

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No. 5983/2010**

% **Date of Decision: 03.02.2011**

Govt. of NCT of Delhi & Anr.

.... Petitioners

Through: Mrs. Jyoti Singh Sr. Advocate with
Mr.Amandeep Joshi, Advocates

Versus

Dr.Pawan Kumar N.Mali & Ors.

.... Respondents

Through: Mr.Sanjay Visen, Advocate

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not? NO
3. Whether the judgment should be reported in the Digest? NO

ANIL KUMAR, J.

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1. The petitioners, Govt. of NCT of Delhi & Anr., have challenged the order dated 2nd February, 2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No.183 of 2009, titled 'Dr.Pawan Kumar N.Mali & others vs. The Secretary, Ministry of Health & Family Welfare Department & Anr.' allowing the OA and directing the

petitioners that the respondents would be eligible for appointment to the post of Medical Officer (Ayurveda) from the date three other persons selected along with the applicants, were appointed, however, they will not be entitled for back wages, but the period will be counted for increments, and their pay will be fixed taking that period into consideration and that period would also be counted towards seniority of the respondents and they would be entitled to be placed in the pension scheme which was applicable in 2003 i.e. Pension Scheme of 1972.

2. The brief facts to comprehend the dispute are that the Ministry of Health & Family Welfare, Govt. of NCT of Delhi in the Directorate of ISM & H advertised 13 posts of Medical Officer (Ayurveda) in the year, 2000.

3. The recruitment to the said 13 posts was done by the Union Public Service Commission by holding a written examination which was held on 10th February, 2002. The interviews were also conducted and 13 Medical Officers were recommended for posting after their results were published on 28th September, 2002 and 04th October, 2002. The recommendation letters dated 18th October, 2002 were sent to the persons who were selected by the Union Public Service Commission, pursuant to which the Govt. of NCT of Delhi/petitioners offered appointments to the applicants on regular basis. The selected candidates accepted the terms and conditions of the Offer of

Appointment letter given by the petitioners, and their medical examination was also conducted.

4. Since the process of selection took considerable time, the doctors who were appointed on contractual basis by the petitioners, filed OA No. 3353/2002 before the Tribunal seeking their regularization. The doctors who were appointed on contractual basis, were declined the relief of regularization by the Tribunal on 8th January 2003. Subsequently out of the 13 Medical Officers appointed on contractual basis, 3 officers namely Dr. Raghu Ram, Dr. Neelesh and Dr. Lalji joined the department on 20th January 2003. The rest of the Medical Officers were awaiting their medical fitness examination. Before the remaining 10 Medical Officers could have joined the department after their placement, the doctors who were appointed on contractual basis filed a writ petition against the order of the Tribunal dismissing their claim for regularization. By order dated 23rd January 2003 the High Court directed the department to maintain "Status Quo" with regard to the doctors who were appointed on contractual basis, which resulted in the respondents not being allowed to join the duties in the Directorate of ISM&H in 2003 except for the three doctors who had already joined the department on 20th January 2003.

5. Ultimately, on 11th August, 2005 and 13th August 2005 the writ petitions of the doctors who were appointed on contractual basis

seeking regularization were dismissed. After the dismissal of the writ petitions, on 19th August, 2005 the petitioners issued Order No.F.1/97/2001/Ay. Unani/DISMH/Pt.File.I, directing the respondents to join their duties. The respondents, thereafter, joined the duties with the petitioners.

6. The respondents contended that at the time the Offer was given to them and was accepted by them and they were medically examined, the Central Civil Service (Pension) Rules, 1972 were applicable. However, on 1st January, 2004 a new pension scheme was adopted by the Govt. of NCT of Delhi, Ministry of Finance, Department of Economic Affairs by Notification no. F No.5/7/2003/-ECB&PR dated 22nd December, 2003. Since the duties were given to the respondents w.e.f. 19th August, 2005, the case of the respondents was considered under the new pension scheme against which the respondents submitted the representations seeking parity with Dr.Raghuram, Dr.Nilesh Ahuja & Dr.Lalaji who were selected with the respondents and who had also been given Offer of Appointment at the same time as the respondents. Though, the respondents had undergone the medical examination, however, they could not be given placement on account of the interim order passed in the writ petition filed by the doctors who were appointed on contractual basis seeking their regularization. The representation of the respondents was however, rejected by the petitioners. The respondents gave a legal notice and thereafter, challenged the order of the petitioners

by filing OA No.183 of 2009 before the Central Administrative Tribunal, Principal Bench, New Delhi. The reliefs claimed by the respondents was to set aside the order dated 24th July, 2008 and to direct the petitioners to grant the increments and consequential service and pensionary benefits to them at par with the other doctors who were regularly selected with the respondents, however, who were assigned duties in 2003.

