

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 2965 OF 2018

1. Archana Nilesh Gore
2. Swati Paranjape .. Petitioners

Versus

The Municipal Corporation of Greater
Mumbai & Ors. .. Respondents

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- Ms. Anjali Purav Yajurvedi for the Petitioners
- Mr. B.D. Birajdar for Respondent Nos. 1 and 2
- Mrs. P.H. Kantharia, GP for Respondent Nos. 3 and 4

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**CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

Reserved on : AUGUST 14, 2019.
Pronounced on : AUGUST 21, 2019.

JUDGMENT (Per Akil Kureshi, J.)

1. This petition is filed by the lecturers (Assistant Professors) discharging the duties in Municipal Medical College. They have prayed for directions for payment of various allowances applicable to the teaching staff of medical colleges as per the Circulars dated 30.7.2009, 5.8.2009 and 17.12.2011 issued by Municipal Corporation of Greater

Mumbai.

2. Brief facts are as under:-

Petitioner No. 1 holds the degree in Physiotherapy. She was appointed to the post of lecturer in the department of Physiotherapy Centre and School at Seth G.S. Medical College from 4.8.2000. Petitioner No. 2 was initially engaged on adhoc basis on clinical post which was later on regularized. Under Office Order dated 25.2.2009, she was appointed on the teaching post of lecturer on regular basis.

3. The petitioners would point out that the Corporation has issued various circulars granting several benefits in favour of the teaching staff of Municipal Medical Colleges along the lines on which the Government of Maharashtra had made provisions. The petitioners rely on following circulars for the respective benefits which have been denied to them:

- (i) Circular dated 30.7.2009 under which the teaching staff has been granted the benefit of non-practicing allowance in following terms:

"The Teaching staff who have accepted the option of not doing private practice, may be given Non-practicing allowance at the rate of 25% on the revised basic pay. The said allowance will be permissible from 1.1.06 or from the date of accepting the option. However, the total amount of basic pay, grade pay and profession allowance should not be more than Rs. 85,000/-"

- (ii) Circular dated 5.8.2009 under which the post graduation allowance has been granted in following terms:-

"The Post Graduation allowance of Rs. 2500/- (Rupees two thousand five hundred only) per month will be permissible for the Post graduation Degree holders on the grounds of the Central Government."

- (iii) Circular dated 17.12.2011 under which while increasing the retirement age for teaching staff of medical / dental colleges of the Corporation, in order to avoid stagnation, the benefit of grade promotion has been granted in following terms:-

"Accordingly, the following benefit of grade promotion may be made permissible to the Teaching Staff in regular service, taking the salary in the pay scale of University Grant Commission, in the Medical / Dental Colleges of the Mumbai Municipal Corporation. (As per annexure hereto).

1. The candidates entering in the Teaching profession in Colleges will be called as Assistant Professors and the pay band Rs. 15600-39100 plus Academic Grade pay Rs. 6000/- will be permissible to

the Lecturers who have already served in the pay scale of Rs. 8000-13500 prior to the revision and then will be called as the Assistant Professors.

2. Academic Grade Pay of Rs. 7000/- from Rs. 6000/- will be permissible to the Assistant Professors holding the Degree of M.D. / M.S. / D.N.B / D.M. / M.C.H. / Ph. D. in the concerned education branch and who have completed the service of four years.

3. Academic Grade Pay of Rs. 8000/- will be permissible to the Assistant Professors to whom the Academic Grade pay of Rs. 7000/- is permissible and who have completed the service of five years, subject to fulfilling the conditions prescribed by the University Grant Commission by them.

4. Pay Band Rs. 37,400/-, 67,000 plus Academic Grade Pay of Rs. 9000/- will be permissible to the Assistant Professors to whom the Academic Grade pay of Rs. 8000/- is permissible and who have completed the service of three years, subject to fulfilling the conditions prescribed by the University Grant Commission by them and they will be called as Associate Professors (Additional).

5. The Associate Professors who have completed service of three years in the Academic Grade pay of Rs. 9000/- and holding the Degree of M.D. / M.S. / D.N.B. / D.M. / M.C.H. / Ph.D. in the concerned

education branch and who have completed the service of four years will be eligible for appointment on the post of professor subject to fulfillment of other conditions in respect of the University works prescribed by the University Grant Commission and by the University and they will be called as professor (additional). The Pay scale of the Post of professor will be pay band of Rs. 37400-67000 plus Academic Grade Pay Rs. 10,000/-.

