

(2016) 03 KL CK 0030

In the High Court Of Kerala

Case No : R.P. No. 176/2016 (E) in W.P. (C). No. 39448/2015 and R.P. No. 201/2016 in W.P. (C). No. 3504/2016

R. Ratheesh

APPELLANT

Vs

Asha K. John

RESPONDENT

Date of Decision : 04-03-2016

Acts Referred:

Kerala Medical Officers Admission to Post Graduate Courses under Service Quota Act, 2008 — Section 3, Section 5, Section 5(1), Section 5(4), Section 9

Citation : (2016) 03 KL CK 0030

Hon'ble Judges : A. Muhamed Mustaque, J.

Bench : Single Bench

Advocate : George Poonthottam, Advocate, for the Appellant; T.B. Hood, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A. Muhamed Mustaque, J.—1. The review petitions are filed by the parties who were not originally arrayed in the writ petitions. They have been granted leave by this Court to file review petitions. Accordingly, these review petitions are filed. The issue in the writ petitions as well as in the review petitions has arisen in the context of admission to the post graduate medical course from the quota earmarked for in-service candidates.

2. Before proceeding with the scope of review, it is appropriate to refer to the method of selection of Medical Officers for admission to post graduate courses under the service quota. The State enacted the Kerala Medical Officers' Admission to Post Graduate Courses Under Service Quota Act, 2008, (Act 29/2008). The Act stipulates that the selection of Medical Officers for admission to Postgraduate Course of study in the State shall be made under the service quota only under the provisions of the Act (Section 3). Section 5 of the Act provides procedure for selection. Section 5(1) reads as follows:

"5. Procedure for selection:—(1) The Government may set apart seats not

exceeding forty per cent of the total seats available to State quota in an academic year, for selection of Medical Officers under service quota considering their service under the Government for admission to Postgraduate Medical Courses in the Medical Colleges of the State in such manner as may be prescribed."

By virtue of Section 5(1), it is for the Government to decide the manner in which selection among Medical Officers have to be made.

3. Section 5(4) prescribes the norms on which selection list has to be prepared. Section 5(4) is as follows:

"5(4) The Postgraduate Course Selection Committee shall finalise the selection list strictly based on the seniority in service of the Medical Officers and following such other criteria as may be prescribed."

The above provision indicates that the selection norms shall be based on the seniority in service.

4. By virtue of the powers conferred under Section 9 of the Act, the Government framed the Kerala Medical Officers' Admission to Post Graduate Courses Under Service Quota Rules - 2010. Rule 4 prescribed procedure for selection of candidates under Service Quota. Rule 4(iii) prescribes minimum period of service which reads as follows:

"4(iii) The Minimum period of service under Government of Kerala to become eligible to apply for Service Quota shall be--

(a) 2 years for Lecturers in Medical Education Service in the concerned discipline; and

(b) 5 years for other State services."

This prescription would show that the Government has fixed a minimum eligibility to apply for service quota.

5. However, the Government also relaxed the minimum service as eligibility, in case, sufficient number of service candidates are not available. Rule 4(5) provides as follows:

"5(v) In case sufficient number of service candidates having 2 years and 5 years of minimum service as stated in sub-rule (iii) above are not available in any category, the period of minimum service can be relaxed by the Government, before the date of allotment."

6. Thus, it can be summed up that the eligibility prescribed under the procedure for candidates in service quota is 5 years and, if candidates are not available, the Government would consider the candidates, who are having two years or above. As seen from the above classification, a distinct and a separate class of service candidates have to be prepared for admission vis-a-vis 5 years and 2 years or above. The 2 years candidates would be selected only if there are no candidates

available under the 5 years category.

7. The Government issued a prospectus for admission to Medical Post Graduate Degree/Diploma Courses-2016 in tune with the Act and Rules. Thereafter, the prospectus was amended making minimum eligibility for applying as 2 years without there being a distinction between different classes eligible for admission among service quota. The relevant clause amending service quota eligibility conditions is as follows:

"7-1.1 The eligibility criteria for the service quota are the same as laid down in Clause 4. The applicants under Service Quota should have completed a minimum period of 2 years on duty within a continuous period of 3 years under regular appointment in the concerned Department to become eligible to apply. Provisional service (under MES/DHS/IMS/MS) if any, before the regular appointment will not be considered."

8. The writ petitions were filed challenging the above clause on the ground that the clause as above is repugnant to the Act and Rules as the Government can prescribe eligibility criteria only in accordance with the Act and Rules framed thereunder. This Court disposed of W.P.(C). No. 39448/2015 on 07/01/2016 holding that the clause in the prospectus as above has to be read down as in the statutory provision and it need not be struck down. In para. 12 of the judgment, this Court held as follows:

"12. If eligibility is not read down in the light of Rule 4(v) it would be repugnant to the statutory provision. Going by the nature of power in terms of Rule 4(v) this can be construed as the minimum period of two years prescribed only for the purpose of allotment of candidates in terms of Rule 4(v) and not beyond that. Therefore, without striking down such provision, this Court is of the view that those candidates can be considered for allotment, if there are no candidates available who would satisfy the minimum 5 years of service under the State quota Health Service."

