

(2010) 08 GAU CK 0075

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 3636 of 2010

Ganesh Das

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 02-08-2010

Acts Referred:

Citation : (2012) 2 GLR 427

Hon'ble Judges : I.A.Ansari, J

Bench : Single Bench

Advocate : Mr. T.J. Mahanta, Mr. S.M. Rahman and Mr. K.Saikia for the petitioner, Mr. B. Choudhury and Mr. S. Dutta for the respondents., Advocates appearing for Parties

Judgement

1. Heard Mr. T.J. Mahanta, learned counsel for the petitioner, and Mr. B. Choudhury, learned Standing Counsel, Health Department. Heard also Mr. S. Dutta, learned Standing counsel, B. Baruah Cancer Institute, and Mr. A.K. Choudhury, learned Central Government Counsel.

2. On the request made by the learned counsel for the parties, this writ petition is taken up for final disposal treating the petitioner's application, which has given rise to Misc. Case No. 2213/2010, as the petitioner's affidavit in reply to the affidavit in opposition filed, in the writ petition, by the respondent Nos. 2, 3, 4 and 5.

3. The respondent No. 2, namely. Dr. B. Barooah Cancer Institute, which is a society registered under the Societies Registration Act (hereinafter referred as "the said Institute"), published an advertisement, dated 9.3.2010, inviting applications for various posts including one post of Consultant in General Surgical Oncology, the prescribed qualification for the said post being minimum three years of experience as resident/junior consultant or "one year as consultant in the respective field with PG Degree".

4. By the present application, made under article 226 of the Constitution of

India, the petitioner has put to challenge the qualification, prescribed by the advertisement, dated 9.3.2010, to the extent that the advertisement makes a person eligible for selection and appointment as consultant, if he has one year working experience as consultant in the respective field with PG Degree. The petitioner contends that the said prescribed qualification, namely, one year of working experience as consultant, has been incorporated to favour respondent No.6. The petitioner further contends that the advertisement, in question, does not prescribe any minimum or maximum age limit for making appointment to the post of consultant and this too has been done, according to the petitioner, to favour the respondent No. 6. In support of his contention, the petitioner cites the previous advertisements calling for applications for appointment to the post of consultant, whereunder the candidate was required to have minimum three years of working experience as Senior Resident/Clinical or research fellow in the surgical oncology in any medical institute with PG Degree from recognized institute with the upper age limit being 38 years.

5. Refuting the allegations made by the petitioner, respondent Nos. 2 to 5 have averred, in their affidavit, as follows:

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6. That the statement made in paragraph 6 of the Writ Petition is not correct and the deponent denies the same. That your deponent begs to state that the Service Rule of Dr. B. Borooah Cancer Institute has not prescribed any qualification for newly created posts. However, the clause 2.5.2.2 of the service rule has prescribed qualification and experience for promotion up gradation of doctors who were already serving in the Institute holding a regular post. Therefore, the qualification and experience prescribed in the advertisement for newly created posts cannot be equated with time bound promotion/upgradation scheme of the existing staff of the Institute.

That as per advertisement dated 15.2.2008 it may be stated that the qualification was experience prescribed were for contractual staff (Consultant in Surgical Oncology) only and this was done prior (sic) Dr. B. Borooah Cancer Institute. The new service rule of the Institute became effective from 28.3.2008.

That your deponent further states that the regular post of Consultant in Surgical Oncology was created by the Board of Directors along with requisite qualification in its meeting held on 11.12.2009 as per clause 2.2 of the service rule. The advertisement for the said post was published as per the qualification was experience prescribed by the Board of Directors.

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8. That with regard to the statement made in paragraph 9 of the Writ Petition your deponent states that in earlier advertisement dated 15.2.2008 the upper age limit was 38 years as per the Service Rules of the Government of Assam

which was followed by the answering respondents at that relevant time. However, the new service rule of the Institute was approved by the Board of Directors which became effective from 28.3.2008. In terms of the present service rules in respect of age, as per clause 20.7, states that the age of a person at his/her joining the service of Dr. B. Borooah Cancer Institute shall not be less than 18 years. The upper age limit for any particular posts shall be as prescribed by the appointing authority. This is further to state that as per clause 2.4.1 of the service rules the Chairman of the Management Council (Director, Tata Memorial Centre, Mumbai) is the appointing authority.

The deponent states that, there is acute shortage of Oncologists in the country and the problem, is more acute in the North Eastern States, under this circumstances the Management Council in its meeting dated 22.3.2010 decided that the Chairman of the Management Council being the appointing authority for Grade I/A posts, as per service rules, the upper age limit of the candidates will be decided by the appointing authority on recommendation of the selection committee.

