



2026:AHC:107073

HIGH COURT OF JUDICATURE AT ALLAHABAD

WRIT - A No. - 835 of 2022

Dr. Albina

.....Petitioner(s)

Versus

State Of U.P. And 3 Others

.....Respondent(s)

Counsel for Petitioner(s) : Karrar Husain, Kshitij Shailendra
(Elevated), Syed Fahim Ahmed
Counsel for Respondent(s) : C.S.C., Gautam Baghel, M.N. Singh,
Nipun Singh

Court No. - 34

A.F.R

Judgement Reserved on 13.04.2026

Judgement Delivered on 08.05.2026

HON'BLE ANISH KUMAR GUPTA, J.

1. Heard Sri H.N. Singh, learned Senior Counsel assisted by Syed Fahim Ahmed for the petitioner, Sri Avneesh Tripathi, learned counsel for the respondents no. 2 and 3, Sri Gaurav Singh, learned counsel appearing for the respondent no. 1 and Sri Utkarsh Singh holding brief of Sri Gautam Baghel, learned counsel for the respondent no. 4.

2. The instant petition has been initially filed by the petitioner seeking quashing of the order/recommendation dated 19.01.2022, whereby the U.P. Public Service Commission has recommended the name of respondent no. 4 for appointment to the post of Reader/Jaharat in Government Unani Medical Colleges and further, seeking a direction to the respondents to appoint the petitioner as the Reader/Jarahat (Surgical) being an eligible candidate, as she is having the post-graduate degree, which was a preferential qualification. Later, by way of an amendment, the petitioner has challenged the advertisement dated 24.09.2019, whereby the said post of Reader/Jarahat under U.P. AYUSH (Unani Department) was advertised as Item No. VIII, and also seeks a Writ of Quo Warranto against respondent no. 4, and also to the respondents not to

permit respondent no. 4 to hold the post of Lecturer, Jarahat Department of the State Takmeel-Ut-Tib College & Hospital, Lucknow.

3. The briefly stated facts of the case are that on the requisition of the State Government, U.P. Public Service Commission, Prayagraj issued an Advertisement No. 2 of 2019-20, dated 24.09.2019, whereby one post of Reader/Jarahat in General Category was advertised to be filled-up on the basis of the conditions prescribed in the advertisement. Pursuant to the said advertisement, the petitioner herein has applied to the post, participated in the selection process and was also interviewed. However, she could not be selected and the respondent no. 1 was selected for the aforesaid post of Reader/Jarahat and her name was recommended vide impugned order dated 19.01.2022 by the U.P. Public Service Commission for appointment. The said advertisement prescribed the following eligibility conditions:-

“(viii) 01 (One) post of Reader Jarahat in Government Unani Medical Colleges of the State, (General recruitment), Deptt. No. S-11/16, Nature of Post. Gazetted & Temporary, Reservation: Unreserved, Pay Band- Rs. 15600-39100/-, Grade Pay 6600/- level-11 (According to 7th Pay Commission), Educational qualification Essential: (1) Five years degree in unani from a University established by law or five years degree from the Board of Indian medicine, Uttar Pradesh or any other state Board or faculty which is registrable Under the united Provinces Indian medicine Act, 1939. (2) Seven years teaching experience of the subject (Five years for a post-Graduate) In a recognized institution. (3) Working Knowledge of Hindi, English and Urdu or Arabic or Persian. Preferential: (1) Post--Graduate qualification from a recognized institution. (2) Research work and publication of original papers and books. Preferential Qualification:-A candidate who has:- (i) Served in the Territorial Army for a minimum period of two years. or (ii) Obtain a "B" Certificate of National Cadet Corps, shall other things being equal, be given preference in the matter of direct recruitment. Age:-Minimum 28 years, maximum 45 years (Age relaxation as per Rules). See general instructions for this. Other condition and qualification:-(1) The selected

