

**(2020) 03 J&K CK 0014**

**Jammu And Kashmir High Court**

**Case No:** Service Writ Petition No. 2421 Of 2018, CM No. 1, 928 Of 2019, IA No. 01 Of 2018

Sanjana Sharma And Another

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

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**Date of Decision:** March 10, 2020

**Acts Referred:**

- Jammu And Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979 - Rule 7(1)

**Hon'ble Judges:** Sanjeev Kumar, J

**Bench:** Single Bench

**Advocate:** Abhinav Sharma, Syed Wajahat Ali, H.A.Siddiqui, F.A.Natnoo, P.N.Raina, J.A.Hamal, Deeksha Handoo

**Final Decision:** Disposed Off

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**Judgement**

1. The petitioners are M.D.in Paediatrics and were engaged on the tenure post of Registrars in Govt. Medical College, Jammu for a period of three years vide Office Order No.915 of 2015 dated 11.09.2015. While the petitioners were undergoing their Registrarship, they applied for and were granted 180 days maternity leave vide office Order No.2127 of 2017 dated 03.07.2017 and Order No.2096 of 2017 dated 13.06.2017 respectively passed by the respondent No.2. The maternity leave in the case of the petitioner No.1 commenced w.e.f. 13.05.2017 whereas in the case of the petitioner No.2, it commenced w.e.f. 26.05.2017. The petitioners, after availing maternity leave sanctioned in their favour, joined back their duties as Registrars in Govt. Medical College, Jammu. In the year 2018, the respondent No.4 vide Notification No.01-PSC (DR-P) of 2019 dated 17.01.2018

invited online applications on the prescribed format from the eligible permanent residents of State of Jammu and Kashmir for ten posts of Assistant Professors (Lecturers) in Paediatrics in various newly opened Govt. Medical Colleges of the State. The petitioners claiming to be possessed of the requisite qualification and experience of two years as Registrars on the cut-off date submitted their online applications. The respondent No.4, on scrutinization of the application forms, came up with a Notice dated 15.11.2018 and notified the names of 47 candidates, who as per the respondent No.4, were found provisionally eligible to participate in the selection process. The petitioners were put in the separate list prepared for ineligible candidates in which they were placed at S.Nos.5 and 3 respectively and they were notified as ineligible, for the reason "Not possessing the requisite experience". The respondent No.4, while relying upon the experience certificate issued by the respondent No.2, took out a period of 180 days maternity leave availed by the petitioners in the year 2017 from total teaching experience claimed by the petitioners. Both the petitioners were, thus, found short of requisite experience and were, thus, declared "ineligible" for participating in the selection process. Since the period of 180 days availed by the petitioners as maternity leave was excluded by the respondent No.4 from the teaching experience of the petitioners, as such, the petitioners filed SWP 1838/2018 seeking inter alia a direction to the respondents to extend the period of their tenure posting as Registrars, Govt. Medical College, Jammu by 180 days so that the petitioners are in position to complete the required period of three years as teaching experience. The petition was disposed of vide judgment dated 14.09.2018 and the direction was issued by this Court to the respondents to take a decision on the request of the petitioners for extension of their deputation period by 180 days. The Court further provided that till the applications submitted by the petitioners were considered and decided, they would not be relieved from the post of Registrars. It is contended that, despite the stay granted by this Court on the relieving of the petitioners and before a decision on their applications was taken by a speaking order, the respondent No.2 vide Order No.548 of 2020 dated 24.02.2018 relieved the petitioners, purportedly, in compliance to the directions passed by this Court in SWP No. 2355/2015 and

also on account of the fact that the petitioners had completed their three years tenure as Registrars in Govt. Medical College, Jammu. After relieving the petitioners from Govt. Medical College, Jammu, the respondent No.2 vide Order No.557 of 2018 dated 15.11.2018 decided the applications of the petitioners for extension of deputation period. The applications were rejected by the respondent No.2 on the ground that under the rules and various communications of the Government, no extension to the tenure post of Registrar can be granted on the ground of maternity leave.

2. The respondent No.4 has filed its objections and has contested the plea of the petitioners on the ground that in terms of the experience certificates issued by the competent authority, i.e., respondent No.2, the petitioners were found lacking the requisite teaching experience of two years and therefore, held ineligible to compete for the post of Assistant Professors. It is plea of the respondent No.4 that what is required by the rules is the "actual" and not the "notional experience" in teaching and a person, who is on leave, of whatever kind, cannot be said to have acquired any teaching experience during the period of such leave. With regard to the plea of the petitioners that they were entitled to extension of their tenure appointment by 180 days equivalent to the period availed by the petitioners as maternity leave, it is contended by the respondent No.4 that matter lies within the domain of other respondents and respondent No.4 being the selection body has nothing to do with it.

3. Other respondents have not filed their objections.

4. There is, however, one application (CM 928/2019) filed by Dr. Nazimus Saqib for being impleaded as party respondent in the writ petition. Neither the petitioners nor the respondents have opposed the said application. Accordingly, the application for the reasons stated therein is allowed and Dr.

