
(2013) 08 OHC CK 0073

In the Orissa High Court

Case No : Writ Petition (C) No. 17191 of 2013

Dr. Sunil Kumar Kar

APPELLANT

Vs

State of Odisha and Others

RESPONDENT

Date of Decision : 14-08-2013

Acts Referred:

Citation : (2013) 116 CLT 923

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Advocate : Sisir Kumar Purohit, K.M.H. Niamati and A.K. Das, for the Appellant; R.C. Mohanty for O.P.-P.G. Medical Council and MCI, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This writ petition has been filed with a prayer to direct opposite party No. 1-State of Odisha, represented by the Secretary in the Department of Health & Family Welfare, Bhubaneswar and opposite party No. 2-Convenor, P.G. Medical/Dental Counseling Committee, SCB Dental College & Hospital, Cuttack to include the petitioner in the "In-Service" category in the counseling for selection to the Post Graduate Medical Admission, 2013. Petitioner's case in a nut-shell is that he after passing M.B.B.S. Examination in December, 2004 was engaged as Asst. Surgeon on contractual basis vide order No. 7506 dated 14.03.2007 of the Health and Family Welfare Department, Government of Odisha on a consolidated remuneration of Rs. 12,000/- per month. Subsequently, vide Order No. 1524 dated 04.06.2007, Order No. 2822 dated 16.08.2010 and Order No. 3381 dated 21.09.2010 from the office of the C.D.M.O., Sonapur and Order No. 23363/H dated 21.09.2010 from H & F.W. Department, Government of Odisha, the petitioner continued to work as Asst. Surgeon (Contractual) at Mursundhi and later on as Consultant Physician at CHC, Birmaharajpur, Sonapur and presently he is working as Medical Officer (Ad hoc) at CHC, Birmaharajpur, Sonapur. While working as such on contractual basis, the petitioner applied for appointment as Ad hoc Doctor pursuant to a notification of

the Government, wherein he was selected by the Government, and thus, the petitioner, whose name appeared at Sl. No. 25 of the list of selected candidates as per Notification No. 23363/H/dated 21.09.2010 of opposite party No. 1, joined on 27.09.2010 forenoon being posted at CHC, Birmaharajpur under Sonapur district. While the matter stood thus, advertisement for the National Eligibility-cum-Entrance Test P.G. 2013 came up which conducts entrance examination and assigns relative merit rankings basing on which the admission to Post Graduate Medical course is done. The rank is a single one irrespective of "Direct" or "In-Service". The petitioner applied for the said test and qualified in the examination. He was assigned All India Rank No. 21981 and State Rank No. 654. The petitioner was required to deposit Rs. 1,000/- to register his name afresh for admission. The petitioner filled up the application form (e-registration) for admission to P.G. (Medical/Dental) courses for the session 2013-14 giving all the service experience claiming in-service category which is governed by the Guidelines for allotment of candidates for Post Graduate (Medical) Courses in the Government Medical Colleges of Odisha. On 11.07.2013 on verification of the documents, the Convenor considered the case of the petitioner and found him eligible as in-service candidate. However, on 26.07.2013 the petitioner's name found place in the common merit list of P.G. Medical, 2013 as direct candidate instead of in-service candidate. Without assigning any reason, petitioner has been considered as direct candidate in spite of the fact that the present petitioner has service experience of more than five years.

2. Mr. Purohit, learned counsel appearing for the petitioner referring to Clause-5 of the NEET PG-11 submitted that the benefit of serving in rural/remote/difficult area shall be extended to the in-service candidates. Further, referring to paragraph-F(2) of the Guideline issued by the State, Mr. Purohit submitted that it is an enabling definition which includes the contractual service if the appointee has been duly selected by Government appointing authority and not necessarily OPSC. It was further submitted that the appointment letters of the petitioner under Annexure-1 series have been issued by the Health and Family Welfare Department, Government of Odisha and subsequently by C.D.M.O., Sonapur and lastly by the H & FW Department and thus the petitioner has served for a total period of more than 5 years on contractual and ad hoc basis. Therefore, non-consideration of the case of the petitioner as in-service candidate is arbitrary, illegal and mala fide and violative of the binding Guidelines of the State Government. The contractual appointment has been made as per the Resolution No. 24104 dated 18.09.2007 of the Government delegating the power of such appointment to the CDMOs who may appoint by inviting applications against the vacancies of Asst. Surgeons and scrutinize the same at his level on the basis of their educational qualification and registration certificate etc. The success rate of "In-Service" doctors being relatively low in P.G. Entrance, the petitioner hopes for being selected in P.G. discipline of his choice, if he is considered in the "In-Service" category.

