

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU.

**SWP No.2304/2009, CMP No.130/2010, CMP No. 3220/2009,
CMP No. 3056/2009 c/w
SWP No.2357/2009, CMP No.3148/2009 and
SWP No. 2308/2009, CMP No. 3068/2009,
CMP No. 3120/2009.**

Date of order: 26.08.2010

- 1.Dr. Javed Iqbal Bhat and others Vs. State and others.**
- 2.Dr. Manjit Singh and others Vs. State and others.**
- 3.Dr. Imran John Beg Vs. State and others.**

Coram:

Hon'ble Mr. Justice Sunil Hali-Judge.

Appearing counsel:

**Mr. T.K.Raina, Advocate for petitioners in SWP No.2304,
Ms.Veenu Gupta, Advocate for the petitioners in SWP
No.2357/2009 and Mr. Anil Sethi, Adv. for petitioners in SWP
No.2308/2009.**

**Mrs. Shaista Hakim, Dy.A.G, Mrs. Seema Shekhar and Ms.
Shivani Jalali, Advocates for the respondents.**

- i/ Whether to be reported in : Yes/No.
Press, Journal/Media.**
- ii/ Whether to be reported in : Yes/No.
Digest/Journal.**

The common question of fact and law are involved in all these writ petitions, as such, the same are being disposed of by a common order.

Vide Advertisement Notice No. 02 dated 30.09.2009 issued by the Chief Medical Officer (Vice Chairman District Rural Health Society), Doda, applications were invited from eligible candidates for contractual appointments of M.B.B.S./I.S.M.Doctors in District Doda under the National Rural Health Mission for six posts of M.B.B.S. Doctors and nine posts of I.S.M. Doctors at Primary Health Centre level with the aim to strengthen the health care delivery system in the rural/urban areas. Subsequent to the said Advertisement Notice, the respondent-Chief Medical Officer, Doda

notified the break-up of 09 posts of Indian System of Medicines (ISM) doctors for various blocks. For facility of ready reference, the same is reproduced herein below:-

S.No.	Name of Institution	No. of MO/ISM posts	Name of Block
01.	PHC Bhagwah	01	
02.	PHC Gundna	01	Ghat
03.	PHC Bharat	01	
04.	PHC Goha	01	Assar
05.	PHC Chinta	01	
06.	PHC Bhella	01	Bhaderwah
07.	PHC Malanoo	01	
08.	PHC Tipri	01	Gandoh
09.	PHC Changa	01	

The petitioners being eligible applied for the said posts of ISM doctors pursuant to the aforesaid advertisement. The selection process came to be initiated by the Committee constituted by the Chairman District Rural Health Society-Dy. Commissioner, Jammu and pursuant thereto, private respondents came to be selected on contractual basis under National Rural Health Mission in Doda district. It is this order, which is subject matter of challenge in present writ petitions.

In order to strengthen the health care delivery, improve access to quality health services and to make them functional and available at the doorsteps of the rural population, the Government of India formulated a National Rural Health Mission. The said scheme was also made applicable to the State of Jammu and Kashmir. In pursuance thereto, Advertisement Notice for making such appointments was issued for engagement on contractual basis of doctors including ISM/H/ Paramedics/ Dawasaz. Two sets of society are contemplated under

the said Scheme, one is J&K State Health Society headed by its Chairman and other is District Rural Health Society headed by the concerned Dy. Commissioner of the district as its Chairman and Chief Medical Officer of the concerned district as its Member Secretary.

The terms and conditions of the said Scheme provide that all the engagements are on contractual basis and orders are required to be issued by the respective District Rural Health Societies. Preference is to be given to the candidates below the age of 40 years and should be the residents of block where the health centre is located so as to ensure continuous presence of the doctors for 24x7 days service. The scheme also provides that the residence of the doctor concerned at the place of posting, is mandatory.

