

CASE NO.:
Appeal (civil) 5757-5759 of 2002

PETITIONER:
State of U.P. & Anr.

RESPONDENT:
Om Prakash & Ors.

DATE OF JUDGMENT: 21/07/2006

BENCH:
H.K. SEMA & A.K. MATHUR

JUDGMENT:
J U D G M E N T

H.K. SEMA, J
WITH
C.A.No.5761-5763/02, C.A.No.5765-5766/02, C.A.No.5760/02,
C.A.No.5764/02, C.A.No.3078 of 2006 @ SLP (c)No.24710
of 2002, C.A.No.3097 of 2006 @ SLP(C)No.24189/02,
C.A.No.7013/04, C.A.No.174/05, C.A.No.275/05,
C.A.No.276/05, C.A.No.278/05, C.A.No.1190/05,
C.A.No.1191/05, C.A.No.1192/05, C.A.No.1193/05,
C.A.No.2734/05 and C.A.No.7533 of 2005.

Delay condoned in SLP (c) Nos.24710 and 24189 of
2002 and leave granted.

I.A.Nos.3-4 of 2001 for impleadment and I.A.Nos.7-
8 of 2004 for intervention in C.A.No.5765-5766 of 2002 are
rejected.

These bunch of appeals raise a common question of
fact and law and as such they are being disposed of by this
common judgment. For the sake of brevity we are taking the
facts from Civil Appeal No.5757-5759 of 2002.

The facts are cumbersome. Avoiding prolixity few
facts are recited. The whole controversy revolves around the
selection made by the Uttar Pradesh Public Service
Commission (hereinafter referred to as the UPPSC) for the
Medical Officers of Homeopathy.

Pursuant to the advertisement dated 22.3.1986 and
a corrigendum dated 14.11.1987, 390 posts were advertised to
be filled up by the Homeopathic Medical Officers through
UPPSC. Alongwith others respondents also applied for the
posts for which the interview was held on 23.10.1990. The
appointments were to be made on the basis of oral interview
and also the marks to be awarded on the qualifications of each
candidate.

It is stated that the respondents possess the
Bachelor Degree of Homeopathic Medicine and Surgery
(B.H.M.S). It is also stated that they have completed five years
course including one-year compulsory routine internship in
Government Hospitals and Public Health Centres from
Homeopathic Medical College affiliated with the Agra
University in the year 1985.

To appreciate the real controversy in perspective, it
is necessary to notice the requisite qualification mentioned in
the advertisement as per the requirement of Rule 8 of the
Uttar Pradesh Homeopathic Medical Service Rule, 1990 (in
short Rules).

"8. Academic qualification:-

A candidate for direct recruitment to the
service must possess:-

I. a recognized degree in Homeopathic, the duration of study of which is not less than five years according to its syllabus of course.

OR

a recognized Diploma in Homeopathy the duration of study of which is not less than four years according to its syllabus of course.

Provided that preference will be given to degree holders.

(emphasis supplied)

II. The applicant should be duly registered with the Homeopathic Medical Board, Uttar Pradesh.

It will be noticed from the above quoted rules that in addition to the requisite qualification a proviso has been added "preference will be given to degree holders".

The real controversy starts from the proviso that "preference will be given to degree holders".

For total seats of 390, 716 degree holders applied, out of which 565 were found eligible for interview and out of them 109 have been recommended and appointed. The total number of diploma holders who had applied for the posts were 4239, out of which 1989 were called for interview and 302 were recommended. The diploma holders in general category who had secured 49% marks were called for interview whereas in the case of backward class candidates those who had secured 48.7% marks were called for interview.

In the batch of writ petitions the main judgment was delivered by the Division Bench of the High Court in Civil Misc.Writ Petition No.10175 of 1994 disposed of on 19.7.1996. The judgment of the Division Bench dated 19.7.1996 passed in Civil Misc. Writ Petition has not been assailed by the appellants and therefore it has attained finality. What has been appealed against in this bunch of appeals is the subsequent order of the High Court following the decision dated 19.7.1996 rendered in Civil Misc.Writ Petition No.10175 and batches of 1994.

