

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03-11-2016

(Orders reserved on 20-10-2016)

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P.No.11338 of 2014
and M.P.No.1 of 2014

Dr.S.Sheela

.. Petitioner

Vs.

1. The State of Tamil Nadu,
Rep. by the Principal Secretary to Govt.,
Health Department,
Fort St.George, Chennai-600 009.
2. The Director of Public Health and
Preventive Medicine, Chennai-600 006.
3. The Director,
Directorate of Medical Services,
Teynampet, Chennai-600 006.

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records relating to G.O.(D).No.1241, Health and Family Welfare (B1) Department, dated 23.11.2009 and the consequential letter in Na.Ka.No.120781/PHC5/E3/2010, dated 03.01.2014 of the second respondent and quash the portion relating to the regularisation of the period from 29.12.2003 to 29.12.2008 and to direct the respondents to regularise the period from 29.12.2003 to 29.12.2008 during which the petitioner was not given suitable post as duty and to give all the benefits for the said period including the payment of salary from October 2003 to 28.12.2003.

For Petitioner : Mr.C.Selvaraju,
Senior Counsel for Mr.K.Govindan

For Respondents : Mr.K.Dhananjayan, Spl.G.P.

ORDER

The petitioner has filed the above Writ Petition praying for issuance of a Writ of Certiorarified Mandamus to call for the records relating to G.O.(D).No.1241, Health and Family Welfare (B1) Department, dated 23.11.2009 and the consequential letter in Na.Ka.No.120781/PHC5/E3/2010, dated 03.01.2014 of the second respondent and quash the portion relating to the regularisation of the period from 29.12.2003 to 29.12.2008 and to direct the respondents to regularise the period from 29.12.2003 to 29.12.2008 during which the petitioner was not given suitable post, as duty period and to give all the benefits for the said period including the payment of salary from October 2003 to 28.12.2003.

2. It is the case of the petitioner that she joined duty as an Assistant Surgeon in June 1990 in Primary Health Centre, Vanapuram at Thiruvannamalai District and served there for 3-1/2 years. After marriage, she got transferred to Villupuram District and joined duty as in-charge Medical Officer in the Primary Health Centre, Karuvatchi on 10.11.1993. During her service, in 2000, her left eye central vision started diminishing, followed by right eye also. From 10.11.1993 to 28.12.2003, she worked continuously as lone in-charge Medical Officer and performed all her duties without any complaint. While so, she was referred to Medical Board in June 2003 and her salary was stopped from October 2003 to December 2003, though she attended duty. She was strictly instructed not to attend duty without obtaining Fitness Certificate from the Medical Board. Hence, as per the Department's order, she appeared before the District Medical Board, which opined on 27.11.2003 that she was unfit to continue in service. On the basis of the Medical Board's report, she was stopped from discharging her duty as Medical Officer.

3. It is the grievance of the petitioner that instead of stopping her from discharging duty, she ought to have been given suitable post. She made a representation after four years, and again she was referred for appearing before the Medical Board on 31.07.2007, but there was no information to her, after she appeared before the said Medical Board. Thereafter, she made representation, dated 10.01.2008 to the Commissioner, State Rehabilitation Department, Chennai-4, requesting him to offer her a suitable post based on her qualification and 13 years experience. Subsequently, she gave another representation, dated 12.02.2008 to the third respondent-Director of Medical Services, Chennai-6, requesting him to permit her to re-join duty in a suitable post based on her qualification and experience. Along with the said representation, she also enclosed a copy of the judgment of the Supreme Court, dated 04.01.2008 in Appeal

(Civil) No.8 of 2008 and also this Court's order dated 30.01.2008 rendered in favour of the persons who were visually impaired during their service, as per Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act.