The case set out by the petitioners in these writ petitions is that selection has been made in violation of condition 4 of the Advertisement Notice, which clearly mentioned that preference as indicated above will be given to the candidates who are below the age of 40 years and reside within the block concerned where the health institution is located so as to ensure continuous presence of the doctor for 24 x7 days. The posts were advertised for District Doda by the Chief Medical Officer (Vice Chairman District Rural Health Society) Doda for various blocks. The earlier criteria disclosed by the respondents was as under:-

1. Weight-age to technical qualification : 50
2. Preference for local of the District : 10
3. Experience (more than one year) : 10
4. Viva Voce (On average basis) : 30

It seems that this criteria was subsequently changed by the respondents on 02.12.2009 by fixing the same as :-

1. Weight-age to technical qualification	: 80
2. Viva voce (on average basis)	: 20

This is stated to have been done on the date when interview was conducted. The criteria for making selection was to be disclosed at the time of interview or even before the selection process was initiated. This was not done by the respondents and exorbitant marks were given to private respondents in the interview by changing the merit. Lastly, the preference was required to be given to those persons, who belong to the blocks for which the posts were advertised.

On the other hand, the stand of the respondents is that the merit was the sole criteria for making selection. Since the petitioners failed to make the grade, therefore, they could not be selected. The expression 'preference' used in the notification does not exclude the persons, who are not residents of the block from consideration. Preference merely vests a preferential right in a resident of the medical block in case other things like merit are the same. The intention was to give preference to the locals of the block. The advertisement notice would indicate that persons belonging to block alone, are not entitled for seeking consideration. The other condition in the scheme though not forming part of the advertisement also makes mention that residence at the place where health centre is located, is mandatory, which according to the respondents would mean residence subsequent to appointment. It should have been reflected clearly in the advertisement notice.

Further contention of the respondents is that the object of the scheme is achieved once the person is appointed and asked to sign the agreement that he resides within the block for which he has been appointed. In essence what is conveyed by the respondents is that the object of the scheme is enforced by the conditions set out in the contract executed after appointment. The salient feature of such conditions is that :-

- (a) the candidate is required to be the resident of the place of posting;
- (b) the post is non-transferable; and
- (c) the candidate is required to ensure continuous presence for 24 hours in the health centre.

Further contention of the respondents is that the petitioners have participated in the selection process, as such, they cannot question the criteria. The merit has been the basis for making selection.

I have heard learned counsel for the parties and perused the record.

The controversy involved in the present writ petitions is as under:-

- (a) Whether the objective of the scheme envisages that the selection is to be made from the candidates residing within the blocks where health centre is located or the zone of consideration can be extended to other candidates who are not residing within the block.;
- (b) Whether it violates Article 14 of the Constitution of India by providing that the selection shall be made on the basis of place of residence where blocks are located ; and

(c) Whether the word 'preference' is to be given different meaning while taking colour from the context, purpose and object of its use under the scheme of things envisaged.

For any classification to sustain the test of Article 14 of the Constitution of India, it is necessary to analyze the objective of the scheme.

In order to understand the purport of the scheme, it is necessary to first indicate the objective of the scheme. The objective as is apparent from the scheme itself is to strengthen the Health Institutions providing Primary Health Care so as to provide all the basic and emergency obstetric care and for strengthening of the routine immunization for the vaccine preventable diseases and decentralizing the health planning and management of the health institutions. The further objective of the scheme is to ensure health services at the door step. In addition to this, it also envisages the accountability and decentralization of the present system. It is not in dispute that as on today Primary Health Centres, which are located in blocks, do not cater to the needs of the people as they are found inadequate to health care delivery. It is in the light of this, the essential terms and conditions of the scheme provide the engagement of doctors on contractual basis and preference be given to the candidates below the age of 40 years and to those who are residents of the blocks where the health centre is located so as to ensure the continuous presence of the doctors for 24 hours. The objective of the scheme, therefore, determines the conditions which are reflected in the advertisement.

What clearly emerges from the purport of the scheme is that in order to provide health facility at the gross root level, the presence of the doctors at the door

steps is the sole object of the scheme. How this objective is to be achieved can have many facets. It is also to be kept in mind that doctors' availability at centres is essence of the scheme. First process to achieve this objective is to prefer those candidates, who are living within the blocks where health centres are located. It serves two purposes:-

- (i) One that they are readily available at the centre; and
- (ii) another that the people living at the grass root level have easy assess to the doctor posted there.

