

WEERASEKARA
v
DIRECTOR-GENERAL OF HEALTH SERVICES
AND OTHERS

SUPREME COURT

FERNANDO, J.

YAPA, J. AND

J.A.N. DE SILVA, J.

SC FR APPLICATION No. 86/2002

30 JANUARY AND 14 FEBRUARY, 2003

Fundamental Rights – Appointment in the Health Department as trainee pharmacist – Applications limited to employees serving in the department – Doubt regarding the construction of a criteria of selection for appointment – Interpretation of the criteria in legitimate expectation of appointment – Article 12(1) of the Constitution.

The petitioner, a dispenser in the Department of Health Services applied to sit an examination for selection and appointment as a trainee Pharmacist. At the closing date of applications he was subject to a five year scholarship bond of which she had to serve a balance period of one and a half months. The advertisement said that the prospective applicants should have served the full bond period.

The petitioner's application was misplaced in the office of the Director -General of Health Services. The petitioner submitted a fresh application and she was issued an admission card to sit the examination. She was, however, not called for interview on the ground that at the time she made her application she had not completed the full period of her bond. Candidates who had secured less marks than the petitioner had been appointed to the post.

Held:

1. There was doubt as to the point of time for completing the bond service, viz., whether it was at the time of the closing of applications or at

the date of the written test or at the date of appointment.

2. In view of the above doubt and the legitimate expectation created by the acceptance of the petitioner's application and permitting her to sit the test, the petitioner was entitled to an appointment. The denial of an appointment was, in the circumstances unreasonable and arbitrary and violative of Article 12(1) of the Constitution.

APPLICATION for relief for infringement of fundamental rights.

Saliya Peiris with Upul Kumarapperuma for petitioner

Harsha Fernando, State Counsel for respondents.

Cur.adv.vult

April 4, 2003.

J.A.N. DE SILVA, J.

The petitioner is a dispenser attached to the base hospital, Kahawatta. When her application alleging violation of fundamental rights was supported in this court, leave to proceed was granted under Article 12(1) of the Constitution.

The petitioner was appointed to the post of dispenser with effect from 3rd July 1995 subject to a probationary period of three years. She had been trained at the cost of the government for two years and in view of the said training her appointment has been subjected to a bond for a period of five years *i.e.* from the 3rd of July 1995 to 3rd of July 2000. Subsequently the petitioner has been confirmed in her post with effect from the 3rd of July 1995.

By an internal notice dated 24th April 2000 (P5) applications were called from the employees of the Health Department for training programmes in several health sector services including training programmes for the posts of pharmacists. The notice stated that applications are called from those employees who have the necessary qualifications and satisfy the conditions as set out in the notice. Paragraph 4 of P5 specifically stated that prospective applicants:

- (a) should have completed three years in the Department;
- (b) been confirmed in their post;
- (c) and should have served the full bond period (for those who are bonded).

In terms of the bond the petitioner had signed, after training it was obligatory for the petitioner to:

- (a) serve the Republic for a period of five years from the date of appointment;
- (b) to be attached to the Department of Health;
- (c) as a dispenser.

The selections for trainee pharmacists were to be made upon a written test followed by an interview. The notice calling for applications was not specific whether the criteria as to the completion of the period of mandatory service should be as at the date of closing the applications (19th of May 2000) or as at the date of the written test or as at the date of appointment.

The petitioner submitted two applications and the circumstances under which it was done had been explained by her in her affidavit. The first application had been submitted through the District Medical Officer of Kahawatta. The written tests were scheduled for the 30th of July 2000. Since the petitioner had not received her admission card she had written to the 2nd respondent (Deputy Director of Health (Administration)). The 2nd respondent informed her that her application was forwarded to the 1st respondent but had been misplaced in the 1st respondent's office. Subsequently the petitioner submitted a fresh application and she was issued an admission card to sit the examination, which was held on the 30th of July 2000.

The petitioner was not called for the interview and had not been appointed to the post of pharmacist on the basis that she had not completed the 5 years of compulsory service stipulated in the bond signed by her at the time she made the application. It is to be noted that several others who had secured less marks than the petitioner had been appointed to the said post but the sole reason for not appointing the petitioner had been that as at the closing date of the applications she had yet to complete one and a half months out of the period in the bond.

