

The Hon'ble Sri Justice C.V.Nagarjuna Reddy

and

The Hon'ble Sri Justice G.Shyam Prasad

Writ Petition No.27859 of 2017

Date: 18.09.2017

Between:

Dr.Mrs.P.Queeni Leena

... Petitioner

and

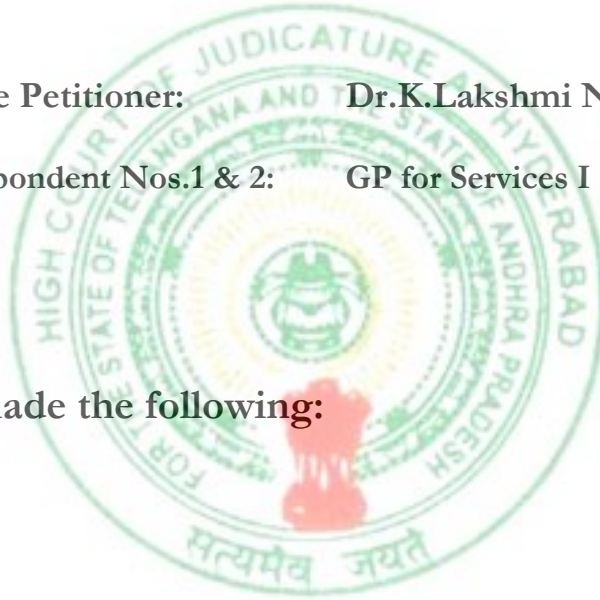
Director of Medical Education,
Govt. of A.P., Vijayawada,
Krishna District and 2 others

...Respondents

Counsel for the Petitioner: Dr.K.Lakshmi Narasimha

Counsel for respondent Nos.1 & 2: GP for Services I (AP)

The Court made the following:



Order: (Per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

The unsuccessful applicant in OA.No.2288 of 2017 before the Andhra Pradesh Administrative Tribunal, Hyderabad (for short 'the Tribunal') filed this Writ Petition.

The Andhra Pradesh Medical Education Service Rules (for short 'the Special Rules') were notified *vide* G.O.Ms.No.154, Health, Medical and Family Welfare Department, dated 04.05.2002. Under these Rules, the post of Assistant Professor falls under Category 9. Annexure - I prescribes the method of appointment for various posts. For the post of Assistant Professor (non-clinical), three methods of appointment are envisaged *viz.*, (i) by way of direct recruitment; (ii) by way of transfer of qualified Civil Assistant Surgeons and Tutors included in Category 10; and (iii) by way of transfer of Civil Assistant Surgeons working under the control of Director of Health and Commissioner, Andhra Pradesh Vaidya Vidhan Parishad (APVVP) in the non-teaching side with requisite qualification.

Rule 6 of the Special Rules deals with the method of appointment, according to which, in every cycle of five vacancies of Assistant Professors in each speciality, the first three vacancies shall be filled up by way of direct recruitment, the next one

vacancy shall be filled up by way of transfer of qualified person working in Category 10 and the remaining one vacancy shall be filled up by way of transfer of qualified person working in non-teaching side *i.e.*, Directorates of Health, Commissionerate of APVVP.

The petitioner claims that she belongs to SC Community; that she was selected and appointed as Civil Assistant Surgeon by way of direct recruitment in the APVVP on 04.07.2000; that subsequently, she was transferred and posted as tutor in Medicine by respondent No.1 *vide* Order, dated 25.04.2003; that accordingly, she was relieved from APVVP and joined respondent No.1- office as tutor in May, 2003; that the post of tutor comes under Category 10; that respondent No.3 was appointed as tutor subsequent to her appointment; that his seniority will be counted from the date of his appointment in 2005; and that he is junior to her.

