

(2016) 04 KL CK 0007

In the High Court Of Kerala

Case No : W.A. No. 694 of 2016 in WP(C) 4957/2016 and W.P.(C) No. 12152 of 2016

Manju K.S. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 04-04-2016

Acts Referred:

Constitution of India, 1950 — Article 141
Kerala Medical Officers Admission to Post Graduate Courses under Service Quota Act, 2008 — Section 5(4), Section 6

Citation : (2016) 2 KLT 562

Hon'ble Judges : Ashok Bhushan, C.J. and A.M. Shaffique, J.

Bench : Division Bench

Advocate : T.B. Hood, M. Isha and Amal Kasha, Advocates C.R. Syam Kumar, Senior Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Ashok Bhushan, C.J.

1. The writ appeal and the writ petition raising same questions of facts and law have been heard together and are being decided by this common judgment. For deciding both the cases, it is sufficient to refer to the facts of W.P. (C) No. 4957 of 2016 giving rise to W.A. No. 694 of 2016. The parties shall be referred to as described in the writ petition.

2. The petitioners are working as medical officers in Health Service Department of Government of Kerala. They are aspirants for admission to Medical Post Graduate Degree/Diploma Courses, 2016 in service quota. The Prospectus for admission to Postgraduate Courses, 2016 was issued by the Director of Medical Education as approved by Government order dated 10.12.2015. Clause 7.1.3 provided for award of weightage marks for difficult rural areas and rural areas for candidates in service quota. Clause 7.1.3 as notified in the Prospectus is as follows:

"7.1.3. Preparation of Seniority list under Health Service Quota:- The merit list for candidates in service quota under HSQ will be prepared by the CEE after awarding due weightage marks for Difficult rural Service and Rural service, put in by the candidates qualifying the examination. Rural Service. In determining the merit in the Entrance test for PG admission weightage in the marks will be given as an incentive at the rate of 5% of marks obtained for each year in service in Rural area upto a maximum of 30% of the marks obtained.

Doctors working in approved Casualty Units in the Government Hospitals are also eligible for claiming Rural Service Quota.

Difficult Rural Service: In determining the merit in the Entrance test for PG admission, weightage in the marks will be given as an incentive at the rate of 10% of marks obtained for each year in service in Difficult Rural area upto a maximum of 30% of the marks obtained.

The list of Government Allopathic Medical institutions designated as Rural stations in Kerala is as mentioned in the Standardised list of Government Allopathic Medical Institutions 2013 prepared by Health Information Cell (DHS) and approved vide GO. (ms) No. 443/2013/H&FWD dated 16.11.2013. The list of Government Allopathic Medical Institutions in Different Rural Areas in Kerala is as mentioned in G.O. (MS) No. 55/2014/H&FWD dated 15.02.2014 (Annexure XI)."

3. The State Government issued an order dated 04.01.2016 deleting the weightage marks which were earlier provided in clause 7.1.3 for rural service and it was provided that weightage shall be applicable in the case of Doctors who are working in difficult rural areas only. The Government order was issued referring to the judgment of the Apex Court dated 12.01.2015 in Sudhir N. and Others v. State of Kerala and Others [, (2015) 6 SCC 685] and the judgment of the Division Bench of this Court dated 28.05.2015 in W.A. No. 803 of 2015 (Dr. Abhilash Kumar M.P. v. State of Kerala). The writ petitioners who had more than 3 years rural service to their credit aggrieved by the Government order dated 04.01.2016 filed W.P. (C) No. 4957 of 2016. The petitioners in the writ petition prayed for the following reliefs:

(i) Issue a writ of certiorari or any other appropriate writ, order or direction calling for the records relating to Ext. P6 Government Order and quash the same to the extent it modifies Clause 7.1.3 of Ext. P5 prospectus deleting the weightage for rural service.

(ii) Declare that amendment of Ext. P5 prospectus as per Ext. P6 Government Order to the extent it modifies Clause 7.1.3 of Ext. P5 prospectus deleting the weightage for rural service, is arbitrary, illegal and unreasonable.

(iii) Declare that action of the respondents in restricting weightage to the service in difficult rural area and excluding the service in rural area is arbitrary and against Section 6 of the Kerala Medical Officers' Admission to post Graduate Medical Courses under Service Quota Act, 2008.

(iv) Issue a writ in the nature of mandamus or any other appropriate writ, order or direction commanding the respondents 1 to 4 to select the candidates for Medical Postgraduate Course under Health Service Quota in accordance with the provisions in Clause 7.1.3 of Ext. P5 prospectus.

