

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.08.2018

CORAM:

The Hon'ble MR.HULUVADI G.RAMESH, ACTING CHIEF JUSTICE

AND

The Hon'ble MR.JUSTICE S.S.SUNDAR

W.A. No. 1436 of 2018

And

C.M.P.No. 11406 of 2018

The Medical Services Recruitment Board
Rep. by its Member Secretary
7th Floor, DMS Building,
No.359, Anna Salai,
Teynampet,
Chennai - 600 006.

... Appellant/Respondent No.2

Vs.

1. Mr.A.Kolamuthu ... Respondent/Petitioner

2. State of Tamil Nadu
Rep. by its Principal Secretary
Health and Family Welfare Department
Secretariat, Chennai - 600 009.

3. The Director of Medical Education
Kilpauk, Chennai - 600 010.

4. The Director of Medical and Rural Health Services
7th Floor, DMS Building,
No.359, Anna Salai,
Teynampet, Chennai - 600 006.

5. The Director of Medical and Rural Health Services (ESI),
7th Floor, DMS Building,
No. 359, Anna Salai,
Teynampet,
Chennai - 600 006.

... Respondents/Respondent Nos. 1, 3, 4, 5

Writ Appeal filed under Clause 15 of the Letters Patent as
against the order dated 10.11.2017 passed in W.P.No. 28342 of
2017.

W.P.No.28342 of 2017:

Prayer:Petition filed under Article 226 of the constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the 2nd respondent in connection with impugned qualification prescribed in the letter issued in Na.Ka. NO.22 Ma.Pa.Dhe.Va/2012 dated 20.3.2013 and to quash the same as illegal and arbitrary in so far as the petitioner case is concerned and consequently direct the 2nd respondent to appoint the post of Radio Grapher in the available vacancies in the post without waiting for the approval of amendment of the rules.

For appellant : Mr. A.Vivek

For 1st respondent : Mr. R.Subramanian

For 2nd Respondent : Mr. P.S.Sivashanmugasundaram
Special Government Pleader

For RR 3 to 5 : Mr.C.Munusamy
Special Government Pleader

JUDGMENT

(Judgment of the Court was made by S.S.Sundar, J.)

The Medical Services Recruitment Board/ the appellant herein has been constituted exclusively for Health and Family Welfare Departments so as to centralise the mode of direct recruitment to all categories existing in Health and Family Welfare Department. After the constitution of Medical Services Recruitment Board, the recruitment to all categories are only done by the appellant from the year 2012.

2. The appellant has issued a notification for the post of 'Radiographer' to fill up 243 vacancies during the year 2013. After obtaining the list of candidates sponsored by the Directorate of Employment and Training, Guindy, Chennai, all the candidates including the first respondent in this Appeal were called for certificate verification for the post of 'Radiographer'. The first respondent has attended certificate verification on 08.04.2013. At the time of verifying the certificate, it is stated by the appellant that the first respondent did not possess the essential qualification as prescribed for the post of 'Radiographer' as per the Special Rules in existence at that time. The required qualification was certificate in Radiological Assistant (CRA) course. The

first respondent, though possessed Diploma in Radio Diagnosis Technology, was not selected for the post of Radiographer. Since the first respondent in this Appeal was found by the appellant as ineligible as per the Special rules in existence at that time, he was not selected for the post of 'Radiographer'.

3. It is also admitted that four candidates, who were not selected for the post of Radiographer, but they possessed Diploma in Radio Diagnosis Technology (DRDT), have filed Writ Petitions in W.P.(MD).Nos. 7152, 7153, 7188 and 7213 of 2013 before the Madurai Bench of Madras High Court, with a prayer to issue appropriate advertisement for the post of Radiographer either by earmarking reservation for Diploma holders or by fixing ratio between the Diploma in Radio Diagnosis Technology holders and Certificate in Radiological Assistant and thereby consider the case of the petitioners. The Madurai Bench of Madras High Court, has allowed the Writ Petitions filed by the petitioners therein and directed the respondents to appoint them in the available vacancies without waiting for approval of amendment of the rule.