Where doctors are not available within the blocks, in that eventuality, zone of consideration can be extended within district. What is emphasized by looking to the nature of the scheme and its objective is that preference has to be given to those candidates, who are living within the blocks. It is only where doctors within the blocks are not available then zone of consideration can be extended. It is in this context the word 'preference' used in the scheme as also in the advertisement notice has to be given its meaning while analyzing the object, context, purpose of its use under the scheme.

After having said so and while examining the contention of the learned counsel for the parties, it be seen that the petitioners have categorically stated that all the posts under the scheme of National Rural Health Mission are on contractual and local criteria basis. It is in this context, the word 'preference' has been used by the respondents in the Advertisement Notice. The petitioners have further contended that the Selection Committee has framed the criteria on their own, which is contrary to the scheme.

The stand of the respondents is that the word 'preference' used would mean that when one or more candidates were found equally positioned then only additional qualification would be taken as tilting factors in favour of the candidates vis-à-vis others candidates. Reliance has been placed by the respondents on the Apex Court's judgment entitled Secretary (Health) Department of Health and F.W. Vs. Dr. Anita Puri and others reported in (1996) 6 Supreme Court Cases 282 wherein it is held as under :-

"When an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference would be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher candidates with higher qualification. It cannot be construed to mean that a person with a higher qualification is automatically entitled to be selected and appointed. In adjudging the suitability of person for the post, the expert body like Public Service Commission in the absence of any statutory criteria has the discretion of evolving its mode of evaluation of merit and selection of the candidates. The competence and merit of a candidate is adjudged not on the basis of the qualification he possesses but also taking into account the other necessary factors like career of the candidate throughout his educational curriculum, experience in any field in which the selection is going to be held, his general aptitude for the job to be ascertained in course of interview, extracurricular activities like sports and other allied subjects, personality of the candidate as assessed in the interview and all other germane factors which the expert body evolves for assessing the suitability of the candidate for the post for which the selection is going to be held. Hence, the High Court was wholly in error in holding that a person possessing M.D.S.degree like respondent no.1 was entitled to be selected and appointed."

Reliance has also been placed in AIR 2006 SC 3080 entitled State of U.P. and another Vs. Om Parkash and others wherein it is held as under :-

".....The word 'preference' would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally

positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-à-vis others in the merit list prepared by the Commission. But preference does not mean en block preference irrespective of inter se merit and suitability.”

The import of these judgments clearly reflects the word ‘preference’ used in the advertisement notice would not mean that the only persons who fall in that category are alone to be selected. It contemplates where one or more candidates are found equally positioned then only the additional qualification would be taken as tilting factor, in favour of the candidates vis-à-vis others. Applying this principle in the present case, the contention of the respondents, cannot be faulty.

However, the word ‘preference’ is capable of different meaning by taking colour from the context, purpose and objective used in the scheme. The word preference used in the judgments above related to the matter where additional qualification was given preference. The advertisement notice provided basic minimum qualification, which was required for the job that was put to advertisement. The preference for higher qualification was to be given by providing some weightage. This was strictly in consonance with the objective of scheme that the merit has to be preferred over other qualification. It is in the light of this the additional weightage was given to the persons who were having higher qualification. In the present case, it is to be seen that appointments of doctors were not to be made by general process of recruitment or by adhering to the rules governing to medical service. These appointments were made by taking into consideration the object and purpose of the scheme aforesaid. It is the scheme, which was guiding factor in the matter of making appointments. The appointments were not required to be made by the

State Recruitment Board or Public Service Commission but by the Committee constituted under the Scheme.

