

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

W.P.No.6431 of 2011

Dr.V.Ravindran, M.S.

.. Petitioner

Vs.

1.The Principal Secretary
Department of Health and Family Welfare
Secretariat, Chennai.

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

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

.. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of a writ of Mandamus directing the respondents to consider granting the post of Associate Professor in Ophthalmology from the date on which his colleagues were granted the post of Associate Professor subsequent to the Inter Directorate promotion counselling conducted on 05.02.2011 or any other date.
(Prayer amended as per the order made in W.M.P.No.23437 of 2019 dated 26.08.2019)

For Petitioner : Mr.Godson Swaminath for
Mr.Isaac Mohanlal

For Respondents : Mrs.Narmadha Sampath
Additional Advocate General

WEB COPY
O R D E R

Writ Petition is filed directing the respondents to consider granting the post of Associate Professor in Ophthalmology from the date on which his colleagues were granted the post of Associate Professor subsequent to the Inter Directorate promotion counselling conducted on 05.02.2011 or any other date.

2(i).The petitioner was appointed as Assistant Surgeon on 11.12.1991 and was posted in Government Primary Health Centre, Pavattakudi. Subsequently, he worked as tutor in Microbiology and Ophthalmology in Regional Institute of Ophthalmology, Government Ophthalmic Hospital, Chennai. Then he worked as Associate Professor of Ophthalmology at Government Peripheral Hospital, Periyar Nagar and Assistant Professor/Senior Assistant Surgeon and subsequently, he was promoted as Senior Civil Surgeon on 13.12.2007 transferring his service from Medical Education Department to Directorate of Medical and Rural Health Services and was posted at Government Hospital, Dindigul, from 13.12.2007 to 23.10.2009. The respondents promoted the petitioner as Chief Civil Surgeon at Government Hospital, Dindigul, on 23.10.2009.

2(ii).The petitioner is a post graduate in surgery (Ophthalmic) and having more than 8 years of teaching experience and fulfilled norms of five years teaching experience as required by the Medical Council of India. While he was working as a Senior Civil Surgeon, the counselling was fixed and a circular was issued by the 3rd respondent dated 22.01.2011 informing that the transfer and promotion counselling for the post of Associate Professor will be conducted during first week of February 2011. In the circular, it was mentioned that eligible candidates must get service certificate in the form from the Head of the Department. One copy will be directly sent to 2nd respondent and another copy will be handed over to the candidate, who has to produce the same at the time of counselling. The petitioner was issued certified proforma and service particulars by the Head of the Institution as he was considered as eligible candidate.

2(iii).The petitioner on 04.02.2011 went to the counselling centre. He was allowed inside the counselling hall, but was prevented from attending the counselling. The petitioner is fully qualified to be appointed as Associate Professor. Apart from the educational qualification, a candidate must possess five years of teaching experience and the petitioner was having eight years of teaching experience.

2(iv).As per Rule of Government Order, 1/20th of vacancies are reserved for smooth transition from one Directorate to another. The respondents without having valid reason prevented the petitioner from attending the counselling and promoting him as Associate Professor on the ground that Medical Officers in Directorate of Medical Education side alone would be eligible to participate in the counselling. Hence, the petitioner filed the present writ petition for issuance of writ of Certiorarified Mandamus calling for records in pursuant to the order of Promotion Counselling conducted on 04.0.2011 vide Ref.No.78891/E1/1/10 dated 29.01.2011 issued by the 3rd

respondent and quash the same insofar as not allotting 1/20th of the total number of vacancies for the post of Associate Professor in the speciality for movement of a person from Director of Medical and Rural Services/Director of Public Health and Preventive Medicine side to Director of Medical Education in accordance with G.O.Ms.No.354, Health and Family Welfare (B-2) Department dated 23.10.2009 is concerned and direct the respondents to allocate 1/20th of total number of vacancies for the post of Associate Professor in the Speciality in the Director of Medical Education side and conduct Promotion/Inter Directorate Counselling within a stipulated time for the post of Associate Professor for persons working in other directorates.