The petitioner further stated that she has completed her Post Graduation in Microbiology in June, 2017; that the Government has issued G.O.Rt.No.464 HM&FW, dated 23.03.2013, regulating filling up of vacant posts of Assistant Professors in Teaching Hospitals and Medical Colleges; that as per the said Government Order, Rule of Reservation is applicable for

filling up these posts; that there is a Rule of Reservation for promotions also; that respondent No.1 has issued Circular, dated 11-05-2017, publishing the vacancy positions of the posts of Professors, Associate Professors and Assistant Professors of Clinical, Non-Clinical and Super Specialties; that as regards the Assistant Professors (Microbiology), the vacancy position was shown as 7; that keeping the same in view, respondent No.1 has issued notification on 08-06-2017 inviting applications from eligible candidates for the purpose of being appointed by way of Transfer as Assistant Professors in various disciplines; that respondent No.1 issued another Notification on 08-06-2017 by which applications from qualified candidates were called for the purpose of filling up the posts of Assistant Professors both in clinical and non-clinical disciplines by various specialties notified under lateral entry; that with regard to Microbiology, total number of 7 posts were shown as vacant; that out of those 7 posts, 40% was reserved for being filled up by way of promotion (through appointment by transfer), 60% was reserved for being filled up by way of direct recruitment; and that 40% of the total number of posts to be filled up by appointment by transfer would come to three.

The grievance of the petitioner is that in the Annexure to the notification, the number of vacancies for Microbiology was shown as two instead of three. The petitioner also referred to the corrigendum issued on 09-06-2017 stating that the in-service Doctors, who were appearing for examinations and expecting results by the end of June, 2017, were also eligible to apply for lateral entry; that the petitioner has written the Microbiology examination under the in-service Doctors' quota; that therefore, she is eligible and entitled to apply for the above said posts; that the results of the said examination were declared during June, 2017, in which the petitioner was declared to have passed; that the petitioner has sent her application on 10.06.2017; that the State Government has issued G.O.Ms.No.108 HM & FW, dated 06.07.2017, for filling up various posts relating to Microbiology as 4; that, however, by Order, dated 25-07-2017, respondent No.1 displayed a final seniority list for the purpose of absorption of Doctors with PG qualifications in Government Medical Colleges and Teaching Hospitals and Director of Public Health and Family Welfare and Commissioner, APVVP; that in the said list, the date of completion of the PG course of the petitioner was erroneously shown as 16-10-2018; and that under the remarks column, it is stated that the PG course was not completed. The petitioner

further averred that instead of showing 7 vacancies, only 6 vacancies were shown for Assistant Professor (Microbiology). Hence, she has filed the afore-mentioned OA.

The Tribunal, without going into the merits of the case, dismissed the OA by taking the view that since the selection process has already been completed, if the petitioner is aggrieved by such process including identification of number of vacancies for lateral recruitment, she has a remedy of filing Appeal before the competent Appellate Authority under Rule 26 of the Andhra Pradesh State and Subordinate Service Rules, 1996 (for short 'the 1996 Rules').

As we were of the *prima facie* opinion that the Tribunal's approach in non-suiting the petitioner on the ground of availability of alternative remedy was erroneous, we have adjourned the case to enable the learned Government Pleader for Services (AP) to file counter-affidavit. Accordingly, a counter-affidavit was filed by the Director of Medical Education on 29.08.2017.

As the submission advanced by the learned Government Pleader on 06-09-2017 based on the counter-affidavit was not clear as regards the vacancy position, we have directed the

respondents to file an additional counter-affidavit, which has been, accordingly, filed by the Director of Medical Education.

We have heard the learned Counsel for both parties at length.

As noted herein before, the Tribunal has dismissed the OA *in limini* on the ground of availability of alternative remedy under Rule 26 of the 1996 Rules. The said Rule reads as under:

26. Appeal against seniority or other conditions of service:

(a) Except where otherwise provided in these or the special rules, an appeal shall lie against an order fixing the seniority of a person or affecting any conditions of service, passed by the appointing authority, to the authority to whom an appeal would lie against an order of dismissal passed against the member of the service, class or category.

(b) The powers in sub-rule (a) shall be exercised by the Head of the Department, if he is not the appellate authority, or by the State Government on its own motion, or on an appeal received by the Head of the Department or the State Government, as the case may be.

(c) The appellate authority, if it is not the Head of the Department or the Government, shall dispose of such appeal within a maximum period of one year. If the appeal has not been disposed of within the aforesaid period, the Head of the Department or the State Government may intervene in the matter, for sufficient reasons to be recorded in writing and take such action as may be considered necessary by them in the matter.

(d) No appeal for restoration of seniority or assignment of notional seniority on par with his junior shall be entertained by the

appellate authority after a period of 90 days from the date on which junior was promoted.

(e) A member of service may submit a revision petition against the order of the Appellate Authority, within three months of the orders passed by the Appellate Authority, to the Government.

