The appointment in the service was to be made in accordance with the Rules.

2. The method of recruitment to the post of Lecturers, which were 16 in number, as per Annexure-1 appended to the said Rules is as follows:--

3. Rule 11-A/ which is an exception, lays down the procedure for selection/appointment to the said post on contract basis for a period of one year

extendable on year to year basis. However these contract employees had no right to claim for regularization or permanent absorption in the Government.

4. The Government of Himachal Pradesh "scrapped" (not repealed) these Rules and notified a policy known as "Policy for Selection of Lecturers (on tenure basis) in the H.P. Government Dental College, Shimla" (hereinafter referred to as the Policy). This was done vide notification dated 21.7.2009 (Annexure R-4/4). In all, thirty posts of Lecturers to be filled on tenure basis were notified, out of which four posts were earmarked for the specialty of Oral Surgery. Out of these four posts, one post was earmarked for Medical Specialist (Anesthesia) which has never been a subject matter of any dispute/litigation. Even in the present petition this post is not even remotely concerned or connected. In terms of the policy, tenure posts were to be filled up on the basis of merit, by an entrance examination. Clause 2.3 of the said policy clearly stipulates that "the incumbents already working as lecturers on contract basis will have to apply again under this Policy".

5. Noticeably as against the 2006 Rules, the method of recruitment under the policy was changed in the following manner:--

7. Method of recruitment:

7.1. From amongst in-Service GDOs (Dental Surgeons) (75%) by Transfer, failing which by direct recruitment.

7.2. Direct Recruitment (25%) failing which from in-Service GDOs (Dental Surgeons).

6. Clause 9 of the Policy clearly lays down the ratio, the procedure for selection and appointment of Lecturers. It is on the basis of written test and appointment is to be made for a period of three years on tenure basis.

7. Vide notification dated 24.8.2009 (Annexure R-4/5), Government clarified that MDS Doctors on contract basis shall continue to work as such till their contract period is over. However, on completion of three years period of contract, such Lecturers were also required to appear in the examination for selection on tenure basis.

8. On 11.8.2012 (Annexure F-10, respondent No. 3 invited applications for the posts of Lecturers in the H.P. Government Dental College, Shimla. Significantly one post of O & M Surgery was advertised which was to be filled up by a GDO candidate on the basis of 75% reservation, in terms of the policy.

9. In the present writ petition, petitioner has assailed the same, alleging that this post stands wrongly reserved for a candidate belonging to a GDO category, whereas it should go to a direct candidate.

10. On 17.8.2012 the Division Bench in this petition had directed that the test and Counselling, as proposed on 22.8.2012 may go on, but the same shall not be finalized without getting orders from the Court.

11. Also during the pendency of the present petition, candidates belonging to the GDO category who had appeared in the entrance examination were impleaded as party respondents No. 4 and 5.

12. The moot question which arises for consideration is as to whether in the absence of any challenge to the Policy so notified on 21.7.2009 (Annexure R-4/4), a person who was appointed on contractual basis would have any right to challenge the advertisement dated 11.8.2012 issued in terms of the said policy, whereby one seat to be filled up in the department of O & M Surgery has been reserved for a candidate belonging to a GDO category.

13. Petitioner has not challenged the Policy, as such, on this short ground the present petition can be dismissed. But however, it would be only prudent to decide the issue so raised to put an end to the controversy for all times.

14. Apparently filling up of vacant posts in the respondent No. 2-College has always been embroiled into some controversy, resulting into filing of various petitions before this Court. In fact, in one such matter, this Court was constrained to observe that "Show me the man, I will show you the law, appears to be the strategy adopted in filling up the posts of lecturers in Dental College, Shimla".