2(v). Subsequently, the petitioner filed amendment petition in W.M.P.No.23437 of 2019 to permit him to amend the prayer for issuance of Writ of Mandamus directing the respondents to consider granting the post of Associate Professor in Ophthalmology from the date on which his colleagues were granted the post of Associate Professor subsequent to the Inter Directorate promotion counselling conducted on 05.02.2011 or any other date. This Court by order dated 26.08.2019 allowed the said W.M.P. and the said prayer was amended.

2(vi). The learned counsel appearing for the petitioner relied on the following judgments:

(i) Order of this Court dated 14.08.2019 made in W.P.Nos.15215 of 2019 etc. batch (Dr.B.Minu Rekha v. The State of Tamil Nadu and others);

"14. Mr.G.Sankaran, learned counsel appearing for the respective petitioners in many of the Writ Petitions, would submit that there are pitfalls in over all recommendations of the Committee and he attempted to draw the attention of this Court to various objections filed in response to the Report submitted by the Committee. However, this Court did not wish to be dragged into individual controversies as that would be beyond pale of the consideration in class litigation like this. This Court is of the view that in regard to the individual grievances regarding assignment of seniority, whether it should be based on the specialty wise, station wise, etc., can be looked into by this Court only when challenges are made individually and adjudicated upon by this Court on the basis of factual matrix of each case. Since this Court is presently called upon to find out an equitable solution which persuaded this Court to appoint the present Committee comprising serving officials of the Government, the Report of the Committee has to be acted upon atleast for the

present counselling exercise if not for future counselling which may depend upon the final call to be taken by the Government. Therefore, in case any writ petitioner for whom, Mr.G.Sankaran, learned counsel is appearing, having any individual grievance, the same can always be projected after the implementation of the Committee's recommendations towards the conduct of counselling for the present year. It is pertinent to note that while dealing with such batch of litigations, the paramount consideration of this Court should be the public interest, namely, patient care in the State. In such view of the matter, the perceived individual grievances of the Doctors have to be pushed to the back-burner and public interest must be allowed to prevail. At the same time, when an individual being aggrieved by any action of the State, it is always open to him to agitate his right before this Court. But it is certainly not open to few individual Doctors to stymie the entire process of counselling which will undermine and affect the entire Medical Administration of the State. In fact, some of the learned counsels who are in agreement with the present counselling exercise, have submitted that the Report also recommends for promotion orders to be issued in certain specialities which are not covered by the challenges in the Writ Petitions. However, this Court feels that such considerations may not be necessary for this Court since this Court is of the considered view that the present counselling exercise need not be stalled any further and the Government ought to be allowed to pursue with the counselling for the present year and complete the same. Any individual grievances of the Doctors concerned, can always be projected in an appropriate forum and reserving such liberty to those Doctors who may still be aggrieved by the recommendation of the Committee, this Court is of the view that the interim orders passed in the Writ Petition which held up the counselling exercise for the present year, need not continue further. Accordingly, all the interim orders passed by this Court, stand vacated. Consequently, the Contempt Petition is closed. The respondents/authorities shall forthwith recommence the counselling exercise for the present year and complete the same on the basis of the recommendations of the Committee within a period of three weeks from the date of receipt of copy of this order."

(ii). Civil Appeal No.888 of 2019 dated 21.01.2019 (Anil Kumar vs. Union of India and others);

"The appellant was aggrieved by the rejection of his claim for financial upgradation by the Council for Scientific and Industrial Research ("CSIR") with effect from 10 May 2011. He was also aggrieved by not being promoted to the post of Senior Controller of Administration / Senior Deputy Secretary in Pay Band-4 i.e. Rs.37,400 - 67,000 with a grade pay of Rs. 8700 in respect of vacancies for 2013-2014 under the CSIR Recruitment & Promotion Rules for Administrative Staff, 1982. He moved the Central Administrative Tribunal, Chandigarh. The Tribunal did not find any substance in his grievance for the reason that he did not fulfil the benchmark of "Very Good" for financial upgradation. The Tribunal was of the view that CSIR is an autonomous body and that the circulars issued by the Union of India would not ipso facto apply.