4. It is further stated by the petitioner that the Commissioner, State Rehabilitation Department, Chennai-4, by letter dated 18.02.2008, forwarded her representation to the authorities concerned for further action, pointing out Section 47 of the said Act and the judgments of various Courts in favour of the disabled persons and recommending to consider her representation sympathetically for giving suitable alternative job based on her 13 years experience. On 11.12.2008, the second respondent-Director of Public Health and Preventive Medicine, Chennai-6, in pursuance of the order of Government in Lr.No.18351/B2/06-1, Health and FW/B2 Department, dated 14.10.2008, issued transfer order and posted the petitioner as Assistant Surgeon, Faculty (Health), Health Manpower Development Institute (HMDI), Villupuram and was directed to report before the Deputy Director of Health Services, Villupuram, who in turn, by letter dated 30.12.2008, directed the petitioner to report for duty before the Principal, HMDI, Villupuram, and accordingly, she joined duty in the said post on 30.12.2008 itself.

5. It is further alleged by the petitioner that since she was not given suitable post from 2003 to 2008, she requested for regularisation of the above period of absence as 'duty period'. However, the Government issued order in G.O.(D).No.1241, Health and Family Welfare (B1) Department, dated 23.11.2009 with regard to the regularisation of the absence period. The Government, in the said G.O., examined the proposal and directed that the leave period of the petitioner from 29.12.2003 to 29.12.2008 be regularised/regulated as follows:

From 29.12.2003 to 28.06.2004 (six months)	Extraordinary leave without pay and allowances without Medical Certificate.
From 29.06.2004 to 29.12.2008	Non-duty under Proviso 2 to Rule 23(a) of the Tamil Nadu Leave Rules, 1993.

The non-duty period shall constitute as an interruption of service and the past service shall not count for the purpose of leave. The leave earned prior to the non-duty shall also lapse."

6. Aggrieved by the above said regularisation/regulation of

the leave period, the petitioner made a representation, dated 27.09.2010 to the second respondent-Director of Public Health and Preventive Medicine, Chennai, stating that the above regularisation of leave has been done as if it is for the Government servant having non-disability, who would have absented himself from service and not for the disabled person on the basis of the provisions of Section 47 of the said Act and she also requested for issuance of orders regulating the period from 29.12.2003 to 29.12.2008 as duty period, as the disability she suffered during her service, was a natural disability. Thereafter, various correspondences took place between the petitioner and the authorities relating to her past service and the present service. Ultimately, the second respondent-Director of Public Health and Preventive Medicine, Chennai, by letter dated 03.01.2014, invited the attention of the Principal, Health Manpower Development Institute, Villupuram to the said G.O.(D). No.1241, and the Government letter No.38590/B1/2012-10, dated 28.11.2003 and stated that the period from 29.12.2003 to 29.12.2008 during which period she had not attended duty due to diminishing eye vision, cannot be regulated as Extraordinary Leave Without Pay and Without Medical Certificate as mentioned in the Government's letter and the G.O., which have been confirmed. According to the petitioner, the delay in giving re-posting to her during 29.12.2003 to 29.12.2008, is purely on administrative grounds, and the said period may be treated as 'duty period'. Hence, the petitioner has filed this Writ Petition for the relief stated supra.

7. When the Writ Petition is taken up for consideration, learned Senior Counsel appearing for the petitioner submitted that in an identical situation, the Supreme Court, in the case of Bhagwan Dass and another Vs. Punjab State Electricity Board, reported in 2008 (1) SCC 579 and also in the case of Kunal Singh Vs. Union of India, reported in 2003 (4) SCC 524, granted necessary relief to the petitioners therein and hence, following the same, similar order may be passed in the case of the present writ petitioner also.

