

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment Date of Pronouncing Judgment
07.02.2018 04.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE SATRUGHANA PUJAHARI

WP No.1636 of 2013

B.Thangaraj

..Petitioner

Vs

1. The Secretary to Government
Health and Family Welfare Department
Secretariat, Chennai - 600009.
2. Director of Medical Education,
Kilpauk, Chennai - 600010.

...Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records in impugned Letter.No.44067/EAPII(2)/12-1 dated 31.07.2012 issued by the 1st respondent to the 2nd respondent informing the rejection of petitioner's claim and consequential impugned order in Ref.No.4025/E4/3/2010 dated 31.07.2012 of the 2nd respondent communicating the order of the 1st respondent to the petitioner and quash the same and consequently direct the respondents to issue order modifying/cancelling the conditions stipulated in the posting orders and grant continuity of service, attendant service and monetary benefits and back wages to the petitioner's from the year 2000 onwards when the judgement in W.P.No.8872 of 1992 dated 29.09.1999 became final.

For petitioner : Mr.S.N.Krishnakumar

For Respondents: Mr.P.Raja,

Government Advocate

O R D E R

This writ petition has been filed by the petitioner under Article 226 of the Constitution of India seeking a writ of Mandamus or any other appropriate by quashment of the letter No.44067/EAPII(2)/12-1 dated 31.07.2012 issued by the first respondent to the second respondent, informing the rejection of the petitioner's claim and consequential impugned order in Reference No.4025/E4/3/2010 dated 31.07.2012 of the second respondent and also directing the respondents to issue orders modifying / canceling the conditions stipulated in the posting orders and grant continuity of service, attendant service and monetary benefits and back wages to him, since the year 2000 onwards in compliance to the direction in W.P.No.8872 of 1992 dated 29.09.1999.

2. It appears that the petitioner joined in a NGO, namely Family Planning Association of India on 16.11.1984 as male attendant, Urban Family Welfare Centre, Saligramam in a Health Project. The said project was funded by the Government of India through the Directorate of Family Welfare Department, Tamilnadu. Due to poor performance of the project, the NGO expressed its unwillingness to run the project hence, the population Project Co-Ordinator, Chennai was asked to take over the said project from 01.03.1992 onwards alongwith the staff to prevent sudden retrenchment of the staff working in the said project. Accordingly, a new health project was sanctioned and another voluntary organisation namely Association of Community Welfare Education and Development took the new project on 01.03.1992 and on the request of the Government, gave appointment to the retrenched staff of the Family Planning Association of India who were willing to join in the post there in the new project. Since in the new project namely Indian Population Project -V, the petitioner did not fit in the staffing pattern, he was terminated from the project on 04.05.1992. The petitioner challenged the same in a writ petition vide W.P.No.8676 of 1992, which was allowed by this Court on 29.09.1999 with a direction to the respondent to provide a suitable post equivalent to the post held by him previously at the time of his termination without any objection of his over age, by creating a supernumerary post within a period of three months from the date of the order with the rider that the petitioner shall not get any back wages and attendant benefit so also continuity in service. Challenging the same, the respondents filed a writ appeal in WA.No.157 of 2001 before the Division Bench of this Court, which was dismissed for non-prosecution, on 07.12.2006. Thereafter, the petitioner made a representation to the respondents on 12.12.2007 to comply with the direction of this Court passed in the aforesaid writ appeal.

