
(2010) 01 MP CK 0036
In the Madhya Pradesh High Court
Case No : Writ Appeal No. 35 of 2007

Krishna Bihari Dubey

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-01-2010

Acts Referred:

Border Security Force Act, 1968 — Section 141
Border Security Force Rules, 1969 — Rule 1
Pharmacy Act, 1948 — Section 11, 14, 30(2), 31, 32

Citation : (2010) 1 JLI 394

Hon'ble Judges : Piyush Mathur, J;A.K.Shrivastava, J

Bench : Division Bench

Advocate : B.P. Singh and Alok Sharma, for the Appellant; D.K. Katare and Arun Katare, for the Respondent

Final Decision : Dismissed

Judgement

Piyush Mathur, J.—The employee Krishna Bihari Dubey, working in the Border Security Force has assailed in this writ appeal, the correctness of the final order/judgment dated 15.12.2000, passed by the Writ Court in Writ Petition No. 1115/1998, wherein the writ Petitioner/Appellant had questioned the legality and correctness of an order dated April 2, 1998, which was passed by the Director, Border Security Force, wherein he was not found eligible for the grant of pay-scale of a "qualified pharmacist" (while rejecting the representation of the writ Petitioner) and the Writ Court had found the logic of denial to be correct.

2. The facts of the matter reveal that the writ Appellant Krishna Bihari Dubey was initially appointed as a Constable on August 6, 1974, in the Border Security Force, when in the year 1981-1982 he sought permission of the Departmental authorities for being sent for the training of compounder, which was granted to him, consequent to which he underwent compounder's training in between dates 25.6.1982 to 25.4.1983 at Shyamshah Medical College and Gandhi Memorial Hospital, Rewa and upon passing this one year training course, he was issued a

certificate (Annexure p-1) of passing "Compounder's Training Course" by the Training College.

3. It further emerges from the record that upon completing the "Compounder's Training Course" the writ Appellant got himself registered with the Madhya Pradesh Pharmacy Council as a "Pharmacist" under the provisions of the Pharmacy Act, 1948 and a Registration Certificate (Annexure P-2) was issued on date 16.5.1983 by the Pharmacy Council to the writ Appellant in terms of Clause (c) of Section 31 of the Pharmacy Act, by conferring upon him all such privileges which a Pharmacist, registered u/s 31(c) would be entitled for. Since the entire matter revolves around Section 31 and Section 32 of the Pharmacy Act, the same is being quoted herein below:

31. Qualifications for entry on first register. - A person who has attained the age of eighteen years shall be entitled on payment of the prescribed fee to have his name entered in the first register if he resides, or carries on the business or profession of pharmacy, in the State and if he:

(a) holds a degree or diploma in pharmacy or pharmaceutical chemistry or a chemist and druggist diploma of an Indian University or a State Government, as the case may be, or a prescribed qualification granted by an authority outside India, or

(b) holds a degree of an Indian University other than a degree in pharmacy or pharmaceutical chemistry, and has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescriptions of medical practitioners for a total period of not less than three years, or

(c) has passed an examination recognized as adequate by the State Government for compounders or dispensers, or

(d) has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescriptions of medical practitioners for a total period of not less than five years prior to the date notified under Sub-section (2) of Section 30.

Any person who is eighteen years old and resides or carries on the business or profession of pharmacy in the State is entitled to get his name entered in the register if he:

(i) holds a degree or diploma in pharmacy or pharmaceutical chemistry or a chemist and druggist diploma, or

(ii) holds any other degree than a degree in pharmacy or pharmaceutical chemistry, and has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescriptions of medical practitioners for three years, or

(iii) has passed an examination recognized as adequate for compounders or

dispensers, or

(iv) has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescription of medical practitioners for not less than five years.

32. Qualifications for subsequent registration. - (1) After the date appointed under Sub-section (2) of Section 30 and before the Education Regulations have, by or u/s 11, taken effect in the State, (a person who has attained the age of eighteen years shall on payment of the prescribed fee) be entitled to have his name entered in the register if he resides or carries on the business or profession of pharmacy in the State and if he:

(a) satisfies the conditions prescribed with the prior approval of the Central Council, or where no conditions have been prescribed, the conditions entitling a person to have his name entered on the first register as set out in Section 31, or

(b) is a registered pharmacist in Anr. State, or

(c) possesses a qualification approved u/s 14:

Provided that no person shall be entitled [under Clause (a) or Clause (c)] to have his name entered on the register unless he has passed a matriculation examination or an examination prescribed as being equivalent to a matriculation examination.