4. It was contended by the petitioners in W.P.(MD).Nos. 7152, 7153, 7188 and 7213 of 2013 that they have possessed higher qualification and that therefore, they cannot be denied an opportunity on the ground that they did not possess the required qualification as per the Special Rules. Accepting their case, the Madurai Bench of Madras High Court, has passed the common order dated 02.08.2018 allowing the Writ Petitions wherein paragraph No.6 runs as follows:-

"6. Therefore, when the respondents have also agreed in the counter affidavit that the petitioners are having higher qualification, namely, Radio Diagnosis Technology (DRDT), this Court finds that they are eligible to be appointed, since the Rules do not contemplated the Diploma as one of the qualifications for the post of Radiographer, however, secondly they have also agreed that the third respondent also made a proposal for amending the Rule by bringing the Diploma as also one of the qualifications for the post of Radiographer. Therefore, when the proposal has already been sent by the third respondent and the petitioners have also taken part in the selection process and thirdly when there are 48 vacancies available now, the respondents are directed to appoint the petitioners in the

available vacancies without waiting for approval of amendment of the rule."

5. After disposal of W.P.(MD).Nos. 7152, 7153, 7188 and 7213 of 2013, the special rules regarding qualification for the post of Radiographer was amended as per G.O.Ms.No. 263, Health and Family Welfare (C2) Department dated 15.11.2016. As per the amendment to the Special Rules governing the post of Radiographer, a candidate must have possessed two years Diploma Course in Radio Diagnosis Technology conducted by the Board of Paramedical Education and the Directorate of Medical Education, Government of Tamilnadu at Government Medical Institution or any other Institution recognised by the Government of Tamilnadu for this purpose. It is also stated that the revised qualification was with an intention to fulfill the Atomic Energy Regulatory Board (AERB) norms.

6. After the amendment, the appellant issued fresh recruitment notification dated 22.08.2017 inviting applications for direct recruitment on temporary basis to the post of Radiographer. In this notification, the qualification for the post of Radiographer specifically mentioned as per the revised qualification introduced by way of amendment as indicated above.

7. The first respondent is not qualified as per the qualification prescribed in the recruitment notification dated 22.08.2017. However, suppressing the amendment and the fresh recruitment notification dated 22.08.2017, the first respondent filed a Writ Petition in W.P.No. 28342 of 2017 with a prayer in tune with the earlier Writ Petitions filed by petitioners in W.P.(MD).Nos. 7152, 7153, 7188 and 7213 of 2013. It was submitted that the matter is covered by the earlier common order of the Madurai Bench of Madras High Court dated 02.08.2016 in W.P.(MD).Nos. 7152, 7153, 7188 and 7213 of 2013 filed by the petitioners therein, who were not selected in the year 2013. The counsel appearing for the appellant has also agreed for disposal of W.P.No. 28342 of 2017 in terms of the earlier order without properly getting instructions as to the subsequent developments and regarding amendment of Special rules.

8. Realising the fact that the first respondent has obtained the order dated 10.11.2017 made in W.P.No. 28342 of 2017 without disclosing the subsequent amendment and the fresh recruitment notification, the appellant has filed the above Appeal before this Court.

9. It is stated that there is no estoppel against statute and therefore, the Appeal is maintainable though by mistake it was represented before the learned Single Judge that the matter is covered by the earlier common order of the Madurai Bench of

Madras High Court in W.P.(MD).Nos. 7152, 7153, 7188 and 7213 of 2013 .

10. The learned Counsel appearing for the appellant pointed out that the amendment to the Special Rules, prescribing specific qualification for the post of Radiographer was not brought to the notice of this Court at the time of disposal of the Writ Petition in W.P.No. 28342 of 2017. He further submitted that the first respondent has suppressed the subsequent amendment as well as the recruitment notification dated 22.08.2017 prescribing the qualification as per the amendment.