The grievance of the appellant was that the failure to communicate the Annual Confidential Reports in which he had failed to meet the benchmark violated the O.Ms issued by the Department of Personnel and Training. The Tribunal rejected that contention holding that since CSIR had adopted the requirement of conveying the ACRs from a particular date in the future, the decision could not be questioned. On the issue of promotion, it has been held that this involved a selection on the basis of performance in service and in the interview and since the Departmental Promotion Committee had graded the appellant as "good", he was not considered for promotion. This view of the Central Administrative Tribunal was challenged before the High Court of Punjab and Haryana.

In Dev Dutt vs. Union of India & Ors.1 a two Judge Bench of this Court held that fairness in public administration and transparency require that all entries in the Annual Confidential Reports of a public servant must be communicated 1 (2008) 8 SCC 725 4 within a reasonable period in order to enable the employee to make a representation for upgradation. The view of the Court was that non-communication of entries in the ACRs has civil consequences since it may affect the chances of the employee for promotion and other benefits. A failure to communicate would be

arbitrary. This Court held that these directions would apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State, in addition to government servants.

A three Judge Bench of this Court has in *Sukhdev Singh vs. Union of India & Ors.*² affirmed the correctness of the view taken in *Dev Dutt* (supra) noting that an earlier three Judge Bench in *Abhijit Ghosh Dastidar vs. Union of India & Ors.*³ had adopted the same principle.

In view of the above statement of law, both the Tribunal and the High Court were in error in coming to the conclusion that CSIR being an autonomous entity and having adopted the O.Ms of the Department of Personnel and Training with effect from a specified date, the appellant could not make a grievance of the non-communication of the ACRs for the relevant period. The failure to communicate the ACRs deprived the appellant of the opportunity to submit his representation in the matter of financial upgradation. Subsequently, the appellant was furnished with an opportunity to submit his representation before his case was taken up for regular promotion, but his representation was not considered. The appellant did not have the benefit of submitting his representation when the Screening Committee took up the case for financial upgradation. CSIR by reason of its autonomy may have certain administrative privileges. No authority can, however, claim a privilege not to comply with a judgment of this Court. Once the law was enunciated in *Dev Dutt's* case (supra), all instrumentalities of the State were bound to follow the principles laid down by this Court. CSIR was no exception.

The appellant has since retired from service on 30 September 2014. The grant of MACP benefit is not a matter of right and it is after the Screening Committee finds that the officer meets the benchmark that an upgradation can be granted. Hence, we are of the view that the appellant should be granted an opportunity, within a period of four weeks from today to submit his representation in respect of the ACRs for the concerned years where he did not fulfil the benchmark for financial upgradation. Upon the

submission of his representation, the respondents shall consider it and communicate the outcome to the appellant within a period of two months thereafter. Based on that decision, the case of the appellant for financial upgradation shall be considered afresh. In the event his ACRs for the relevant period are upgraded, the case for financial upgradation shall be determined within a period of three months thereafter. We also direct that in the event that the ACRs for the relevant period are upgraded, the case of the appellant for promotion to the post of Senior Deputy Secretary/Controller of Administration shall be considered afresh by the Departmental Promotion Committee expeditiously. This exercise shall be carried out with reference to the date on which his junior in service came to be promoted.

In the event that the case of the appellant is considered favourably, he would be entitled to all consequential benefits which flow from the financial upgradation and upon the grant of regular promotion to the post of Senior Deputy Secretary. The appeal is, accordingly, allowed and the judgment of the High Court shall stand set aside."

3.The respondents filed counter affidavit and the learned Additional Advocate General appearing for the respondents contended that the petitioner was transferred to Directorate of Medical and Rural Health Services. After such transfer, the petitioner was promoted as Civil Surgeon and subsequently, promoted as Chief Civil Surgeon, without reference to their Directorate of Medical Education. The service particulars in certified proforma was not sent to the 2nd respondent. The petitioner at that relevant time was working as Chief Civil Surgeon in Directorate of Medical and Rural Health Services. The said post is equivalent to Professor in the Directorate of Medical Education. The post of Associate Professor is lower post than the Chief Civil Surgeon. The counselling was only for the promotion of the candidates, who are working as Assistant Professors to the post of Associate Professors. The petitioner was holding higher post and therefore, he was not rightly considered for the post of Associate Professor.

