IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 10.07.2018

CORAM

THE HONOURABLE THIRU JUSTICE V. PARTHIBAN

W.P.No.44032 of 2016

Dr.Gnanakkan Prem Nawaz .. Petitioner

versus

1. The Secretary to Government,
Health and Family Welfare Department,
Secretariat,
Chennai-600 009.

2. The Director of Medical and Rural
Health Services,
DMS Compound,
Teynampet,
Chennai-600 006.

3. The Tamil Nadu Public Service Commission,
rep. by its Member Secretary,
Frazer Bridge Road,
VOC Nagar, Park Town,
Chennai-600 003. .. Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari, to call for the proceedings of the 2nd respondent in Ref.No.36904/ E6/1/2016 dated 03.10.2016 and quash the same and consequently directing the 1st and 2nd respondent to promote the petitioner to the post of Chief Civil Surgeon on par with her juniors together with all concomitant benefits of seniority and all other attendant benefits and in accordance with seniority of the 3rd respondent and the proceedings of the 1st respondent in G.O.(D) No.1123 dated 15.10.2013.

For Petitioner : Mr.K.M.Vijayan, SC
for M/s K.M.vijayan Associates.

For Respondents: Mr.J.Pothiraj, Spl.G.P.

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ORDER

The present writ petition has been filed, seeking for the following relief:

> "To issue Writ of Certiorari, to call for the proceedings of the 2nd respondent in Ref.No.36904/ E6/1/2016 dated 03.10.2016 and quash the same and consequently directing the 1st and 2nd respondent to promote the petitioner to the post of Chief Civil Surgeon on par with her juniors together with all concomitant benefits of seniority and all other attendant benefits and in accordance with seniority of the 3rd respondent and the proceedings of the 1st respondent in G.O.(D) No.1123 dated 15.10.2013."

2. The petitioner had applied for selection to the post of Assistant Surgeon in response to the Notification issued by the 3rd respondent/Tamil Nadu Public Service Commission for the year 1989-1990. In the selection, the petitioner was successful and she was placed in 45th place having been provisionally selected for appointment to the post of Assistant Surgeon. According to the petitioner, she belongs to Hindu-Pallan community which was one of the SC communities notified. Despite her selection, she was not granted any appointment since her claim for community status was referred to for due verification and report.

3. Since no consequential appointment order was issued to the petitioner and her community status had been disputed, she was constrained to approach this Court in W.P.No.15391 of 1991 challenging the action of the 3rd respondent in withholding the name of the petitioner from being appointed as Assistant Surgeon. This Court, by order dated 12.2.1999 allowed the writ petition with all consequential benefits. In pursuant thereof, the order of appointment issued to the petitioner on 25.4.2001 as Assistant Surgeon in Government Hospital Reddiyapatti, Virudhunagar District and she joined duty in the said post on 29.5.2001. A selection list including the petitioner's name was published in Notification dated 1.7.2001 issued by the 3rd respondent and the original seniority of the petitioner as granted by the TNPSC was also restored, i.e. rank No.45. Thereafter, vide G.O.(D) No.1123 dated 15.10.2013, the services of the petitioner came to be regularized with effect from 29.5.2001 and in the same order, it was made clear that her seniority shall be made as per the Commission's select list, but was made eligible to draw arrears of income only from the date of appointment.

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4. The grievance of the petitioner is that though her original seniority has been restored vis-a-vis her batch mates who came to be appointed in 1991 in consequence of the selection conducted in the year 1989-90, the attendant benefits as a corollary, the restoration of seniority have not been granted. Therefore, the petitioner has been making repeated representations over a period of time requesting for grant of consequential benefits of promotion on the basis of her due seniority which stood restored vide Gazettee Notification dated 1.7.2001.

5. In the meanwhile, the Government issued G.O.Ms.No.354 dated 23.10.2009 providing for time-bound promotion and also providing for minimum eligibility service in respect of each category of post, namely, Assistant Surgeon, Senior Assistant Surgeon, Senior Civil Surgeon and Chief Civil Surgeon. Thereafter, another G.O. was issued in G.O.Ms.No.245 dated 30.10.2013 clarifying the G.O.Ms.No.354 issued in 2009 providing four time bound promotions on completion of 8, 15, 17 and 20 years of service as Senior Assistant Surgeon, Civil Surgeon, Senior Civil Surgeon and Chief Civil Surgeon as the case may be. In fact, by further communication of the second respondent dated 19.9.2014, the seniority as assigned to the petitioner was further being confirmed. Subsequently, on 11.12.1994, the petitioner was refitted in the category of Senior Assistant Surgeon with effect from 23.10.2009 by applying the above Government Orders.