Nazimus Saquib son of Sajjad Ahmed R/O H.No.18-A, Rama Lane Extension Talab Tillo, Jammu is impleaded as party-respondent. Registry shall, accordingly, update the cause title of the petition.

5. Heard learned counsel for the parties and perused the record.

6. The grievance projected by the petitioners in this petition is twofold (i) that the period of 180 days availed by the petitioners as maternity leave

counts for teaching experience of the petitioners as Registrars and, therefore, the respondent No.4 was not justified in excluding the said period from the total experience possessed by the petitioners on the cut-off date and (ii) that if respondent No. 4 is correct in deducting the period of 180 days availed by the petitioners as maternity leave, then the respondent No.2 ought to have extended the tenure appointment of the petitioners as Registrars by a period of 180 days so that they could acquire the requisite teaching experience of three years, which as per MCI guidelines, is minimum experience required for the post of Assistant Professor.

7. Indisputably, the appointment of the Registrar as also Assistant Professor amongst others is governed by the Jammu and Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979 (hereinafter referred to as "the Rules of 1979"). As per Rule 7(1), no person is eligible for recruitment/promotion to a post in the service unless he possesses the qualification and fulfils the requirements of recruitment prescribed for that post in Schedule-II. From reference to Scheduled-III, the post of Assistant Professor is to be filled up by promotion from Class-V, i.e., Lecturer in the concerned discipline. Whereas the post of Lecturer under the Rules of 1979 is a direct recruitment post to be filled up by a person possessing the post-graduation qualification in the concerned speciality and teaching experience as Registrar/Tutor/ Demonstrator or Senior Resident for a period of two years in a recognised Teaching Medical Institution recognized by the MCI or the University of Kashmir/Jammu. In the instant case, the post notified by the respondent No.4 was entry level post of Assistant Professor meant for new Medical Colleges established in the State and were provided to be filled up by way of direct recruitment from the person(s) possessing MBBS Degree, MD/MS in the concerned discipline from an institution duly recognised by the MCI and possessing two years teaching/research experience as Registrar/Tutor/Demonstrator or Sr. Resident from an institution duly recognized by the MCI.

8. The petitioners responded to the Advertisement Notification No. 01-PSC (DR-P) of 2018 dated 17.01.2018 issued by the respondent No.4 and sought consideration for the posts of Assistant Professors (Paediatrics) in the newly established Medical Colleges of the State. As per the

Advertisement Notification, the petitioners, apart from possessing the requisite educational qualification, were also required to possess two years teaching experience as Registrar/Tutor/Demonstrator/Sr. Resident on the cut-off date indicated in the Advertisement Notification. The petitioners have relied upon the teaching experience certificates issued in their favour by the Principal Govt. Medical College, Jammu in which it has been specifically mentioned that during the period of their service as Registrars, the petitioners had availed 180 days maternity leave. The respondent No.4 excluded 180 days from the total experience claimed by the petitioners and found the petitioners lacking requisite experience of two years as Registrars, thus, declared them ineligible. The petitioners contend that this period of 180 days availed by them as maternity leave is required to be treated as "notional experience" and, therefore, cannot affect continuity of their experience, which they gained while working as Registrars in Govt. Medical College, Jammu.

9. Per contra, learned counsel for the respondent No.5 and Mr. P.N.Raina Sr. Counsel appearing for the impleaded respondent submits that two years teaching experience required for the post of Assistant Professor is "actual experience" gained while working against the post and not the "notional experience".

10. Having given my thoughtful consideration to the aforesaid contentious issue and taking note of clear stipulation in the Advertisement Notification, which provided for two years teaching experience, I could not persuade myself to accept the plea of the petitioners. Undoubtedly, teaching experience as Registrar/Tutor/ Demonstrator/Sr. Resident can be gained only by actually working and cannot be gained notionally. Indisputably, both the petitioners were out of action for a period of 180 days and were, thus, not performing any duties, muchless, teaching duties during the aforesaid period. If that be so, admittedly, both the petitioners did not have requisite teaching experience of two years on the cut-off date. They were, thus, correctly held ineligible. I am not impressed by submission of learned counsel for the petitioners that the maternity leave, which is availed by a female Govt. employee is not by choice, but, by compulsion and, therefore, to deprive a female of the period of maternity leave towards counting of the total

experience would be harsh and per se discriminatory. While there is no denying the fact that maternity leave is not availed by choice, but, is a necessity, nonetheless, that would not take away the essence of the requirement of eligibility prescribed for the post. The contention of the learned counsel for the petitioners would hold good in a case where instead of teaching experience, the requirement of rules is service of two years.

Whatever be the nature of leave availed by an employee, the period spent on leave cannot count for teaching experience. Teaching experience, as held above, can only be acquired by actually working on the post not by being on leave. The concept of "notional experience" is alien to service jurisprudence.