candidates may be transferred to any Government Unani Medical College of the State on any equivalent post. Note:- (1) The new pension scheme will be applicable permitted by the U.P. Government at present. (2) Candidates will have to mention their obtained marks and total marks of all semesters in online application and annex all semesters marksheet (in which maximum marks/minimum marks/obtained marks should be clearly mentioned) essentially alongwith other all certificates, at the time of demand of records. (3) Regarding essential qualification No.3. candidates will have to annex related certificate/marksheet about adequate knowledge of Hindi. English and Urdu or Arabic or Persian. (4) Experience certificate should be of full time paid post in an institution recognized by Government and issued by appointing authority and it should be counter signed by Registrar/Director of State Unani Medical Council or by a competent authority of the Government. Experience of unpaid or part time post will not be acceptable.”

4. Learned Counsel for the petitioner submits that the said advertisement was wrongly prescribed the conditions of eligibility of higher degree in Ayurvedic/Unani from University established by law or higher degree from the board of Indian Medicine, Uttar Pradesh or any other State, Board or faculty which is registerable under **the United Provinces [Ayurvedic and Unani Tibbi Systems of Medicine] Act, 1939 (hereinafter referred as, ‘the Act, 1939’)**. The thrust of the arguments made on behalf of petitioners is that in the year 1970, the Indian Medicine Central Council Act, 1970 (*hereinafter referred as, ‘the Act, 1970’*) was enacted by the Parliament as the medical education was a subject matter in the Concurrent List. The Act, 1970 has superseded the Act, 1939. In lieu of such suppression, the State Government by framing the Uttar Pradesh State Ayurvedic and Unani Colleges Teachers’ Service Rules 1990 (*hereinafter referred as, ‘the Rules, 1990’*) cannot prescribe the qualifications which were prescribed under the State Act, 1939 but ought to have prescribed the qualification in terms of the Act, 1970. In such view of the matter, the petitioner seeks quashing of the advertisement itself and consequently seeks quashing of the impugned order whereby the U.P. State Public Service Commission has recommended the

appointment of the respondent no. 4 pursuant to the said advertisement.

5. In support of its submissions, Sri H.N. Singh, learned Senior Counsel for the petitioner has relied upon the Full Bench Judgement of this Court in *Anand Kumar Yadav and Others vs. Union of India and Others : [2015 (8) ADJ 338 (FB)]*.

6. It is further submitted by the learned Senior Counsel that pursuant to Section 36 of the Act, 1970, the regulations were framed in the year, 1986 which have been later amended in the year 2016, which prescribe the higher qualifications and also the degree of post-graduation for appointment to the post of Reader. Therefore, since the respondent no. 4 was not having the post-graduate qualification, she was not eligible for appointment and since the petitioner was having the post-graduate qualification she ought to have been given preference in the appointment as per the advertisement.

7. Learned Senior Counsel for the petitioner has further relied upon the judgment of the Apex Court in *Ashish Kumar v. State of U.P., (2018) 3 SCC 55* and submits that in part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescriptions, which reads as under:

*“27. Any part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescription. Thus, looking to the qualification prescribed in the statutory rules, the appellant fulfils the qualification and after being selected for the post denying appointment to him is arbitrary and illegal. It is well settled that when there is variance in the advertisement and in the statutory rules, it is the statutory rules which take precedence. In this context, reference is made in the judgment of this Court in *Malik Mazhar Sultan v. U.P. Public Service Commission [Malik Mazhar Sultan v. U.P. Public Service Commission, (2006) 9 SCC 507 : 2006 SCC (L&S) 1870]*. Para 21 of the judgment lays down the above proposition which is to the following effect: (SCC p. 512)*

“21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates

who were within the age on 1-7-2001 and 1-7-2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules.”

8. Thus, since in the instant case, the advertisement has prescribed the qualifications, which are registerable in the State Act of 1939, which has already been superseded by the Parliamentary Act of 1970, governing the same subject of medical education. Therefore, the said qualifications under the Old State Act could not have been prescribed in their advertisement, therefore, the advertisement itself is bad and thus the same be quashed.

