
(2011) 07 RAJ CK 0034

In the Rajasthan High Court

Case No : Civil Writ Petition No. 8528 of 2009

Dr. Poonam Parakh

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:

Constitution of India, 1950 — Article 309
Rajasthan Medical and Health Service (Collegiate Branch) Rules, 1962 — Rule 21, 24A(4)
Rajasthan Various Service (Amendments) Rules, 2011 — Rule 3

Citation : (2012) 1 RLW 767

Hon'ble Judges : Govind Mathur, J

Bench : Single Bench

Judgement

Govind Mathur, J.—Having same question under adjudication, these two petitions for writ are heard together and are disposed of by this common order.

Facts pertaining to SB Civil Writ Petition No. 8528/2009

2. Petitioner Dr. Poonam Parakh, with the qualification of Post Graduation in Obstetrics & Gynecology, is eligible to be considered for appointment to the Rajasthan Medical & Health Services except for the impediment prescribed by Rule 21 of the Rajasthan Medical Service (Collegiate Branch) Rules, 1962 (hereinafter referred to as "the Rules of 1962"), that reads as under:

No candidate shall be eligible for appointment to the service who has more than two children on or after 1/6/2002.

Provided that the candidate having more than two children shall not be deemed to be disqualified for appointment so long as the number of children he/she has on 1st June 2002, does not increase:

Provided further that where a candidate has only one child from earlier delivery but more than one child are born out of a single subsequent delivery, the children so born shall be deemed to be one entity while counting the total

number of children.

3. The provision aforesaid was inserted in the Rules of 1962 with effect from 20.6.2001 by Rajasthan various service (Amendment) Rules, 2003.

4. The Petitioner is mother of baby Ria, born on 27.10.2000 and also a male child born on 19.2.2003. Baby Ria is suffering from a genetic disorder "Incontinentia - Pigmentii". She is also suffering from mental retardation and excessive brain damage including severe visual handicap. Her intelligence quotient is 54% and as such she suffer with 90.83; permanent disability.

5. The another male child of the Petitioner born on 19.2.2003 is also suffering from Fallot's Tetralogy, a congenital heart disease. He was also subjected to a major cardiac surgery at Escorts Hospital, New Delhi, in the age of ten months. Beside the above, he is also suffering other associated major post surgical complications.

6. Being first two children suffering with severe ailment the Petitioner and her husband Dr. Manish Parakh (Petitioner in SB Civil Writ Petition No.2744/2009) planned for a third child with a view to have at least a normal child and also to provide necessary company to their earlier children. A normal baby then was born on 21.12.2004.

7. The Respondents under an advertisement dated 25.11.2005 invited applications from eligible candidates for the purpose of appointment to Rajasthan Medical and Health Services and the Petitioner considering herself eligible to be recruited on the posts advertised submitted an application. While submitting such application she sought relaxation of condition No. 12 prescribed in the advertisement relating to eligibility, that was in consonance to Rule 21 of the Rules of 1962.

8. An another advertisement dated 11.12.2008 was issued by the Principal and Controller, Dr. Sampurnanand Medical College and Associated Group of Hospitals, Jodhpur for initiating process of selection for appointment of medical officers on contract basis. The selection committee interviewed the Petitioner on 28.1.2009, and selected the Petitioner but appointment was not accorded to her in view of the provisions of Rule 21 of the Rules of 1962. An another advertisement was issued on 3.8.2009 inviting applications from eligible desirous candidates for the purpose of appointment to the post of Assistant Professor under the Rules of 1962. Under this notification too, the Petitioner is not eligible to be considered for appointment on the post aforesaid in view of the condition No. 9(3), which is as per proviso to Rule 21 of the Rules of 1962.

