

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.08.2016

CORAM

THE HONOURABLE MR.JUSTICE HULUVADI G. RAMESH
and
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Writ Appeal No.943 of 2016

and

CMP.No.12209 of 2016

Swarnarekha Narayanan ... Appellant/Respondent in WP
vs.

1.Dr.K.Prabhuraman

2.Dr.P.Magesh ... Petitioners in WMP

3.The Government of Tamil Nadu,
rep. by the Principal Secretary to Government,
Health and Family Welfare Department,
Fort St. George,
Chennai- 600 009.

4.The Director of Medical Education,
Periyar E.V.R. Road,
Kilpauk,
Chennai - 600 010.

5.Medical Council of India,
rep. by its Secretary,
Pocket - 14, Sector - 8, Dwarka Phase -I,
New Delhi - 110 077. ... Respondents 2 to 4 in WMP

Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 05.07.2016 made in W.M.P.No.15744 of 2016 in W.P.No.34125 of 2015 passed by the learned Single Judge of this Court. Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to suitable modify the Interim order made in MP No.2/2015 in WP No.34125/2015 dated 27.10.2015 to the effect that any promotion made shall be subject to outcome of the result in the writ petition (in WMP No.15744/2016 in WP 34125/2015)

For Appellant : Mr.V.Raghavachari for
M/s.Swarnam J. Rajagopalan

For R1 & R2 : Mr.L.Chandrakumar
For R3 & R4 : Mr.K.Venkataramani, AAG assisted
by Mrs.A.Srijayanthi, SGP
For R5 : Mr.V.P.Raman

JUDGMENT

(Order of the Court was made by HULUVADI G. RAMESH, J.)

Being aggrieved over the order passed by the learned Single Judge of this Court in WMP.No.15744 of 2016 in W.P.No.34125 of 2015, the appellant, who was the first respondent/writ petitioner, has filed the present Writ Appeal.

2. The facts leading to the filing of this Writ Appeal are as follows:

2.1 The appellant was temporarily appointed as Senior Resident in Neuro Surgery, Government General Hospital with effect from 09.04.2009 under Rule 10(a)(i) in the category of Non-service P.G. candidate. Thereafter, on successful completion of the Tamil Nadu Public Service Commission, Recruitment (Direct) Special Qualifying Examination, her service was regularised with effect from 09.04.2009 by the fourth respondent vide proceedings dated 07.01.2015. Now, she is working as Senior Assistant Professor in the Department of Neuro Surgery at Government Chengalpattu Medical College.

2.2 According to the appellant, Tamil Nadu Public Service Commission conducts examination for the post of the Assistant Surgeon and the qualification for the same is M.B.B.S Degree and the score obtained by the candidates is used to arrive the position in the Civil Medical List (hereinafter referred to as 'CML'). The rank assigned to the candidates in CML is in turn used for determining the inter-se seniority of those candidates, who possess Specialty / Super Specialty / Diploma Degrees.

2.3 While so, on the basis of the recommendations of the Committee, which was constituted to look into the promotional opportunities of the Government Doctors at various levels and other related issues, G.O.Ms.No.354 Health and Family Welfare (B2) Department dated 23.10.2009 came to be passed. As per paragraph No.4(II) of the said G.O, on the side of the Director of Medical Education, seniority list will be of two categories: (1) General seniority - for all those doctors with MBBS and diploma degree; and (2) Specialist seniority - Specialty wise seniority for those with Master degree and/or super specialty

degree and both the general seniority and specialty seniority will be based on their seniority in Civil Medical List.

2.4 Challenging the aforesaid paragraph of the G.O., the appellant has filed a writ petition in WP.No.34125 of 2015, wherein, it has been stated that the appellant possessed a M.Ch degree in Neuro Surgery at the time of joining the service. However, by virtue of the said G.O., a candidate possessing M.B.B.S. degree, who joined prior to the appellant and thereafter, obtained a Super Specialty degree, would get accelerated promotion to the post of Associate Professor on the moment he/she completes the minimum tenure (2 years) of Assistant Professorship. Therefore, the said G.O. is erroneous, insofar as it prescribes the CML as the basis for fixing the inter-se seniority of specialized medical officers and the same is liable to be struck down.

2.5 When the writ petition came up on 27.10.2015, the learned Single Judge of this Court has granted an interim order, permitting the counseling to go on, however, directing the respondents therein not to declare the results until further orders.