(2) After the Education Regulations have by or u/s 11 taken effect in the State, a person shall on payment of the prescribed fee be entitled to have his name entered on the register if he has attained the age of (eighteen years), if he resides, or carries on the business or profession of pharmacy, in the State and if he has passed an approved examination or possesses a qualification approved u/s 14 (or is a registered pharmacist in Anr. State).

4. The facts demonstrate that soon after obtaining the registration from the Pharmacy Council, the writ Appellant was posted in the Medical Wing of the Border Security Force and the Chief Medical Officer had remustered him in the Cadre vide order dated 25.8.1983 as "Unqualified Pharmacist" in terms of Section 31 of the Pharmacy Act, however, on account of being remustered as "unqualified Pharmacist" he was granted a lower pay-scale in comparison to those employees, who were also holding similar qualifications and for securing uniformity of pay-scale, since when he continues to work in the Medical Wing in the same pay-scale, however, he raised his grievance by preferring his representation of December 1, 1986 and sent several reminders and finally he was granted the pay-scale of "qualified compounder" by order dated 24.7.1996 but he was not granted the benefit from the date, when he was remustered (promoted) vide order dated 24.7.1996, although some of the similarly situated Constables/Pharmacists were extended the benefit of grant of fixation of pay-scale of "qualified compounder" (ASI Pharmacists) w.e.f. the date of their remusterment in the year 1983.

5. The present writ Appellant had challenged the action/inaction of the authorities of the Border Security Force by preferring a writ petition before the High Court and this Court had disposed of Writ Petition No. 1809/1996 on date 7.2.1997 by directing the Respondents to consider the claims of posting of employees as "qualified compounder" w.e.f. the date of remusterment and refixation of his pay, pursuant to which the BSF. Authorities had considered the representation and found the Appellant not eligible for grant of these benefit vide their order dated 2.4.1998 (Annexure P-29), which was challenged in the present Writ Petition No. 1115/1998, which came to be dismissed by the Writ Court vide its impugned order/judgment dated 15.12.2000.

6. We have heard Shri B.P. Singh and Shri Alok Sharma, learned Counsel for the writ Petitioner/Appellant and Shri D.K. Katare with Shri Arun Katare, learned Counsel for the Respondents and have carefully perused the entire record of the case, available in the writ record.

7. The contention of the learned Counsel for the Petitioner-Appellant is that Clause (c) of Section 31 of the Pharmacy Act provided for a lawful entry of an individual in the Register of the Pharmacy Council, who has passed an examination, which is recognized as adequate examination by the State Government for compounders or dispensers and since the writ Appellant has passed the Compounder's Training Examination and the Pharmacy Council has registered him under Clause (c) of Section 31 therefore, he should be treated to be a "qualified compounder" for the purposes of the Departmental Circulars and the Recruitment Rules, for extending benefit for the concerning pay-scale, from the date, he was remustered in the Cadre as "Pharmacist".

8. Shri B.P. Singh, learned Counsel for the writ Appellant further submits that the Respondents have materially erred in initially remustering the Appellant as "Unqualified Pharmacist" as also in subsequently remustering him as "qualified compounder" by not extending the benefit from the date of remustering, for no good or sound reasons. He submits that similarly situated employees had been granted benefit from the date of their remusterment, therefore, the employer could not take a different stand in the case of the writ Appellant or play hostile discrimination, in an arbitrary manner.

9. Shri D.K. Katare, learned Counsel appearing for the Respondents has submitted that Section 31 lays down a clear distinction and clearly provides for the categories of persons, who could seek registration in the Pharmacy Council, based upon their qualifications and since the writ Appellant does not fulfill the qualifications and the criteria, provided in the Pharmacy Act and the Recruitment Rules, therefore, his claim for being classified as a "qualified Pharmacist" was rightly rejected by the competent authority, which do not call for any interference at the hands of the High Court.

10. Shri Katare has further submitted that initially the guidelines dated 27.9.1974 were in force, which were certainly providing for some lesser

qualifications but after the coming into force of the new set of guidelines w.e.f. March 1, 1983, the writ Appellant was having no case at all, for being classified as a "qualified Pharmacist" as the same were providing for specified qualifications/courses and since the Appellant was not possessing either of the qualifications, he was not entitled for being granted the desired relief.

