

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 22, 2023

+ W.P.(C) 8547/2018

DR. BEENA AGARWAL

..... Petitioner

Through: Ms. Anita Sahani and
Ms. Meghna De, Advs.

versus

UNION PUBLIC SERVICE COMMISSION AND ANR.

..... Respondents

Through: Mr. Naresh Kaushik, Adv. for
R-1
Mrs. Avnish Ahlawat,
Standing Counsel (GNCTD)
with Ms. Tania Ahlawat,
Mr. Nitesh Kumar Singh,
Ms. Palak Rohmetra,
Ms. Laavanya Kaushik and
Ms. Aliza Alam, Advs. for
R-2

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

V. KAMESWAR RAO, J

1. The challenge in this writ petition is to an order dated March 23, 2017 passed by the Central Administrative Tribunal, Principal Bench, New Delhi ('Tribunal', for short) in Original Application being O.A.No.380/2015 filed by the petitioner herein, which was dismissed by the Tribunal. The claim of the petitioner before the Tribunal was

for regularisation of her services as Specialist Doctor.

2. The facts as noted from the record are that, pursuant to the advertisements issued by the Directorate of Health Services, GNCTD, for appointment of Medical Officers on contract basis, the petitioner was appointed as a Junior Specialist (Surgery), in the year 1996 for a period of one year. Her contractual period was extended from time to time. The GNCTD, in consultation with the Ministry of Health and Family Welfare decided to constitute General Duty Medical Officer (GDMO) and Non-Teaching Specialists Cadre in the first place and Public Health and Teaching cadre on a later date. After receiving the concurrence of the Union Public Service Commission (UPSC), the Delhi Health Services Allopathy Rules, in respect of GDMOs and Non-Teaching Specialists Cadres were notified on December 23, 2009.

3. Pursuant to the framing of the 2009 Rules, the GNCTD in consultation with the UPSC invited the Doctors appointed on contract basis for a personal talk for assessment of their suitability by the UPSC. Rule 6 (2) of the 2009 Rules, stipulates as under:

“All officers appointed on contract basis/ad hoc basis on or before 18th December, 2006, i.e., the date of issue of the Government of Delhi’s O.M. No. F.70/49/206/H&FW/SSHFW 463-475 dated 18th December, 2006, on the basis of their suitability as assessed by the Commission and requisite educational qualifications and experience prescribed for the post and being found fit, shall be deemed to have been appointed under these rules and assigned to the Sub-Cadre of General duty Medical Officers or Non-Teaching Specialists, as the case may be, and they shall be members of the Service at the entry level of the respective Sub-Cadre at the initial constitution stage”.

4. The UPSC proposed to assess them, for regularization, on the basis of their complete ACRs. Since the complete ACRs in the prescribed form were not available, in respect of the Doctors, the UPSC took a decision that all Doctors appointed on contract basis, who fulfill the educational qualification as per the Recruitment Rules shall be assessed by subjecting them to a qualifying written test followed by a personal talk/interview. The six Doctors, including the petitioner were not recommended for regular appointment by UPSC. They had approached the Tribunal in OA No.3653/2012. The said OA was disposed of on May 28, 2013, directing the respondent to assess the candidature of the applicants therein for regularization, keeping in view the record of their performance in Delhi Health Services as contractual employee, including their experience. In other words, such elements would be given due weightage in interaction or otherwise.

5. The UPSC challenged the said order of the Tribunal before this Court in Writ Petition (Civil) No.6260/2013, which came to be dismissed on October 28, 2013. In compliance of the order of the Tribunal dated May 28, 2013, the UPSC decided to re-assess the six left out doctors including the petitioner. The UPSC, unlike on the previous occasion wherein the selection criteria stipulated was 100 marks for interview/personal talk, assessment of bio-data – 50 marks – Total: 150 marks – cut off percentage – 75%, decided this time to assess the candidates against the 200 marks – 100 marks for personal talk/interview and another 100 marks for assessment of bio-data. The 100 marks allocated for the assessment of bio-data was further split in

five segments.