However, without complying with the same, a Review Application was filed against the writ appeal, which came to be dismissed on 17.06.2009 by this Court. In spite of the same, the order of this Court was not complied with. Therefore, the petitioner filed a contempt petition against the respondents and after receiving notice in the contempt petition, the 1st respondent issued an order of appointment to the petitioner on 06.02.2010. After the issuance of appointment order, the contempt petition was dropped, giving liberty to the petitioner to workout his grievance against consequential posting before the appropriate forum. The petitioner, however, made a representation, requesting the respondents to grant him the service benefit for a period from 29.09.1999 to 09.02.2010 and also consequential promotional benefits to him. Since the same was not considered, the petitioner filed a writ petition in W.P.No.20336 of 2010 before this Court seeking a writ of mandamus directing the 1st respondent to consider his representations, dated 29.04.2010 and 21.07.2010 to modify the conditions imposed in the order of appointment and issue fresh posting orders. But, this Court, by order, dated 10.10.2011, passed an order and directed the respondents therein to consider the representations of the petitioner, on its own merits and in accordance with law, within a period of four weeks from the date of receipt of a copy of this order. Thereafter, the authority asked for certain documents i.e., the Employment Exchange ID card as well as the letter of attending personal interview on 16.11.1984, the appointment order dated 16.11.1984 and the termination order issued in the year 1992, for taking further action in the matter. Accordingly, the petitioner complied with the same, but no order having been passed, the petitioner filed a contempt petition for non-compliance of the order of this Court in Contempt Petition No.586 of 2012. On receipt of the contempt petition, the respondents treated the appointment of the petitioner as a new appointment on 08.02.2010 and an order in this regard was issued, vide impugned proceedings in Lr.No.44067/EAPII(2)/12-1 dated 31.07.2012 and also informed about the rejection of his claim. Hence the contempt petition came to be closed, giving liberty to the petitioner to challenge the rejection order. The petitioner has challenged the same, on the ground that since the benefit of the order dated 29.09.1999 was not given to the petitioner within the time stipulated and matter was delayed and it was only after a contempt petition was filed, he was issued with the order of appointment, the petitioner is entitled to the back wages and continuity of service from the date of his termination till the date of pronouncement of the judgment dated 29.09.1999 and thereafter, with the continuity of his services, along with the past service rendered, instead of considering his service as a new appointment and alternatively it is averred that even, if the appointment is a new appointment by creating a post in terms of the directions issued in the W.P.No.8676 of 1992, the

petitioner is entitled to the benefits from the year 2000 onwards. Hence, the prayer as stated earlier has been made by the petitioner.

3. A Counter affidavit has been filed by the respondents, indicating the fact that the petitioner was working as a Family Planning Attendant in the Family Planning Association of India from 16.11.1984, as a male attendant under the Urban Family Welfare Center, Saligramam, run by the Family Planning Association of India (a Non Government Organisation) since 1984. The scheme was funded by the Government of India through the Directorate of Family Welfare Planning Department of the state of Tamil Nadu. But, due to poor performance of the Health Project, the Family Planning Association of India expressed its unwillingness to run the Project. Hence, the population Project Coordinator of the Corporation of Chennai was asked to take over the said Project with effect from 01.03.1992 onwards. The staff were ordered to be taken over only as a temporary measure to prevent their sudden retrenchment by the Family Planning Association of India. However, on discussion of the project coordinating authorities of India, Population Project-V, in Chennai Corporation, another Private Voluntary Organisation, namely the Association for community Welfare Education and Development (ASCOWED) was asked to take over the Project with effect from 01.03.1992. The new organization was requested to consider to offer of appointment to the retrenched the staff who were working in the discontinued Health Project run by the Family Planning Association and Government of India on humanitarian grounds, provided they satisfy the conditions and norms prescribed by the India Population Project-V and expressed their willingness to work under the new agency (Association for Community Welfare Education and Development).

The petitioner herein was one of such candidates, who had joined as Attendant in the new urban health project run by the Association for Community Welfare Education and Development and as the petitioner did not fit into the staffing pattern, since one female Attendant was appointed, his service was terminated on 04.05.1992. The petitioner, thereafter, had filed a writ petition No.1876 of 1992 seeking direction to allow him to continue his service at the institution of the third respondent with consequential benefits and this Court by its order dated 29.09.1999 had dispose of the same, with the operative portion of the order as follows:-

" The third respondent herein is directed to provide a suitable post equivalent to the post held by him previously i.e., at the time of termination of his service dated 04.06.1992. It is also ordered that the first respondent cannot raise any objection with regard to the overage

since the outer limit of age has been relaxed in the case of the present writ petitioner as stated supra. The first respondent is also hereby directed to create a supernumerary post within a period of three months from the date of the order and appoint him in the said scale of pay, there is no further extension of time to the first respondent. The writ petitioner is not entitled to get any back wages and attendant benefits and he is not entitled to get continuity of service. The writ petition is ordered on the above terms. In the circumstances of the case there will be no order as to costs".

Thereafter, the writ appeal has been filed against the same was dismissed and a Review Application was also dismissed. The Contempt petition was filed for violation of the said order and accordingly, the Government had decided to implement the order, dated 29.09.1999 and necessary instructions were given to the Director of Medical Education, by the Government letter (D) No.104EAP II/2007, dated 06.02.2010 to give appointment to the petitioner in any of the posts such as Hospital Worker/Sanitary Worker/Office Assistant etc., in Group "D" service under the control of Directorate of Medical Education temporarily subject to the following conditions that: 1. He is not entitled for any back wages and attendant benefits etc.,; 2. He is not entitled to get continuity of service for any purpose; 3. This case should not be quoted as precedent in future and such appointment order. Accordingly, the appointment was given to the petitioner at the Government Hospital for Thoracic Medicine, Tambaram on 08.02.2010 and the contempt petition was closed. Thereafter, the petitioner made representations as to which were examined in consultation and ultimately, it was found that the petitioner is not entitled to back wages and other attendant benefits etc., as indicated in the appointment order and rejected the representations of the petitioner. The aforesaid fact also having been intimated to this Court and the contempt petition has been closed, which was filed for non-compliance of the order of this Court in W.P.No.20336 of 2010. Therefore, the respondents stated that the writ petition is devoid of merits, as no fault can be found with the rejection of the representations of the petitioner and prayed for the writ petition to be dismissed.