8. By filing detail counter affidavit, learned Special Government Pleader appearing for the respondents submitted that as per Section 47 of the said Act, the petitioner was provided with a suitable job in Health Manpower Development Institute, Villupuram and she was permitted to join duty there as Faculty Member, and that the said post does not involve any examination of patients/diagnosis of ailments, etc., and she joined duty there on 30.12.2008. Learned Special Government Pleader further submitted that the petitioner joined in the Tamil Nadu Medical Services on 06.06.1990 and her services had been regularised with effect from 06.06.1990, but her probation was not declared earlier, and hence, she has been sanctioned Extraordinary Leave without pay and allowances without Medical Certificate from

29.12.2003 to 28.06.2004 and from 29.06.2004 to 29.12.2008 as non-duty as per Proviso 2 to Rule 23(a) of the Tamil Nadu Leave Rules. In pursuance of the said G.O.(D).No.1241, the Additional Director of Public Health and Preventive Medicine, Chennai, issued proceedings on 18.01.2010, with regard to regularisation of her leave period. At the time of sanction of leave, the petitioner was only a probationer and has not passed any Departmental Examinations during the tenure of 13 years of service and eligible leave has been sanctioned as per the Rules in force.

9. Learned Special Government Pleader further contended that a probationer is eligible for six months Extraordinary Leave at a time as per Proviso 2 to Rule 23(a) of the Tamil Nadu Leave Rules. Hence, the petitioner's leave period has been regularised as per the Rules. He further submitted that as the Medical Board has not recommended the leave period from 29.12.2003 to 29.12.2008, the duty absent period from 29.12.2003 to 28.06.2004 (six months) had been regulated as Extraordinary Leave without pay and allowances without Medical Certificate and the period from 29.06.2004 to 29.12.2008 had been regulated as non-duty period under Proviso 2 to Rule 23(a) of the Tamil Nadu Leave Rules. However, in view of her disability, as per Section 47(1) of the said Act, she was given a suitable job in HMDI, Villupuram and she was not kept on compulsory wait. The petitioner requested for posting during 2008 and the posting was given during 2008 and she accordingly joined duty on 30.12.2008. Further, as a probationer, she has not passed the Departmental Examinations, and as such, she is not eligible for increments, etc. For these reasons, learned Spl.G.P. prayed for dismissal of the Writ Petitions.

10. Keeping in mind the above submissions made on either side, I have carefully considered the same and perused the materials available on record.

11. The learned Senior Counsel appearing for the petitioner relied on the said decision of the Supreme Court reported in 2008 (1) SCC 579 in respect of applicability of Section 47 of the said Act. Moreover, the present Writ Petition is filed for regularisation of her non-duty period from 29.12.2003 to 29.12.2008 and that on 30.12.2008, she joined in the alternative post in HMDI, Villupuram and the fact remains that she was not paid salary, allowances, etc., at the relevant point of time.

12. Learned Special Government Pleader focused his submissions mainly with regard to non-declaration of the petitioner's probation period initially, which was only subsequently declared and that she has not passed the relevant Departmental Examinations. He further contended that the petitioner was not kept under compulsory wait, as she was

suitably given alternative post in HMDI, Villupuram, where she joined on 30.12.2008 as Health Faculty and hence, for these reasons, learned Spl.G.P. submitted that the petitioner is not entitled for the relief sought for in this Writ Petition.

13. On a perusal of the impugned G.O., and letter, I find from the materials available on record that initially, she worked as Assistant Surgeon on 06.06.1990 to 28.12.2003; due to her defective eye sight, she was sent for the opinion of the Medical Board at various stages. Her service was subsequently regularised as per G.O.(Ms).No.506, Health and Family Welfare Department, dated 27.06.1995. The medical opinion of the Medical Board was sought for to assess as to whether she would have to be allowed to continue in service and she did not appear before the Board on 01.04.2003 and 17.09.2003, due to which, she was again asked to appear before the Board at Villupuram on 18.11.2003 and 27.11.2003, on which dates, she appeared before the Board, which recommended that she is unfit for the job and unfit to continue in service due to her poor vision. Thereafter, she was referred for second medical opinion before the Regional Institute of Ophthalmology and Government Ophthalmic Hospital, Chennai on 31.07.2007, and the Medical Board of the said Hospital declared that she is unfit to continue in service due to poor vision in both the eyes. Subsequently, based on her representation and as per the relevant Rules in force, she was given alternative employment in Health Manpower Development Institute, Villupuram, where she joined on 30.12.2008. It is stated in the impugned G.O. that the delay in giving her re-posting was purely on administrative grounds.