7. The Tribunal relied on 'Telecommunication Engineering Service Association (India) & Anr. v. Union of India & Anr.' 1994 Supp. (2) SCC 222 holding that in the event of re-fixation of seniority and notional promotion with retrospective effect, the employees would be entitled only to re-fixation of their pay which should not be less than that of those who were immediately below them, however, they would not be entitled to back wages. In the circumstances, though the seniority and other benefits were given by the Tribunal from the date the three doctors who were selected on regular basis were allotted duties, however, the tribunal did not grant them any back wages. The Tribunal also held that the respondents would be entitled to be placed in the pension scheme which was applicable in 2003 i.e. Pension Scheme of 1972.

8. The petitioners have challenged the order of the Tribunal, contending inter-alia, that if the respondents could not join the

department in 2003, it was not on account of any fault of the Government, but on account of the status quo order granted with respect to services of ten doctors who were appointed on contract basis, because of which their services could not be terminated and the respondents could not be assigned duties. It is also asserted that though Offer of Appointment was issued to the respondents on 08th October, 2002, consequent to which they were required to contribute compulsorily to the GP Fund and Group Insurance Scheme, but they did not contribute to the same and in the mean time, a new pension scheme was notified on 22nd December, 2003 which came into effect from 01st January, 2004 and therefore, the new scheme is applicable on the respondents. According to the petitioners, though the back wages have been declined to the respondents on the principal of “No Work No Pay”, but still they have been awarded increments for two years and they are also to be granted seniority which according to the petitioners is illegal and not sustainable.

9. The writ petition was opposed by the respondents who have filed counter affidavits dated 30th November, 2010 contending inter-alia, that the petitioners have distorted the facts and there is no illegality or unsustainability in the order of the Tribunal which has relied on the precedents of the Supreme Court and has declined the back wages, but has granted seniority and increments from the date, the three regular

doctors similarly placed as that of the respondents were assigned the duties after their appointment.

10. Referring to the new pension scheme, it is contended that it has been made applicable to all the new recruits to the Central Government Service from 1st January, 2004. According to the learned counsel for the respondents, the respondents cannot be construed to be new recruits after 1st January, 2004 as Offers of Appointment were given to them in 2003, and they were accepted by them as well and all of them had undergone the medical test. According to the respondents all the formalities for their appointments were concluded except that they had not been given placement in view of the status quo order dated 23rd January 2003.

11 We have heard the learned counsel for the parties in detail. It is well settled that an order of Court cannot prejudice anyone (*actus curiae neminem gravabit*). This position has been explained by the Supreme Court, in ONGC v. Assn. of Natural Gas Consuming Industries, AIR 2001 SC 2796, where it was held that an interim order of the court cannot enure beyond the life of the substantive proceeding, when the litigant, ultimately loses on the merits of the case, and that the maxim entitles the succeeding party to be put back into a position which existed, at the time when no interim order subsisted. In Karnataka Rare Earth v. Senior Geologist, Deptt. of Mines and Geology, (2004) 2 SCC

783 it was held by the Supreme Court that when on account of an act of the party, persuading the court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed. As also observed in the case of Sunil Kumar Sharma v. State of U.P. and Ors. 2002 (4) AWC 3172, where it was held that interim orders of the Court cannot prejudice or non-suit a party against whom it is issued unless it attains finality. Passing of an ad-interim order is generally by way of exception to the general rule that no order be passed against a person without hearing and it is on the basis of equity of preserve 'situation' so that final relief is not lost. But granting relief or passing a decree on the basis of something done under ad-interim order will amount to granting undue advantage over the other party.

12. The respondents were duly selected after a written examination and interview, and intimation about their selection was given to them by the Union Public Service Commission pursuant to which the

petitioners had offered them appointment which was accepted by the respondents. Once the Offer of Appointment was accepted by the respondents and their medical examination was also done, merely because they were not given placement on account of continuation of the doctors who were appointed on contractual basis in respect of whom the status quo order was passed, it cannot be held that there was no appointment of such doctors or that they have to be treated differently than some of the doctors who were selected along with the respondents, but who had been given placement and appointment on account of availability of the posts. The status quo order in respect of the doctors on contractual basis which was ultimately vacated and the writ petition was dismissed, will not prejudice the respondents.

