

THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

Writ Petition No.41943 of 2018

ORDER:

The petitioner is a Professor of Cardio-Thoracic Surgery in the Nizams Institute of Medical Sciences, Punjagutta, Hyderabad (hereinafter referred to as 'NIMS').

2. He is a specialist in Paediatric Cardiac Surgery and Heart Transplant and performed the first-ever Heart transplant in a public sector hospital.

3. He joined the said organization on 16.09.1992 and was appointed as Professor on 20.01.2006. He had also been appointed as a Dean in the NIMS earlier which was kept in abeyance later; and was also Head of the Department of Cardio Thoracic Surgery w.e.f. 13.08.2013 till 12.09.2016.

4. The 5th respondent joined the NIMS on 10.01.2007 and was a student of the petitioner. He is presently only an Additional Professor.

5. When the 5th respondent was appointed as In-Charge Head of the Department of Cardio Thoracic Surgery Department as well as Vascular Surgery Department by proceedings RC.No.PLNG-1/5/2018/VS Department dt.30.06.2018 overlooking the claims of the

petitioner who is senior to the 5th respondent, petitioner has filed the present Writ Petition.

6. One Dr. Jyothendra Kumar Singh, who was a M.C.H. resident, had made a complaint to the Director on 16.07.2014 against the petitioner alleging that petitioner demanded and received a bribe from the said person.

7. An enquiry report was submitted by a Committee of Deans on 21.08.2014 holding that there is no documentary proof that any money was paid; that the complainant admitted before the Enquiry Committee that transactions from January to June, 2014 in his bank account were not related to the M.C.H. C.T. Surgery examinations conducted in July, 2014; and there is no material to link the financial transactions in the bank account of the complainant to the M.C.H. C.T. Surgery examinations conducted in July, 2014.

8. In spite of the same, on the basis of the said allegation Crime No.7/RCO-CR-1/2015 under Section 7, 13(2) read with 13(1)(D) of the Prevention of Corruption Act, 1988 on 04.05.2015 by the Anti-Corruption Bureau (for short 'ACB') of the State Police Department.

9. On that basis, the Executive Board of the NIMS passed resolution No.1485 dt.12.09.2016 stating that the ACB has established the case against the petitioner and pending disciplinary proceedings and further enquiry by ACB, he should be removed from HOD ship so that

investigation and disciplinary proceedings can be done in a free and fair manner.

10. Ultimately, the A.C.B. filed a final report dt.08.05.2017 in Crime No.7/RCO-CR-1/2015 to close the case as sanction was not granted by the State Government to prosecute the petitioner. Thereupon on 30.01.2018, the Principal Special SPE & ACB cases-cum-IV A.C.J., Hyderabad closed the F.I.R. of the A.C.B.

11. One Dr. Kaladhar, a student of the petitioner, filed W.P.No.32917 of 2018 challenging the appointment of the petitioner as Dean in the NIMS vide G.O.Rt.No.521, Health, Medical and Family Welfare, Department dt.06.09.2018. The said Writ Petition was dismissed on 23.10.2018 by this Court stating that it is in the nature of a Public Interest Litigation (P.I.L.) and in service matters, a PIL is not maintainable.

12. The State Government then referred the matter vide Memo No.3093/VC/1/2016-1 dt.17.03.2017 to the Tribunal for Disciplinary Proceedings to enquire against the petitioner.

13. The petitioner challenged the same in WP.No.40085 of 2018. The said Writ Petition was allowed on 28.12.2018 holding that petitioner is not an employee of the State Government and the provisions of Andhra Pradesh Civil Services (Tribunal for Disciplinary

Proceedings) Act, 1960 do not apply to the petitioner and the State Government cannot refer his case to the said Tribunal for disciplinary enquiry against him.

15. The above facts are admitted facts.

16. Petitioner contends that when he is senior to the 5th respondent and when he has been exonerated by the Enquiry Committee of the NIMS of the charges leveled by Dr. Jyothendra Kumar Singh on 21.08.2014, and the proceedings under the Prevention of Corruption Act, 1988 initiated against him were closed by the Criminal Court on 30.01.2018, and the reference by the State Government to the Tribunal for disciplinary proceedings vide Memo dt.17.03.2017 was set aside on 28.12.2018 by this Court in WP.No.40085 of 2018, the petitioner cannot be denied the chance of being Head of the Department of the Cardio-Thoracic Surgery Department by the respondent nos.1 to 4, that his claim to be incharge Head of the Department cannot be overlooked and the 5th respondent, who is not even a Professor, and who is 15 years junior to petitioner and also a student of the petitioner, cannot be appointed under the impugned proceedings dt.30.06.2018 as In-Charge Head of the Department of the Cardio-Thoracic Surgery Department by the Dean of the NIMS. He contended that the impugned order is arbitrary, illegal and not bona fide.

17. According to him, proceedings O.O.No.15/ACAD/95 dt.06.03.1995 were issued by the NIMS that Senior most person will be the Head of the Department; and G.O.Rt.No.180, Health, Medical and Family Welfare (A1) Department dt.30.03.2019 was issued by the State Government stating that Head of the Department should be on rotation basis once in two years amongst the *Professors* of the Department strictly as per the seniority list; and both these proceedings have been violated by the 3rd respondent while passing the impugned order appointing the 5th respondent, petitioner's junior, though he is only an Additional professor as in-charge Head of the Department of the Cardio-Thoracic Surgery Department.