15. Significantly, without inviting any applications from the public, or notifying that the post was to be filled up on contractual basis, for whatever reason, the State gave appointment to the present petitioner. Though it was only for a period of six months, but then this arrangement was allowed to be continued for an endless period. At the time when petitioner was engaged on contractual basis, 50% of the seats of Lecturers were to be filled up by in-service candidates and 50% were to be filled up by direct recruits. The State for some reason or the other, did not initiate the process of filling up the posts in the year 2006. Why so? has not been so explained. In fact, record reveals that five posts of Lecturers in different specialties of respondent No. 2-College were filled up on contractual basis. Out of these five posts, two belonged to the department of O & M Surgery, one of which was filled up by the present petitioner. On 29.1.2009, the Government did attempt to fill up the posts of Lectures in the respondent No. 2-College when advertisement (Annexure R-4/3) was issued, but for some undisclosed reason, the process was not completed and it appears that the same was scrapped and advertisement withdrawn.

16. Not only that, for some strange reason the Government scrapped the Rules and in turn brought out a policy. Significantly the Rules were framed under Article 309 of the Constitution of India. What was the need to scrap (not repeal) these Rules has also not been explained by the State. But then it is prerogative and wisdom of the Executive/Legislature. Court is not being judgmental about the same. I have not gone into the question which was never raised as to whether the Rules could have been scrapped by a Policy. In terms of the policy, posts lying vacant with respondent No. 2-College were sought to be filled up. The

saving clause being that Lecturers appointed on contract basis were not made permanent or conferred any right by virtue of their contractual services so rendered by them. They were required to compete with similarly situated persons and get selected through proper written examination. Undisputedly petitioner has not appeared in the entrance examination at any point in time.

17. The matter however did not rest here. The Government took a "U" turn. On 9.7.2010 it came out with the following notification (Annexure R-4/6):-

Government of Himachal Pradesh, Department of Medical Education & Research

No. HFW-B(B)15-4/2005-II

Dated 9.7.2010

NOTIFICATION

In partial modification of policy issued vide No. HFW-B(B) 15-4/2005 Vol. II dated 21.7.2009, the Governor, Himachal Pradesh is pleased to fill up those 8 vacant posts of Lecturers in H.P. Government Dental College which were advertised by the H.P. Public Service Commission on 29.1.2009 under the provision of the then existing Himachal Pradesh Medical Education (Dental) Services, Recruitment and Promotion Rules, 2006 issued on 21.12.2006 only in those department where the posts are not presently occupied by tenurial appointees and this one time relaxation in the policy shall not be quoted as precedent in future.

By Order

Principal Secretary (Health) to the Government of Himachal Pradesh.

18. Now Government could not have blown hot and cold. It could not have adopted two yardsticks for filling up different post in the same department by applying two set of Rules. This ipse dixit of the Government is writ large. There is no justifiable reason on record explaining such action.

19. Be that as it may be, pursuant thereto, an advertisement for filling up seven posts of Lecturers, two for the O & M Surgery was issued on 20.8.2010 (Annexure R-4/7). Even this was withdrawn as is noticed hereinafter in paragraph No. 24.

20. At this stage, some of the in-service (GDO) candidates namely Sh. Pravesh Kumar Zhingta, Sh. Sanjeev Vaid, Sh. Vinay Bhardwaj and Sh. Anil Kumar filed CWP No. 5489 of 2010. Attempt on the part of the Government to fill up the posts by granting one time relaxation was in effect under challenge.

21. In the said petition, on 8.9.2010 following interim order was passed:--

The H.P. Medical Education (Dental) Service Rules, 2006 were notified on 21.12.2006. Those rules were scrapped w.e.f. 21.7.2009. The petitioners though are in-service candidates (GDOs), their appointments as lectures are on tenure

basis and are continuing as such. However, the Lecturers who are continuing on contract basis had made representation to the Government that as on 29.1.2009 they had become eligible for regular appointment for the post of Lecturers in terms of the Rules, which had already been scrapped. It appears that representation was considered. It is stated in the affidavit as follows:-

The matter was examined at the Government level and it was decided that in order to give these and other eligible candidates one opportunity to face the Commission the matter should be placed before the Cabinet for permission to allow the department to fill up the vacant posts of Lecturers through Public Service Commission on regular basis by relaxing the provisions of the policy. The matter was taken up before the Cabinet which approved the same and accordingly Notification dated 9.7.2010 was issued whereby it was decided to fill up those 8 vacant posts as Lecturers through direct recruitment where the posts are not occupied by appointees on tenure basis as one time relaxation and accordingly requisition was sent to the Himachal Pradesh Public Service Commission on 12.7.2010.