Undisputedly, the respondents were degree holders with requisite qualification as prescribed in the advertisement. The apple of discord centers around the proviso. The respondents/writ petitioners contended before the High Court that such preference has not been given to the degree holders and they were clubbed together with the diploma holders and considered as such by the Commission. The respondents challenged the entire selection in the writ petition as ultra vires the qualifications prescribed in the advertisement. The select list has also been challenged on the ground of arbitrariness as according to the respondents/writ petitioners the preference clause was totally ignored. It was contended before the High Court by the appellants that the ratio for filling up 390 total seats was in the ratio of 1 to 8. In other words, for filling up the 390 total seats, 2554 candidates were called for interview, out of which 1989 were diploma holders and 565 degree holders were found eligible.

The High Court after repelling the contention of the

appellants has interpreted the preference clause as under:-

"If we read the preferential clause, giving the ordinary literal meaning, the Degree holders were to be preferred to Diploma holders, as has been explained in the advertisement itself, i.e. the Diploma holders will be considered only when the Degree holders are not available in requisite number. These are the words used in the clarification clause given in the advertisement. It is plain and clear from those words that in case where Degree holders are not available in requisite number, only then, Diploma holders are to be considered. Therefore, there was no rationality in clubbing them together while considering the preference to be given to the Degree holders."

The High Court rejected the consistent contention of the appellants that the writ petitioners/respondents herein were also called for interview and they were not selected for the posts.

However, the High Court on the aforesaid reasoning of interpretation of preference clause as prescribed in the advertisement has come to the following conclusion:

"Considering the facts and circumstances of the case, we have no hesitation in holding that the Commission acted in most arbitrary and unreasonable manner in making selection for the post of Homeopathic Medical Officer. It is not expected from such a constitutional body, like the public Service Commission to act in such a casual manner while considering the public employment. We would have had no hesitation in quashing the entire selection made by the Commission but considering the public interest and also bearing in mind that the persons already selected have been appointed and are working on their posts as Homeopathic Medical Officers for more than two years and they could not be made party in these writ petitions, although a few of them have intervened by filing applications and have been heard, and further that fresh selection will unreasonably delay causing inconvenience to the public in general, we refrain from doing so in the larger interest. Therefore, on conclusion of the hearing, we sought information from the learned Standing Counsel as to how many posts of Homeopathic Medical Officers are still vacant. The learned Standing Counsel filed an affidavit on behalf of the State annexing therewith a letter dated 20.5.1996, disclosing that 50 posts of Homeopathic Medical Officers are still lying vacant, out of which 15 posts are earmarked for the female candidates. Therefore, considering all these circumstances, we are of the view that it would be equitable in the facts of the case to issue direction to the Commission to forward the names of all the petitioners to the State Government for appointment on the vacant post of Homeopathic Medical Officers."

The interpretation of the preference clause given by

the High Court runs into the teeth of the decisions rendered by this Court in a catena of cases.

This Court has consistently held that when selection is made on the basis of merit assessed through the competitive examination and interview, preference to additional qualification would mean other things being qualitatively and quantitatively equal, those having additional qualification would be preferred. It does not mean en bloc preference irrespective of inter se merit and suitability.

In Secy.(Health) Deptt. Of Health & F.W. vs. Dr.Anita Puri (1996) 6 SCC 282, this Court held that preferential qualification do not as of right entitle to selection. In that case the advertisement inviting applications for the post of Dental Officers prescribed B.D.S. as the minimum qualification but stipulated preference for higher dental qualification. This Court held at scc p.285 as under:-

"Admittedly, in the advertisement which was published calling for applications from the candidates for the posts of Dental Officer it was clearly stipulated that the minimum qualification for the post is B.D.S. It was also stipulated that preference should be given for higher dental qualification. There is also no dispute that M.D.S. is higher qualification than the minimum qualification required for the post and the Respondent No. 1 was having that degree. The question then arises is whether a person holding a M.D.S. qualification is entitled to be selected and appointed as of right by virtue of the aforesaid advertisement conferring preference for higher qualification? The answer to the aforesaid question must be in the negative. When an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference should be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher qualified candidates. But by no stretch of imagination it can be construed to mean that a higher qualified person automatically is entitled to be selected and appointed. In adjudging the suitability of a 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 candidate. 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, extra-curriculum 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. In this view of the matter, the High Court in our considered opinion was wholly in error in holding that a M.D.S.

qualified person like Respondent No. 1 was entitled to be selected and appointed when the Government indicated in the advertisement that higher qualification person would get some preference. The said conclusion of the High Court, therefore, is wholly unsustainable and must be reversed".