6. If the benefit of Grade promotion is made permissible as per above Sr. No. 4 and 5, then till getting the regular promotion by the said Assistant Professor, and Associate Professor by chain system, he may be called as the Associate Professor (Additional) and Professor (additional)"

4. The petitioners would point out that though they and other similar teaching staff of physiotherapy branch are part of the academic set up of the Corporation's medical and dental colleges, they have been denied these benefits for no valid reasons. On behalf of the petitioners, learned counsel argued that the branch of physiotherapy is considered as critical as any other medical branch. Lately, physiotherapy is considered crucial for rehabilitation of patients recovering from various injuries, particularly arising out of the accidents. The branch of physiotherapy is, therefore, recognized as part of branch of medicine. She submitted that the

physiotherapists are made to undergo rigorous training programmes during their under graduate and post graduation courses. Till recently, there was no facility for pursuing the doctorate in the said branch in the State. However, the Center for Doctoral study has now been established.

5. Learned counsel further submitted that the distinction drawn by the respondents for denying the benefits to the petitioners is wholly arbitrary. She submitted that as per the policy of the Corporation, even the teaching staff of physiotherapy now retire at the age of 62 years instead of the previous retirement age of 58 years. Despite which, the petitioners have not been given the benefit of stagnation increments as provided in the said circular dated 17.12.2011. Learned counsel submitted that the petitioners and other physiotherapy teachers have made various representations to the authorities. In fact, the Dean of the medical college has prepared a proposal for granting such benefits. The Corporation should, therefore, grant the benefits without any further delay.

6. On the other hand, learned counsel for the respondents opposed the petition contending that various benefits flown from the said circulars are meant for medical and dental teaching staff. The physiotherapists are not medical practitioners. They fall in entirely different branch of teaching. The M.B.B.S. , M.D. and M.S. courses are highly rigorous. The assistant professors hold the degree of B.Sc. and M.Sc. in physiotherapy whereas the assistant professors teaching the M.B.B.S. Students are highly qualified. Their educational qualifications are M.D., M.S. and Ph.D.. Besides teaching, they perform various other tasks such as treating patients, providing consultancy in hospitals to which the medical colleges are attached. They are registered with the Indian Medical Council. They can prescribe medicines to the patients after examining them. The assistant professors who have M.S. degree are also allowed to perform surgeries. He, therefore, submitted that the directions as prayed for by the petitioners cannot be granted. Learned counsel relied on various circulars issued by the State of Maharashtra on the basis of which the circulars in question have been issued by the Corporation and contended that the basic purpose for

granting the benefits flowing under the said circulars was to compensate highly qualified doctors who are engaged in teaching assignments. Learned counsel relied on following decisions:-

- (i) **U.P. State Sugar Corpn. Ltd. & Anr. Vs. Sant Raj Singh & Ors.**¹
- (ii) **State of West Bengal & Anr. Vs. West Bengal Minimum Wages Inspectors Association & Ors.**²

7. As per the petitioners, they are entitled to all the benefits flowing from the said circulars which the respondents, have not granted to them. In defence, the respondents have filed affidavit of one Hemant Deshmukh, Dean of K.E.M. Hospital dated 2.5.2019. In the said affidavit, it is pointed out that there is difference in the educational qualification and the nature of work performed by the assistant professors teaching MBBS students as against the assistant professors teaching physiotherapy to the students. It is pointed out that the assistant professors in MBBS courses are highly qualified having educational qualification of M.D. / M.S. / D.M. / Ph.D etc They are registered under the Indian Medical Council. Essentially, they are doctors who are

1 2006 AIR SCW 3013

2 2010 II CLR 365

allowed to treat the patients and carry out surgeries if they are surgeons. It is further pointed out that the petitioners are imparting education in physiotherapy at physiotherapy school to students who do not get medical degrees. It is further pointed out that the petitioners have the qualifications of B.Sc. / M.Sc. physiotherapy which is vastly different from any medical course such as MBBS. It is, therefore, contended that the allowances such as PG allowances, non practicing allowances and stagnation increments cannot be made applicable to the petitioners and other physiotherapy assistant teachers.

8. We are of the opinion that the respondents have brought forth valid distinction between the assistant professors and other teaching staff of the medical degree colleges viz a viz the teaching staff of the physiotherapy courses which are considered para medical courses. The intensity, duration, the nature of subjects taught in the respective courses are shown to be vastly different. The Assistant professors in medical courses are specialized doctors registered with Indian Medical Council. They would

be eligible for treating patients, prescribing medicines and carrying out surgeries if qualification so permits. These elements are conspicuous by their absence in case of the petitioners and other physiotherapy teachers. The benefits of the allowances such as post graduation allowance and non practicing allowance, cannot be made applicable to them unless the employer takes a decision in this respect. In absence of any clear decision in this regard, we would be guided by the stand of the respondents and the reasons cited for making this distinction.