As already stated, underlining purpose of the scheme was based upon the local criteria. So the word 'preference' would assume different connotation in the present context looking to the purpose and object of its use under the scheme. In my view, the word 'preference' under the scheme, would mean local criteria meaning thereby the persons, who are available and living within the blocks, have to be given preference. Otherwise very purpose of the scheme gets defeated. I am fortified by the view taken by the apex court in judgment entitled Secretary A.P. Public Service Commission V. Y.V.V.R. Srinivasula (2003) 5 SCC 341, which reads as under :-

"The word 'preference' in our view is capable of different shades of meaning taking colour from the context, purpose and object of its use under the scheme of things envisaged. Hence, it is to be construed not in an isolated or detached manner, ascribing a meaning of universal import, for all contingencies capable of an invariable application. The procedure for selection in the case involve, a qualifying test, a written examination and oral test or interview and the final list of selection has to be on the basis of the marks obtained in them. The suitability and all round merit, if had to be adjudged in that manner only what justification could there be for overriding all these merely because, a particular candidate is in possession of an additional qualification on the basis of which, a preference has also been envisaged. The rules do no provide for separate classification of those candidates or apply different norms of selection for them."

Therefore, I hold that selection had to be made strictly in consonance with the scheme by giving preference to local criteria. The word 'local' has been defined relating to place, expression of place, belonging or confined to a particular place. The criterion means the standard laid down for making such selection.

The second question which arises for consideration is that what would happen to those cases where no

eligible candidates are available in the blocks. In that eventuality, the connotation given to the word 'preference' herein above would not desist the Selection Committee to consider the candidates beyond the blocks. The word 'preference' used in the scheme does not exclude the persons living within the district. It covers a situation where selection has to be made from the candidates belonging within and outside the blocks. Once there is no candidate available within the blocks, then the person living outside the blocks has also to be considered. I say so because the consideration has to be given to all the candidates living within the district, which is strictly in consonance with the objective of Articles 14 and 16 of the Constitution of India.

The next question which arises for consideration is whether for making selection, the merit has to be the sole criteria and providing preference to the persons of a particular class, violates Articles 14 of the Constitution of India.

It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. It may be founded on different bases, namely, geographical or according to objects or occupations or the like. What is important is that there must be a nexus between the basis of classification and the object of the Act under consideration. A law may be constitutional even though it relates to a single individual

if, on account of some special circumstances or reasons applicable to him and not applicable to others.

Applying this principle to the present case, as already discussed hereinabove, the object of the scheme provides creation of health centre in the blocks where doctor is available for 24 hours. The condition of the scheme, as already discussed hereinabove, clearly makes a mention that it has to be based on local criteria. There is no dispute that for making appointment, all the eligible persons are required to be considered. The word 'preference' as provided under the scheme, has to be interpreted in the context of the scheme sought to be implemented. It may also be indicated that the scheme does not exclude consideration of the persons, who were not living within the blocks but only provides preference for those, who are living within the blocks. As such, it cannot be said that there is total exclusion of the persons beyond the said blocks. What it contemplates is that if doctors within the block are available, they are required to be given preference. Their eligibility and capacity to handle the job is tested by the selection committee. I am fortified by the view taken by the apex court in case reported in AIR 1958 SC 538 entitled Ram Krishna Dalmia and others Vs. Shri Justice S.R.Tendolkar and others, wherein it is held as under :-

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like. What is important is that there must be a nexus between the basis of classification and the object of the Act under

consideration. It is also well established by the decisions of Supreme Court that article 14 condemns discrimination not only by a substantive law but also be a law of procedure... “

The next question which arises for consideration is that once the petitioners have participated in the selection process, they cannot question the same. This argument has to be understood in the context where prior to initiation of selection process, the criterion is disclosed. Admittedly earlier criteria was subsequently changed by the respondents by re-fixing it as 80 marks for weightage to technical qualification and 20 marks for viva voce (on average basis). This was informed to the candidates prior to the initiation of selection but on 02.12.2009. It cannot be said that the petitioners are estopped from questioning this criteria.

In view of the above, I allow this writ petition and quash the impugned select list for the post of Medical Officer under National Rural Health Mission in Doda district, with a further direction to the respondents to initiate the process of selection afresh by giving preference to those who are living within the blocks. In case of non-availability of the candidates within the blocks, the zone of consideration be extended within the district. Let this process be completed within six weeks from the date copy of this order is made available to the respondents by the petitioners.

Disposed of along with connected CMP(s) if any.

**(Sunil Hali)
Judge.**

Jammu.
26.08.2010.
'Madan'