

(2014) 07 J&K CK 0044

In the Jammu And Kashmir High Court

Case No : OWP (PIL) No. 861/2010, CMA Nos. 1416/2010 and 1478 Of 2013

Syed Shah and Others

APPELLANT

Vs

State of JandK and Others

RESPONDENT

Date of Decision : 11-07-2014

Acts Referred:

Citation : (2015) 2 JKJ 103

Hon'ble Judges : Hasnain Massodi, J;Dhiraj Singh Thakur, J.

Bench : Division Bench

Advocate : I. Sofi, Advocate, for the Appellant; G.A. Lone, for the Respondent

Final Decision : Allowed

Judgement

Dhiraj Singh Thakur, J.â?"Sher-I-Kashmir Institute of Medical Sciences, Srinagar is a deemed University in terms of Section 4 of the Sher-I-

Kashmir Institute of Medical Sciences (Grant of Degrees) Act, 1983 established for the purposes of providing instruction and research in the

science of modern medicines and other allied sciences including physical and biological sciences. For that purpose, it has been conferred the

powers, inter alia, to hold examinations, grant degrees, diplomas and other academic distinctions. This Institute, which is situate in the valley of

Kashmir at Srinagar is one of the premier institutes in the country on the lines of All India Institute of Medical Sciences, New Delhi. Patients from

all across the State repose faith and confidence in the professional competence of the doctors working at the said Institute and believe that highest

standards of academic excellence and research are maintained by its faculty and other doctors working therein. In the present Public Interest

Litigation, the petitioners question the appointment of respondent Nos. 8 and 9

as Assistant Professors in the Department of Physical Medicine and Rehabilitation by virtue of the order impugned dated 20th of October, 2010 bearing Govt. Order No. 34-SKIMS of 2010 on the ground that the order impugned has been passed, appointing the said respondents as Assistant Professors in the Department (supra) even when they did not possess the requisite qualification as prescribed by the Medical Council of India.

2. The Medical Council of India in purported exercise of powers conferred by Section 33 of the Indian Medical Council Act, 1956 with the previous sanction of the Central Government framed regulations called the ""Minimum qualifications for Teachers in Medical Institutions Regulations, 1998"" (as amended from time to time). As per these regulations, the requisite qualifications and eligibility conditions prescribed for the post of Assistant Professor, Physical Medicine and Rehabilitation are as under:

3. From the record, it appears that the official respondents issued an advertisement Notice No. 01 of 2004 dated 31.12.2004 for filling up inter alia the post of Assistant Professor in the Department of Physical Medicine and Rehabilitation. The requisite eligibility conditions and qualification were prescribed in the said notice, Respondent Nos. 8 and 9 also responded but were not found to be eligible. The Apical Selection Committee in its meeting held in August 2005 recommended the appointment of respondent Nos. 8 and 9 as Senior Residents subject to the condition that the said two doctors shall obtain diploma in P.M.R to become eligible. Till then it was decided that two posts of Assistant Professor would be reserved for them. It was decided that the official respondents would sponsor the said respondent Nos. 8 and 9 to undergo the two years diploma training in Physical Medicine and Rehabilitation for which the said respondents are purported to have given their consent.

4. In the year 2008, another advertisement Notice No. 02 of 2006 dated May 81, 2006 and yet again Advertisement Notice No. 02 of 2007 dated October Of, 2007 were issued for filling up the remaining posts of Assistant Professors in the Department of Physical Medicine and Rehabilitation, which posts were other than the two posts blocked by the respondent Nos. 8 and 9 in terms of the decision taken by the Apical Selection Committee.

5. Since respondent Nos. 8 and 9 had failed to obtain the requisite diploma in

their favour, the Apical Selection Committee vide its decision taken by December 2007 recommended yet again that the said two doctors be sponsored to any of the five institutions reflected in the said decision for obtaining a diploma- It was also decided that the doctors should complete the diploma within four years, failing which they would be reverted back to their parent department. This recommendation of the Apical Selection Committee is stated to have been approved by the Chief Minister, who was the Chairman of the governing body of the Sher-I-Kashmir Institute of Medical Sciences.

6. It is stated that instead of undergoing the requisite diploma course, the respondents No. 8 and 9 managed to have the order impugned dated 20th of October, 2010 bearing Govt. Order No. 34-SKIMS of 2010 passed by the respondents during the pendency of OWP (PIL) No. 665 of 2010 filed by the petitioners in which the petitioners had prayed for relief of filling up. the post of Assistant Professor in the Department of Physical Medicine and Rehabilitation strictly in accordance with the rules and in the said petition, the court had already issued notices, which were also served upon them. It was urged that the order impugned was passed with a view to make infructuous the said OWP (PIL) No. 665/2010.