9. *Per contra*, Sri Gaurav Singh, learned Standing Counsel for the State submits that in the instant case, the petitioner has not challenged the validity of the Act, 1939 or the 1990 Rules framed by the State Government under Article 309 of the Constitution of India, which prescribes the qualification which are registerable under the Act, 1939 for appointment on the post of Reader. Neither the said Act, 1939 nor 1990 Rules are under challenge in the instant petition. Therefore, the advertisement prescribing the qualification in terms of the statutory rules framed by the State under Article 309, cannot be questioned.

10. It is further submitted by learned Standing Counsel for the State that it is a settled position of law that a candidate who has participated pursuant to an advertisement in the selection process and has been disqualified cannot be permitted to challenge after the declaration of result of the

selection process. It is further submitted that it is a settled position of law that regulations framed under Section 36 of the Act, 1970 are only recommendatory and not mandatory and it is beyond the scope of the Indian Council of Central Medicine to prescribe the qualification for recruitment to the post of Professors, Readers and Lecturers. It can only lay down the broad guidelines. Therefore, such qualifications for recruitment are required to be framed under the proviso to Article 309 and thus the recommendations made by the Indian Council of Central Medicine cannot override the Rules framed under Article 309 by the State concerned. Therefore, learned Standing Counsel for the State seeks dismissal of the instant petition.

11. Sri Utkarsh Singh, Advocate holding brief of Sri Gautam Baghel, learned counsel respondent no. 4 has also adopted the submissions of the learned Standing Counsel for the State. They have relied upon the following judgments of the Apex Court in support of aforesaid submissions:-

1. Ramesh Chandra Shah and Others Vs. Anil Joshi and others : (2013) 11 SCC 309

2. Madras Institute of Development Studies and Another Vs. Dr. K. Sivasubramaniyan and Others : [2015(4) ESC 601(SC)]

3. Secy. (Health) Deptt. of Health & F.W. and Another Vs. Dr. Puri and others Anita : (1996) 6 SCC 282

4. State of U.P. and Another Vs. Om Prakash and Others : 2006 (6) SCC 474

5. Pepsico India Holding P. Ltd. Vs. Grocery Market & Shops Board and others : (2016) 4 SCC 493

6. Government of Andhra Pradesh and Another Vs. Dr. R. Murali Babu Rao and Another: (1988) 2 SCC 386

12. Having heard the rival submissions so made by learned counsel for the parties, this Court has carefully gone through the records of the case. The advertisement dated 24.09.2019 has prescribed the following

qualifications.:-

“Educational qualification Essential: (1) Five years degree in unani from a University established by law or five years degree from the Board of Indian medicine, Uttar Pradesh or any other state Board or faculty which is registrable Under the united Provinces Indian medicine Act, 1939. (2) Seven years teaching experience of the subject (Five years for a post-Graduate) In a recognized institution. (3) Working Knowledge of Hindi, English and Urdu or Arabic or Persian.

Preferential: (1) Post--Graduate qualification from a recognized institution. (2) Research work and publication of original papers and books.”

13. It is undisputed in the instant case that pursuant to the said advertisement, the petitioner herein without challenging the advertisement as such has participated in the selection process and could not qualify, and respondent no. 4 has qualified in the selection process. Pursuant to the said advertisement and consequently the recommendations were made by the U.P. Public Service Commission for appointment of respondent no. 4 to the post of Reader/Jarahat in Unani Department. It is only after the selection process is complete, petitioner has filed the instant petition initially for seeking quashing of the said recommendation of U.P. Public Service Commission and seeking mandatory injunction to give appointment to the petitioner and later by way of an amendment the advertisement has also been challenged.