2.6 In such circumstances, one Dr.K.Prabhuraman and Dr.P.Magesh has filed a petition in WMP.No.15744 of 2016 in WP.No.34125 of 2015 to implead them as parties to the writ petition and also to modify the interim order passed by this Court, stating that they had joined the service on 14.06.1993 and 07.10.1997 respectively as Civil Assistant Surgeon and after obtaining a degree in M.Ch (Neuro Surgery) during August 2011, they were promoted as Assistant Professors and they continued to act in such capacity and that, the next avenue for promotion is Associate Professor and they are eligible for promotion. Further, it has been contended that as per the seniority in CML, they are seniors to the appellant herein, who had joined the post on temporary basis under Rule 10(a)(i) on 09.04.2009 and that, promotion process may not be stalled, as it will ultimately affect the students. In view of the same, the learned Single Judge of this Court has modified the interim order in the following terms:

"The writ petitioner (appellant herein) is entitled to participate in the counseling process for promotion to the post of Associate Professors (Neuro Surgeon) and the respondents 3 and 4 herein are directed to keep one post vacant for the post of Associate Professors (Neuro Surgeon) till the disposal of the writ petition.

It is also made clear that this interim order is subject to the result of the writ petition and

the promotion of the respondents 1 and 2 herein as Associate Professors (Neuro Surgeon) is also subject to the result of this writ petition. It is also made clear that the writ petitioner (appellant herein), by virtue of this interim order, cannot claim any equity at the time of final disposal of the writ petition."

Aggrieved over the said order, the writ petitioner is before this Court with the present Writ Appeal.

3. Learned counsel for the Appellant submits that the appellant is senior to respondents 1 and 2 in the cadre of Assistant Professor in Neuro Surgery, which ought to have been the criterion for promotion to the post of Associate Professor in Neuro Surgery and the CML ranking cannot be the criterion. However, in terms of G.O.Ms.No.354 dated 23.10.2009, reckoning the CML ranking for fixing inter-se seniority of specialty / super specialty medical officers, the appellant who possesses the super specialty degree at the time of entry itself and who is having much experience in the specialty field, is forced to work under respondents 1 and 2, who acquired the M.Ch degree much after the appellant's entry into service. Learned counsel further submits that by the order impugned herein, the learned single Judge has allowed the issue to get precipitated and that, the promotion to the appellant's juniors like that of respondents 1 and 2 in the cadre of Assistant Professors, to the post of Associate Professors without deciding the vires of the Rules and the Executive Order, would cause irreparable injury and loss to the appellant herein. Apart from that, placing reliance on the decision of the Hon'ble Supreme Court reported in (2010) 13 SCC 348 (Challa Jaya Bhaskar and others v. Thungathurthi Surrender and others), learned counsel submitted that the adaptation of Civil Medical List seniority as the basis for fixation of inter-se seniority is contrary to the said decision. Therefore, learned counsel seeks for appropriate orders.

4. Learned counsel appearing for respondents 1 and 2 submits that respondents 1 and 2 joined the service on 14.06.1993 and 07.10.1997 respectively and they are seniors to the appellant, as per the rank in CML. Learned counsel further submits that taking into consideration all the factors, the learned single Judge of this Court has rightly passed the impugned order by modifying the interim order already granted and the same would in no way affect the right or interest of the appellant.

5. We have also heard the learned Additional Advocate General

assisted by the Special Government Pleader appearing for respondents 3 and 4 and the learned standing counsel for the fifth respondent - Medical Council of India and perused the materials placed before us.

6. The facts remain undisputed are that the appellant joined the service on 09.04.2009 under the category of non-service candidate and at that time, she possessed a M.B.B.S. degree and a Super specialty degree in M.Ch (Neuro Surgery). Subsequently, her service was regularised with effect from 09.04.2009 by the proceedings of the Director of Medical Services dated 07.01.2015. Thereafter, she was promoted as Assistant Professor in Neuro Surgery on 27.04.2010. It is also not in dispute that respondents 1 and 2 were recruited as Civil Assistant Surgeons on 14.06.1993 and 07.10.1997 respectively with M.B.B.S. degree qualification and after completion of their Master degree in the year 2011, they were appointed as Assistant Professors in 2012. Therefore, the appellant is senior to respondents 1 and 2 with respect to the date of appointment as Assistant Professor and she is having much experience in the specialty field than respondents 1 and 2. However, by virtue of G.O.Ms.No.354 dated 23.10.2009, as per the seniority in CML, respondents 1 and 2 are seniors to the appellant by considering the date of entry into service and they are eligible to participate in the counseling for promotion to the post of Associate Professors ahead of the appellant herein.