6. The petitioner was aggrieved by refitting her only as Senior Assistant Surgeon with effect from 23.10.2009 and hence, she made a representation stating that her original seniority assigned in the year 2001 had to be taken into consideration for refitment in various higher grades. A detailed appeal was submitted by the petitioner to the 1st and 2nd respondents on 26.07.2015. In response to the appeal, the second respondent issued a communication dated 3.10.2016 rejecting the claim of the petitioner on the ground that in 2009, the petitioner had completed only 8 years of service and therefore, she was given refitment only as Senior Assistant Surgeon by taking her services into consideration from the date of her appointment from 29.5.2001. The said rejection order is being assailed in the present Writ Petition.

7. Shri K.M.Vijayan, learned senior counsel appearing for the petitioner would submit that it was not the fault of the petitioner for having not been appointed along with her batch mates in 1991, as 3rd respondent Commission had referred the matter for enquiry regarding the community status of the petitioner which led to the filing of Writ Petition before this Court in 1991 which came to be disposed of only in 1999 allowing

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the claim of the petitioner. Thereafter, appointment came through in 2001 and rightly, the respondent restored the seniority of the petitioner as assigned by the Commission along with her batch mates who were selected in 1989-90. Therefore, the learned senior counsel would submit that once original seniority had been restored, the concomitant benefits that will flow with seniority have to be conferred on the petitioner as otherwise, the restoration of the original seniority would not have any meaning for the service progression of the petitioner. Although it is a fact that the petitioner came to be appointed in 2001, nevertheless, the time bound promotion as provided in G.O.Ms.No.354 dated 23.10.2009 and G.O.Ms.No.245 dated 30.10.2013 had to be bestowed upon the petitioner, since the said time bound promotion was granted to the other members on completion of respective years of service. No selection was involved in such refitment in the higher grades and therefore, the petitioner is deemed to have worked along with their batch mates from 1991 since for no fault of her, she was denied from being appointed along with her batch mates in 1991 itself. The learned senior counsel would point out that any other conclusion against the petitioner would tantamount to punishing the petitioner for no fault of her. By virtue of subsequent appointment in 2001, the petitioner was literally made to lose all valuable years of service and was also made to lose promotion to higher grades which were given to her other batch mates. According to the learned senior counsel, many of the batch mates of the petitioner have become Chief Civil Surgeons on their completion of 20 years of service. That being the case, denial of the said benefit to the petitioner, is per se discriminatory and violative of Articles 14 and 16 of the Constitution of India.

8. Upon notice, Mr.J.Pothiraj, learned Special Government Pleader entered appearance and filed a detailed counter affidavit.

9. Learned Special Government Pleader would submit that the petitioner has not rendered actual years of service in order to stake a claim for time bound promotion. Although original seniority of the petitioner was restored, in the absence of actual qualifying service, the petitioner is not entitled to be posted or re-fitted in the higher positions, namely, Civil Surgeon, Senior Civil Surgeon and Chief Civil Surgeon as the case may be since for re-fitment in these posts, one has to render minimum 15, 17 and 20 years of service respectively. Admittedly, the petitioner has not rendered the actual service as stated above and having lack of experience and having not worked in actual terms, the petitioner is not entitled to Civil Surgeon, Senior Civil Surgeon and Chief Civil Surgeon as the case may be in terms of the Government Orders referred to above. In the said circumstances, the petitioner was rightly refitted

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in the post of Senior Assistant Surgeon in 2009 with effect from 23.10.2009 vide proceedings of the 2nd respondent dated 11.12.2014 as she had admittedly completed only 8 years of service by then. Therefore, there is absolutely no scope for any grievance on the part of the petitioner and in such regard, the 2nd respondent has rightly rejected the claim of the petitioner vide impugned proceedings dated 3.10.2016. Therefore, the claim of the petitioner is devoid of merits and liable to be rejected.

10. The learned Special Government Pleader would also place reliance upon the order passed by the Hon'ble Supreme Court reported in "(2018) 11 SCC 413 (Sunaina Sharma and others versus State of Jammu and Kashmir and others)". He would draw the attention of this Court to para 11 of the order, which is extracted herein below:

> "11. At this stage, it would be pertinent to mention that it is a settled principle of law that normally no person can be promoted with retrospective effect from a date when he was not born in the cadre. Seniority has to be reckoned only from the date the person entered into that service. In this behalf reference may be made to the judgment of this Court in State of Bihar Vs. Akhouri Sachindra Nath & Ors.2 where this Court held as follows :-
>
> > "12. …..It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into service….."
>
> Thereafter, in "Kaushal Kishore Singh vs. Dy. Director of Education", this Court held as follows :-
>
> > "5. The claim of seniority of the employee is always determined in any particular grade or cadre and it is not the law that seniority in one grade or cadre would be dependent on the seniority in another grade or cadre..."

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11. According to the learned Special Government Pleader, no person can be promoted with retrospective date, i.e. from the date when he was not borne in the cadre. Therefore, the petitioner cannot claim for promotion earlier to the year 2001 when she was not in service at all.

12. This Court has considered the rival submissions of the learned senior counsel for the petitioner as well as the learned Special Government Pleader and perused the materials and pleadings placed on record.