3. Mr. Purohit further submitted that Hon'ble Supreme Court has held that the

criteria of 2012 for in-service candidate would prevail as per which the petitioner is squarely covered under "in-service" category. However, the web-site notified only on 26.7.2013, i.e., Friday after-noon denying the "in-service" status to the petitioner considered him in the "Direct" category. Thus, the cause of action arose on Friday evening and the petitioner filed the present writ petition on 29.7.2013. Hence, there is absolutely no delay on the part of the petitioner in approaching this Court. Opp. party no. 2 had designed the schedule of admission in such a way that it left absolutely no scope for an aggrieved person to seek remedy. This Court has earlier allowed a candidate to take admission as "in-service" candidate in the identical situation vide order dated 24.7.2013 in W.P.(c) No. 16266 of 2013 who obtained 1420 in State Rank. Thus, the petitioner is entitled to the same relief whose rank No. is 654 in the State. There is no wrong in claiming such a remedy. Wrong must not be left remediless and right not to be left un-enforced. In support of his contention, Mr. Purohit relied upon the judgments of Hon"ble Supreme Court in the cases of Dhannalal Vs. Kalawatibai and Others, and Rameshwarlal Vs. Municipal Council, Tonk and Others, . Opp. party nos. 2 to 5 taking the plea of restriction imposed by the Hon"ble Supreme Court to complete the admission by 31st July, 2013 left the aggrieved person to continue to suffer for the wrong committed by them. Each order pertains to its own fact. Each fact deserves separate and independent consideration and requires modulation of relief befitting to the case that is why the judiciary is being manned by thinking of Hon"ble Judges without being backed by earlier decision and not by computer who can dispense better equal justice. The Hon"ble Supreme Court has not restricted the power vested under Article 226 of the Constitution of India and not a single judgment of the Hon"ble Supreme Court is there which can put an absolute bar even after the injustice and illegalities perpetrated by the State. No judgment protects a wrong action and the wrong doer cannot be given advantage of his own wrong. Opp. parties 2 and 5 have wrongfully denied the petitioner to avail the in-service benefits. Placing reliance on a judgment of Andhra Pradesh High Court in W.P.(C) No. 20041 of 2012, Mr. Purohit submitted that while deciding an identical issue the Hon"ble Andhra Pradesh High Court granted relief of compensation of Rs. 4.00 lakhs and a seat in the next year P.G. The vacant seat of All India quota if would be surrendered in that event, the petitioner may be given a seat in M.S. (Orthopedics).

4. Referring to the judgment of Hon"ble Supreme Court dated 1.8.2013 Mr. Purohit submitted that the Hon"ble Supreme Court having extended the Medical Counseling and admission till 21st August, 2013, it has far reaching effect in giving relief to the petitioner. Further Mr. Purohit filed a memo along with a copy of the D.M.E.T. Notification dated 8.8.2013 and submitted that the 2nd round counseling (choice locking) for P.G. Medical and Dental Examination, 2013-14 will start from 10.8.2013, which may be taken into consideration while deciding the petitioner's claim.

5. In the additional written note dated 12.08.2013, referring to the dictionary meaning of the expression "regular", it is stated that it conformed to a rule,

agreeable to an established rule, law, principle or type or to established customary forms. It is further submitted that the petitioner has rendered his service from 26.03.2007 till 31.03.2013 with the forcible break of 5 months 15 days due to joining of regular doctor. The petitioner had served for 5 years 6 months and 24 days. The requirement in the guideline is 3 years of regular service including contractual temporary, ad hoc and has been duly selected by Government/OPSC/PSU appointing authority before 31.03.2013. In the instant case, the petitioner having been duly selected and appointed by the Government appointing authorities both on contractual and ad hoc basis having completed more than 3 years service is entitled to be considered under the category of "in-service" candidate. In support of his contention, learned counsel for the petitioner relied upon the judgment of this Court dated 24.07.2013 passed in W.P. (C) No. 12740 of 2013. It is further submitted that since the Hon'ble Supreme Court has extended the time of admission of the All India Seats till 21.08.2013, then the State admissions cannot be barred till then at least. Concluding his argument, Mr. Purohit submitted that the petitioner may be considered as in-service candidate by carving out a seat in the existing capacity or creating a supernumerary seat to protect the right of the petitioner.