This Court again considered the same question in Secretary, A.P.Public Service Commission vs. Y.V.V.R.Srinivasulu (2003) 5 SCC 341 and held at scc p.348 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 not provide for separate classification of those candidates or apply different norms of selection for them. The 'preference' envisaged in the rules, in our view, under the scheme of things and contextually also cannot mean, an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. Such a construction would not only undermine the scheme of selection envisaged through the Public Service Commission, on the basis of merit performance but also would work great hardship and injustice to those who possess the required minimum educational qualification with which they are entitled to compete with those possessing additional qualification too, and demonstrate their superiority merit wise and their suitability for the post. It is not to be viewed as a preferential right conferred even for taking up their claims for consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when anyone or more of them are found equally positioned by using the additional qualification as a tilting factor, in their favour vis-a-vis others in the matter of actual selection".

In the instant case, the requisite academic qualification for the post of homeopathy as prescribed in the

advertisement was a recognized degree in Homeopathy or a recognized diploma in Homeopathy. A proviso has been added that preference will be given to degree holders. This would mean that a recognized diploma in homeopathy prescribed in the advertisement is also a required minimum educational qualification with which they are entitled to compete with those candidates possessing the degree. 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 bloc preference irrespective of inter se merit and suitability.

That apart this Court has consistently held that inclusion of candidate's name in merit list does not confer any indefeasible right to be appointed. [See Shankarsan Dash v Union of India, AIR 1991 SC 1612 and Union Territory of Chandigarh v Dilbagh Singh, (1993) 1 SCC 154]

In the facts aforesaid we are clearly of the view that the High Court has misdirected itself by issuing such directions despite the fact that the respondents were not selected by the Commission.

Counsel for the respondents herein would contend that since the order of the High Court dated 19.7.1996 passed in Civil Misc. Writ Petition No.10175 of 1994 and batches has now attained finality, the subsequent order of the High Court following the same decision assailed in the present appeals must also be dismissed. We are unable to accept this contention. Adhering to such contention would amount allowing the perpetuation of illegality.

We may also dispose of one of the arguments of the counsel for the appellants. Counsel contended that the judgment of the High Court dated 19.7.1996 passed in Civil Misc. Writ Petition No.10175 of 1994 which judgment was followed in a subsequent order has been assailed in this batch of appeals and, therefore, the judgment dated 19.7.1996 is clearly illegal and the same should also be set aside. We are unable to agree with this submission for more than one reason. Firstly, the judgment dated 19.7.1996 has not been appealed against and it has now been implemented and has attained finality. Secondly, the writ petitioners in Civil Misc. Writ Petition No.10175 of 1994 and batches thereof which were allowed by the High Court in its judgment dated 19.7.1996 are not before us.

However, the subsequent orders following the judgment by the High Court dated 19.7.1996, which has been assailed in these bunch of Civil Appeals, are quashed and set aside. Accordingly, Civil Appeal Nos.5757-5759/02, 5761-5763/02, 5765-5766/02, 5764/02, C.A.No\005\005\005\005\005\005\005of 2006 @ SLP (c) No.24710/02, C.A.No\005\005\005of 2006 @ SLP (c) No.24189/02, C.A.No.174/05, C.A.No.275/05, C.A.No.276/05, C.A.No.278/05, C.A.No.1190/05, C.A.No.1191/05, C.A.No.1192/05, C.A.No.1193/05, C.A.No.2734/05 and C.A.No.7533 of 2005 filed by the State of U.P. and Uttar Pradesh Public Service Commission are allowed.

Civil Appeal Nos.7013 of 2004 and 5760 of 2002 are dismissed. Parties are asked to bear their own costs.