7. Learned counsel for the appellant sought to argue that by the impugned order, respondents 1 and 2, who did not possess the Master degree at the time of the appellant's entry into service, would be permitted to participate in the counseling for promotion to the post of Associate Professors and therefore, the promotion, if any, granted to respondents 1 and 2 is squarely contrary to the dictum laid down in the decision rendered in the case of Challa Jaya Bhaskar (cited supra), wherein, the Apex Court has held that the seniority of persons in the past service i.e., prior to the acquisition of the post graduate degree in the post of Assistant Professorship would not be counted and that the doctrine of eclipse would not apply in a case like this and that, seniority with the basic degree cannot be counted for computing the seniority in the cadre of Assistant Professor, since the basic qualification for appointment as Assistant Professor being a post graduate degree.

8. For better appreciation, the ratio decidendi of the said decision is extracted hereunder:

"Those belonging to the non-teaching line could not be appointed in the teaching line till they had acquired the post-graduate degree."

9. However, we are of the view that the Apex Court would decide the question arising before it, depending upon the facts and circumstances of each case.

10. At this juncture, it is pertinent to note that the Service Rules are stated to have been framed regarding feeder cadre on two different categories i.e., teaching and non-teaching staff. Insofar as the fixation of seniority is concerned, of course, as per the mandate laid down by the Apex Court in the decision (cited supra), the same is from the date of acquisition of the required qualification and not from the date of joining the service. In this regard, learned counsel for the appellant would contend that in the light of the aforesaid decision of the Hon'ble Supreme Court, as per the date of possessing the Master degree, the seniority of the appellant ought to have been fixed above respondents 1 and 2 and in that event, she would be considered for promotion to the post of Associate professor ahead of respondents 1 and 2, whereas, in view of G.O.Ms.No.354 dated 23.10.2009, respondents 1 and 2, who entered into service with basic M.B.B.S. degree qualification prior to the appellant, but acquired the master degree after the appellant became the Assistant Professor, would become senior to the appellant and they are eligible to participate in the counseling for promotion ahead of the appellant, though she is having much teaching experience in specialty field. Under such circumstances, anomaly would be created with respect to the seniority of the Medical Officers from the post of Assistant Professor to the post of Associate Professor in toto.

11. A perusal of the order impugned herein would reveal that the learned Single Judge of this Court, after having heard the learned counsel appearing for all the parties, has directed respondents 3 and 4 to keep one post vacant for the appellant herein and also permitted the appellant to participate in the counseling for promotion to the post of Associate Professor. In this regard, the anxiety of the appellant is that even if the same being done so, the issue arises herein with regard to the fixation of inter-se seniority of specialized Medical Officers based on CML ranking, could not be settled.

12. We are of the opinion that the Government has framed the Rules in such a fashion that the persons having rich experience in the field are compelled to work under their juniors. Unless and until the Service Rules and the Government Order are either amended or modified, the same issue will arise again and again. However, such amendment or modification cannot be done by this Court, as it is the policy decision of the Government and it can be done only by the Executive. Therefore, it is for the

appellant to make a representation pointing out all the defects in the Service Rules and the Government order and also making suggestions for the same to the Government, which, in turn shall do the needful, so as to put an end to the issue once for all.

13. In such view of the matter, we do not interfere with the order impugned herein. At the same time, we cannot slightly brush aside the apprehension of the appellant that by considering the date of entry into service, if any promotion is given to respondents 1 and 2 to the post of Associate Professors, the appellant would lose her chance of getting promotion, even though she is senior to respondents 1 and 2 in the cadre of Assistant Professor. Therefore, we request the learned Single Judge to hear all the parties and dispose of the main writ petition itself within a reasonable time. It is open to all the parties to place their respective submissions before the learned Single Judge of this Court.

14. Accordingly, the writ appeal is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The the Principal Secretary to Government,
Government of Tamil Nadu,
Health and Family Welfare Department,
Fort St. George, Chennai- 600 009.

2.The Director of Medical Education,
Periyar E.V.R. Road,
Kilpauk, Chennai - 600 010.

3. Secretary, Medical Council of India,
Pocket - 14, Sector - 8, Dwarka Phase -I,
New Delhi - 110 077.

1 cc to M/s.Swarnam Rajagopal, Advocate, sr.48220

1 cc to Government Pleader, sr.48653

W.A.No.943 of 2016

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