18. He also referred to Section 35 of the Nizams Institute of Medical Sciences Act, 1989 and contended that directions issued by the State Government on questions of policy are binding on the NIMS and that it should function under the general supervision of the Government.

19. No counter affidavit was filed by the 1st respondent.

20. In the counter filed by the respondents 2 to 4 they contended that the Executive Board resolution No.1485 dt.12.09.2016 was not challenged by the petitioner and so the Writ Petition is not maintainable.

21. It is to be noted that copy of the said resolution was not marked to the petitioner and it is not proved to have been served on the petitioner. The said resolution was also not referred to in the impugned order passed by the 3rd respondent. When the same was not communicated to the petitioner, he cannot be blamed for not questioning it.

22. It is also contended that petitioner has alternative remedy of appeal, but no provision of the Act providing such appellate remedy is quoted. Therefore this plea is also not tenable.

23. It is contended that appointment of 5th respondent as in-charge as Head of the Department is a temporary arrangement pending enquiry and investigation by the NIMS and ACB authorities and it is not a permanent appointment and cannot be questioned by the petitioner.

24. If the appointment of the 5th respondent was made as a temporary arrangement pending enquiry and investigation by the NIMS and ACB authorities, once the enquiry of the Deans Committee in its report dt.21.08.2014 exonerated the petitioner and the ACB case was also closed on 08.05.2017, and W.P.No.40085 of 2018 filed by the petitioner challenging reference by the Government vide Memo No.3093/VC/1/2016-1 dt.17.03.2017 to the Tribunal for disciplinary proceedings to enquire against the petitioner was allowed on 28.12.2018, there is no longer any impediment to appoint the

petitioner as Head of the Department of the Cardio Thoracic Surgery. There is no necessity to continue the 5th respondent as In-charge Head of the said Department thereafter.

25. Also an In-charge arrangement is normally for very short periods but already the 5th respondent has been an In-charge Head of the Department of the Cardio-Thoracic Surgery Department for almost 10 months.

26. It is also contended by the respondents 2 to 4 that the prior appointment of the petitioner as Head of the Department in 2013 was not on the basis of his seniority, but that cannot be a reason to now to deny to him appointment as in-charge or as Head of the Department of Cardio Thoracic Surgery.

27. Next it is contended that the NIMS Committee report dt.21.08.2014 is only a preliminary enquiry report and not final enquiry report. This is factually incorrect because the report dt.21.08.2014 does not state that it is a preliminary enquiry report. On the contrary its states that a detailed enquiry was conducted which indicates that it is a final enquiry report.

28. Merely because W.P. No.2988 of 2018 filed by Dr.Jyotender Kumar Singh where he sought for prosecution of petitioner by the ACB, is pending, the respondents cannot state that no conclusion can

be drawn in favour of the petitioner. In fact, the State Government filed a counter in the said Writ Petition stating that there is no case for prosecution of the petitioner by the ACB and stated that the matter was referred to the Tribunal for Disciplinary proceedings. As already stated W.P. No.40085 of 2018 filed by the petitioner challenging the said decision of the State Government was set aside on 28.12.2018. No interim orders were secured by Dr.Jyotender Kumar Singh till date admittedly.

29. The Standing Counsel for NIMS did not dispute that the State Government had issued G.O.Rt.No.180 Health, Medical and Family Welfare (A1) Department dt.30.03.2019 stating that *“The Head of the Department should be on rotation once in two years amongst the Professors of the Department strictly as per the seniority list....”* This direction of the Government is binding on the NIMS under Section 35 of the Act and it cannot ignore it.

30. Since the petitioner is a Professor and the 5th respondent is only an Additional Professor, the 5th respondent, who is only an Additional Professor, cannot be continued as Head of the Department even on incharge basis when the petitioner can be appointment as a regular Head of the Department, being a senior to the 5th respondent and also a Professor.

31. The 5th respondent adopted the pleas of the respondents 2 to 4, which have been considered and dealt with above.

32. The additional plea of the 5th respondent that under Section 51 (vi) of the Act, the Director has power to declare the Heads of Departments in NIMS from time to time and so he has the discretion to appoint any person of his choice is of no avail because the Director must act in accordance with law and not arbitrarily.

33. Once the enquiry of the Deans Committee in its report dt.21.08.2014 exonerated the petitioner and the ACB case was also closed on 08.05.2017, and W.P.No.40085 of 2018 filed by the petitioner challenging reference by the Government vide Memo No.3093/VC/1/2016-1 dt.17.03.2017 to the Tribunal for disciplinary proceedings to enquire against the petitioner was allowed on 28.12.2018, there is no longer any impediment to appoint the petitioner as Head of the Department of the Cardio Thoracic Surgery and to continue the 5th respondent as In-charge Head of the said Department.

34. For all these reasons, the Writ Petition is allowed; proceedings RC.No.PLNG-1/5/2018/VS Department dt.30.06.2018 of 3rd respondent are set aside; and the respondents 1 to 4 are directed to consider appointing the petitioner as regular Head of the Department of the Department of Cardio Thoracic Surgery, if he is the seniormost

person in the said department, within 4 weeks from the date of receipt of a copy of this order. There shall be no order as to costs.

35. As a sequel, miscellaneous applications pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 30-04-2019
LSK