The deponent states by not defining the upper age limit as per provisions of the new service rules of the Institute it has also benefited the petitioner along with the other candidates who has already completed 39 years of age. It has also been seen that many other candidates would not have attained eligibility to appear in the interview if an upper age limit was fixed but several candidates including the petitioner have been benefited as per this provision and have appeared in the interview. Otherwise these posts would have remained vacant and specialty services of Oncology in this tertiary care centre would have been greatly hampered.

9. That it is respectfully stated that there is acute shortage of oncologists in the county in spite of relaxation in the norms by the Board of Directs, the number of candidates appeared for interview for various posts of consultants are as follows :

Consultant (Medical Oncology) 1 post advertised. Only 1 candidate appeared for interview before Selection Committee.

Consultant (Preventive Oncology) 1 post advertised. Only 1 candidate appeared for interview before selection committee.

Consultant (Pathology) 2 posts advertised. Only 2 eligible candidates appeared for interview before the Selection Committee. Out of these, one was

Internal candidate already working in the Institute.

Consultant (Anesthesiology) 2 posts advertised. Only 3 eligible candidates appeared for interview before the Selection Committee. Out of these, one

was Internal candidate already working in the Institute.

Consultant (Surgical Oncology) 1 post advertised. Only 2 eligible candidates appeared for interview before the Selection Committee. Out of these, one

was Internal candidate already working in the Institute.

The petitioner's age: 39 years. Internal candidate's age : 46 years.

Junior Consultant (Radiation Oncology) 2 posts advertised. There was no candidates.

Senior Consultant (Radiation Oncology) 2 Posts advertised. There was only one internal candidate (43 years).

Junior Consultant (Pathology) 1 Post advertised. There was only one internal candidate (50 years).

Medical officer (Palliative Medicine) 1 posts advertised. Two candidates appeared for interview. The age of one candidate with 46 years and the other with 39 years.

It is clear from the above that there is acute shortage of specialists in the field of Oncology. Therefore, the Board of Directors of the Institute had rightly relaxed the qualification for various posts. Though there was provision for creation of various regular posts as per the provision of 2,111 tripartite agreement way back in 1997, for various reasons the above posts could not be created. This had adversely affected the patient care services of the Institute. Taking this into consideration and as per the provision of the new service rule, the Board of Directors expeditiously created the above posts in the interest of the patient care services of the Institute. Rigid upper age limit would have resulted in vacancies in various posts, thereby further affecting the patient care services.

10. That the statement made in paragraphs 10 and 13 of the Writ Petition are not correct and hereby denied by the deponent. This is absolutely incorrect to say that new added qualification, i.e., one year as consultant in the respective field with P.G. degree was incorporated and no age limit was prescribed by the Director of the Institute. The deponent states that the advertisement for the said post was published as per the qualification and experience prescribed by the Board of Directors in its meeting held on 11.2.2009. The deponent states that, it is illusion on the part of the petitioner, that new added qualification was incorporated and no age limit was prescribed in order to favour a particular candidate who is already working under the answering respondents. It is worthwhile to mention that in the advertisement 3 years of experience as Resident I Junior Consultant or one year as consultant was prescribed. The Post of Resident I Junior Consultant is lower level Posts. The Post of Consultant is higherlevel post and therefore, oneyear experience in the similar capacity was prescribed by the Board of Directors for the regular post of consultant as an alternative option.

11. That with regard to the statement made in paragraphs 11 and 14 the Writ Petition your deponent states that the Chairman of the Management Council vide his letter dated 1.4.2010 requested respondent No. 5 to submit his comments on the representation and the respondent No. 5 submitted his comments vide his

letter, dated 5.4.2010."

6. Reacting the above averments made by the respondents aforementioned, the petitioner, in his affidavit in reply, submits that the post of consultant, in the said Institute, is equivalent to the post of Assistant Professor of a teaching hospital. Suffice it to point out here that the post of Assistant Professor is a post under a teaching hospital and not under a nonteaching hospital such as the one, which we have at hand, namely, Dr. B Barooah Cancer Institute. There is, admittedly, no rules framed and no instructions have been issued by the Medical Council of India and/or by the Government or by any competent authority, other than the society, which runs the said Institute, prescribing qualification and age limit for appointment to the post of consultant in a nonteaching hospital.