6. Mr. R.C. Mohanty, learned counsel appearing on behalf of opp. party No. 2-P.G. Medical Selection Committee, 2013 submitted that from a bare reading of the appointment order so also the posting order under Annexure-1 series of the writ petition it clearly reveals that the service/employment/appointment of the petitioner is not a regular one which will construe to be an employment on regular basis. Rather, the same is either contractual or ad hoc basis and purely temporary in nature which is terminable at any time without assigning any reason. From clause "F (2)" of the Guideline, it is crystal clear that a candidate can be considered in the in-service category if he/she has been given regular employment in Government of Orissa Public Sector Undertakings/Govt. of India Public Sector Undertakings located in Odisha and has completed a length of 3 years of regular service including contractual/temporary/ad hoc and has been duly selected by the Government/OPSC/PSU/Appointing Authority, before 31st March, 2013 at the time of making application. But in the present case the petitioner in his entire service period has never been provided with a regular employment. Rather period of services rendered by him is either contractual or ad hoc basis and purely temporary in nature. Therefore, as per clause 2 of Guideline-F, the petitioner is not coming under the zone of consideration to be considered as "in-service" candidate.

7. Mr. Mohanty further submitted that on verification of the documents by the Selection Committee petitioner's case has been considered as a Direct Category candidate and accordingly in the merit list which was published/provided in the website on 26.7.2013, the petitioner's name found place at serial no. 294 in the provisional merit list of Medical (P.G.) Direct candidate (2013). Thereafter the choice locking of the candidates was allowed from 26.7.2013 to 28.7.2013 up to 5 PM. After choice-locking, the allotment letter was not issued to the candidates

in view of filing up of the SLP (c). No. 24238 of 2013 on 27.7.2013 and said SLP(c) was disposed of on 30.7.2013, wherein the Hon"ble Supreme Court upheld the judgment of the High Court and allowed 5 years to be taken into consideration for a candidate for in-service category instead of 3 years. Accordingly, the allotment letter was issued immediately on 30.7.2013 and as such counseling was over on 31.7.2013 in obedience to the order of the Hon"ble Supreme Court. Placing reliance on the judgment of the Hon"ble Supreme Court in Mridul Dhar (Minor) and Another Vs. Union of India (UOI) and Others, and in the case of Medical Council of India Vs. Manas Ranjan Behera and Others, and Faiza Choudhary Vs. State of Jammu and Kashmir and Another, it was submitted that no admission is permissible after the cutoff date i.e. 31.7.2013 for the current year.

8. Learned counsel appearing for opposite party-P.G. Medical Counseling Committee filed an affidavit dated 12.08.2013 stating therein that in Writ Petition (Civil) No(s). 433 of 2013 in the matter of "Dr. Fraz Naseem and others Vs. Union of India and others, the Hon"ble Supreme Court vide its order dated 01.08.2013 modified the order dated 23rd March, 2012 passed by the Hon"ble Court in I.A. No. 16 of 2012 in C.A. No. 1944 of 1993 in the matter of Anand S. Biji Vs. State of Kerala and others and directed that a 4th round of online process will be conducted for the seats remaining vacant in the All India Quota and the same will be completed by 21st August 2013. In this 4th round of online counseling the candidates who have given willingness for participation in the 3rd round of counseling for the purpose of up-gradation will also be permitted to participate as they were not aware that there will be a 4th round of online counseling. The P.G. (Medical) Selection Committee-2013 with a wrong notion that the extended cutoff date, i.e., 31.07.2013 fixed by the Hon"ble Supreme Court has been further extended, it flouted an advertisement/notification that the 2nd round counseling (Choice locking) for P.G. (Medical & Dental) admission for the academic session 2013-14 will start from 10.08.2013 and said notification was uploaded in the website and published in Newspaper. The P.G. (Medical/ Dental) Selection Committee-2013 immediately issued a corrigendum which was uploaded in the website and published on 09.08.2013 in the newspaper to the effect that the Second round counseling scheduled to start from 10.08.2013 is deferred until further Order.

Mr. Mohanty submitted that the aforesaid corrigendum was made with the hope that after 4th round counseling on 21.08.2013, if any seat is surrendered to State and further time is extended by the Hon"ble Supreme Court, then the state will be in a position to conduct further counseling, otherwise no counseling is permitted as per the time schedule of MCI and the judgments derived in the case of Mridul Dhar (Minor) and Another Vs. Union of India (UOI) and Others, and Medical Council of India Vs. Manas Ranjan Behera and Others, Concluding his argument, Mr. Mohanty prayed for dismissal of the writ petition.

