

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

Date of order: 02.03.2009

LPAOW no. 50/2008
CMP nos. 59/2008 & 3/2009

Dr. Anuradha Bharti and anr. v. State of J&K and ors.

Coram:

Hon'ble Mr. Justice Barin Ghosh, Chief Justice

Hon'ble Mr. Justice Virender Singh, Judge

Appearing counsel:

For Appellant(s) : Mr. K. S. Johal, Advocate with
M/s. Amit Gupta and Pavit Singh Katoch, Advocates.

For respondent(s) : Mr. M. I. Qadri, Advocate General with
Mrs. Shaista Hakim, Dy. A. G.
Mr. D. S. Chauhan, Advocate.
Mr. D.C. Raina, Sr. Advocate with
Mr. Vikas Mangotra, Advocate.

i)	Whether approved for reporting in Law Journals?	Yes
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ii)	Whether approved for reporting in Press?	Optional
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Per Barin Ghosh, CJ (Oral):

The appellants along with some others approached the Writ Court seeking to contend that the insertions made in SRO 158 of 1995 by SRO 430 of 2007 are inappropriate and not sustainable, the reason being that such insertions stood in the way of the writ petitioners being eligible to offer themselves for being admitted in the post-graduate medical courses.

By the judgment and order under appeal, the writ petition has been rejected on the ground that the insertions so made are aimed at fulfilling the Directive Principles of State policy contained in Section 24 of the Constitution of the State. Being aggrieved thereby the present appeal has been preferred by two of the writ petitioners.

SRO 158 of 1995 sets down the eligibility of candidates who are entitled to apply for being considered for admission in post-graduate courses in Medical Colleges. By SRO 430 of 2007, two clauses have been added to SRO 158 of 1995, whereby and under an in-service aspirant seeking admission in post-graduate courses in Medical Colleges is required to have at least two years of rural service experience. Only when a candidate has so served, he would be entitled to apply for being considered for admission on the strength of a certificate to be issued. It had been the contention of the State, which contention has been accepted by the learned Single Judge and repeated before us, that the said clauses had been inserted for the purpose of enticing in-service Medical Officers to serve the village community and, thereby, to improve the backward regions of the State insofar as medical facilities are concerned.

There cannot be any dispute that many and probably almost all the rural areas are backward in comparison to urban areas of the State in relation to medical facilities available to the denizens of the respective areas. Therefore, there can not be any dispute that if the Government

decides as a policy to improve upon the medical infrastructure available in rural areas and, for that matter, either entices or compels, as a condition of service, its existing members of medical service to serve in rural areas, such a policy, as such, may not be interfereable.

In the instant case, however, by the insertions, referred to above, service in the rural areas has been made as an eligibility criteria or condition for an in-service candidate to apply. Specifying eligibility, no doubt, is within the domain of the person competent to specify eligibility. Neither the writ petitioners, nor the appellants have contended that the State Government is incompetent to fix eligibility. They are contending that fixation of eligibility of having minimum of two years of rural service is bad and illegal, inasmuch as the same is not achievable through the effort of the candidate, but depends upon things which are beyond his control.

Fixation of eligibility either of academics or of experience, though, is a matter strictly within the domain of the person competent to fix eligibility, but the same must be achievable by the person seeking to cross the eligibility hurdle either by his own efforts or by exercise of his option. When an eligibility criterion of a particular percentage in a particular examination is fixed, the person, who has been able to achieve that criterion, alone is entitled to contend that he has eligibility. Obtaining of that particular percentage in that particular examination

depends upon the effort of that candidate and is not circumscribed by anything else. Similarly when a particular experience is the bench-mark of eligibility, a person who has that experience can contend that he has eligibility. In order to achieve that experience the person concerned must have the option to pursue his career in that direction without being circumscribed by anything else.

In the instant case, had there been a policy of the Government that every entrant in the medical service would be required to serve either two years or more in the rural areas as a condition of his service, it could be said that the eligibility fixed by the insertions is achievable by the candidate seeking admission through his own volition by exercise of his option to join the medical service. In the absence of such a policy, rendering of two years rural service by a Health Department Medical Officer would depend on his being per chance posted in a rural area for two years. The same would not depend on his volition. If eligibility is fixed on the basis of per chance, achievement thereof would not depend upon either effort or volition; the same will depend on fortune, and fortune cannot be regarded as eligibility. There is admittedly no such policy.

Even though a policy for making Health Department Medical Officers to serve at least two years in rural areas would be laudable and towards achievement of the goal set out in Section 24 of the

Constitution, but the inserted eligibility criteria will not achieve the purpose unless the officer concerned seeks to pursue higher studies and, accordingly, the purpose and object of putting such eligibility criteria by the insertions in question may partially serve the purpose by enticing only those doctors, if there be any, who are interested to pursue higher studies to get themselves posted for two years in rural areas, but even then that would be dependent on the wishes of some one else, i.e., authority competent to post, upon which they have no control.