On a reading of the above-reproduced Rule, it is clear that an Appeal shall lie against an order fixing the seniority of a person or affecting any conditions of his service, passed by the appointing authority. The petitioner's grievance does not either relate to fixation of seniority or affecting of any of her conditions of service. As noted above, her grievance is against the action of the respondents in not properly identifying the vacancies and notifying the same for effecting promotion. Therefore, the Tribunal fell into a serious error in throwing out the OA on the ground of availability of an alternative remedy.

As regards the merits of the case, the petitioner has filed a copy of the statement of vacancy position and "mismatch" work of Assistant Professors in non-clinical, clinical and super specialties in the State. The learned Government Pleader has not disputed the authenticity of the said statement. As per the said Statement, Microbiology is shown at Serial No.6 and the total number of vacancies is shown as 7. The statement also contains a column "Mismatch" against which '0' is shown as regards

Microbiology. However, in the notification, dated 08-06-2017, issued by respondent No.1, the total number of vacancies in Microbiology for lateral entry *i.e.*, appointment by transfer from among the in-service Doctors is shown as '2'.

The sheet anchor of the case of the petitioner is that, admittedly, 40% of the vacancies are reserved for lateral entry and the posts should be notified as 3 and not 2. The respondents have not disputed if the total vacancies are 7, 3 posts must be reserved for lateral entry. They have, however, taken the stand that the vacancies in respect of Microbiology are only '6'.

In Para 7 of the counter-affidavit filed by respondent No.1, it is stated as under:

“Further, it is also respectfully submitted that, the applicant has not completed PG course as on the date of counseling *i.e.*, 27-07-2017, and however, it is submitted that, the total vacancies in the department of Microbiology are (6) six under the control of DME institutions as on notification for lateral entry, out of six vacancies, two (2) posts in Microbiology department are allotted to be filled through lateral entry as per ration 40% and 4 vacant posts are reserved for Direct Recruitment (60%).”

When we have repeatedly questioned the learned Government Pleader as to how 7 vacancies, which were shown to have been in existence in May, 2017, as evident from the vacancy position and mismatch work of Assistant Professors in non-

clinical, clinical and super specialties, have got reduced to 6, she has replied that an Assistant Professor working in Cardiology Department is accommodated in Microbiology post and therefore, the said post is treated as a mismatch. It is consternating to note that a person belonging to Cardiology Department was deputed to work in the Department of Microbiology, only to accommodate him in that particular unit. This, in our view, constitutes grave mismanagement of the Institution and sheer abuse of the discretionary power of the Management.

Be that as it may, it is not the case of the respondents that the 7th vacancy was filled up either by direct recruitment or by way of promotion of a qualified person. Merely because a person belonging to a foreign department is shown to be working in the unit in which the vacancy in Microbiology post is in existence, it is not permissible for the respondents to keep the said post vacant only to accommodate a person from another Department in that particular unit. Thus, in our opinion, the purported mismatch is nothing but a misnomer.

The learned Government Pleader for Services (AP) submitted that even if the 7th vacancy is notified, the petitioner being at Serial No.4 would not be entitled to promotion.

The learned Counsel for the petitioner has strongly resisted the above plea by stating that since the petitioner belongs to DME stream, she will get her turn for the 3rd vacancy, if notified for recruitment by transfer. He has also submitted that many candidates, who have appeared for examinations and whose results were awaited, were considered and promoted and that the petitioner, having already obtained her PG decree, is also entitled to be considered for promotion. However, we are not inclined to go into these aspects as they need to be considered by the respondents once the vacancy is notified.

From the discussion undertaken above, we are convinced that the 7th vacancy in Microbiology very much exists and the same needs to be notified for being filled up with the eligible candidate by way of recruitment by transfer (lateral entry). The respondents are, accordingly, directed to notify the vacancy within two weeks from the date of receipt of this order. The petitioner and other eligible candidates are entitled to apply for such vacancy. Within three months from the date of publication of notification, the vacancy must be filled up by considering the claims of all the eligible candidates including that of the petitioner.

Order, dated 02-08-2017, in OA.No.2288 of 2017 on the file of the Tribunal is set aside. The Writ Petition is, accordingly, allowed to the extent indicated above.

As a sequel, WPMP.No.34602 of 2017, filed by the petitioner for interim relief, is disposed of as infructuous.

(C.V.Nagarjuna Reddy, J)

(G.Shyam Prasad, J)

Dt: 18th September, 2017
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