14. It is settled position of law that the person who consciously takes part in the selection process and thereafter having failed or not selected in the said selection process cannot be permitted to challenge the selection process or the advertisement. In this regard, it is relevant to take note of the judgment of the Apex Court in *Om Prakash Shukla vs. Akhilesh Kumar Shukla, 1986 Supp SCC 285*. The Three-Judges' Bench of the Apex Court has held that when person appeared in examination without protest, he was not entitled to challenge the result of the examination. The same view has also been reiterated in *Madan Lal v. State of J&K, (1995) 3 SCC 486* in the following words:-

*“9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla* [1986 Supp SCC 285 : 1986 SCC (L&S) 644 : AIR 1986 SC 1043] it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.”*

15. Likewise in *Manish Kumar Shahi v. State of Bihar*, (2010) 12 SCC 576, the Apex Court has observed as under:-

“16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does

not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

16. Likewise in ***Vijendra Kumar Verma vs. Public Service Commission: (2011) 1 SCC 150***, the Apex Court held that once the candidate has taken the chance and opportunity while participating in the selection process without any protest at any stage of the selection process, he/she cannot turn back and challenge the selection procedure.

17. In ***Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309***, the Apex Court considering the above judgements has observed as under:-

“24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.”

18. In ***Madras Institute of Development Studies vs. K. Sivasubramaniyan, (2016) 1 SCC 454***, the Apex Court has held that a candidate who has further applied pursuant to the advertisement and the rules without raising any objection to the alleged advertisement and rules, and participated in the selection process by appearing before the Committee of Experts and after he was not selected, cannot be permitted to turn around and challenge the very selection process.

19. Since in the instant case, the advertisement was issued in the year 2019, the petitioner herein without raising any objection had applied and participated in the selection process and was also interviewed and after the result was declared and respondent no. 4 was selected and recommended by the U.P. Public Service Commission for appointment, the instant petition has been filed by the petitioner challenging the selection process and the advertisement itself. This cannot be permitted in

view of the aforesaid settled position of law.

20. The petitioner has further challenged the selection of the respondent no. 4 on the ground that the advertisement prescribed the qualification and also provided that preference be given to the postgraduate qualification from a recognized institution or for the research work and publication of original papers and books. The petitioner claims that since he was a postgraduate and the respondent no. 4 was not a postgraduate, therefore, the preference ought to have been given to the petitioner instead of respondent no. 4.

21. In *Secretary, Health Department and FW and others vs. Dr. Anita Puri and others, 1996, SCC 282*, the Apex Court has categorically observed as under:

“.....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.....”

22. In *State of U.P. v. Om Prakash, (2006) 6 SCC 474*, the Apex Court has observed 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 bloc preference irrespective of inter se merit and suitability.....”

23. Thus, from the aforesaid judgments of the Apex Court, it is settled position of law that when an advertisement describes the essential

qualifications as well as the preferential qualification, then in such position, all the candidates who are having essential qualifications are eligible to apply and participate in the selection process and on the basis of the selection process where number of candidates are participating, when two or more candidates are having the equal marks, then in that case the preference shall be given, who is having the preferential qualification. Merely because, a candidate is possessing the preferential qualification would not give him any preferential right to be selected. In such view of the matter, the claim of the petitioner is that she was having preferential qualification, therefore, preference ought to have been given to her, is unfounded and cannot be sustained.

24. Learned Senior Counsel for the Petitioner has vehemently claimed that so far as the medical education is concerned, the Act, 1939 has already been superseded by Act, 1970 enacted by the parliament, as the medical education was the subject of Concurrent List and once the parliament has been enacted any State Act, so far as it is repugnant to the Central Act, cannot be given effect to. Thus, he claims that since the regulations framed under the Central Act are in fray, which prescribe the essential qualification for appointment to the post of Principal, Professor, Reader, Assistant Professor etc. Thus, any lesser qualification prescribed under the rules framed under Article 309, are not in consonance with the Central Act, the same are repugnant to that extent and thus the same cannot be given effect to, since the impugned advertisement prescribes the qualification in terms of the Rules 1990, which takes note of the 1939 Act of the State, which has already been superseded by the Central Act. Thus, the advertisement was not a valid advertisement, therefore, the same should be quashed.