4. The learned Single Judge who heard the writ petition held that order dated 04.01.2016 was issued by the Government amending clause 7.1.3 on the basis of the judgment of the Apex Court as well the Division Bench of this Court. Hence, the writ petition is to be dismissed. Aggrieved by the judgment of the learned Single Judge dated 11.02.2016, W.A. No. 694 of 2016 has been filed.

5. W.P. (C) No. 12152 of 2016 has also been filed by three in-service candidates, who claim that they have more than 5 years rural service under the Health Service Department to their credit. The petitioners also aggrieved by the Government order dated 04.01.2016 have prayed for the same relief as was claimed in W.P. (C) No. 4957 of 2016. On the request of learned Senior Counsel for the petitioners in W.P. (C) No. 12152 of 2016, the writ petition was called and heard along with W.A. No. 694 of 2016.

6. Sri. K. Gopalakrishna Kurup, learned Senior Counsel appeared for the petitioners in W.P. (C) No. 12152 of 2016, Sri. T.B. Hood, learned counsel appeared for the appellants in W.A. No. 694 of 2016, Sri. Titus Mani Vettom appeared on behalf of the Medical Council of India and Sri. C.R. Syam Kumar, learned Senior Government Pleader appeared for the State.

7. Learned Senior Counsel appearing for the petitioners contended that the Prospectus having been issued providing weightage for rural area service in clause 7.1.3, it was not open for the Government to delete the weightage for rural area service confining it only to difficult rural area service. After issuance of the Prospectus, the rules of game cannot be changed midway. He further submitted that judgment of the Apex Court relied in the Government order dated 04.01.2016 i.e. Sudhir N's case (supra) has no relevance with regard to weightage to be given to in-service candidate. The Division Bench judgment in Abhilash Kumar's case (supra) referred to in Government order where the Division Bench had laid down that in-service candidates are entitled to weightage only for remote/difficult area service, needs reconsideration.

8. It is contended that Apex Court in *Christian Medical College, Vellore v. Union of India and others* [, (2014) 2 Supreme Court Cases 305] has quashed Regulation 9 of Post Graduate Medical Education Regulations, 2000 (hereinafter referred to as, the 2000 Regulations). Regulation 9 was thus not available to hold that weightage for rural area as provided in Section 6 of the Kerala Medical Officers' Admission to Postgraduate Courses under Service Quota Act, 2008 (hereinafter referred to as, the 2008 Act) cannot be relied on. It is contended that earlier, the Division Bench in *Fenny, K.P. (Dr.) and another v. State of Kerala and others* [, ILR 2014 (3) Kerala 361] has held that due to the quashing of Regulation 9 by *C.M.C. Vellore's* case (supra), Regulation 9 is no more in

existence, whereas the Division Bench in Abhilash Kumar's case (supra) apparently has expressed its concurrence with the said view, but has taken a contrary view that proviso to Regulation 9 was surviving and the only provision for giving weightage to in-service Doctors is Regulation 9. He contended that the conflict between the observation made in Fenny K.P.'s case (supra) and in Abhilash Kumar's case (supra) needs to be resolved by a Larger Bench.

9. The learned Government Pleader submits that the Division Bench of this Court in Abhilash Kumar's case (supra) was directly concerned with the issue which is sought to be raised in the present writ petition. It is submitted that with regard to 2015 Postgraduate Medical Education, in-service candidates have filed writ petition challenging the Government order dated 16.03.2015, by which the Government had deleted the weightage for rural service, which was earlier provided in the Prospectus. The learned Single Judge had allowed the writ petition and quashed the Government order dated 16.03.2015, against which, writ appeal was filed by Abhilash Kumar M.P. The Division Bench of this Court had allowed the appeal and held that in-service candidates are only entitled to the weightage for remote/difficult rural area service and they are not entitled to the weightage for rural area service. Against the judgment of the Division Bench in Abhilash Kumar's case (supra), S.L.P. (C) has also been dismissed.

10. Learned Senior Government Pleader further contended that when the Prospectus was issued, in clause 7.1.3, under mistake, the weightage was shown both, for remote/difficult rural area and rural area, whereas under the judgment of the Apex Court and the Division Bench, by which the State was bound, weightage ought not have been shown for rural area. Hence, the State immediately corrected clause 7.1.3 providing weightage only for remote/difficult rural area. Therefore, no exception can be taken to the Government order dated 04.01.2016. It is contended that all the submissions which are sought to be raised in the present case for giving weightage to rural area service were considered in detail in Abhilash Kumar's case (supra) and the Division Bench having negatived the said contention, the same cannot be allowed to be raised and the present writ petition is fully covered by the Division Bench judgment of Abhilash Kumar's case (supra).