13. In the circumstances, the directions of the Tribunal that though the respondents be not given back wages from the date their colleagues were appointed, however, they would be entitled for seniority and increments cannot be termed to be illegal or unsustainable in the facts and circumstances of the case. *In Balwant Singh Narwal v. State of Haryana*, (2008) 7 SCC 728, at page 729 Supreme Court was concerned with the case where an advertisement for the 18 post was issued by Haryana Public Service Commission which were subsequently increased to 37. The Commission declared the merit list of 30 selected candidates on 30-9-1993 (published on 1-10-1993), which included Respondents 4 to 16. However, before the State Government could make appointment

in terms of the said list, a non-selected candidate filed WP No. 12700 of 1993 contending that only 18 posts were notified and the Commission could not make recommendations for selection of 30 candidates. The said writ petition was allowed by a learned Single Judge of the Punjab and Haryana High Court on 4-4-1994 and the recommendations in excess of the 18 vacancies were quashed on the ground that the Commission could not make recommendations beyond the number of posts advertised. A Division Bench dismissed the appeal against the judgment of the learned Single Judge. The State Government appointed only 16 as against 18 permitted by the High Court, not for want of vacancies but on account of some technical difficulty in appointing the other candidates. Respondents 4 to 16 who were denied appointments, though their names were in the selected merit list of 30 candidates, challenged the order. The Supreme Court reversed the judgment of the High Court and set aside the judgment of the Single Judge and held that the recommendation made by the commission were in accordance with law and all the 30 names recommended were entitled for appointment. Consequent thereto State Government appointed respondents 4 to 16 as Principals. In dispute about the seniority, the said respondents pointed out that but for the litigation they would have been appointed along with others who had been selected and in the circumstances they should be given seniority above those who were appointed against subsequent vacancies. The State Government considered the plea and accepted their request. Aggrieved by the

decision of the State Government the earlier appointees, against the subsequent vacancies filed a writ petition contending that the selection by commission was merely recommendatory and does not imply automatic employment and thus respondents 4 to 16 cannot claim seniority. High Court rejected the writ petition which was challenged in the Supreme Court which upheld the decision of the High Court relying on *Surendra Narain Singh v. State of Bihar (1998) 5 SCC 246* holding that candidates who were selected against earlier vacancies but who could not be appointed along with others of the same batch due to certain technical difficulties, when appointed subsequently, will have to be placed above those who were appointed against subsequent vacancies. In *Surendra Narain Singh (supra)* it was held by the Supreme Court that when appointment is delayed the candidates could not be allowed to suffer for no fault of theirs and their seniority would be protected. Similarly the respondents who were selected with three other doctors who were appointed but the respondents could not be appointed on account of stay granted in respect of the services of the doctors who were appointed on contract basis, on their appointment would be entitled for seniority from the date they had accepted the offer of appointment along with three other doctors who were appointed.

14. Similarly, if the new pension scheme is applicable to new recruits from 1st January, 2004, the respondents could not be termed as new

recruits as the offers of Appointment were sent to them much prior 1st January, 2004 and was also accepted by them and pursuant to which they were also asked to undergo the medical examination and they were found to be fit. The only factor is that they were not given placement in different hospitals as the doctors who were appointed on contractual basis were continuing on account of the status quo order granted in their favor by the court which was ultimately vacated.

15. In the circumstances, the status quo order passed in favor of the doctors who were appointed on contractual basis cannot prejudice the respondents. In the circumstances, the Tribunal's order directing the computation of period during which they were not placed in the hospital for the purpose of increments and for seniority cannot be termed to be illegal or contrary to law. For the same reasons, since the respondents were recruited prior to 1st January, 2004 the Pension Scheme of 1972 shall be applicable to them and not the new pension scheme applicable from 1st January, 2004 to the new recruits.

16. In the totality of the facts and circumstances, the petitioners have not been able to make out any case of perversity or illegality in the order of the Tribunal which shall entail any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

17. The writ petition, in the facts and circumstances, is without any merit and it is, therefore, dismissed. Considering the facts and circumstances, the parties are left to bear their own costs.

ANIL KUMAR, J.

FEBRUARY 03, 2011

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VEENA BIRBAL, J.