13. No doubt, the petitioner came to be appointed after a prolonged litigation before this Court which ended in her favour in 1999, vide proceedings dated 25.4.2001. However, the fact of the matter is that the respondents on their own, vide Gazettee Notification dated 1.7.2001, restored the original seniority of the petitioner as assigned by the 3rd respondent Service Commission vis-a-vis the batch mates of the petitioner who were selected for the year 1989-90. In fact, the seniority of the petitioner was further confirmed by the respondents when the services of the petitioner came to be regularized vide G.O.(D). No.1123 dated 15.10.2013, wherein, it is stated in para 3 as under:

> "3. The Government have examined the proposal of the Director of Medical and Rural Health Services in detail and decided to accept the same. Accordingly, the Government direct that the services of Dr.Gnanakkan Premnawaz, Assistant Surgeon, Government Hospital, Perundurai, Erode District be regularized with effect from 29.5.2001 Fore Noon (i.e.) the date of her joining in Tamil Nadu Medical Service and her seniority shall be made as per the Commission's selection list. She is also eligible to draw arrears of increment if any, consequent on the retrospective regularization."

14. From the above, it could be seen that the petitioner's seniority remained in tact without altering the same even though the petitioner was not appointed in 1991 along with her batch mates. In view of the admitted position, the petitioner's original seniority had been restored, despite passage of considerable time in the litigation before this Court, the attendant benefits that are concomitant to the assigned seniority of the petitioner, cannot be denied as otherwise, the restoration of original seniority would become meaningless and inoperative. The main bone of the contention resisting the claim of the petitioner is that the petitioner has not rendered respective years of service factually and actually and therefore, not entitled to time bound promotion as contemplated and envisaged in G.O.Ms.No.354, dated 23.10.2009 and

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G.O.Ms.No.245 dated 30.10.2013 and therefore, she is not entitled to re-fitment in higher grades as the petitioner had clearly lacked experience in each category. Such submission made on behalf of the respondents is valid and acceptable in the normal circumstances, since experience in every category is quite essential and necessary in order to get promotion to the next higher cadre for shouldering higher responsibility. However, as far as the case on hand is concerned, it was not the fault of the petitioner for not having been appointed in 1991 despite her selection and she was made to approach this Court, challenging the action of the 3rd respondent Service Commission which was withholding her selection. Unfortunately, the litigation had taken very many years and eventually ended in favour of the petitioner. Therefore, pendency of the claim of the petitioner before this Court, cannot result in negation of right of the petitioner for being treated equally on par with her batch mates. In the said circumstances, the decision relied upon by the learned Special Government Pleader, cannot be applied to the factual matrix of the present case, particularly in the teeth of the fact that the respondents themselves have restored the original seniority of the petitioner as assigned by the 3rd respondent Service Commission along with batch mates of the petitioner, who were selected in the year 1991. Mere restoration of seniority without any consequential or attendant benefits on the basis of such seniority will have absolutely no significance or meaning in the service progression of the petitioner. Needless to mention that the batch mates of the petitioner have become Chief Civil Surgeon on the basis of time bound promotion as provided in the aforesaid G.Os. That being the case, there cannot be any iota of justification in denying the same benefit to the petitioner who was also similarly placed except the fact that she was driven to this Court by the 3rd respondent Commission and the litigation was pending before this Court for considerable time. In the said circumstances, denial of the same benefits to the petitioner as given to her batch mates would be violative of Articles 14 and 16 of the Constitution of India. The rejection of the petitioner's claim by the 2nd respondent, therefore, does not satisfy the test of doctrine of equality enshrined in Article 14 of the Constitution of India and does not also satisfy the test of reasonableness as provided therein.

15. For the above said reasons and in the extraordinary circumstances, this Court is of the considered view that the petitioner is deemed to have been appointed along with her batch mates in 1991 and thereby she is entitled to refitment (time bound promotion) as envisaged in G.O.Ms.Nos.354 dated 23.10.2009 and 245 dated 30.10.2013. Accordingly, the impugned rejection order passed by the 2nd respondent in Ref.No.36904/E6/1/2016 dated 3.10.2016 cannot be countenanced both in law and on facts and therefore, the same is set aside. The respondents are

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directed to pass orders, granting the benefits to the petitioner as envisaged in the aforesaid G.Os., within a period of eight weeks from the date of receipt of a copy of this order. However, it is made clear that the petitioner is not entitled to arrears of actual differential salary as admissible in the higher post as she has not actually worked in such higher post, but entitled to notional benefits on such promotion.

16. The Writ Petition is allowed on the above terms. No costs.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1. The Secretary to Government,
Health and Family Welfare Department,
Secretariat,
Chennai-600 009.

2. The Director of Medical and Rural
Health Services,
DMS Compound,
Teynampet,
Chennai-600 006.

3. The Tamil Nadu Public Service Commission,
rep. by its Member Secretary,
Frazer Bridge Road,
VOC Nagar, Park Town,
Chennai-600 003.

+1cc to Mr.K.M.Vijayan ASSO, Advocate, S.R.No.44785

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BM 03/08/2018

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