9. These review petitions are filed by candidates, who fulfill minimum two years experience and do not fulfill 5 years experience. Their argument is essentially based on the judgment of the Hon'ble Supreme Court in *Sudhir N. And Others v. State of Kerala And Others* [, (2015) 6 SCC 685] and also based on the MCI Regulations regarding Post Graduation. The learned counsel would argue that there cannot be any distinction between the candidates, based on the length of service and they would all form part of one class and thus, merit alone can be the basis for admission inter se amongst the candidates.

10. It is appropriate to refer the judgment of the Hon'ble Supreme Court in *Sudhir's* case supra. A challenge was made before this Court by certain candidates regarding Section 5(4) of the Act 29 of 2008. The challenge was on the ground that Section 5(4) of the Act is repugnant to the Post Graduate Medical Education Regulations, 2000 as inter se merit is alone the criteria for admission. This Court had held that the candidates, who were aspiring for

admission to Postgraduate medical education should satisfy the minimum eligibility as prescribed by the MCI Regulations, then alone the inter se seniority can be applied. However, the Hon'ble Supreme Court reversed the judgment of this Court holding that merit alone can be the basis for admission and preparation of the rank list based on the seniority in the service is impermissible. It was further held that Section 5(4) was beyond legislative competency of the State Legislature and cannot hold the field when it is in clear breach of the MCI Regulations. Thus, it was held that admissions made only on the basis of inter se merit of the service candidates alone can be the criteria.

11. Thus, the learned counsel for the review petitioners would argue that merit among the service candidates alone could be the criteria from service candidates and the distinction made in the Rules, between 5 years and 2 years, has become obliterated consequent upon the declaration of law by the Hon'ble Supreme Court.

12. In *K. Duraisamy and Another v. State of T.N. And Others* [, (2001) 2 SCC 538] the Hon'ble Supreme Court held as follows:

"It is well settled that the Government possesses the right and authority to decide from what sources the admissions in educational institutions or to particular disciplines and courses therein have to be made and that too in what proportion. It is also settled that at the super-speciality level, in particular, and even at the postgraduate level reservations of the kind known as "protective discrimination" in favour of those considered to be backward should be avoided as being not permissible. Reservation, even if it be claimed to be so in this case, for and in favour of the in-service candidates, cannot be equated or treated on a par with communal reservations envisaged under Article 15(4) or 16(4)."

13. This Court is of the view that it is for the Government to decide the source of admission. If the Government makes a distinction based on intelligible differentia for such source, the Court cannot frown upon such decision. The Government has prescribed minimum eligibility as 5 years. There is no challenge against the prescription of 5 years as minimum eligibility. The Government thought it is befitting to consider only such candidates, who have put experience of minimum 5 years for admission at the first instance. The Government also have relaxed the minimum eligibility to 2 years or more, if there are no other candidates available from among 5 years service medical officers. What is decided in *Sudhir's* case (*supra*) is that when a candidate is selected from a separate source or class, there cannot be distinction among the candidates based on seniority and merit alone should be the criteria. The norms applied for selection from a particular class alone was under challenge in *Sudhir's* case. There was no challenge against the prescription of minimum length of 5 years as eligibility criteria. As per the Rules, 5 years eligibility is the criteria and relaxation is given only if seats have become vacant in service quota on account of want of service candidates, who fulfill 5 years experience. Thus, it can be seen that the candidates, who are aspiring admission in service quota and who have not

fulfilled 5 years service are not eligible at first instance. When a minimum service is fixed as eligibility, selection among such candidates can only be based on merit. In fact, this Court read down the prospectus in the light of the Act and Rules. The eligibility of the 2 years experienced candidates could be only considered, if there are vacancies after allotment to the 5 years candidates. They form distinct and separate class based on their eligibility. They cannot be equated with 5 years experience candidates to form a single class for the purpose of admission. The 2 years experienced candidate is a separate and distinct class for the purpose of admission. When the Act and Rules clearly indicates that admission can be made only in terms of the Act and Rules, in the absence of any challenge to such eligibility conditions, this Court can only read down the clause in the prospectus in terms of the Act and Rules.

14. The Sudhir's case (supra) only laid down the principles relating to applying the norms among the class for selection and not with reference to eligibility conditions. The norms of selection cannot be equated with eligibility conditions. The judgment in Sudhir's case would apply only if the candidates aspiring for admission in service quota forms into separate class. The admission among the class can only be based on merit as laid down in Sudhir's case and cannot be based on seniority as provided under Section 5(4), in the light of Sudhir's case. When Rules clearly distinguish the eligibility of two separate class and so long as Rules remain in statutory book, clause in the Prospectus can be read and understood only in terms of the Rules. Therefore, I do not find any merit in the review petitions, the review petitions are accordingly dismissed.