It is the simple contention of the petitioners that in case the Government relaxes the policy and goes for regular appointment, such regular appointment can be only in terms of the rules. The benefit of such relaxation in terms of the revived rules shall be given to the 50% quota for in-service candidates.

The learned Advocate General submits that the relaxation in policy does not ipso facto mean that there is revival of the scrapped Recruitment and Promotion Rules. If that be so, there must be some provision in some rules providing for regular appointment. That aspect is apparently missing in the affidavit as well. Therefore, we make it clear that in case the regular appointment, now offered to the contract employees is in terms of the scrapped R & P Rules, the benefit thereof shall be given to the petitioners herein also to the extent of 50% reserved for in-service candidates.

22. The aforesaid writ petition was disposed of in terms of judgment dated 5.7.2011 and since petitioner wants this Court to construe one sentence out of the same in his favour, it is reproduced in toto:--

CMP No. 6499 of 2011.

Allowed. Sh. Narotam Ghezta, son of Sh. Krishan Chand Ghezta r/o Charan Niwas, Lower Cemetery ,, Sanjauli, is impleaded as the additional 3rd respondent. The application is accordingly disposed of.

CWP No. 5489 of 2010.

Show me the man, I will show you the law, appears to be the strategy adopted in filling up the posts of lecturers in Dental College, Shimla. Pursuant to our order dated 27.6.2011, the Principal of the Dental College is present before this Court with records. Having gone through the records, the emerging picture is certainly disturbing, if not shocking. There has been no consistent policy in the matter of

recruitment. The Principal submits that on account of timely steps not taken to fill up the posts of lecturers, the interests of the institution have suffered to a great extent, particularly at the time of inspection by the Dental Council of India. Apparently, lack of consistent policy in the matter of appointment and maintenance of discipline seems to be one of the major contributing factors to its loss of face.

2. The challenge is on Annexure P-7, notification dated 9.7.2010 and Annexure P-8, advertisement of the Public Service Commission. As per Annexure P-7, the government issued a notification that steps were being taken to fill up 8 posts of lecturers in Government Dental College, which had been advertised by the Public Service Commission on 29.1.2009. On 29.1.2009, the Public Service Commission had initiated the recruitment process for filling up of 8 posts of lecturers in the Dental College; 2 general in Oral Surgery, 2 general in Oral Pathology, 1 general in Community Dentistry, 1 general in Periodontics and 1 general in Conservative Dentistry. It appears, no fruitful steps were taken pursuant to the advertisement, referred to above. Be that as it may. After Annexure P-7, notification of the government dated 9.7.2010, the Public Service Commission has issued Annexure P-8, advertisement to fill up the posts of lecturers, in terms of the Himachal Pradesh Medical Education (Dental) Services Recruitment and Promotion Rules 2006. The petitioners submit that as per the said Rules, 50% of the posts in the cadre should be filled up from among the in-service candidates. Whether there are lecturers in Oral Surgery in the sanctioned posts in the cadre from in-service candidates is itself a matter to be examined. In any case, since 2 posts are advertised, there is no dispute that one should go to the direct. If in the sanctioned cadre, there is deficiency of in-service candidates to the extent of permitted 50%, necessarily steps should be taken to fill up those posts from among the in service candidates. Now, that the Rules are permitted to be resurrected as per Annexure P-7, the cadre strength and eligibility also will have to be determined on the basis of the position existing as on Annexures P-7 and P-8.