The main issue in this application is to determine the relevant date on which the eligibility criteria of the applicant need to be evaluated.

The primary contention of the petitioner was that on the date that she made the application she was under a bond but by the time she sat the examination and when the selection was done the bond period had expired. The respondents on the other hand have taken up the position that the notice (P5) specifically stated that the closing date was to be on 19.05.2000, by that date the petitioner had not completed serving the bond period and therefore she was disqualified even to apply to be a trainee pharmacist. As stated earlier the notice calling for applications was not specific whether the criteria as to the completion of the period of mandatory service should be as at the date of closing of the applications or as at the date of the written test or as at the date of appointment. The 1st respondent in his affidavit has admitted that this lacuna is there in the notice (P5).

The petitioner contended that it was the duty of the respondents to specifically state the date on which the mandatory period of five years should be calculated when calling for applications for trainee pharmacists in the Health Department.

Learned counsel for the petitioner submitted that in terms of the Establishments Code there was a duty cast on the respondents to scrutinize the applications and to be satisfied of their eligibility. By accepting the petitioner's application and permitting her to sit for the written test they have given her a legitimate expectation that upon her being successful at the examination and the interview, she will be selected to undergo the course of trainee pharmacists. It was further pointed out that the respondents could have verified the qualifications stated in the application of the petitioner and could have even rejected the application before calling for the written test, if the requirement was that the petitioner should have completed the required five years bond period as at the closing date of the application.

The 1st respondent in his affidavit has taken up the position that the applicants were allowed to sit the examination on the assumption that the applicants have submitted the applications as

they in their opinion had fulfilled and satisfied the necessary eligibility criteria.

The 1st respondent has also taken up the position that due to “administrative reasons” and “time constraints” he could not consider all the applications in detail prior to the written examination.

The explanation given by the 1st respondent to say the least is not worth putting down in writing. It is unsatisfactory and unacceptable. The mess in the administrative section of the Health Department is clearly demonstrated when the respondents say that the petitioner’s first application had been misplaced in the office and an admission card was issued to the petitioner on her second application.

The 1st respondent cannot rely on what the petitioner ought to have assumed but should necessarily state specifically the requirements in the notice calling for the eligibility criteria that would apply. By permitting the petitioner to sit the examination, it is the respondents who led the petitioner to believe that the relevant date for meeting the criteria as to the bond was not earlier than the date of examination.

During the course of the argument it was made known that in terms of the agreement (Bond P5), the petitioner could be discharged from the bond by repaying any amount then due to the government on account of expenses borne by the government in the event of the resignation or change in her appointment. The Establishments Code which is applicable to government servants too recognizes this principle. Apart from the provisions in the Establishments Code the documents submitted by the petitioner together with her further affidavit in December 2002 indicate that there had also been a practice in the Health Department of adding the undischarged period of the bond to the period of the second bond.

The petitioner was not going to leave the government service or the Health Department and join another private institution. She was seeking to further her prospects within the government service thus fulfilling the purpose for which the bond had been entered into. In these situations authorities should take a realistic view and adopt a practical approach. The requirement that an applicant should

have served the full bond period was not a condition relating to suitability, (such as qualifications, experience, past performance, seniority, examination performance etc.). It did not affect the competitiveness of one applicant *vis a vis* another. It was a bar to appointment, arising from an agreement between an applicant and the State as employer, which could have been (a) waived by the State (b) recovered by payment as provided in the bond itself and (c) recovered by the substitution of an alternate obligation in a different capacity as evidenced by practice. While generally eligibility criteria must be satisfied as at the closing date of applications, in the circumstances of this case the failure to make express provision to that effect, permitting the petitioner to sit for the written examination and proved practice would have led the petitioner to believe that the condition of service had been satisfied or waived or substituted. Therefore I hold that by failing to select the petitioner to follow the pharmacist training course the 1st respondent acted arbitrarily and unreasonably and thereby acted in violation of the equal protection of the law guaranteed under Article 12(1) of the Constitution. The court is informed that the training course is scheduled to proceed till the end of the year. In the circumstances I direct the 1st respondent to permit the petitioner to follow the said pharmacist course immediately if the petitioner so wishes. However the State is directed to pay Rs. 25,000/- (Rupees Twenty Five Thousand) as cost to the petitioner.

FERNANDO, J. – I agree.

YAPA, J. – I agree.

Relief granted.