6. Out of the six candidates considered for selection by the UPSC, only three were selected. The petitioner had not found her name on the list of selected candidates. The case of the petitioner was rejected. Similarly, one more candidate namely Dr. Saroj Bala was also rejected.

7. Aggrieved by the action of the UPSC for not recommending her for regular appointment, the petitioner herein had filed OA in which the impugned order has been passed. The primary grounds of challenge of the petitioner were; (i) the action of the UPSC was that the petitioner has rich and vast experience of 27 years, which also included ten years as Head of the Department of Surgery. This has not been given due consideration by the UPSC. (ii) The petitioner could not have been adjudged as unsuitable in the face of her demonstrated excellent work record, competence, skills etc. (iii) As the petitioner was selected at the time of initial appointment through a properly conducted interview, the reassessment ought to have been done on the basis of experience and performance record only. The academic additional qualification was never a criterion for selection in the initial selection process but has been subsequently added arbitrarily with an objective to declare the applicant unfit.

8. The UPSC's case as averred in paragraphs 8.1 to 8.3 of the reply is as under:

“8.1 With regard to the averment made in para 7.2 (i) above, it is respectfully submitted that the order of the Learned Tribunal, as upheld by the Hon'ble High Court, clearly directed the Respondents “to assess the candidature of the

Applicants once again for their regularization keeping in view the record of their performance in DHS as contractual employee, including their experience. Such elements would be given due weightage in interaction or otherwise". Thus, it may be observed that both the Hon'ble Tribunal as well as Hon'ble High Court took note of the selection process which included personal talk/interaction and accordingly ordered that due weightage of performance and experience would also be given in the process of interaction. Accordingly, the Commission devised a revised criteria of assessment of suitability in respect of Applicants giving due weightage of their performance and experience would also be given in the process of interaction. Accordingly, the Commission devised a revised criteria of assessment of suitability in respect of Applicants giving due weightage of their performance and experience, as per directions of the Tribunal and High Court. There is no case of violation of direction of the Hon'ble Court. It may also be submitted that the Personal Talk has been an integral part of the selection process based on which 526 doctors were initially selected and 3 doctors were selected later. Solely because of the fact that the Applicant could not qualify again, the Applicant has chosen to challenge the selection process, which is devoid of any merit.

8.2 With regard to the averment made in para 7.2 (ii) above, it is respectfully submitted that as stated in the above para, it was the direction of the Learned Tribunal duly upheld by the High Court that due weightage of 'performance' and 'experience' would also be given in the process of interaction. Accordingly, to comply with the direction of the Hon'ble Court, the allocation of marks of Bio-data was revised and 50 additional marks were allotted for 'work experience'. Accordingly, total marks in Bio-data were increased from 50 to 100. The personal talk was held by the designated Selection Board (Assessment Board) consisting of experts in the relevant field of specialization who assess the candidates in a holistic manner on the basis of such questions as deemed fit for the post in overall public interest. Therefore, the fairness of the Assessment in the Personal Talk

by the Board comprising of senior experts in that particular field may not be questioned just for the reason that three candidates (including the Applicant) were not assessed 'fit', out of a total of 532 candidates.

8.3 With regard to the averment made in para 7.2 (iii) above, it is respectfully submitted that the averment made by the petitioner is incorrect and baseless. Being an independent constitutional body, the Commission can devise its own methods for making fair and transparent selection. In order to recognize any additional qualification that the candidates would have been acquired subsequently during the course of their employment, the selection criteria need to give some allocation of marks on additional qualification as well. It is relevant to mention that this criteria has been adopted in respect of all the candidates. It is pertinent to submit that out of six doctors who did not qualify in the first assessment, three were assessed 'fit' in the second assessment later as per the revised criteria”.