4. I have heard the learned counsel for the parties and have gone through the materials on record.

5. During the course of hearing, it has been submitted by the learned counsel for the petitioner that since

in spite of direction of this Court in the writ petition to give appointment to the petitioner by creating a supernumerary post within three months from the date of order passed in W.P. No.8676 of 1992 was not carried out, but the same was challenged in a Writ Appeal which was also came to be dismissed and in spite of that such appointment was not given to the petitioner and it was only when a contempt petition was filed, the appointment was given to him, the petitioner is entitled to the relief sought for, more particularly the appointment at least notionally in compliance to the direction of this Court in the earlier writ petition. The Authority, however, in order to harass him did not comply with the order which had reached its finality after the disposal of the writ appeal. It is only after filing of the contempt petition, such an order was given to him. The petitioner's belated appointment has deprived him to get the pensionary benefits and promotional benefit as his service thereafter did not qualify for pension, so also promotional benefit available, hence on the ground of equity, the petitioner at least is entitled to appointment in terms of the order passed in the writ petition. However, it is fairly conceded that in such a case of antedating his appointment the petitioner is entitled to the benefit notionally inasmuch as he had not worked during the said period in the post appointed.

6. Per contra, learned counsel appearing for the respondents vehemently opposes the aforesaid submission of the learned counsel for the petitioner on the ground that the petitioner's appointment being a new one, the petitioner is not entitled to the relief sought for more particularly when in the Contempt Petition filed this Court had close the contempt and also the very order passed in the Writ Petition pursuant to which the appointment was given indicates that the petitioner is not entitled to any wages and continuity in service though he is required to be given appointment in a post carrying his earlier scale of pay. In other words, it is submitted that his appointment being a new one he is not entitled to the relief sought for in this writ petition and as such the same is liable to be dismissed.

7. In order to appreciate the contention of the parties, it would be apposite to mention here that the petitioner in the writ petition No.8676 of 1992 though had claimed to set aside his termination and direct his appointment with continuity in service but the Court came to pass the order as quoted supra. From the aforesaid order as it appears this Court had specifically directed that the petitioner is not entitled to any back wages or continuity in service but entitle for a fresh appointment in a equivalent post within the time stipulated even if no post is available by creation of a

supernumerary post. From the tenour of the aforesaid order, it can very well be said that this Court directed the immediate appointment of the petitioner within the time stipulated. However, the said order was not carried out and writ appeal was filed which was not pursued and dismissed for non-prosecution. Review petition filed was also dismissed it is only after filing of contempt, the order was carried out and the petitioner was given appointment. No doubt in the contempt petition, the respondents responsible for such procrastination were not proceeded with as the appointment was already given but the order passed there in had not closed the claim of the petitioner in as much as he was given the liberty to ventilate the grievance in an appropriate forum by filing appropriate petition. Therefore, the contention raised that since in the contempt the respondents were not proceeded with the respondents claim in this regard is closed appears to this Court to be devoid of merit and has been raised to be rejected. The other contention that the order passed in the writ petition being specifically stating that the petitioner appointment is a new one as such he is not entitled to back wages, the petitioner claim therefore, in the writ petition is devoid of merit. Such contention is also appears to be fallacious inasmuch as eventhough the appointment is a fresh one having no link to the continuity of his earlier service and as such back wages was denied to him in the writ petition, as the claim of the petitioner in this case is based on the order passed in the said writ petition. In this case, the petitioner's prayer is to give him the new appointment from an anterior date in pursuance to the order in the writ petition No.8676 of 1992, which has reached its finality therefore, cannot be said to have been denied to him vide the order dated 29.09.1999. However, it cannot be lost sight that the said order was challenged in a writ appeal which came to be disposed of on 07.03.2006. The petitioner thereafter, was legitimately expecting an order of appointment in terms of the order passed in the writ petition. But the respondent without any justifiable reasons, eventhough they did not pursue the writ appeal diligently filed a Review challenging the order in the writ appeal which was also dismissed. Thereafter, also they did not give him appointment to the petitioner and it is only after the contempt was filed, the appointment was given. The petitioner though was armed with the aforesaid order of this Court but for no reasons, the respondents deprived him the benefit of the service by giving a fresh appointment in terms of the order. Their such delay which can very well said to be without any reasons has deprived the petitioner the benefit to a Government servant accruing on account of a longer qualified service. The action therefore, of the authority was to frustrate the order passed in the writ petition to give immediate appointment without considering the fact that the petitioner was over aged in as much as a supernumerary post was directed to be created to appoint the

