

(2013) 09 AHC CK 0191
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 45494 of 2013

Shyam Babu and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Citation : (2013) 10 ADJ 198 : (2013) 4 UPLBEC 3175

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Yogesh Agarwal and Rohitashwa Upadhyay, for the Appellant; Anurag Khanna and Sudeep Harkauli, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri Yogesh Agarwal, learned counsel for petitioners and learned Standing Counsel for respondents. Petitioners, who have obtained a training certificate of Dental Hygienist, have invoked this Court's jurisdiction under Article 226 so as to challenge vires of Rule 8 of U.P. Dant Swasthya Vigyani Aur Dant Mechanic Sewa Niyamawali, 1993 (hereinafter referred to as "Rules, 1993") with a further direction that the respondents be directed to allow petitioners to participate in the selection process for appointment to the post of "Dental Hygienist" for which an advertisement has been published on 8.1.2013.

2. The Rules, 1993 contain provisions relating to recruitment and conditions of services of "Dental Hygienist" and "Dental Mechanic", constituting Group-C services in the State of U.P. In view of Rule 5, recruitment is confined to open market direct recruitment. Rule 8 provides qualifications which reads as under:

English Translation by the Court:

8. The candidate must have secured a Certificate or Diploma in Dental Health or Dental Mechanics, as the case may be, from a recognised institution for direct recruitment to the posts in service and his/her registration is also required with the State Dental Council, Uttar Pradesh.

3. There is another provision, namely Rule 25 which confers upon State Government power of relaxation of the Rules, 1993 and it would also be relevant in the present case, hence, is reproduced as under:

English Translation by the Court:

25. Where the State Government is satisfied that the enforcement of any rule regulating service conditions of the persons appointed in the service may cause undue hardship in a particular matter, it may, by an order, exempt or relax the requirements of the said rule, notwithstanding anything existing in the rules applicable to the said matter, to such extent and subject to such conditions, as may be deemed necessary to proceed with the said matter in a just and equitable manner.

4. The profession of "Dentistry" is regulated by a Parliamentary Act, i.e., Dentist Act, 1948 (hereinafter referred to as "Act, 1948"). The term "Dentistry" has been defined in Section 2(d) and it includes within its ambit, the work and performance of a "Dental Mechanic" and "Dental Hygienist". Section 2(d) reads as under:

(d) "dentistry" includes-

(i) the performance of any operation on, and the treatment on any disease, deficiency or lesion of, human teeth or jaws, and the performance of radiographic work in connection with human teeth or jaws or the oral cavity;

(ii) the giving of any anesthetic in connection with any such operation or treatment;

(iii) the mechanical construction or the renewal of artificial dentures or restorative dental appliances;

(iv) the performance of any operation on, or the giving of any treatment, advice or attendance to, any person preparatory to, or for the purpose of, or in connection with, the fitting, inserting, fixing, constructing, repairing or renewing of artificial dentures or restorative dental appliances, and the performance of any such operation and the giving of any such treatment, advice or attendance, as is usually performed or given by dentists;

5. The terms "Dental Hygienist" and "Dental Mechanic" are also defined in Section 2(b) and (c) and reads as under:

(b) "dental hygienist" means a person not being a dentist or a medical practitioner, who scales, cleans or polishes teeth, or gives instruction in dental hygiene;

(c) "dental mechanic" means a person who makes or repairs denture and dental appliances;

6. There are few more definitions which are relevant for adjudication of this case and, hence, may be reproduced as under:

- (g) "prescribed" means prescribed by rules or regulations made under this Act;
- (j) "recognised dental qualification" means any of the qualifications included in the Schedule;
- (k) "recognised dental hygiene qualification" means a qualification recognised by the Council u/s 11;
- (l) "registered dentist", registered dental hygienist and registered dental mechanic shall mean, respectively, a person whose name is for the time being registered in a register of dentists, a register of dental hygienists and a register of dental mechanics.

7. The qualifications for "Dental Hygienist" is recognised in the manner as provided in Section 11 while that of "Dental Mechanist", it is provided in Section 12, which read as under:

11. Qualifications of dental hygienists.--Any authority in a State which grants a qualification for dental hygienists may apply to the Council to have such qualification recognised, and the Council may, after such inquiry, if any, as it thinks fit, and after consulting the Government and the State Council of the State in which the authority making the application is situated, declare that such qualification, or such qualification only when granted after a specified date, shall be a recognised dental hygiene qualification for the purposes of this Act.

(emphasis added)

12. Qualifications of dental mechanics.--The Council may prescribe the period and nature of an apprenticeship or training which shall be undergone and the other conditions which shall be satisfied by a person before he is entitled to be registered under this Act as a dental mechanic.