7. Both the official respondents as well as the private respondents No. 8 and 9 have filed their reply. A preliminary objection has been taken that the present PIL is not maintainable in view of the Apex Court judgments, which specifically prohibit the courts from entertaining PILs in regard to service matters. The second objection that is taken is that the Public Interest Litigation is in fact sponsored at the behest of one Dr. Ali Mohammad Buhroo, Head of the Department of Physical Medicine and Rehabilitation. It is stated that the petitioner No. 3 is believed to be close relative of Dr. Burhoo, who entertained a grouse against the respondents No. 8 and 9 on account of loss of patient inflow in the Sher-I-Kashmir Institute of Medical Sciences after the said respondents had undergone some training in Physical Medicine and Rehabilitation at AIIMS. It is stated that in the guise of Public Interest Litigation, personal scores are sought to be settled by the said Head of the Department against the said respondents.

Thirdly, it was urged that there were no candidates available, who could satisfy the requisite qualification and eligibility conditions and it was the

said respondents alone, who had shown their willingness for undergoing diploma in Physical Medicine and Rehabilitation unlike others.

8. Reference was made to a communication issued by Dr. U. Singh, Professor and Head, Department of Physical Medicine and Rehabilitation, All

India Institute of Medical Sciences, New Delhi wherein it was suggested that diploma in Physical Medicine and Rehabilitation was available only in

a few states and the candidates for the same were admitted from their respective states quota only. It was also suggested in the said letter that it

would not be possible for the candidates working in Srinagar to get admission in other states, since the seats are reserved for local candidates.

9. Reference was also made to a Circular dated 12-2-2008 issued by the Directorate General of Health Services, Govt. of India in regard to the

post of Assistant Professor, Physical Medicine and Rehabilitation Department of Medical Colleges on contractual basis, which prescribed requisite

qualification as prescribed by the Medical Council of India failing which M.S Surgery or MD Pediatrics; or MD Medicine with more than one year

experience in PMR was considered to be good for appointment as Assistant Professor.

10. It was urged that on account of impossibility of acquisition of the requisite qualification as prescribed by the Medical Council of India rules and

on-account of the pressing need of doctors in the department of Physical Medicine and Rehabilitation, it became necessary to issue the order

impugned in the present petition.

11. In rebuttal, learned counsel for the petitioners stated that acquisition of the prescribed qualifications for the post of Assistant Professor was not

at all impossible to acquire inasmuch as there were a number of institutes offering diploma in the concerned field for which the respondents to not

even made a murmur regarding any effort having been made to apply for admission and consequent refusal for admission in the said institutes. It

was further urged that Medical College, Tnyandrum, Calicut Sedical College, Chennai Medical College, Amrita Institute of Medical Sdencea and

Research Kochi, Verdhman Mahavir Med cal College New Delhi, Tamilnadu MGR, University, Anna Salie, Chennai Medical College and

Hospital Kolkata. National Institute for Orthopaedically Handicapped Kolkata, SMS Medical College, Jaipur were some of the institutes which

were offering such courses. It was urged that the communicate dated February 27, 2008 addressed by Dr. U. Singh was elicited with a view to somehow form a basis for the official respondents to issue the order impugned suggesting the impossibility for the respondents No. 8 and 9 to acquire the qualification as prescribed.

12. Heard learned counsel for the parties.

13. The issues that arise for consideration in the present Public Interest Litigation are:

(i) Whether the present Public Interest Litigation is maintainable in view of the Apex Court rulings on the subject that PILs are not to be entertained in regard to service matters;

(ii) Whether it was impossible to acquire the eligibility as prescribed by the Medical Council of India, thus justifying the appointment of the respondents.

14. The issue with regard to public interest litigation in service matters is no longer res Integra.

15. In Dr. Duryodhan Sahu and Others Etc. Etc. Vs. Jitendra Kumar Mishra and Others Etc. Etc., , while dealing with the issue regarding the maintainability of the public interest litigation in service matters answered the question in negative by holding that public interest litigations in service matters should not be entertained.

16. Again in Gurpal Singh Vs. State of Punjab and Others, , while considering the said issue, held as under:--

5. The scope of entertaining a petition styled as a public interest litigation and locus standi of the petitioner particularly in matters involving service of an employee has been examined by this Court in various cases. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests:

(i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and

(ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case,

however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does

not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The Court has to act ruthlessly while dealing with

impostors and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They

pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect.

17. However, in Hari Bansh Lal Vs. Sahodar Prasad Mahto and Others, , the Apex Court carved an exception to Public interest litigations in

service matters and held that public interest litigation in service matters was not maintainable except by way of writ of quo warranto for which

appointment must be shown to be contrary to statutory provisions. In paragraph 34 of the judgment supra, following principles were deduced by

the Apex Court:--

34. From the discussion and analysis, the following principles emerge:

(a) Except for a writ of quo warranto, PIL is not maintainable in service matters.

(b) for issuance of a writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules.

(c) Suitability or otherwise of a candidate for appointment to a post in government service is the function of the appointing authority and not of the

court unless the appointment is contrary to statutory provisions/rules.