9. It is not in dispute that the Counseling was over on 31.7.2013. Choice locking

was allowed from 26.7.2013 to 28.7.2013 up to 5.00 P.M. After choice-locking, the allotment letter was not issued to the candidates in view of filing of the SLP (c) No. 24238 of 2013. The said SLP was disposed of on 30.7.2013 and accordingly, the allotment letter was issued on 30.7.2013. The petitioner filed the present writ petition before this Court on 29.7.2013 and the matter was listed on 30.7.2013 for fresh admission. Since the petitioner wanted to rely upon certain document, he was directed to file the same along with an affidavit serving copy on Mr. R.C. Mohanty, who usually appears for P.G. Medical Counseling Committee. Mr. R.C. Mohanty was directed to take instruction. The matter was heard on the next day i.e. 31.7.2013 and judgment was reserved. On the request of the parties they were allowed to file written note of submission within two days which were filed. Thereafter, the petitioner filed Misc. Case No. 16980 of 2013 to bring certain facts on record on the ground of subsequent development in the matter which has direct bearing on the question under consideration. On being mentioned the matter was listed on 12.08.2013 under heading "To Be Mentioned" for further hearing. The petitioner filed additional written note and the opposite parties filed an affidavit on 12.08.2013. As stated above, the choice locking was over on 28.07.2013 and the allotment letter was issued on 30.07.2013.

10. There cannot be admission after cut-off date as fixed by the Hon''ble Supreme Court. The Hon''ble Supreme Court in the case of Mridul Dhar (minor) and another (supra) held that the time scheduled has to be strictly adhered to by all concerned, including Government, State and Central both MCI/DOCI, College, new or old, student, Boards, Universities, Examining Authorities, etc. It is also held that no mid-stream admission is to be there and no admission in excess of sanctioned intake capacity or in excess of quota of any one, whether State or Management. It was further held that carry forward of any unfilled seats of one academic year to next academic year was also not permissible.

11. In Manas Ranjan Behera (supra) Hon''ble Supreme Court held that time schedule prescribed has to be strictly followed as has been decided in the cases of Mridul Dhar (supra) and Fiza Choudhury" (supra). It is further held that a medical seat has life only for the year it falls and that too only till the cut-off date fixed to complete the admission.

12. The law declared by the Hon''ble Supreme Court and directions given by it are binding on every Court and the High Courts are unexceptionally bound by them.

13. The Hon''ble Gujarat High Court in the case of State of Gujarat Vs. Gordhandas Keshavji Gandhi and Others, held that a decision of the Supreme Court is binding on all the High Courts. By Article 141 of the Constitution of India it is laid down that the law declared, by the Supreme Court shall be binding on all courts within the territory of India.

14. The Hon''ble Bombay High Court in the case of Amruta Babaji Mozar Vs.

Kondabai, deceased by her heirs Babai Laxman Mandhare etc. and another, held that the law declared by the Supreme Court is no doubt of paramount precedence and is binding on all the Courts notwithstanding any decision to the contrary of the High Court to which a Court may be subordinate. This would have been the position even without Article 141 of the Constitution because of the precedent-oriented system of judicial administration received by us from the Britishers and followed by us with utmost devotional rigidity.

15. The Hon'ble Karnataka High Court in the case of Oriental Insurance Co. Ltd. Vs. Smt. Salma and Others, held that it is well settled that even obiter dicta made in the decision of the Supreme Court is binding upon High Court and High Court is not competent to interpret the decision of the Supreme Court.

16. If the decision of the opposite parties not to include the petitioner in in-service category is quashed and the petitioner does not get benefit or relief from the said quashing, the writ Court should not interfere at the behest of the petitioner.

Mere declaration of correctness or otherwise of petitioner's eligibility without any consequential effect qua the petitioner for the current year would merely be an exercise in futility and would not result in any enforceable right. This is so because no relief can be granted to the petitioner at the present juncture of time based on the decision relating to correctness or otherwise of the petitioner's eligibility.

In Dr. N.C. Singhal Vs. Union of India (UOI) and Others, while examining the case of the promotion the apex Court came to the conclusion that even if the directions earlier made are struck down, the appellant could not get any post vacated by them. Therefore, entertaining such a petition at the behest of the petitioner is not permissible.

17. In view of the above, there is no need to go into the merit of the case with regard to petitioner's eligibility because the cut-off date for taking admission in PG (Medical) Course has already been over on 31.7.2013. Now, the question of merit is of academic interest.

18. The contention of the petitioner that if vacant seats of all India quota would be surrendered, in that event the petitioner may be given a seat in M.S. (Orthopedic) does not merit consideration because the contention is merely hypothetical and is based on unforeseen contingency. There is no scope for consideration that factor at the present juncture.

19. The interim protection as granted to the petitioner vide order dated 24.7.2013 in other W.P.(c) No. 16266 of 2013 is of no help to the petitioner since the said interim order was passed before commencement of choice-locking on 26.7.2013. In the instant case as stated above, the matter was placed before the Court for the 1st time on 30.7.2013 by which time choice-locking was over and the allotment letter was issued on the same day i.e. 30.7.2013. For the reasons

stated above, no relief can be granted as prayed for in the present writ petition and accordingly, the same is dismissed.