Facts relating to SB Civil Writ Petition No. 2744/2009

9. Petitioner Dr. Manish Parakh is holding the post of Assistant Professor in the Department of Pediatrics at Dr. Sampurnanand Medical College, Jodhpur. This Petitioner is husband of Dr. Poonam Parakh, the Petitioner in SB Civil Writ Petition No.8528/2009. His predicament is that in view of Sub-rule(4) of Rule 24-A of

the Rules of 1962, he is not eligible to be considered for promotion to the next higher post for five recruitment years from the date his promotion becomes due.

Sub-rule(4) of Rule 24-A of the Rules of 1962 referred above reads as under:

Sub Rule (4) of Rule 24A:

No person shall be considered for promotion for five recruitment years from the date on which his promotion becomes due, if he/she has more than two children on or after 1st June, 2002:

Provided that,-

(i) the person having more than two children shall not be deemed to be disqualified for promotion solongas the number of children he/she has on 1st June, 2002 does not increase.

(ii) where a Government servant has only one child from the earlier delivery but more than one child are born out of a single subsequent delivery, the children so born shall be deemed to be one entity while counting the total number of children.

The issue under adjudication:

11. Petitioner Dr. Poonam Parakh is questioning validity of Rule 21 of the Rules of 1962 and her husband Dr. Manish Parakh is challenging the validity of Sub-rule (4) to Rule 24-A of the Rules of 1962 as inserted vide amendment Rules of 2003.

12. The argument advanced on behalf of the Petitioners in petitions for writ is that the provisions in question are highly unjust, arbitrary and also in contravention of the substantive provisions of "the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995", that was enacted to provide equal opportunities and complete participation of physically disabled person in all social, economic, political activities, and further to provide all necessary aid for their promotion.

13. This Court while issuing notice to the Respondents in the case of Dr. Poonam Parakh, while observing the need of the proviso impugned in view of the national campaign relating to family planning and welfare, also found the proviso concerned harsh in the case of the Petitioner. A direction, thus, was given to the Respondents to consider case of the Petitioner and further to make suitable amendments in the Rules to meet the circumstances existing.

14. By an another order dated 7.12.2010, while accepting the stay petition preferred by Dr. Poonam Parakh, this Court observed and ordered as under:

I am having no doubt that the proviso inserted with Rule 21 of the Rules of 1962 is having a rational as that is in consonance with the National Programme of Family Planning and Welfare. However, at the same time the Rules of 1962 are not taking adequate care of peculiar circumstances as existing in present case. The Petitioner is a mother of two disable children, and therefore, she decided to

have a third child to support disable children and also the third child. Her working commensurating to her qualification is necessary. The Rules of 1962 empowers the government to relax the eligibility relating to the age and experience if required, as such, the relaxation in the eligibility is not absolutely barred. The facts of the present case also require extension of relaxation from the condition prescribed under the proviso to Rule 21 of the Rules of 1962, though that is not related to age or experience.

So far as appointment of the Petitioner on contract basis is concerned that has been erroneously denied by the Respondents. The proviso to Rule 21 is applicable for appointments given under the Rules of 1962 and not otherwise. The appointment on contract basis is not at all under the Rules of 1962, as such, the appointment could have not been denied to the Petitioner on that pretext. Prima facie I am of the view that the facts of the case and also the objects of the persons with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 requires acceptance of the said petition.

Accordingly, the stay petition is allowed. The Respondents are directed to provide appointment to the Petitioner on contract basis as a consequent to her selection under the advertisement dated 31.12.2008. The appointment on contract basis is required to be given on or before 15.2.2011. A direction is further given to consider case of the Petitioner provisionally for the purpose of appointment as Assistant Professor in pursuant to the advertisement dated 3.8.2009. The Respondents are also required to execute the directions given on 28.8.2009, before next date of hearing, i.e. 18.2.2011.