8. Section 13 talks of effect of recognition and Clause (b) thereof provides that no person after the first register is compiled under Act, 1948, be entitled to be enrolled in any register as "Dental Hygienist" unless holds a recognised dental hygiene qualification. For ready reference, Section 13 of Act, 1948 is reproduced as under:

3. Effect of recognition.--Notwithstanding anything contained in any other law, but subject to the provisions of this Act,-

(a) any recognised dental or dental hygiene qualification shall be a sufficient qualification for enrolment in the appropriate register of any State;

(b) no person shall, after the first registers are compiled under this Act, be entitled to be enrolled in any register as a dentist or dental hygienist unless he holds a recognised dental or dental hygiene qualification or as a dental mechanic unless he has undergone training which satisfies the prescribed requirements referred to in Section 12.

9. Section 20 confers power to make Regulations upon the Council, i.e., Dental

Council of India (hereinafter referred to as "DCI") constituted u/s 3, with the approval of Central Government.

10. Besides others, such qualifications as prescribed by DCI may also prescribe the standard curricula for training of "dentists" and "dental hygienists".

11. Here it may also be noticed that Section 21 read with Section 2(h) also contemplates constitution of a State Council, i.e., State Dental Council (hereinafter referred to as "SDC") which has to prepare and maintain a register of "Dentists", possessing recognised dental qualification in Part-A, and, those not possessing such qualification, in Part-B.

12. The first register at initial stage contained both the parts but subsequent registration is permissible only for those possessing recognised qualification i.e. in Part-A.

13. Similarly, a register of "Dental Hygienist" and a register of "Dental Mechanic" may also have to be maintained by it, if so directed by State Government, by notification in the Official Gazette, vide Section 36. Section 37 provides that only such persons shall be entitled for having names registered on the Register of "Dental Hygienist", if reside in the State and hold a recognised dental hygiene qualification. In respect of first Register of Dental Hygienist, however, an exception has been provided that a person shall be entitled to be registered, if he has been engaged as a "Dental Hygienist" as his principal means of livelihood, for a period not less than two years, prior to the date of Notification u/s 36(1). The effect of registration has been provided in Section 46 which is of utmost importance in the present case and reads as under:

46. Effect of registration.--(1) Any reference in any other law to a person recognised by law as a dentist shall be deemed to be a reference to a dentist registered under this Act.

(2) No certificate required by or under any other law from a dentist shall be valid unless the person signing it is registered as a dentist under this Act.

(3) After the expiry of three years from the date appointed under subsection (2) of Section 32, a person who is not registered in Part A of the State register of dentists shall not, except with the sanction of the Central Government or the State Government hold any appointment as dentist in any dispensary, hospital or other institution which is supported wholly or partially from public or local funds:

Provided that the provisions of this sub-section shall not apply to any such person who is holding such an appointment immediately before the said date.

(4) After the expiry of two years from the publication of a register of dental hygienists in a State, no person whose name is not entered in that register shall hold appointment as dental hygienist in any dispensary, hospital or other institution in the State which is supported wholly or partially from public or local funds.

(5) Any person who is a registered dentist, registered dental hygienist or registered dental mechanic in a State may practise as such in any other State.

(emphasis added)

14. The practice by unregistered person is a criminal offence vide Section 49 of Act, 1948.

15. It appears that State Government finding deficiency of competent and trained "Dental Hygienist" propounded a scheme for providing "Dental Hygienist" Training at its six State Medical Colleges, other than Dental College at Lucknow, vide Government Order dated 31.12.1996, pursuant whereunto, petitioner No. 1 underwent training at State Medical College, Allahabad, petitioner No. 2 at Gorakhpur and rest of three petitioners at Agra. When they applied for registration with SDC, since the aforesaid course run by the State Medical Colleges, was not approved by DCI, nor recognised under Act, 1948, petitioners could not be registered with "U.P. Dental Council". The matter about such trainees who had undergone Dental Hygienist Training in State Medical College, yet not eligible and competent to be registered with U.P. Dental Council, drew attention of State Government and Council and correspondence is going on as to how these candidates' interest should be protected, but no final decision in this regard could have been taken so far. The real problem comes from specific and mandatory provisions of Act, 1948, which prohibits such registration and also restrains a person to be enrolled in Register of the Council, for being appointed as "Dental Hygienist" in any Dispensary, Hospital or other institution in the State which is wholly or partly supported from public or local funds.

16. The prohibition u/s 46 of Act, 1948 is unambiguous, clear and mandatory. While framing rules of recruitment and conditions of service, the rule framing authority, obviously, could not have made any provision for appointment which might be in violation of Act, 1948. It is in these circumstances, while providing qualifications for appointment of "Dental Hygienist" etc., the rule framing authority has provided that the incumbent must possess requisite qualification from a recognised institution and should be registered with the SDC so as to keep it in consonance with Act, 1948.

