

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2019

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE D. KRISHNAKUMAR

W.A.No.2946 of 2019
and CMP.Nos.19153, 19155 of 2019

Dr.A.Dharmalingam
Director of Medical and Rural
Health Services (ESI) (Retired)
No.24, Iyyanar Koil street,
Now @ Keerai
Thattamchavadi (Post)
Puducherry 605 009. ... Appellant/Petitioner

Vs.

- 1.The Government of Tamil Nadu
represented by its Principal Secretary to Government
Health and Family Welfare Department,
Secretariat, Chennai - 600 009.
- 2.The Director of Medical and Rural Health Services,
DMS Compound, Anna Salai,
Chennai - 600 006. ... Respondents/Respondents

Writ Appeal filed under Clause 15 of the Letters Patent
against the Order dated 11.10.2018 made in W.P.No.7049 of 2013.
Prayer in WP.No.7049 of 2013 :- Writ Petition filed under
Article 226 of the Constitution of India, for issuance of a Writ
of Mandamus, directing the 1st respondent to consider the
proposals submitted by the second respondent in
Ref.No.31999/E6/1/2009 dated 22/12/2011 for inclusion of the
Petitioner's name in the panel for the post of Director of
Family Welfare for the year 2011-12.

For Appellant : Mr.T.Ranganathan

For Respondents : Mr.P.S.Sivashanmuga Sundaram
Special Government Pleader

J U D G E M E N T
(delivered by S.MANIKUMAR, J)

Challenge in this writ appeal is to the order of the writ court dated 11.10.2018 made in W.P.No.7049 of 2013, by which, the writ court, dismissed the Writ Petition filed by the appellant herein.

2. Shorts facts leading to filing of the appeal are that the appellant was initially selected by the Tamil Nadu Public Service Commission in the year 1978 and appointed as Assistant Surgeon on 12.04.1979. On completion of 10 years of service, he was granted Selection Grade in the post of Assistant Surgeon and he was designated as Senior Assistant Surgeon in 1989. He was further promoted as Civil Surgeon with effect from 01.02.1999. Thereafter, he was promoted as Senior Civil Surgeon in April, 1999 with effect from 01.02.1999 and as Joint Director of Medical Services on 01.10.2007. He was further promoted as Additional Director of Medical Services with effect from 20.09.2010. He was posted as Director of Medical and Rural Health Services (ESI) in the same cadre with effect from 31.05.2011. Thereafter, he was given full additional charge of Director of Family Welfare with effect from 01.11.2011 and retired from service on 31.01.2012.

3. It is the further contention of the appellant that he was the only eligible officer for promotion to the post of Director of Family Welfare for the year 2011-2012. The post of Director of Family Welfare fell vacant with effect from 01.11.2011 consequent to the retirement of Dr.Purushotham Vijayakumar on superannuation on the afternoon of 31.10.2011. Government have issued order in G.O.(Rt.)No.984, Health and Family Welfare (A2) Department dated 31.10.2011 and posted him as Director of Family Welfare on Full Additional Charge. The Director of Medical and Rural Health Services, Chennai sent proposals to the Principal Secretary to the Government, Health and Family Welfare Department, Chennai in Ref.No.31999/E6/1/2009 dated 22.12.2011 for inclusion of his name in the panel for the post of Director of Family Welfare for the panel year 2011-2012. In the said proposal, the Director of Medical and Rural Health Services mentioned only his name, since he was the only eligible and qualified officer for inclusion in the panel. Even though, the said proposals were sent on 22.12.2011, no action was taken by the Government to issue the panel for the year 2011-2012. The petitioner retired from service on 31.01.2012. If the proposals sent by the Director of Medical and Rural Health Services, Chennai, were finalised he would have been duly considered by the Government in time and would have retired as a regular

Director of Family Welfare. Since this was not done, the petitioner submitted a representation to the Principal Secretary to the Government, Health and Family Welfare Department, Chennai - 600 009 on 04.09.2012 requesting him to consider his claim for promotion to the post of Director of Family Welfare retrospectively and grant necessary service benefits. No order has been passed on the said representation.