9. The question of granting benefit of the circular dated 17.12.2011, however, stands on a different footing. In the circular, it was noted that the retirement age of the teaching staff of the medical and dental colleges of the Corporation having been increased from 58 to 62 years, in order to avoid stagnation in promotion to the assistant professors, certain benefits of higher grade would be made available. Subject to fulfillment of conditions, this circular provides for increasing the grade pay in case of assisting professors. Learned counsel for the respondents, in context

of this circular, had vehemently contended that the benefits flowing from the said circular were confined to the teaching staff of medical and dental colleges of the Corporation alone which would not include the assistant professors of the physiotherapy. However, the material on record would suggest that such contention is invalid. We may recall, learned counsel for the petitioners had argued that the retirement age even in case of teaching staff of physiotherapy courses was increased pursuant to the said policy decision from 58 years to 62 years. She drew our attention to the affidavit in rejoinder dated 25.7.2019 filed by the petitioners in which it was specifically stated that :

"11. With reference to para 13, I say that retirement age of teaching staff from physiotherapy department is also enhanced from 58 years to 62 years as they are also teachers from Medical college of Corporation. It seems that the respondent Nos. 1 to 3 have made submissions without looking into the records and actual facts. The Exhibits 'L', 'P' and 'Q' to the petition which are the communications clearly mention that age of retirement of three sections Physiotherapy / Occupational Therapy and Audiology and Speech Therapy of medical college of MCGM has been changed from 58 years to 62 years and that scheme of time bound promotion as per circular dated 17.12.2011 is applicable to Occupational Therapy and Physiotherapy Department. I say that the teachers in the cadre of Professor and Associate Professor in Physiotherapy Department are continued in the employment after their age of 58 years and they

continued till their age of 62."

10. Not only that there is no denial from the respondents to these specific averments of the petitioners, to our question, learned counsel for the respondents agreed that after issuance of the said circular dated 17.12.2011, three assistant professors of physiotherapy had retired, all of them at the age of 62 years. He has stated that there was no separate or other circular issued for increasing the retirement age of the teaching staff of physiotherapy courses. In plain terms, thus, the respondents have also treated the assistant professors of physiotherapy courses for the purpose of retirement age, at par with teaching staff of medical and dental colleges. The source of increasing the retirement age is the said circular. Learned counsel for the Corporation had however feebly argued that this was on account of misinterpretation by the Dean of the college, which cannot be accepted. Firstly, there is nothing on the record to suggest that such decision was unilaterally taken by the Dean without consulting the Corporation. Secondly, even if such a decision was taken, nothing prevented the Corporation from correcting the same. Nothing of the sort had been done. Lastly, as is well known, juristic personalities

such as statutory Corporations, function through its administrators and executives. In absence of any material on record, the Corporation cannot disown the decision, even if we were to believe, was taken by the Dean. We must, therefore, proceed on the basis that the Corporation had also consciously retired the assistant professors of physiotherapy courses at the age of 62 years relying on the said circular dated 17.12.2011. If that be so, the benefits flowing from the said circular must be made available to the assistant professors of physiotherapy courses also. Higher grade pay was being made available in view of possibility of stagnation in promotional cadre due to increase in retirement age which, would slow down the upward mobility of an incumbent in feeder cadres. When the Corporation itself has implemented the decision to retire the teaching staff of the physiotherapy courses at the increased age of 62 years, the benefit of higher grade pay to avoid stagnation also must be available to them.

11. Under these circumstances, the petitioners' prayer for the benefits flowing from circulars dated

30.7.2009 and 5.8.2009 is rejected. However, it is held that the petitioners and other teaching staff of the physiotherapy courses, would get the benefits flowing from the circular dated 17.12.2001. of course, subject to scrupulous fulfillment of all conditions contained therein. The pay fixation of the eligible assistant professors be carried out accordingly. For the past period, the revised pay fixation would have notional effect. Actual benefits would be payable from the date of this judgment. No arrears for the past till the date of the judgment would be payable. Entire exercise be carried out within the period of two months from today.

12. Writ Petition is accordingly disposed of.

[S.J. KATHAWALLA, J.]

[AKIL KURESHI, J]