11. A careful examination of the provisions contained in Clause (c) of Section 31 clearly reveal that the Legislature has permitted registration of those individuals as a "Pharmacist" who holds Degree or Diploma of a University and those who had been working as compounders and dispensers and persons engaged in the compounding of Drugs, but Clause (c) of Section 31 specifically deals with such examination which is provided as "adequate" by the State Government for the existing compounders and dispensers and not for those who had undergone Training of a Compounder for the "First Time" and as such the very registration of the writ Appellant as "Pharmacist" appears to be contrary to the spirit and scope of Section 31 of the Pharmacy Act, because firstly the training or the examination, which the Appellant has undertaken, has not been prescribed by the Central Government or the State Government to be the "adequate" examination without which Clause (c) would not have its independent application to the individuals who are neither compounders nor dispensers and secondly, prior to completion of "Compounder Training" the employee was admittedly working as a Constable in the establishment of the Border Security Force and only upon passing of less than one years" training, and registration with the Pharmacy Council, he was re-mustered in the Medical Wing of Border Security Force. Therefore, mere registration with the Pharmacy Council, even at the initial stage was not advancing the case of the writ Petitioner/Appellant, for attracting application of the benefit of considering him as a "qualified pharmacist" and as such from this analysis of the matter, we do not find that any factual or legal mistake has been committed by the Respondents in rejecting the claim of the writ Petitioner/Appellant.

12. The contention of learned Counsel for the Appellant regarding application of the old guidelines and non-application of the New Recruitment Guidelines (Rules) made effective since March 1, 1983 appears to be unconvincing, in as much as the guidelines dated 27.9.1974 were also providing for somewhat similar qualifications and laying down almost identical eligibility criteria, which the writ Petitioner/Appellant was not fulfilling either at the time of consideration of his claim for the first time or at the time when his representation came to be disposed of by the impugned order. For ready reference the eligibility criteria prescribed in the old guidelines and the new recruitment guidelines are mentioned herein below:

Old Guidelines (Year 1974) Scale of Pay Qualifications 1. Rs. 330-10-380-EB- For fully qualified pharmacists, i.e., those 12-500-EB-15-560 possessing qualifications mentioned in Sections 31 and 32 of the Pharmacy Act by Clause (d) of Section 31 *ibid*.

2. Rs. 330-8-370-10- For unqualified pharmacists, i.e., those 400-EB-10-480 covered by Clause (d) of Section 31 of the Pharmacy Act of possessing registerable qualifications under this clause.

New Guidelines (Year 1983) 3. Pharmacist General Rs. 330- Not Between 20 i) Matriculation or (qualified) Central 10-380- appli- to 30 years equivalent ASI Service EB-12- cable (Relaxable for ii) Degree or Dipoma Group 500 -EB- Government or Diploma in "C" (Non 15-560 service upto pharmacy granted by Gazetted 35 years in an institution of the Non- accordance Central or State Govern- Ministeri- with the ment or an institution al) instructions or recognized by the orders issued Central or State Govern- by the Central ment. Government iii) Passing qualification u/s 31 and 32 of the Pharmacy Act, 194H and registered under Section 33 of the said Act.

4. Pharmacist -do- Rs. 330- -do- -do- i) Matriculation or (unqualified) 8-370- equivalent. ASI 10-456- ii) Qualification speci- EB-10- fied in Clause (d) of 480 Section 31 of the Pharmacy Act, 1948 and registered under Section 33 of the said Act.