4. It is the further contention of the appellant that, since the first respondent has not passed any orders on his representation for promotion as Director of Family Welfare from 01.11.2011, the date from which he was holding the said post on full additional charge, as per the orders of the first respondent issued in G.O(RT) No.984 Health and Family Welfare (A2) department dated 31.10.2011, he has filed W.P.No.7049 of 2013 for a direction to the first respondent to consider the proposal of the second respondent sent in letter No.31999/E6/1/2009 dated 22.12.2011 and to pass appropriate orders.

5. Before the writ court, the learned Government Advocate, appearing for the respondents contended that the writ petitioner was allowed to retired from service on 31.1.2012 on attaining superannuation and the relief sought for him cannot be considered.

6. Writ court, after adverting to the pleadings and the submissions of both parties, held that promotion can never be claimed as a matter of legal right. However, consideration for promotion is a fundamental right of an employee. The relevant portion of the order of the writ court dated 11.10.2018 reads thus:

"4. This Court is of an opinion that promotion can never be claimed as a matter of legal right. However, consideration for promotion is a fundamental right of an employee. An employee who is eligible and qualify in accordance with the Rules in force should be considered along with all other eligible candidates waiting for promotion. In the event of considering the case for promotion, all the eligible persons must be considered."

"5. In the present case on hand, undoubtedly, a proposal was submitted by the second respondent to consider the name of the writ petitioner for promotion to the post of Director of Family Welfare. However, the writ petitioner attained the age of superannuation on his retirement on 31.01.2012. Thus, the writ petitioner cannot claim promotion as a matter of legal

right, as his case was not considered in the panel for the year 2011-2012, and no promotion was granted before the date of retirement".

7. Being aggrieved by the order of the writ court, appellant has filed the instant writ appeal on the following grounds:

i) Writ court has failed to note that the appellant was holding the post of Director of Family Welfare on full additional charge from 1.11.2011 as per the orders of the 1st respondent issued in GO (RT) No.984 Health and Family Welfare (A2) Department dated 31.10.2011 and therefore his right for promotion as Director of Family Welfare accrued on 1.11.2011 itself.

ii) Writ court has failed to note that the appellant was promoted and posted as Director of Medical and Rural Health Services (ESI) Chennai by the 1st respondent in GO (D) No.906 Health and Family Welfare (A2) Department dated 1.8.2011.

iii) Writ court has failed to note that the appellant was posted as Director of Family Welfare on full Additional Charge as ordered in G.O. (Rt.) No.984 Health and Family Welfare (A2) Department dated 31.10.2011 and that the appellant was even otherwise holding the promotional post of Director of Family Welfare from 1.11.2011 till his retirement on superannuation on 31.1.2012.

iv) Writ court has failed to note that when the appellant was fully qualified to hold the promotional post of Director of Family Welfare from 1.11.2011, against the permanent vacancy arose due to the retirement of Dr.Purushothaman Vijayakumar, Director of Family Welfare on 31.10.2011.

v) Writ court has failed to note that the 1st respondent, while preparing the panel for the post of Director of Medical and Rural Health Services for the year 2010-2011, name of the appellant would have been considered, taking note of the retirement vacancy on 31.10.2011 and also taking into consideration that the Appellant was the next Senior most to be promoted to the post of Director of Medical and Rural Health Services. Hence the fault on the part of the 1st respondent while preparing the panel shall not deprive the Appellant for promotion to the post of Director of Medical and Rural Health Services from 01.11.2011, on regular basis.

vi) The Hon'ble High Court Madras have already

settled the principle of considering the promotion of an employee after the date of retirement, considering the fact that he has already occupied the said promotional post on in charge as ordered by the Government. Hence the right of the Appellants cannot be denied for the latches on the part of the 1st respondent even though the 2nd respondent has sent a proposal to the 1st respondent properly.

vii) The inaction on the part of the 1st respondent without taking a decision on the proposal of the 2nd respondent in sent letter No.31999/E6/1/2009 dated 22.12.2011 and issue appropriate orders, till the date of retirement of the Appellant, even though the Appellant was holding the said promotional post of Director of Medical and Rural Health Services as per the orders of the Government in G.O.(RT) No.984 Health and Family Welfare (A2) Department dated 31.10.2011, which the writ court has not appreciated in the order dated 11.01.2018.