11. Learned counsel for the Medical Council of India refuting the submission of learned Senior Counsel for the petitioners contends that weightage has to be given only to the candidates working in remote/difficult rural area as per the MCI regulations. The judgment of Abhilash Kumar's case (supra) covers the issue.

12. We have considered the submissions of learned counsel for the parties and perused the records.

13. The only issue which arises for consideration is that whether the State was justified in issuing the Government order dated 04.01.2016 amending clause 7.1.3 of the Prospectus by deleting the weightage which was provided in the Prospectus for rural area service and confining the weightage only to remote/

difficult rural area service. The submission of the petitioners is that the Government had no jurisdiction to amend the Prospectus after it has been issued. Present is a case where the Government have corrected its mistake in clause 7.1.3 by issuing the Government order dated 04.01.2016. The Government order dated 04.01.2016 refers to the judgment of Sudhir N's case (supra) and the Division Bench judgment of Abhilash Kumar's case (supra). It is necessary to look into the Government order dated 04.01.2016 (Ext. P6) which is relevant for the present case. In the Government order dated 04.01.2016, the following was stated:

"The Director of Medical Education as per letter read as 5th paper above has requested to modify clause 7.1.3 of the Medical Post Graduate prospectus deleting the weightage prescribed for Rural service as the said clause is against the verdict dated 12.1.2015 of the Hon'ble Supreme Court and judgment dated 28.5.2015 of the Hon'ble High Court in W.A. No. 03/15 and connected cases.

As per the verdict of the Hon'ble High Court dated 28.05.2015, service weightage is applicable in the cases of Doctors who are working in the Difficult Rural Areas only. The Hon'ble High Court had upheld the G.O. (Rt.) No. 847/2015/H7FWD dated 11.3.2015 issued in compliance to the direction of the Hon'ble Supreme Court limiting the weightage to the candidates of the Difficult Rural Service only.

In the above circumstances, Government are pleased to modify the clause 7.1.3 of the prospectus deleting the weightage of 5% of marks obtained for each year of Rural Service up to a maximum of 30% of obtained. The weightage given to Doctors working in approved casualty units in the Government Hospitals considering the same at par with rural service is also withdrawn.

The Director of Medical Education, Director of Health Services and the Commissioner For Entrance Examination shall initiate further steps in accordance with the above modifications made to Medical Post Graduate Prospectus 2016-17."

14. Now the judgment of the Apex Court and Division Bench of this Court referred to in Government order dated 04.01.2016 needs to be noted.

15. Sudhir N's case (supra) arose out of the Division Bench judgment of this Court in Mohammed Riaz v. State of Kerala [, 2011 (2) KLT 294]. The in-service candidates filed the writ petition challenging Section 5(4) of the 2008 Act which provided for admission to postgraduate course on the basis of seniority of in-service candidates. The Division Bench of this Court although had held that Section 5(4) was beyond the legislative competence of the State, the Division Bench adopting a re-conciliatory attitude held that those in-service candidates who secured 50% marks in entrance examination shall be admitted on the basis of seniority. The matter was taken by the in-service candidates in appeal before the Supreme Court. The Apex Court approved the view of the Division Bench that Section 5(4) is beyond the legislative competence of the State. The Apex Court

further held that the admission to postgraduate course has to be on the basis of merit. The Apex Court had also observed that the admission is to be held in accordance with the Regulation 9 and in terms of third proviso to Regulation 9, weightage for service rendered in remote/difficult area is also permissible. After referring to Regulation 9 of the 2000 Regulations as framed by the MCI, the following was stated in paragraphs (14) (relevant portion) and (15):

" The above leaves no manner of doubt that admissions to post - graduate medical courses have to be made only on the basis of academic merit of the candidates. It is clear from sub-regulation (2) (supra) that for determining the "academic merit" the university/institution can adopt any of the methodologies stipulated therein. In terms of proviso (1) to Regulation 9, general category candidates must secure 50% marks while those belonging to SC/ST and other backwards classes are required to secure at least 40% marks in the entrance test in order to be eligible for admission. In terms of the third proviso to R. 9 (supra) weightage for service rendered in remote and difficult areas is made permissible at the rate of 10% of the marks obtained for each year in service in remote or difficult areas upto a maximum 30% of the marks."