9. The Tribunal while rejecting the OA in paragraph 10, held as under:

“10. We have given our thoughtful consideration to the arguments put-forth by the learned counsel for the parties and have also perused the pleadings and documents annexed thereto. A similar matter has already been considered by the Tribunal in OA1556/2014, and decided vide order dated 15.11.2016. The case of the two applicants therein was identical to that of the present applicant. The Coordinate Bench while dismissing OA-1556/2014 has considered a catena of judgments of the Hon'ble Supreme Court on the issue. The gist of all the judgments is that after having participated in the selection process and having been declared unsuccessful, a candidate cannot question the selection process. For clarity, we would like to extract the relevant portion from the said order:

“51. Moreover, it is trite law that after having

participated in the selection process, and having been unsuccessful, and having failed to be selected in the process of selection, the persons not selected cannot turn around and question the whole process of selection undertaken. In the instant case, the two applicants of this OA had, like the applicant of OA No.380/2015 – Dr. Beena Aggarwal, willingly participated in the process of assessment undertaken from 27.03.2012 to 04.04.2012 by the Respondent No.5-UPSC, and had been declared unsuccessful, alongwith three others. When the orders thereafter obtained by those six unsuccessful persons from a Coordinate Bench of this Tribunal, for their re-assessment being taken up, were challenged before the Hon'ble Delhi High Court, the Hon'ble Delhi High Court had ordered for such reassessment to be undertaken, as already discussed above. Even after such a reassessment was conducted on 21.02.2014, the two applicants, along with the third applicant Dr. Beena Aggarwal in OA No.380/2015, had still not been found suitable, even after such reassessment. When 529 Doctors have been so found to be suitable to be inducted into the new cadre at the time of the initial constitution of the DHS, including the three Doctors re-assessed on 21.02.2014, and only the two applicants before us, along with one more Dr. Bina Aggarwal, whose OA still pending for adjudication, were not so selected, they cannot now, after having voluntarily participated twice in the process of their assessment, turn around and challenge such process of assessment. The law in this regard has been laid down by the Hon'ble Apex Court in the following cases:

- “i) Madan Lal vs. State of J&K: AIR 1995 SC 1088;*
- ii) Dhananjay Malik & Ors. vs. State of Uttaranchal &*

Ors.: AIR 2008 SC 1913; (2008) 4 SCC 171;
iii) National Institute of Mental Health & Neuro Sciences vs. Dr. K.Kalyana Raman & Ors. AIR 1992 SC 1806;
iv) Osmania University Represented by its Registrar, Hyderabad, Andhra Pradesh vs. Abdul Rayees Khan: (1997) 3 SCC 124;
v) K.H. Siraj vs. High Court of Kerala & Ors. (2006) 6 SCC 395;
vi) University of Cochin Rep., by its Registrar vs. N.S. Kanjoonjamma and Others, AIR 1997 SC 2083;
vii) K.A. Nagamani vs. Indian Airlines & Ors., (2009) 5 SCC 515;
viii) Amlan Jyoti Borooah vs. State of Assam & Ors., (2009) 3 SCC 227;
ix) Manish Kumar Shashi vs. State of Bihar & Ors. (2010) 12 SCC 576;
x) Chandra Prakash Tiwari & Ors. vs. Shakuntala Shukla & Ors., (2002) 6 SCC 127: 2002 SCC (L&S) 830;
xi) Union of India & Another vs. N. Chandrasekharan & Ors. (1998) 3 SCC 694. ””

10. The submission of Ms. Anita Sahani, learned counsel for the petitioner is that the respondents could not have rejected the case of the petitioner for regular appointment on the basis of reassessment carried out without giving due weightage to her long years of unblemished service, qualification, experience including that the petitioner has been Head of the Department of Surgery. According to her, the rejection is only possible, if the respondents have ignored above parameters while assessing the candidature of the respondent.

11. She has also submitted that Dr. Saroj Bala whose case for regular appointment was rejected, had been granted appointment by the

order of the Supreme Court in ***Dr. Saroj Bala v. The Government of NCT of Delhi & Ors., Civil Appeal NO(s). 7115/2022***, filed by her. She seeks parity with Dr. Saroj Bala.

12. Mr. Naresh Kaushik, learned counsel appearing for the UPSC do also concede to the fact that Dr. Saroj Bala, who is similarly placed like the petitioner was also considered but was also not found fit, has been regularised by the Supreme Court. He does not really contest the claim made by the petitioner in the present writ petition.

13. Ms. Avnish Ahalwat would contest the writ petition and justify the order passed by the Tribunal by stating that the assessment having been done by the UPSC consisting of Experts in the field, who have not found her fit enough to be given regular appointment cannot be interfered with.