8. Heard both sides and perused the materials available on record.

9. In the case on hand, the appellant was working as Director of Medical and Rural Health Services (ESI) in the cadre of Additional Director and was also holding full additional charge of Director of Family Welfare from 1.11.2011 to 31.1.2012. On the crucial date i.e. 15.3.2011, the post of Director of Family Welfare was regularly occupied by Dr.Purushotham Vijayakumar and the post of Director of Medical and Rural Health Services was also regularly occupied by Dr.N.Raja. Hence regular panel was not drawn on crucial date.

10. Instructions for preparation of panel for appointment by promotion have been issued in G.O. (Ms) No.368, Personnel and Administrative (Per.S) Reforms Department, dated 18.1.1993. Among other things, it is mentioned that an officer should have, not less than one year service left before retirement for appointment as Head of the department. Those who do not have such a minimum period of left over service but are otherwise found to be fully qualified and are fit for promotion as Head of Department and deserve recognition as on the crucial date of preparation of panel, should be compensated by appointing them as Officers on Special Duty (OSD) with a specific assignment and with the same scale of pay as that of the Head of Department.

11. It is the contention of the respondents that appellant/petitioner was in the cadre of Additional Director of Medical and Rural Health Services and that he cannot claim right for the post of Director of Family Welfare, since he was not having one year left over service from the date of vacancy till his date of superannuation i.e. 1.11.2011 to 31.1.2012. However, he was permitted to look after the duties and responsibilities of the post of Director of Family Welfare as additional charge, for which he can claim additional charge allowance only, and not as a matter of right to claim the promotional post.

12. From the materials on record, it could be deduced that the appellant did not possess one year of left over service on the crucial date of the panel and moreover the post was also not vacant till 31.10.2011. However, a proposal seemed to have been sent for the post of Director of Family Welfare which fall vacant from 1.11.2011 has been sent by the Director of Medical and Rural Health Services, DMS Compound, Chennai to the first respondent who is the competent authority to draw panel for the post of Director of Family Welfare.

13. Materials on record further discloses that when the said proposal of the second respondent was in active consideration of the first respondent in consultation with the advisory departments, the appellant herein, attained the age of superannuation and he was permitted to retire from Government service on 31.1.2012 AN in the post of Director of Medical and Rural Health Services. Moreover, according to the respondents, it is not correct to state that post of Director of Medical and Rural Health Services (ESI) is a Director Post as mentioned by the appellant. It is in the cadre of Additional Director only. When the appellant did not fulfill the criteria for promotion to the post of Director, he cannot claim promotion as a matter of right. However, the appellant was given full additional charge as Director of Family Welfare.

14. As per the procedure followed, if a person does not have one year of service left before retirement at the time of his actual promotion, he has to be considered for appointment as 'Officer on Special Duty' from the date on which his junior having more than one year of service before retirement is appointed as Head of Department. In the case of the appellant he does not come under the latter category also, as none of his juniors were promoted to the post of Director. Appellant continued to hold additional charge till he attained the age of superannuation on his retirement on 31.01.2012. In such view of the matter, the learned single Judge has rightly held that the

appellant shall be given the notional promotion without monetary benefits. We find no reason to interfere with the said order. Accordingly, the writ appeal is dismissed. No costs.

15. In view of the above, instant writ appeal is dismissed. No Costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Principal Secretary, Government of Tamil Nadu,
Health and Family Welfare Department,
Secretariat, Chennai - 600 009.

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

+1 cc to M/s.T.Ranganathan, Advocate Sr.No. 80540

AKM/13.11.19/7P-4C/

W.A.No.2946 of 2019 and
C.M.P. Nos.19153, 19155 of 2019

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