15. Regulation 9 is, in our opinion, a complete code by itself inasmuch as it prescribes the basis for determining the eligibility of the candidates including the method to be adopted for determining the inter se merit which remains the only basis for such admissions. To the performance in the entrance test can be added weightage on account of rural service rendered by the candidates in the manner and to the extent indicated in the third proviso to Regulation 9. Suffice it to say that but for the impugned legislation making an attempt to change the basis on which admissions can be made, such admissions must, in all categories, be made only on the basis of merit as determined in terms of the provision extracted above. That method, however, is given a go - bye by the impugned legislation when it provides that in - service candidates seeking admission in the quota reserved for in - service doctors shall be granted such admission not on the basis of one of the methodologies sanctioned by R. 9(2) of the Rules but on the basis of inter se seniority of such candidates. The question is whether the State was competent to enact such a law. Our answer to that question is in the negative. The reasons are not far to seek."

16. From the observations made by the Apex Court in the above mentioned paragraphs, it is clear that weightage for rural service rendered by the candidates has to be extended as indicated in the third proviso to Regulation 9. The third proviso to Regulation 9 provided as follows.- "Further provided that in determining the merit and the entrance test for post graduate admission weightage in the marks may be given as an incentive at the rate of 10% of the marks obtained for each year in service in remote or difficult areas upto the maximum of 30% of the marks obtained". Thus, the Apex Court while deciding the criteria to be adopted for admission of in-service candidates in postgraduate courses has made the above observation which is the law declared by the Apex

Court and was clearly binding on the State of Kerala.

17. The State of Kerala committed a mistake in issuing the Prospectus i.e. clause 7.1.3 providing weightage for rural areas also which was in teeth of the aforesaid judgment. Hence, no error was committed by the State Government, immediately rectifying the mistake by issuing Government order dated 04.01.2016. Further in the Division Bench judgment of this Court in Abhilash Kumar's case (supra), the same issues which are sought to be raised in the present writ petition were raised. In the aforesaid case, with regard to Medical Postgraduate Admission, 2015, Prospectus was issued by the State wherein the weightage for in-service candidates was shown. Clause 7.1.3 of 2015 Prospectus contemplated weightage both for remote/difficult area service and for rural area service. Clause 7.1.3 was modified by the Government providing weightage marks for rural service, put in by the candidates qualified for the entrance examination.

18. Another Government order dated 11.03.2015 was issued where the Government have clarified that as per direction of the Apex Court in Sudhir N's case (supra), the Government intended to provide weightage only to difficult rural area, but, it was wrongly mentioned as rural area. Hence, the Prospectus is corrected as providing weightage for "difficult rural area". The Government order dated 11.03.2015 was challenged by the writ petitioners contending that the same was bad and the benefit of weightage for rural service cannot be denied. The learned Single Judge allowed the writ petition and held that weightage could be given to both rural area and difficult rural area, which judgment was challenged in W.A. No. 949 of 2015 (Dr. Abhilash Kumar M.P. v. State of Kerala). The Division Bench after considering the submission of the parties relying on Sudhir N's case (supra) held that weightage is to be provided only to difficult rural area service as per Regulation 9. In paragraphs (63), (64) and (65), the following was held:

"63. Now we come to Government Order dated 11.03.2015. The Government Order as extracted above, provides that the Government came to the conclusion that intention of the Supreme Court Judgment in Sudhir N's case (supra) was to give weightage only to remote or difficult area whereas its earlier order dated 03.02.2015 had extended the benefit to rural service. The Government Order corrected the said mistake and issued modification providing weightage only to remote area and difficult area. Government Order dated 11.03.2015 had been issued to correctly implement the ratio of judgment of the Supreme Court in Sudhir N's case (supra). The Government Order dated 11.03.2015 was clearly in conformity with Regulation 9 proviso of the 2000 Regulation. The fact that 03.02.2013 is not in accordance with the Regulation 9 third proviso and not in accordance with the ratio of the judgment in Sudhir N's case (supra) the Government was not denuded with its power to correct the mistake so as to obey the binding precedent under Article 141 of the Constitution of India. In this context another submission that the Government Order dated 11.03.2015

permits change of Rules of game after examination was over shall be separately hereinafter be considered.

64. The State is well aware of both the rural service and difficult service. In the prospectus itself in paragraph 7.1.3 the Government had referred to the list dated 16.11.2013 of the Government Medical Institutions of rural service whereas another Government Order dated 15.12.2014 was appended along with the prospectus which contained the details of the Medical Institutions in difficult rural areas in Kerala. Thus, both the stations, rural stations and difficult rural stations were identified and notified. Regulation 9 proviso entitles both the remote or difficult area/difficult rural area as Notified by the State Government on 15.12.2014 are fully eligible for weightage as per the proviso to Regulation 9.