4.The respondents filed additional counter affidavit and the learned Additional Advocate General appearing for the respondents contended that the feeder category for promotion to the post of Associate Professor is Clinical Assistant Professor. A person must possess M.S. (Ophthalmology) or DNB (Ophthalmology). In addition to that, he should have published

2 research papers in indexed/national journals. It is possible for the Directorate of Medical Education to accommodate the petitioner as Assistant professor of Ophthalmology in the cadre of Chief Civil Surgeon in any of the Government Medical College and Hospital based on the availability of vacancies under the administrative control of the Directorate of Medical Education by relaxing relevant rules. As and when the next panel for the post of Associate Professor of Ophthalmology drawn by the Directorate of Medical Education, Chennai, the name of the petitioner will be considered subject to eligibility and availability of vacancies. If the petitioner does not fulfill eligibility criteria, he will not be considered as a member by the Medical Council of India.

5.The learned Additional Advocate General further contended that the Government by G.O.(Ms).No.77, Health and Family Welfare (A1) Department, dated 23.02.2016, ordered following qualifications:

"1.Professor - Must possess teaching experience for a period of not less than four years as Associate Professor in any subject or in a super speciality either on clinical or non-clinical side.

2.Associate Professor - (i) No person shall be appointed to the post of Associate Professor in any subject, either clinical or non-clinical unless he/she possesses teaching experience for a period of not less than five years as Assistant Professor in the speciality concerned.

(ii) No person shall be appointed to the post of Associate Professor in the super speciality unless he/she possesses teaching experience for a period of not less than two years as Assistant Professor in the speciality concerned."

If the petitioner satisfies the above qualifications, he will be considered based on the availability of the vacancies.

6.The learned Additional Advocate General further contended that the persons belonging to one category will be considered first for promotion. When there is no suitable persons are available, then other feeder category for promotion will be considered. The petitioner belongs to Directorate of Medical and Rural Health Services and his name will be considered only when there is no person available in the Directorate of Medical Education side and prayed for dismissal of the writ petition.

7.Heard the learned counsel appearing for the petitioner as well as the learned Additional Advocate General appearing for the respondents and perused the materials available on record.

8.The petitioner sought to be promoted as Associate Professor in the counselling held on 05.02.2011. According to the petitioner, he is fully qualified as Associate Professor and he is possessing eight years of teaching experience, whereas five years teaching experience is the requirement for the post of Associate Professor. According to the petitioner, his service particulars in the certified proforma has forwarded to the 2nd respondent. On the other hand, the respondents have denied that the said proforma was sent to the 2nd respondent by the Head of Department of Hospital, where the petitioner was working at the time. In the counter affidavit filed by the respondents, they have stated that proforma for only two Doctors working in the Directorate of Medical and Rural Health Services were received. It is the contention of learned Additional Advocate General that petitioner is working as Chief Civil Surgeon in the Directorate of Medical and Rural Services and the counselling is only for promotion of Assistant Professors to the post of Associate Professors and hence the petitioner was rightly not allowed to participate in the counselling. All these contentions are without merits. The very same contentions of the petitioner as well as the respondents were considered by this Court in the order dated 03.08.2012 made in W.P.(MD)No.4681 of 2011 filed by one Dr.K.Rajendran. The issue involved in the said writ petition is with regard to very same counselling during February 2011. In the said order, it has been brought to the notice of this Court that one Dr.S.Vetrivel Chezian, a Senior Civil Surgeon then upgraded as Chief Civil Surgeon with pay band IV salary in ESI Hospital, Coimbatore, was promoted and posted as Associate Professor and more than 80% of the persons who attended the counselling are drawing pay band-IV salary. These facts were not disputed by the respondents. The reliance placed on by the learned Additional Advocate General on the qualification mentioned in the additional counter affidavit and the contention that if the petitioner fulfilled the qualification as per G.O. (Ms.) No.77, Health and Family Welfare (A1) Department, dated 23.02.2016, he will be considered for promotion to Associate Professor subject to availability of vacancies by relaxing the rules, is without merits. The said qualification was prescribed subsequent to the Government order and the same cannot be put against the petitioner for promoting him as Associate professor.