7. Coupled with the above, what transpires, on perusal of the materials on record and upon hearing the learned counsel for the parties, is that the earlier advertisements, including the advertisement, dated 15.2.2008, were for contractual appointments, when no regular post of consultant was in existence in the said Institute; whereas the impugned advertisement is in respect of newly created regular posts of consultant. In terms of the decision by the Board of Directors empowering the Management Council, the Rules of Business and Service Rules of the said Institute have been finalized by the Management Council of the said Institute in its meeting held on 2.2.2008. As far as the Service Rules of the said Institute is concerned, service rules have come into force with effect from 28.3.2008. These rules are not under challenge. Rule 2.2 provides for lateral entry to any post if it is felt necessary. The post of consultant, which is a Grade A post, is required to be filled up, under rule 2.4.2, by open advertisement on national basis.

8. In the light of the above facts, when the averments, made by the respondents aforementioned in their affidavit, are considered, it becomes clear that in terms of rule 2.2 of the Service Rules, the post of consultant in General Surgical Oncology was created by the Board of Directors with its requisite qualification in its meeting held on 11.12.2009. As the advertisement is an invitation to eligible persons at the national level, it cannot be held, in the absence of any specific material on record showing to the contrary, that the prescribed qualification, making a person, with one year of working experience, eligible for appointment as consultant, in the said Institute, has been provided in order to favour the respondent No. 6. The Board of Directors of the said Institute, in terms of the Service Rules aforementioned, was entitled to prescribe the requisite qualification and it is in exercise of this power that the requisite qualification has been prescribed.

9. As the upper age limit has been left open, any one, in terms of the decision of the Board of Directors, who has completed 18 years of age, is eligible to participate in the selection and appointment to the post of consultant. The respondents aforementioned also contend that there is acute shortage of Oncologists, particularly, in the Northeastern States and it is for this reason that

the Management Council, in its meeting, dated 22.3.2010, decided that the Chairman of the Management Council, being the appointing authority for Grade I/A post, as per Service Rules, shall prescribe the upper age limit on the recommendation of the Selection Committee. The respondents have further pointed out that the upper age limit has not been prescribed, because of the fact that adequate number of candidates may not remain available. In fact, the averments, made in para 9 of their affidavit by the respondents aforementioned, show that for one post of consultant in Medical Oncology and one post of consultant in Preventive Oncology, one candidate each appeared for interview and even for the two posts of Consultant in Pathology and two posts of consultant in Anesthesiology, only two candidates and three candidates respectively appeared and it is only in respect of the one post of consultant in Surgical Oncology that there are two eligible candidates, namely, the present petitioner and the respondent No. 6. Even for the post of Junior Consultant, the situation is no different. In such circumstances, when there is no specific bar imposed by any competent authority on the Management Council prescribing the qualification and other conditions of services, this court is of the view that in the facts and attending circumstances of the present case, the qualifications, prescribed by the advertisement, dated 9.3.2010, in respect of the posts of consultant, call for interference by this court. The advertisement, in the facts and attending circumstances of the present case, also does not call for interference merely because no upper age limit has been prescribed, particularly, when the respondents have clearly demonstrated that the restrictions, if were imposed by prescribing upper age limit, would have further reduced the number of candidates inasmuch as the petitioner and the respondent No. 6 are the only two candidates for the lone post of consultant in General Surgical Oncology and both of them are able to participate, because of the fact that there is no upper age limit, for, had the age limit been 39 years, as had been in the past in respect of contractual appointments, even the petitioner and respondent No. 6 would not have been eligible. Thus, the choice that the said Institute had, was very limited and in the facts and circumstances of the present case. The said Institute has done what could have been the best for the said Institute.

10. Mr. S Dutta, learned counsel, has submitted, it may be pointed out, that as far as the Medical Council of India is concerned, it has no role to play in prescribing the qualification for appointment to the post of consultant in a nonteaching hospital or in the management of the said Institute. This submission, made on behalf of the respondent Nos. 2 to 5, has been disputed by Mr. T. J. Mahanta, learned counsel for the petitioner. It is not really material, in the present case, as to whether the Medical Council of India has any role to play in the management of the said Institute or not. What is of paramount importance to note is that the Medical Council of India has not prescribed any qualification for appointment of a consultant in an institute such as the present one. As far as the said institute is concerned, it had, in the light of what has been discussed above, the authority to prescribe qualification and age limit and it has, in

exercise of this authority, prescribed, the qualification, which it considered, in the facts and attending circumstances, necessary to prescribe.

11. Situated thus, this court does not find any merit in this writ petition. The writ petition is, therefore, not admitted and shall accordingly stand dismissed.

12. The interim directions, passed, in this case, on 25.6.2010, shall accordingly stand vacated.

13. No order as to costs.