In the circumstances, we do not think that the conditions imposed by SRO 430 of 2007 achieved or could achieve the purpose and object of Section 24 of the Constitution or that by the said SRO, an eligibility criteria could be inserted in SRO 158 of 1995 which is not achievable by the candidate seeking admission of his own volition or by exercise of his option but is entirely dependent upon some body else's action.

We, accordingly, hold that SRO 430 of 2007 cannot stand the test of law and, accordingly, allow the appeal, set aside the judgment and order under appeal and quash SRO 430 of 2007.

At the same time, we have to think about further relief(s) to be granted to the appellants before us. We make it clear that as on the date of the writ petition, the SRO in question was holding the fort and, accordingly, was applicable to the appellants. It was on the permission of the Court that the appellants appeared in the Entrance Examination.

One of them did succeed in such examination and, at the same time, it is also correct that the judgment rendered by us today would relate back to the date of presentation of the writ petition insofar as the appellants are concerned, the but the fact remains that the success of the said appellant at the said Entrance Examination did not fructify into an admission in view of dismissal of the writ petition, and as a result the seat in which the said appellant could be accommodated has been filled up by some one else. In the circumstances, it would be appropriate on our part to permit the appellants to respond to the present advertisement, which we have kept alive only for the appellants by interim orders passed on the appeal and, accordingly, direct the respondents to allow the appellants to fill up forms in terms of the advertisement published in January, 2009 by coming Friday, i.e., March 6, 2009, with a further direction upon the respondents to allow the appellants to take full advantage of such applications to be made by them.

Learned counsel for the appellants has relied upon the judgment of the Hon'ble Supreme Court rendered in case of *Kanpur University v. Sameera Gupta*, reported in (1983) 4 SCC 309 and many other judgments, where the Hon'ble Supreme Court found as a fact that a candidate, who was entitled to be admitted, was not admitted and, accordingly, issued directions for giving admission to such a candidate who ought to have had been admitted. It was submitted that having

regard to the success recorded by the Competent Authority, the said appellant should be given the benefit of his success and he must be given a berth in the seats available for the forthcoming admissions. The only difference between the candidates in the cases before the Hon'ble Supreme Court and the case at hand is that the candidates before the Hon'ble Supreme Court of their own right had appeared at the test for admission. That right was sought to be defeated by not giving them the marks to which they were entitled. The Hon'ble Supreme Court had corrected only that and upheld their success at the test in which they had appeared of their own right; whereas in the instant case, the appearance of the appellants was not permissible in view of the subject eligibility criteria. It was only on the basis of the interim order of the Court that the appellants appeared at the test. Their right to appear was not pronounced by lifting the embargo. One of the appellants succeeded in the test, but the said success did not mature into an admission. In consequence, the seat to which he could be accommodated has already been supplied. By reason of the pronouncement made today, the appellants' right to be considered without achieving the subject eligibility has been upheld and the embargo has been lifted and they have been put in the same platform as that of others. This right can be exercised with others who would be appearing in the forthcoming examination. In the circumstances, if one of those seats is kept reserved for one of the appellants, the same would

be inappropriate, as competition for that seat would be lost to people entitled to compete for the same.

It has come to our knowledge that appellant No. 2 has filed a writ petition, registered as SWP no. 740/2008, seeking to contend that, inasmuch as he has tendered resignation, he is no longer an employee of the State and, accordingly, the bar imposed by SRO 430 of 2007 is not applicable to him and, therefore, he must be granted the benefit of the success that he has obtained in the test conducted in the year 2007. We dismiss the said writ petition and all proceedings thereunder only on the ground that the success that the appellant No. 2 obtained in the test was on the basis of an interim order passed by the Court, but in his capacity as an in-service candidate. Without that order, the appellant could not appear in the examination. At or before filling up of the form for appearing in the examination, he did not disclose that he is a candidate who is not associated with the Government as one of its employees. Therefore, he is not entitled to take advantage of the success that he obtained at the said test in any capacity except in his capacity as an employee of the State.

We make it clear that the tenor of this judgment would indicate that the effect of this judgment is prospective, except for the appellants for whom by interim orders the period of responding to the advertisement had been extended from time to time.

After we pronounced the judgment, the learned counsel for the appellant cited a number of judgments, but none of them pertain to lifting of eligibility criteria by the pronouncement of Court and accommodating the successful candidate competing on interim order, without reserving a place for him in the competition.

(Virender Singh)
Judge

(Barin Ghosh)
Chief Justice

Jammu,
02.03.2009.