13. An argument about the non-publication of the New Recruitment Rules in the Official Gazette has also been seriously and vehemently argued on behalf of the writ Petitioner/Appellant that since the new rules were prescribing for the necessity of its publication in the Official Gazette and no proof of its publication in the Gazette has been placed on record, therefore, an adverse inference may be drawn about its non-publication and consequently the old rules may be applied for deciding the issues projected in the present matter, without adjudicating the effect of the promulgation of the New Recuitment Rules of Year 1983. This argument prima facie appeared to be attractive at its first blush and the learned Counsel for the writ Petitioner/Appellant has correctly demonstrated that there exist the legal necessity of publication of these rules in the Gazette. The text of the Notification date March 1,1983 also clarifies in Rule (1)(b) of the BSF (Group "C" combat and para Medical Staff) Recruitment Rules, 1983, the Government of India, while issuing Notification, in terms of Section 141 of the Border Security Force Act, 1968 has mentioned that the rules shall come into force on the date of their publication in the Official Gazette. A perusal of the Board Security Force Act, 1968 and particularly Section 141 of this Act, specially provide that the Recruitment Rules shall come into force only when they shall be published in the Official Gazette and since neither the writ Petitioner or the Respondents have placed on record the details of the publication of the Recruitment Rules in Gazette, this Court finds it difficult to believe that the rules were ever published in the gazette. Consequently this Court finds that in absence of a proof of the publication of the Recruitment Rules, 1983 in the Official Gazette, no definite findings can be arrived at about the application of the 1983 Rules and similarly no claim could be adjudicated upon, on the strength of these Recruitment Rules of 1983, which could not be ever published in the Official Gazette. Therefore, the case of the writ Petitioner/Appellant is being tested at

the touchstone of the Old Guidelines of Year 1974, for appreciating the merits of the matter.

14. The Recruitment Guidelines of Year 1974 provide for the two distinct pay-scales, based upon the registration of the pharmacists in Clauses (d) alone and not under Clause (c) of Section 31 of the Pharmacy Act, wherein those fully qualified pharmacists possessing qualifications mentioned in Sections 31 and 32 were granted pay-scale of Rs. 330-560 and those who were unqualified Pharmacists, having registerable qualifications under Clause (d) of Section 31, were granted pay-scale of Rs. 330-480, with the further qualification of being classified as "qualified Pharmacist" and unqualified Pharmacist" respectively and no pay-scale was provided in relation to those individuals who were possessing "Compounder Training Certificate" in alleged terms of Clause (c) of Section 31 of the Pharmacy Act and since this classification was ordered as per the recommendation of the third Pay Commission, the same was communicated to the Medical Officer, which has been demonstrated before us to the Old Guidelines or Old Recruitment Rules, applicable to the "compounders" who were remustered in the Medical Wing for the Border Security Force, but we fail to understand and appreciate this logic/submission of the counsel for the Appellant, as to how the Guidelines of Year 1974, applicable to the two sets of employees/pharmacists, registered under Clause (d) of Section 31 would ensure to the advantage of the employees, registered under Clause (c) of Section 31 of the Pharmacy Act, in absence of Guidelines/Instructions or Recruitment Rules providing for the extension of benefit of same pay-scale or a higher pay-scale to the employees (Pharmacists) registered under Clause (c) of Section 31 of Pharmacy Act. Therefore, we have no hesitation in holding that letter dated September 17, 1974, described before us as the Old Guidelines of Year 1974, would have no application to the employees/pharmacists, who hold registration under Clause (c) of Section 31 as the pay-scale of Rs. 330-560 and Rs. 330-480 have been made applicable to only such Pharmacists who hold their registration under Clause (d) of Section 31 and not under Clause (c) of section of the Pharmacy Act and since the Appellant holds a registration under Clause (c) of Section 31, he would not be governed by the Guidelines of Year 1974. Therefore, only upon completing a period of five years as a Trained Compounder, the Appellant would be entitled to be entered in the "first register", in terms of Section 32 of the Pharmacy Act.

15. The counsel for the Union of India had disclosed before the Writ Court that soon upon completion of ten years" service, the writ Petitioner/Appellant had been given the higher pay-scale and the same submission has been reiterated before this Court, to demonstrate that while rejecting the representation of the writ Appellant, the Union of India has not committed any factual or legal error, in extending the benefit of higher pay-scale to the Appellant only after his completing ten years" service, in terms of the Recruitment Rules. This shows that the writ Petitioner/Appellant has been correctly given the pay-scale from the proper date, when the employer found him eligible, as per the Recruitment Rules and as such no fault could be found in the logic or in the application of the

provisions of the Recruitment Rules by the Union of India, while rejecting the representation of the writ Appellant by its order dated 2.4.1998 (Annexure P-29).

16. The learned Writ Court has very meticulously examined the factual and legal aspect of the matter and has correctly adjudicated the merits of the matter and in view of the aforesaid discussion; we find no factual or legal error, in the final order/judgment passed by the Writ Court. Consequently the writ appeal preferred by the writ Petitioner/Appellant is hereby dismissed. There shall be no order as to costs.