petitioner. Therefore, the equity and fair play is in favour of the petitioner. The petitioner is also very reasonable in conceding that if his appointment is antedated, he is not legally entitled to the actual monetary benefits but the same notionally till the date of actual appointment in the post pursuant to the order passed. This Court would have in normal course of thing granted such relief from the date the appeal was dismissed but as it appears the respondents were not diligent in pursuing the appeal and appears to be recalcitrant litigant and as such the appeal was dismissed for non-prosecution. Hence, this Court is inclined to grant such relief to the petitioner on the last date stipulated to carry out the order dated 29.09.1999 passed in the writ petition No.8676 of 1992 cited supra.

8. For the foregoing reasons, the writ petition is allowed. Consequently, the impugned order rejecting the representation of the petitioner vide order dated 31.07.2012 stands quashed. The respondent is directed to antedate the appointment of the petitioner to the last date of the time stipulated in the aforesaid writ petition to comply the order. However, the benefit accruing out of such antedating of appointment shall be notional till the date the petitioner joined in the post in pursuance to the order of appointment given to him in terms of the direction in the aforesaid writ petition. It goes without saying that the petitioner is entitled to continuity in service from the date his present service is antedated. This order be carried out within three months of receipt of the production of the order whichever is earlier before the respondents. No costs.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

Kv/dn

To

1. The Secretary to Government
Health and Family Welfare Department
Secretariat, Chennai - 600009.

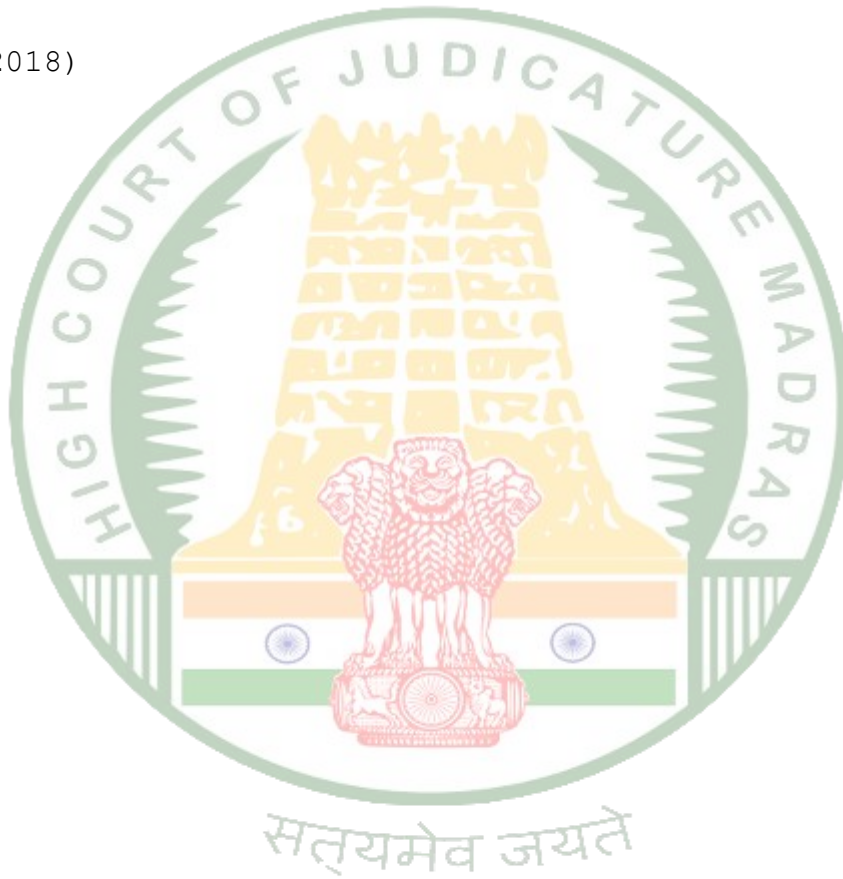
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2. Director of Medical Education,
Kilpauk, Chennai - 600010.

+1 CC to Govt. Pleader sr 35017.

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SP(11/06/2018)



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