11. The learned counsel appearing for the first respondent submitted that the first respondent more qualified at the time when the recruitment notification was issued in the year 2013. He further submitted that the Writ Petitions filed by the similarly placed persons, who were found to have more qualification, were allowed . Since the appellant has implemented the direction of this Court in the earlier Writ Petitions filed by the similarly placed persons, like that of the first respondent, the learned counsel for the first respondent submitted that the first respondent cannot be discriminated.

12. The facts in this case are not in dispute. In the year 2013, the first respondent was called for the interview and the appellant found that he was not qualified for the post of Radiographer. The first respondent has not challenged his non selection at the relevant point of time. Though it was held in the Writ Petitions filed by similarly placed persons like that of the first respondent, that they have higher qualification, the Writ Petitions filed by them were in contemplation of an amendment to the Special Rule regarding qualification. After the earlier Writ Petitions were disposed of, the Special Rule was amended prescribing two years Diploma Course in Radio Diagnostic Technology conducted by the Board of Paramedical Education and Directorate of Medical Education, Government of Tamilnadu at Government Medical Institution or from any other Institution recognised by the Government of Tamilnadu as a qualification for the post of Radiographer.

13. Admittedly the first respondent is not qualified as per the prescribed qualification after the amendment. It is not the case that the qualification possessed by the first respondent is equivalent to the qualification prescribed as per Special Rules, which is now in vogue. The first respondent did not file any Writ Petition earlier till the new recruitment notification is

issued. Even though similarly placed persons have filed Writ Petitions in the year 2013 immediately after their non selection, the first respondent was just watching and did not file a Writ Petition. Hence, the first respondent/petitioner is only a fence-sitter and he cannot be given any relief, particularly when there are subsequent events, that altered the position to the disadvantage of the first respondent. As per the new recruitment notification, the first respondent is neither qualified nor competent to the post of Radiographer and he cannot seek relief on the basis of the common order passed earlier in the Writ Petitions filed in year 2013.

14. Having regard to the facts which are not disputed, the first respondent is neither qualified nor competent to participate in the selection process pursuant to the recruitment notification dated 22.08.2017. The first respondent has not challenged his non selection for the post of Radiographer in the year 2013. Hence, this Court is of the view that the first respondent cannot get the relief following the earlier common order passed in the Writ Petitions filed in the year 2013.

15. The learned Single Judge, without taking into account the subsequent events and also the amendment to the Special Rules introducing specific qualification, has allowed the Writ Petition in W.P.No. 28342 of 2017 filed by the first respondent on 10.11.2017 only on the ground that the issue has already been decided in the earlier Writ Petitions. However it is not so.

16. The Writ Petition filed by the first respondent, suppressing the amendment as well as the subsequent recruitment notification dated 22.08.2017, can not be entertained. There is no estoppel against statute. A person who has not qualified as per the recruitment notification dated 22.08.2017, cannot rely upon the earlier common order, which cannot be sustained, in view of altered circumstances where it cannot be said that the first respondent is also qualified as per the recent recruitment notification.

17. The writ appeal is, therefore, allowed. No costs. Consequently, C.M.P.No.11406 of 2018 is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

vsg
To

1. The Principal Secretary
State of Tamil Nadu
Health and Family Welfare Department
Secretariat, Chennai - 600 009.
2. The Director of Medical Education
Kilpauk, Chennai - 600 010.
3. The Director of Medical and Rural Health Services
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No. 359, Anna Salai,
Teynampet, Chennai - 600 006.

+1cc to Mr.A.Vivek, Advocate Sr.55102
+1cc to the Government Pleader Sr.55356

W.A. No. 1436 of 2018
And
C.M.P.No. 11406 of 2018

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srg 12/09/2018

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