14. She submits, regularisation is not a mode of appointment. Only process which require to be undertaken in making regular appointment, in terms of the recruitment rules. Since that process has been carried out through UPSC which did not find the petitioner fit, this Court would not interfere in the judgment.

15. Having heard the learned counsel for the parties and perused the record. At the outset, we may state that, during the process of hearing, we have called for the record for assessment carried out by the UPSC. We find that like the petitioner, even Dr. Saroj Bala was not considered fit for being granted the regular appointment. It is a fact that Dr. Saroj Bala had approached the Supreme Court in ***Dr. Saroj Bala (supra)***, which has been allowed in favour of Dr. Saroj Bala wherein, the Supreme Court has stated as under:

“Leave granted.

Heard learned counsel for the appellant, the Government of National Capital Territory of Delhi and the Union Public Service Commission.

The dispute in this proceeding is over regularisation of the appellant in the Delhi Health Service, in which she was appointed on ad-hoc basis.

The Central Administrative Tribunal had rejected her plea for regularisation and the order of the Tribunal was sustained by the High Court. The judgment of the High Court was delivered on 20th March 2017. Subsequently, in the case of Nageshwar Kumar Nagar & Ors. vs. Govt. of NCT of Delhi & Ors. in SLP(C) Nos. 12140-12141 of 2018, this Court held:-

“...In view of the order passed by this Court on 13.03.2018 in SLP(C) No.26984-26987 of 2017 Anju Gupta & Ors. Et. vs. Govt. of NCT of Delhi & Ors. Etc. these special leave petitions are also disposed of on the same terms. If there are other similarly placed persons, they may also be treated at par.”

In the case of Anju Gupta & Ors. which has been referred to in the decision of Nageswar Kumar Nagar & Ors. a Coordinate Bench of this Court opined that the petitioners therein ought to be given one time regularization, without seniority over and above regularly recruited persons.

Having considered this order, Mr. Naresh Kaushik, learned counsel for UPSC submits that the earlier rejection of the appellant's plea for absorption was based on certain criteria which may not apply at present since the appellant is entitled to be regularised now. According to him, the only criteria for regularisation is now continuous service of ten years within the cadre and it is not in dispute that the appellant has discharged such service. In view of this stand taken by the UPSC, we do not consider it necessary to go into the question of legality of the Service Rules, on the basis of which the appellant's regularization plea was being refused.

Mr. Sanjay Jain, Ld. ASG/learned senior counsel appearing for the NCT Government accepts the stand of UPSC. In such circumstances, we allow this appeal and direct that the appellant shall be regularised in the cadre subject to the fulfillment of other applicable conditions.

W.P.(C) No. 826/2017:

Learned counsel for the petitioner submits that having regard to the Order we have passed in the appeal arising out of SLP(C) No.

20297/17, he has instructions not to press the petition filed by his client under Article 32 of the Constitution of India challenging the legality of Rule 6 of the Delhi Health Service (Allopathy) Rules, 2009. This petition is accordingly dismissed as not pressed.”

(emphasis supplied)

16. We find that the petitioner was considered by the UPSC and had secured more marks than Dr. Saroj Bala in that sense; she is slightly higher in the merit, though both of them were found “unfit”. Be that as it may, the Supreme Court has granted the regularization in favour of Dr. Saroj Bala. In view of the stand of the UPSC, which stand was accepted by the learned ASG representing the Govt. of NCT of Delhi, there can be no contest.

17. If that be so, there is no reason, why the petitioner, who is also similarly placed like Dr. Saroj Bala and has vast experience of more than 27 years and has been working as Head of the Department of Surgery, should not be given the same benefit as has been granted by the Supreme Court. For parity of reasons, the petitioner shall also be entitled to the benefit of regularization in the cadre subject to the fulfillment of other applicable conditions.

18. The order of the Tribunal dated March 23, 2017 is set aside. The petition is disposed of. No costs.

V. KAMESWAR RAO, J.

ANOOP KUMAR MENDIRATTA, J.

FEBRUARY 22, 2023/aky