11. In the view I have taken, I am fortified by judgment of the Hon<sup>ble</sup> Supreme Court rendered in the case of *Vivek Mudgil v. State of UP and others*, reported in 2019(2) SCC 427. The paragraph No.10 of the judgment reads thus:-

¶10. It is not in dispute that as on the last date of submission of applications pursuant to the advertisement issued by the Board inviting applications for appointment to the post of Principal, the appellant herein was having only 9 years 3 months of teaching experience. Even as per the notification, having regard to academic qualification possessed by the appellant, there was a requirement of 10 years of teaching experience. It is not in dispute that the appellant had only 9 years 3 months of teaching experience on the last date of making applications. Mainly the writ petitions were filed in the High Court alleging that his period of foreign study leave is to be computed for the purpose of computing the teaching experience of 10 years. It was the case before the High Court that as he was granted leave as per the leave rules and he was also granted increments for the said period, as such, such period has to be computed. It is to be noticed at this stage that he was granted scholarship for higher studies in Czechoslovakia. It is not in dispute that from 15.04.1992 to 08.03.1996 he was studying in Czechoslovakia and same cannot be considered as a teaching experience. Further, having regard to the requirements in the Regulations teaching experience of 10 years is rightly considered as a necessary qualification by the Division Bench of the High Court.¶

12. In view of the aforesaid legal position, the reliance placed by the learned counsel for the petitioners on the meeting of the Executive Committee of

Medical Council of India held on 21.08.2014 is totally misplaced. Reference to maternity leave in the aforesaid meeting is for a different purpose and,

therefore, cannot be taken benefit of by the petitioners to buttress their claim. As per "minimum qualification for Teachers Medical Institution

Regulations 1998", the minimum prescribed qualification for the post of Assistant Professor in "Paediatric" is as follows:-

"For the candidate possessing MD/MS degree from MCI recognised Medical College:

Three years teaching experience in the subject as Resident/Registrar/Demonstrator/Tutor in a recognised Medical College either during the post-

graduate course or after obtaining post-graduation degree in the subject."

13. The eligibility requirements provided by the MCI in the aforesaid regulations are the minimum and are required to be adhered to by all MCI

recognised Colleges across the board and the requirement of three years teaching experience, which experience as explained hereinbefore, can be

acquired only by actually working as Registrar/Tutor/Demonstrator/Resident and cannot be claimed on notional basis. There is a definite object for

providing teaching experience as the post of Assistant Professor in any Medical College is a teaching post and unless the person possesses the

requisite prescribed experience, he/she may not be in a position to handle the teaching assignment of Assistant Professor in the Medical College. On

that analogy, it should be held and I hold that the teaching experience can only be gained by actually and physically working on the post and not

notionally while being on leave, of whatever kind. It is, however, beyond my comprehension as to how the respondents are carrying on selection to the

post of Assistant Professor by prescribing only two years teaching experience, which is less than the minimum teaching experience prescribed by the

Medical Council of India in terms of the Regulation 1998 framed by the MCI prescribing minimum eligibility for teaching faculty in the Govt. Medical

Colleges. It is trite that MCI Regulations have overriding effect over the contrary rules, if any, framed by the State Government. [See-D r. Preeti

Shrivastava V. State of MP and others, reported in (1999) 7 SCC 120]

14. Be that as it is, the respondents are flouting the basic eligibility norms of the MCI with impunity, but, the fact remains that for any candidate to be eligible for the post of Assistant Professor in the Govt. Medical College, it is necessary to acquire/possess the minimum of three years teaching experience. The petitioners in the instant case were deprived of acquiring the requisite teaching experience of three years as Registrars because their tenure was cut short because of the maternity leave, which they had to avail not by choice, but, by necessity. Therefore, the contention of the petitioners that they are entitled to extension of their tenure by 180 days is, therefore, not without substance and, thus, cannot be brushed aside.

15. For the aforesaid reasons, I hold the petitioners entitled to extension in their tenure of Registrarship by 180 days so that they are able to acquire the requisite teaching experience of three years as Registrars and therefore, attain eligibility to apply for the post of Assistant Professor in the recognised Medical Colleges. Accordingly, this petition is disposed of in the following manners:

(i) The decision of the respondent No.4 declaring the petitioners "ineligible" for the post of Assistant Professor for not possessing two years actual teaching experience on the cut-off date is upheld;

(ii) The petitioners are held entitled to extension of their tenure of Registrarship by 180 days, which is equivalent to period of maternity leave availed by them";

(iii) The respondent No.2 shall arrange to re-engage both the petitioners as Registrars in "Paediatrics" in Govt. Medical College, Jammu only for a period of 180 days so as to enable them to make good the shortfall of 180 days.

(iv) The respondent No.2 shall pass appropriate orders for re-engagement of the petitioners as Registrars within a period of four weeks from the date certified copy of the order is served upon him.

(v) If during the pendency of this petition, the petitioners have, somehow, acquired the requisite experience of three years as

Registrar/Tutor/Demonstrator/Resident or are otherwise not desirous to make good shortfall for any reason, the directions (ii) to (iv) need not be implemented.



16. Disposed of as above along with connected CM(s).