9.Considering the above facts and the reasons given in para-10 and 12 of the order of this Court dated 03.08.2012 made in W.P.(MD)No.4681 of 2011, the learned Judge quashed the order refusing to allow the petitioner therein to attend the counselling and directed the respondents to consider granting post of Associate Professor in General surgery to the petitioner in any one of the colleges referred to in the prayer made in the writ petition. The ratio laid down in the above order is squarely applicable to the facts of the present case.

10. In view of the order passed by this Court in the similar circumstance as stated above, the writ petition is allowed. No costs.

Sd/-
Assistant Registrar (J)

//True Copy//

Sub Assistant Registrar

kj

To

1. The Principal Secretary
Department of Health and Family Welfare
Secretariat, Chennai.

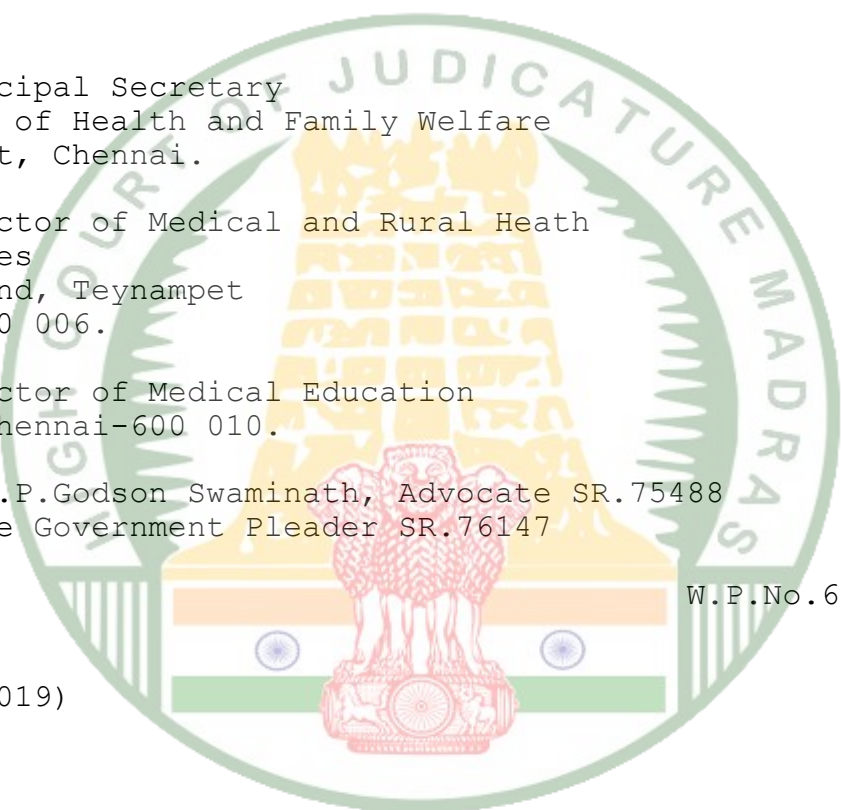
2. The Director of Medical and Rural Health
Services
DMS Compound, Teynampet
Chennai-600 006.

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

+1cc to Mr. P. Godson Swaminath, Advocate SR.75488
+1cc to the Government Pleader SR.76147

W.P.No.6431 of 2011

(CO)
CB(06/11/2019)

The seal of the High Court of Madras is a circular emblem. It features a central yellow temple gopuram (tower) with a red lion capital on top. Below the gopuram is a red and white striped banner with a central wheel. The entire emblem is set against a green background with a white border. The text 'HIGH COURT OF JUDICATURE MADRAS' is written in a semi-circle around the top, and 'सत्यमेव जयते' is written in Devanagari script at the bottom.

WEB COPY