17. Learned counsel for petitioner could not show any provision under which, in disregard to the provisions of Act, 1948, petitioners could have been made eligible for appointment to the post of "Dental Hygienist". The respondents on their own, neither can disregard mandate of Section 46 of Act, 1948, nor be compelled to do so by a Court of law. Nothing else has been brought to the notice of this Court so as to show any deficiency in Rule 8. Nothing is placed before this Court which may fortify challenge of petitioners to the validity of Rule 8. There is no violation of any Parliamentary or State Act or the provisions of Constitution.

18. On the contrary, admittedly, qualifications laid down in Rule 8 are in conformity with the provisions of Act, 1948 and to give effect thereto.

19. Sri Yogesh Agarwal, learned counsel for petitioners, attempted to argue that this view would cause serious prejudice to the petitioners and, therefore, State Government may consider question of relaxation of Rule 8, by exercising power under Rule 25. Besides the fact that in the garb of relaxation, State Government cannot be allowed to contravene a statutory provision, particularly when such contravention would also be an offence under Act, 1948, even otherwise I find that power of relaxation in this regard is not available. Rule 25 permits State Government to relax any provision relating to "conditions of service" in respect of a person appointed in service. Meaning thereby, any provision which relates to "recruitment" cannot be relaxed, particularly when the incumbent is yet to become a "member of service".

20. The distinction between "recruitment" and "conditions of service" and rules relating to either of them is no more res integra having been considered time and again.

21. In State of Madhya Pradesh and Others Vs. Shardul Singh, , the Court explained the expression "conditions of service" as under:

The expression "conditions of service" is an expression of wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc.

22. In I.N. Subba Reddy Vs. Andhra University and Others, , the Court explained the term as under:

The expression "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it, in matters like pension etc.

23. Same view was taken in para 6 of the judgment in Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and Another, .

24. In Lily Kurian Vs. Sr. Lewina and Others, , in para 13 of the judgment, the Court referred to above decisions and observed that the expression "conditions of service" includes everything from the stage of appointment to the stage of termination of service and even beyond including the matter pertaining to disciplinary action.

25. In Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, , the Apex Court held where a rule permits relaxation of provisions pertaining to "conditions of service", the same would be applicable to the condition after appointment to the service in accordance with rules. It also held that that "conditions of recruitment" and "conditions of service" are distinct and the latter is preceded by an appointment according to rules, the former cannot be relaxed.

26. A Division Bench of this Court (in which I was also a member) in Dr. Rajeev

Ranjan Misra and Others Vs. The State of U.P., The Chairman U.P. Public Service Commission and The Director Homoeopath Govt. of U.P., , referring to some of above authorities, has said:

The distinction between rule of "recruitment" and "condition of service" is no more res integra having already been settled by the Apex Court in a catena of cases. In State of Madhya Pradesh and Others Vs. Shardul Singh, , the Apex Court held that the term "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till retirement and even pension etc. It was reiterated in I.N. Subbareddy v. State of A.P., 1997 (1) SCC 554. In Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, , the Apex Court held where a rule permits relaxation of provisions pertaining to "conditions of service", the same would be applicable to the condition after appointment to the service in accordance with rules. It also held that that "conditions of recruitment" and "conditions of service" are distinct and the latter is preceded by an appointment according to rules, the former cannot be relaxed.

Part 3, 4 and 5 contain rules of recruitment which includes rules pertaining to reservation, eligibility and other qualifications with respect to nationality, educational qualifications, age, character, marital status, physical fitness etc. and procedure for recruitment. The rules pertaining to "recruitment" cannot be relaxed by exercising power under Rule 26 since such rules are not relaxable.

27. The above decision has been followed in Devendra Nayak and Another Vs. State of U.P. and Others, .

28. There is a Full Bench judgment of Gujarat High Court also dealing with this issue in A.J. Patel and Others Vs. The State of Gujarat and Others, . The judgment was rendered by Hon"ble K.T. Desai, C.J. and in para 27, with reference to the terms "recruitment" and "conditions of service" mentioned in Article 309 of the Constitution, His Lordship said:

From this Article it is evident that rules relating to the recruitment of persons to public services and posts are distinct from rules relating to the conditions of service. The conditions of service are conditions applicable to persons who have been appointed to public services and posts. The terms and condition relating to recruitment and relating to appointment to public services and posts must, therefore, be regarded as distinct and different from the conditions of service governing persons on their appointment to public services and posts.

29. In the present case, it cannot be doubted that the essential qualification prescribed in Rule 8 pertains to "recruitment". Hence it would not come within the ambit of Rule 25 which contemplates relaxation of a rule pertaining to "conditions of service" and not that of recruitment.

30. In substance, I have no manner of doubt that Rule 8 does not suffer from any infirmity or invalidity. On the contrary, being consistent with the statutory

provisions of Act, 1948, it, in effect, gives strength to mandate contained under various provisions of Act, 1948.

31. As discussed above, there is no merit in the contention raising doubt over the vires of Rule 8. The writ petition lacks merit. Dismissed.