25. So far as the medical education is concerned, it is undisputed that it is the subject matter of the Concurrent List. Earlier there was a State Act of 1939, later the Parliament has enacted a Central Act. However, so far as the State Public Services or the State Public Service Commissions are concerned that is the subject matter exclusively available to the State and proviso to Article 309 permits the State to frame rules to prescribe the condition for selection for State Public Service. In terms thereof, the 1990 Rules have been framed by the State which prescribe the qualification for

selection of Reader (Jaharat) in Government Unani Medical Colleges. Therefore, the State Rules were framed by the State in accordance with the constitutional scheme. Therefore, the State Rules shall hold the field in the matter of Selection for State Public Service. So far as the regulations framed by the Indian Central Council of Indian Medicine under Section 36 of the Central Council of Indian Medicine Act, 1970 are concerned, with regard to the same, similar regulations framed under Indian Medical Council Act, 1956 held to be recommendatory in nature and they cannot be held to be mandatory.

26. In ***Government of Andhra Pradesh vs. Dr. R. Murali Babu Rao and another 1988 (2) SCC 386***, the Apex Court has held that the rules framed under proviso to Article 309 shall override the conflicting recommendations/regulations framed under the Central Act. In this regard, the following observations made by the Apex Court, which would be relevant to take note of:-

“15.Nevertheless, the Government failed to appreciate that the recommendation which was later approved of by the Government of India and acquired the status of a regulation, was only recommendatory and could not override a rule framed under the proviso to Article 309 of the Constitution. The panel had to be drawn by the State Government strictly in conformity with the rules of recruitment made under the proviso to Article 309 and not on the basis of the recommendations of the Council.

16.A fortiori, the recommendations made by the Council or the Regulations framed by it are only recommendatory and not mandatory. It is not for the Council to prescribe qualifications for recruitment to posts of Professors, Readers and Lecturers. It can only lay down broad guidelines therefor. Such qualifications have necessarily to be prescribed by the framing of Rules under the proviso to Article 309. Right to be considered for promotion is a condition of service and it can only be regulated by a rule framed under the proviso to Article 309.”

27. In such view of the matter, so far as the appointment to the public service, which is the case herein, it is settled position of law that the rules

framed under proviso to Article 309 would apply and hold the field in case of any contradiction with the recommendations/regulations framed under the Act, 1970. Consequently, this Court do not find any irregularity in the advertisement which prescribed the qualification as prescribed under 1990 Rules. So far as the last prayer, that is the issuance of Writ of Quo Warranto against respondent no. 4 is concerned, the same has been resisted by learned counsel for respondent no. 4 and submits that the post of Teachers, Professors, Assistant Professors, Associate Professors etc., are not amenable to the Writ of Quo Warranto.

28. In support to the submission, learned counsel for the petitioner has relied upon the judgement of the Division Bench of Lucknow Bench of this Court in *Kundan Singh versus State of UP and others, 2020 SCC OnLine All 6* in which the Division Bench has categorically held that the post of Professors are merely the employee of the statutory body, therefore, they cannot be described as the public service in respect of which a Writ of Quo Warranto would lie. In such view of the matter, a similar view has also been taken by the Division Bench of this Court in *Dr. Neetu Singh v. State of U.P. and others, 2019 SCC OnLine All 5871*. In view of the aforesaid discussion, the petitioner has no right to challenge the advertisement and also to challenge the selection of respondent no. 4, by participating in the selection process.

29. Accordingly, the writ petition is **dismissed**.

30. Respondents are directed to act upon the recommendations made by the U.P. Public Service Commission vide the order dated 19.01.2022 and do needful in the matter, if not already acted.

31. Interim order granted earlier is hereby *vacated*.

(Anish Kumar Gupta,J.)

May 8, 2026

Shubham Arya