18. In the backdrop of the aforementioned settled legal principles, it will be seen that the private respondents 8 and 9 do not possess the requisite

qualification in terms of the rules governing appointment to the post of Assistant Professor in Physical Medicine and Rehabilitation. Order

impugned dt. 20.10.2010, clearly reflects the status regarding the in-eligibility of the private respondents aforementioned despite which, they have

been given appointment on the premise that the qualification prescribed was impossible to be acquired by the said respondents.

19. The private respondents, in the present case, beyond any doubt, are ineligible to hold the post of Assistant Professor in the aforementioned

stream. The petitioners have, therefore, clearly succeeded in bringing out the ineligibility of the private respondents 8 and 9 and proved that their

appointment is contrary to the rules of Medical Council of India.

20. Once this court is satisfied that the appointment of the aforementioned private respondents is contrary to rules, it would not hesitate to entertain the present Public interest litigation and issue a writ of quo warranto for setting aside the same irrespective of the allegation that the petition was motivated and filed at the behest of one of the faculty members' in the department of PMR in SKIMS. The present petition cannot be stated to be a service dispute as the petitioners herein have no direct interest nor are they staking any claim to the posts occupied by the private respondents 8 and 9. The petitioners simply question their appointment as being contrary to the rules.

21. In *High Court of Gujarat and Another Vs. Gujarat Kishan Mazdoor Panchayat and Others*, , the Apex Court drew a clear distinction between the cases where the court could issue a writ of certiorari as against a case where it could issue a writ of quo warranto. In paragraphs 22 and 23 of the judgment supra, the Apex Court held as under:--

22. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine at the outset as to whether a case has been made out for issuance of a writ of certiorari or a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. While issuing such a writ, the Court merely makes a public declaration but will not consider the respective impact of the candidates or other factors which may be relevant for issuance of a writ of certiorari. (See *R.K. Jain Vs. Union of India and Others*,

23. A writ of quo warranto can only be issued when the appointment is contrary to the statutory rules. (See *More The Mor Modern Cooperative Transport Society Ltd. Vs. Financial Commissioner and Secretary to Govt. Haryana and Another*,

22. Be that as it may, we hold that the present public interest litigation, questioning the appointment of private respondents 8 and 9, being contrary to the statutory rules, is maintainable.

Issue No. 2

23. A reference to the order impugned and the stand taken by the official respondents would make it clear that the only ground on which the ineligibility of the private respondents 8 and 9 is sought to be justified is that the requisite qualification of Diploma in PMR, could not have been

obtained by the said respondents as there were no institutes which would give admission to the said respondents. Reliance is also placed upon the letter of one Dr U. Singh, Professor and Head of Department of PMR, AIIMS, New Delhi, who was of the opinion that it was remotely possible to find any local candidate with full qualifications as per MCI as there were no local medical colleges or hospitals where Post Graduate Degree courses were being run in PMR and further was of the opinion that a Diploma in PMR was available but the seats were reserved for local candidates from that particular State.

24. This is, however, contradicted by the petitioners who have placed on record, a list of medical colleges where Diploma courses in PMR are available in as many as 13 medical colleges and other medical institutes of the country. They have also placed on record the prospectus issued by the AIIMS, New Delhi, wherein the course of PMR is made available to sponsored/foreign students thereby belying the stand of the private respondents.

25. The Latin maxim 'Lex non cogit ad impossibilia' also expressed as 'impotentia excusat legem' in common english parlance means that law does not compel a man to do that which he cannot possibly perform. However, in the present case, there is nothing on record which would satisfy this court that the private respondents 8 and 9 made any effort to apply for admission to the courses run by those institutes in the field of PMR and that their applications were rejected. It does indeed appear that the letter of Dr. U. Singh, was elicited only with a view to justify the appointment of the private respondents 8 and 9. This was certainly not a case of there being any impossibility in the acquisition of qualification prescribed by MCI for the post of Assistant Professor. In any case, if there was any such difficulty, the right course was to seek amendment/relaxation of the rules through the Medical Council of India instead of taking an executive decision contrary to rules, which on the face of it is illegal.

26. We can ill-afford to allow such appointments to continue in prestigious medical institutes including the present one by a faculty who is not qualified. Any such effort to permit continuance of such doctors, notwithstanding the fact that they would have acquired some experience in the field during the course of their illegal appointment could negate the effort of

specialized bodies like the Medical Council of India at achieving academic excellence in the medical faculty besides jeopardizing the patient care in the hospitals.

27. We have, therefore, no doubt in holding that the appointment of private respondents 8 and 9 against the post of Assistant Professor, PMR in

SKIMS, is contrary to rules as the said respondents do not possess the requisite qualification as prescribed by the rules to hold such a post. For

the reasons stated here-in above, this petition is allowed. Order impugned dt. 20.10.2010, is set aside. Interim order dt. 31.12.2010, shall also

stand vacated.