14. It is worthwhile to extract the above said two judgments of the Supreme Court:

(a) 2003 (4) SCC 524 = AIR 2003 SC 1623 : (Kunal Singh Vs. Union of India):

"12. Merely because under Rule 38 of the CCS (Pension) Rules, 1972, the appellant got invalidity pension is no ground to deny the protection mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provisions of Section 47 of the Act.

13. For the reasons stated and discussions made

above, the appeal deserves to be accepted. Hence the impugned order affirming the order of termination of services of the appellant is set aside and the appeal is allowed. We direct the respondents to give relief in terms of Section 47 of the Act.

14. There shall be no order as to costs."

(b) 2008 (1) SCC 579 (Bhagwan Dass and another Vs. Punjab State Electricity Board) :

"In the light of the discussions made above, the action of the Board in terminating the service of the disabled employee (appellant No.1) with effect from March 21, 1997 must be held to be bad and illegal. In view of the provisions of Section 47 of the Act, the appellant must be deemed to be in service and he would be entitled to all service benefits including annual increments and promotions etc. till the date of his retirement. The amount of terminal benefits paid to him should be adjusted against the amount of salary from March 22, 1997 till date. If any balance remains, that should be adjusted in easy monthly instalments from his future salary. The appellant shall continue in service till his date of superannuation according to the service records. He should be reinstated and all due payments after adjustments as directed, should be made to him within six weeks from the date of presentation of a copy of the judgment before the Secretary of the Board.

In the result the appeal is allowed with costs quantified at Rs.5,000/-."

15. While considering the above facts and circumstances of the case and on a perusal of the provisions of Section 47 of the said Act and the relevant service regulations for the time being in force, it is seen that she has been continuously representing the respondents from 2003 onwards for providing suitable job based on her vision disability. Moreover, it is not the case of the respondents that she has abandoned and left the job in 2003 and came back in 2008. That being the factual position, I am of the considered view that based on the above said judgments of the Supreme Court reported in 2003 (4) SCC 524 and 2008 (1) SCC 579, the relief sought for by the petitioner has to be necessarily granted, more specifically, with regard to her regularisation of non-duty period from 29.12.2003 to 29.12.2008.

16. In the above said decisions reported in 2008 (1) SCC 579 (cited supra) and 2003 (4) SCC 524 (cited supra), the Supreme Court has exhaustively considered the ambit and scope of Section

47 of the said Act and granted similar relief with consequential reliefs to the petitioners therein. Though in the case on hand, the respondents have complied with Section 47 of the said Act, but the same was not fully complied with, as the necessary "non-duty period" of the petitioner, has not been regularised for no fault of hers. Hence, on this short ground alone, the petitioner is entitled for the relief sought for in this Writ Petition.

17. Therefore, for the foregoing reasonings, the Writ Petition is allowed, quashing the impugned G.O. dated 23.11.2009 and letter dated 03.01.2014, more particularly with regard to the portion of observations dealing with regularisation of her 'non-duty period' from 29.12.2003 and 29.12.2008. The respondents are directed to regularise the said 'non-duty period' as "duty period" and thereby, grant her all the benefits for the said period, including necessary emoluments, like salary, allowances, etc., and all other resultant benefits, and the arrears, etc., shall be disbursed within a period of three weeks from the date of receipt of a copy of this order. The respondents shall accordingly fix her pay and other service benefits from the relevant date. No costs. The Miscellaneous Petition is closed.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

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Copy to

1. The Principal Secretary to Govt.,
Health Department,
Fort St.George, Chennai-600 009.
2. The Director of Public Health and
Preventive Medicine, Chennai-600 006.
3. The Director,
Directorate of Medical Services,
Teynampet, Chennai-600 006.

1 cc to M/s. K. Govindan, Advocate, Sr. 62518

1 cc to Government Pleader, Sr. 62825

W.P.No.11338 of 2014

CP (CO)

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