3. Learned Counsel appearing for the Public Service Commission points out that the government has withdrawn its requisition for appointment to the posts of lecturers in Oral Surgery, Community Dentistry and Periodontics and hence the Public Service Commission did not pursue its steps for the recruitment as per Annexure P-8 in those categories. However, on a pointed query, the Principal of the Dental College has brought to the notice of this Court that the government has in the meanwhile taken steps to fill up the posts by promotion in Community Dentistry and Periodontics. It is also pointed out that as per the government letter dated 5.1.2010, two posts in Oral Pathology and one post in Conservative Dentistry had to be filled up by direct recruitment.

4. There is no dispute as to the availability of vacancies in the posts of lecturers in Oral Surgery. The Principal also submits that it is only in the interest of the institution that posts are filled up either by way of promotion or by way of direct

recruitment since the children are put to very severe hardships for want of lecturers in Oral Surgery. It is also not in dispute that the government has infact addressed this burning issue in respect of other departments in the Dental College and has taken timely steps either to fill up the posts by way of direct recruitment or by way of promotion. If, as on the date of Annexure P-7, notification by the government dated 9.7.2010 and the subsequent notification dated Annexure P-8 advertisement issued by the Public Service Commission on 20.8.2010, there existed vacancies and in case those vacancies are still available in Oral Surgery and in case the petitioners are otherwise qualified and eligible to be considered against the 50% quota available to the in-service candidates against the cadre strength of posts, they have to be considered along with other eligible candidates as on that date, in terms of the selection process as per the Rules, which have been resurrected as per Annexure P-7. Since there is no dispute as to the availability of one post from the in-service candidates, there will be a direction to the respondents to take steps to fill up the one post available to the in-service candidates in accordance with the Rules by the selection process under the Rules, initiated as per Annexures P-7 and P-8. This shall be done within a period of two months from today.

5. The Writ Petition is disposed of, so also the pending application(s), if any.

[Emphasis supplied]

23. Thereafter for some strange reason, the State withdrew its action of filling up the posts of Lecturers in terms of advertisement dated 20.8.2010 (Annexure R-4/7) and withdrew four posts of Lecturers, two of which belonged to the department of O & M. This was so done vide press note which is at page-133 of the paper book.

24. Most significantly, the present petitioner filed a review petition (Annexure R-4/11) specifically taking a plea that the advertisement was issued by the Government inadvertently as in fact no post was lying vacant. Petitioner was one of the incumbents who had already occupied the same. Importantly at that time petitioner himself pleaded that after completion of his contractual period of three years, the post was to be advertised and filled up in accordance with the policy. The Review petition was disposed of vide judgment dated 11.10.2011 which also is reproduced as under:--

This is a petition for review of the judgment dated 5.7.2011 at the instance of the third party. According to the review petitioner direct recruitment in respect of vacancies for the post of lecturer in Oral Surgery as per the advertisement of the Public Service Commission dated 20.8.2010 (Annexure P-8 in the writ petition and Annexure R-7/7 in the Review Petition) should not have been pursued since there were no vacancies. Review petitioner has placed reliance on Annexure RP-5, notification dated 9.7.2010 of the Government of Himachal Pradesh contending that direct recruitment should have been permitted only where posts are not occupied by tenure appointees. It is seen from the information furnished

by the review petitioner himself as per Annexure RP-3 that in case of Oral Surgery the sanctioned strength was four. There was only one regular appointee, one tenure appointee and others were contract appointees. It is also seen from notification dated 29.8.2009 of the State Government that the contractual lecturers are not equated or treated at par with tenure lecturers. In the notification it is clearly stated that after the completion of the contract period the incumbent will have to appear in the examination for selection as tenure lecturer. Thus it is fairly clear that there were two vacancies for the post of lecturers in Oral Surgery. In the judgment which is sought to be reviewed this Court has only directed to fill up only those two vacancies in view of Annexure P-7, notification of the Government dated 9.7.2010 followed by advertisement of the Public Service Commission dated 20.8.2010 since the Government itself had decided to fill up the vacancies despite their earlier policy decision to scrap the Recruitment and Promotion Rules. Thus, we find no error apparent on the face of record so as to review the judgment. Review petition is dismissed. Pending application (s), also stands disposed of.