65. In view of the forgoing discussion our answer to issue Nos. I to V are as follows:

(i) The proviso to Regulation 9 of 2000 Regulation providing for award of marks to the rural or difficult area of service is still continuing even after striking down Regulation 9 by the Apex Court in Christian Medical College, Vellore's case (supra).

(ii) The state cannot rely on Section 6 of the 2008 Act for giving weightage marks to in service candidates serving in rural areas.

(iii) For admission to in-service candidates award of marks is entitled to be given to Doctors serving in remote or difficult area only and no weightage is to be given to Doctors serving in rural areas.

(iv) The Government Order dated 11th March, 2015 was fully justified it having implemented the judgment of the Apex Court in Sudhir N's case (supra) and being in conformity with proviso to Regulation 9 of the 2000 Regulations.

(iv) The law laid down by the Apex Court in Sudhir N's case (supra) is a binding precedent and is a declaration of law on proviso to Regulation 9 of the 2000 Regulation weightage of marks is to be given to in service candidates serving in remote or difficult areas."

19. The State being a party to the said judgment and having not appealed against the Division Bench judgment in Abhilash Kumar's case (supra) was obliged to follow the direction confining to the weightage to difficult rural area only and a mistake was committed in clause 7.1.3 of the Prospectus when the weightage was provided for both rural area and remote/difficult rural area, which was subsequently corrected on 04.01.2016.

20. The submission which has further been pressed by learned Senior Counsel for the petitioners is that in C.M.C. Vellore's case (supra), the Supreme Court has already quashed Regulation 9. An earlier Division Bench in Fenny K.P.'s case (supra) has taken the view that even the earlier Regulation which was existing prior to 21.10.2010 shall not revive, including the proviso added by notification

dated 15.02.2012, there was no criteria for admission laid down by Medical Council of India and the State was free to fix any criteria. It is contended that in the judgment of Abhilash Kumar's case (supra), the Division Bench has held that the third proviso providing weightage shall not be treated to have been quashed by C.M.C. Vellore's case (supra). Hence, there is apparent conflict between the aforesaid two judgments i.e. Fenny K.P.'s case (supra) and Abhilash Kumar's case (supra), and the matter needs to be referred to a Larger Bench for consideration.

21. In Abhilash Kumar's case (supra), the Division Bench of this Court has also specifically taken note of the judgment of the Apex Court in C.M.C. Vellore's case (supra) and held that in C.M.C. Vellore's case (supra), the Apex Court shall be deemed to have quashed the notification as extracted in paragraph (11) confining to NEET. The same view has been taken by us in the judgment dated 01.04.2016 in W.A. No. 660 of 2016 (Aarif Latheef v. State of Kerala) and other connected appeals that the Apex Court in C.M.C. Vellore's case (supra) has quashed only that part of the notification which was quoted in paragraph (11) of the judgment confining to holding of Common Entrance Examination by the Medical Council of India and other parts of Regulations were not struck down.

22. It is relevant to note that Fenny K.P.'s case (supra) was not directly concerned with the question of weightage to in-service candidates of rural or remote/difficult rural area, whereas the question which is directly in issue in the present cases was in issue in Abhilash Kumar's case (supra), which was considered and decided.

23. As noted above, the Apex Court in Sudhir N's case (supra) has already laid down that weightage for in-service candidates for postgraduate admission has to be extended as per third proviso to Regulation 9. The relevant paragraphs of the Apex Court judgment i.e. paragraphs (14) and (15) have already been extracted above. In view of the clear pronouncement of the Apex Court regarding applicability of weightage as per proviso 3 to Regulation 9 i.e. weightage only for remote/difficult area, we see no necessity in the present case to make a reference to a Larger Bench with regard to any contradictory observations regarding existence of Regulation 9. We further note that the submission that Sudhir N's case (supra) does not lay down the correct law and is per incuriam since it does not notice C.M.C. Vellore's case (supra) has also been considered and repelled by our judgment dated 01.04.2016 in Aarif Latheef's case (supra).

24. The issue thus been directly covered by the judgment of the Apex Court in Sudhir N's case (supra) that weightage has to be given to third proviso to Regulation 9 i.e. only for remote/difficult area, we see no ground to interfere with the Government order dated 04.01.2016 and the judgment of the learned Single Judge dated 11.02.2016.

In view of the foregoing discussions both, the writ appeal and the writ petition are dismissed.