15. In view of the orders passed by this Court on 28.8.2009, 7.12.2010 and also looking to the ancillary circumstances, the Governor of Rajasthan while exercising powers conferred by proviso to Article 309 of the Constitution of India amended various service rules including the Rules of 1962 by incorporating a proviso in the terms that "while counting the total number of children of a candidate, the child born from earlier delivery and having disability shall not be counted". The resultant is that Rule 21 of the Rules of 1962 and the Rule 24-A of the Rules aforesaid are subject to the proviso that reads as under:

Provided also that while counting the total number of children of a candidate, the child born from earlier delivery and having disability shall not be counted.

16. The problem of the Petitioners survives, even after insertion of the proviso aforesaid, as the effect to the newly added proviso is given from the date of its notification i.e. 24.2.2011, as such the Petitioners shall not be having any positive effect of the exclusion now given, though they are sufferers of the same circumstances those were considered and prompted the rule framing authority to make necessary amendments in various service Rules. To meet this situation, the argument advanced by counsel for the Petitioners is that though the amendment in Rules came into force from the date of its publication, but being an amendment of curative nature, it shall be reasonable to presume that it came to

be in force from the date the bar was introduced in the Rules of 1962 for appointment and promotion on having children more than two. The proposition is supported by the judgment of Hon'ble Supreme Court in the case of Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi,

17. While opposing the writ Petitioners' contention, it is submitted that the provisos in question were added through the amendment Rules, those specifically refer that, "they shall come into force with immediate effect". This assertion clearly indicates the intention of rule framing authority for not giving retrospective application to the provision concerned. As such the interpretation sought to be made is unwarranted and also erroneous.

18. Heard learned Counsel for the parties.

19. The provisions to render the persons having more than two children ineligible for appointment and also for promotion for a term of five years were inserted in the Rules of 1962 vide notification dated 4.10.2001 and 23.7.2003 respectively. The object for such insertion was to streamline the service Rules with the national policy of family planning and welfare. The provisions aforesaid are certainly having a rational and are based on intelligible criteria, but their side effects for the persons having indignant and disabled children were not visualised by the law framer and those were brought on surface by the Petitioners through these writ petitions. The rule framing authority quite objectively considered the issue and to cure the harshness of the rule chose to introduce a proviso to the substantive provision vide notification dated 24.2.2011, in the terms that while counting the total number of children, the child born from earlier delivery and having disability shall not be counted. The proviso is introduced on diagnosis of the ailment arising due to the amendments made in the Rules of 1962 under the notifications dated 23.7.2003 and 4.10.2001, as such, the same is remedial and curative. Need not to say that an ailment of harshness and arbitrariness generating from a statute is required to be curbed from root. In the case of Allied Motors (supra) it was held by the Apex Court that a proviso inserted as a remedy for unintended consequences and to make a provision workable, a proviso which supplies an obvious omission in the original statute and provides a reasonable interpretation to the statute, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the statute as a whole. In the case in hand the curative measure taken by introducing the proviso, if given effect only from the date appointed that is 24.2.2011, then that shall be having no curing effect for the period commencing from the date of adding the substantive provision in the Rules of 1962 to the date of the notification of the proviso. True it is, as per the notification dated 24.2.2011 the amendment rules shall come into effect with immediate effect, meaning thereby, w.e.f. 24.2.2011, however, this statute is to be interpreted in a qualified and intelligible sense. The proviso introduced is curative in nature being inserted as a remedy for unintended consequences of the substantive provisions and also to meet an omission in the original statute, thus, deserve to be interpreted reasonably and

that can be done by giving effect to it from the date of the inclusion of substantive provisions in the Rules of 1962, making the persons ineligible for appointment and for consideration for promotion for five years.

20. Accordingly, these petitions for writ are disposed by holding that the amendment made in various service Rules, including the Rajasthan Medical Service (Collegiate Branch) Rules, 1962 vide Rule 3 of the Rajasthan Various Service (Amendments) Rules, 2011 shall be treated as came into force w.e.f. 20.6.2001. The Petitioners shall be entitled for all consequential benefits.

21. No order to costs.