[Emphasis supplied]

25. Significantly one post in terms of judgment dated 5.7.2011 stood filled up and with regard to the remaining posts Government has now issued the impugned advertisement dated 11.8.2012.

26. As one of the two posts was sought to be filled up on the basis of the old Rules by giving one time relaxation, for some reason or the other, State did not fill up all the posts which were lying vacant from the year 2006 till the year 2012. Why is it that no steps were taken by the State to fill up the posts lying vacant in accordance with the Rules/Policy, at the earliest, has not been sufficiently explained. Be that as it may be, the fact of the matter is that petitioner had himself sought review of the judgment dated 5.7.2011 passed by this Court. Petitioner had desired that the post should go to a direct candidate. Such contention of his was not accepted by the Court. In fact he had himself contended that the post was to be filled up in terms of the policy.

27. It appears that contract appointees exerted pressure and got amended/relaxed the Rules/Policy and made the State issue various notifications to suit their convenience and requirement. The contract appointees were required to appear in a written test.

28. It is not the case of the Government, at least in the present writ petition, that suitable candidates were either not eligible or not available or that the present petitioner was possessed with a special skill, trait or knowledge necessitating grant of extension of his contractual appointment. The procedure prescribed by law, in my considered view, was given a complete go by.

29. In order to ensure that ratio of 75:25 for GDOs and direct recruits was not adhered to, which obviously did not suit the persons employed on contractual basis, as their period of contract stood extended, the State gave one time

relaxation without adhering to the Rules or following the Policy. Extra post was sought to be given to the contractual employees. Why so? has not been explained. In fact, policy of the Government with regard to the method of recruitment was necessarily required to be complied with in letter and spirit.

30. Further in support of his prayer, learned Counsel for the petitioner, has invited my specific attention to the following sentence in the judgment dated 5.7.2011 to contend that this Court had accepted the position that one post in the department of Oral Surgery was in fact to go to a direct candidate:--

In any case, since 2 posts are advertised, there is no dispute that one should go to the direct.

31. As such, according to the learned Counsel, the post so advertised was reserved for the non-GDOs category.

32. In my considered view, the contention needs to be rejected. A sentence in the judgment cannot be torn apart and read alone to benefit the petitioner. The backdrop in which the judgment was passed is to be seen. The Government was endeavoring to give a go by to its policy. The GDOs who were the petitioners were claiming implementation of the policy. The Government was endeavoring to fill up the posts of GDOs by contractual/direct appointees. It is in this background that petitioners therein were trying to bring in at least one post back into the arena for the GDOs candidates and interim order dated 8.9.2010 which in any event merged with the judgment dated 5.7.2011 was passed. GDOs were not concerned with the second post. This is so apparent from the judgment when read in totality. No specific direction was given by the Court for filling up the second post which in fact stood withdrawn. Also merits, legality or illegality of the Policy was never adjudicated. In fact, in the last paragraph of the judgment, it is clearly mentioned that there is no dispute that one post should go to a promotee. Also there was no specific challenge to the policy in the said writ petition. In fact none of the parties before the Court were candidates belonging to either contract or direct appointees. Present petitioner did make an endeavour, by filing a review petition, to contend that the post was that of a direct candidate, the same was not so accepted by this Court. The Court moved on the premise, as was so represented by all concerned, that at least one post was to go to a GDO category, which in fact is the issue in the present petition. Despite the dismissal of the review petition, petitioner accepted the judgment and did not take up the matter any further,

33. Petitioner's letters of appointment makes it categorically clear that his contract appointment is only till such time the post to which he stands appointed is actually filled up by a tenure appointee.

34. Hence, in my considered view, there is no merit in the present petition and for all the reasons recorded hereinabove, the present petition is dismissed. Interim orders stand vacated. Record kept in the sealed cover is returned with a direction to the respondents to immediately declare the results and fill up the

post so advertised, in accordance with law. I must place on record full appreciation of the manner in which Sh. Rajinder Dogra, learned Additional Advocate General fairly assisted the Court.

With the aforesaid observations, present petition stands disposed of, so also the pending application (s), if any.