

(2011) 10 DEL CK 0246

In the Delhi High Court

Case No : Writ Petition (C) 6164 of 2010

Dr. Mohinder Kumar

APPELLANT

Vs

Medical Council of India and Another

RESPONDENT

Date of Decision : 12-10-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 340

Citation : (2011) 10 DEL CK 0246

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Petitioner in Person, for the Appellant; Ashish Kumar, R-1. and Mr. Jatan Singh, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The petition seeks mandamus to the Respondent No. 1 Medical Council of India (MCI) to treat the three years Senior Residency done by the Petitioner at par with the teaching experience as an Assistant Professor and to allow the Petitioner to be promoted as an Associate Professor w.e.f. 20th March, 2009 after two years of teaching experience as an Assistant Professor. The Petitioner also claims damages against the Respondent No. 1 MCI.

2. The Petitioner claims to have, done Senior Residency of three years in the Deptt. of Surgery in JIPMER, Pondicherry; to have thereafter joined as Assistant Professor in Gian Sagar Medical College and Hospital, Village Ram Nagar, District Patiala, Punjab on 24th February, 2007; to have thereafter joined as Assistant Professor in AII MSR, Bhatinda, Punjab on 5th November, 2007 and to have thereafter joined as Assistant Professor in Rama Medical College Hospital & Research Center, Kanpur (UP) on 23rd November, 2008. The Petitioner appearing in person informs that he is since w.e.f. 2nd February, 2010 working as Assistant Professor with SGT Medical College, Budhera, Gurgaon. His grievance is that though he was entitled to be promoted as an Associate Professor after two years experience as an Assistant Professor but has not been so promoted.

3. The promotion of the Petitioner is to be effected by the Medical College in which the Petitioner may be employed. No such Medical College in which the Petitioner was employed as aforesaid or in which the Petitioner claims to be now employed has been made a party.

4. It has been enquired from the counsel for the Respondent No. 1 MCI whether the Respondent No. 1 MCI has any role in promotion by the Medical Colleges of their faculty members. The counsel for the Respondent No. 1 MCI responds that though the Respondent No. 1 MCI has no role and no approval of the Respondent No. 1 MCI for promotion is required but the Respondent No. 1 MCI has framed the Minimum Qualification for Teachers in Medical Institutions Regulations, 1998 prescribing the qualifications/criteria for promotion. It is further stated that in the inspections done by the Respondent No. 1 MCI of the Medical Colleges from time to time, if any faculty member is to be found without the necessary qualification and/or to have been promoted without the qualification necessary therefor, then the said faculty member is not counted in the faculty and action is taken against the Medical College for not having the prescribed faculty members.

5. In the circumstances, though strictly speaking in the absence of the College with which the Petitioner may be employed, no direction for promotion of the Petitioner as sought can be issued but it is deemed expedient to deal with the pleas raised by the Petitioner.

6. It is not in dispute that as per the Regulations aforesaid, the teaching experience prescribed for being appointed / promoted as Reader / Associate Professor (in the Department of General Surgery to which the Petitioner admittedly belongs) is of five years as Assistant Professor / Lecturer in a recognized Medical College. However, vide amendment with effect from 24.07.2009 the term of five years has been reduced to four years.

7. The contention of the Petitioner is that he was entitled to promotion as Associate Professor after completing only two years as Assistant Professor. The Petitioner instead of showing as to how the same is possible in the face of the Regulations aforesaid, relies on the promotion granted vide order dated 14.12.2009 of the Ministry of the Health & Family Welfare to Assistant Professors in the Medical Colleges under the said Ministry to the post of Associate Professor. The Petitioner on the basis of documents filed before this Court in that regard contends that he is being discriminated against.

8. In fact, it was in view of the said plea of the Petitioner that vide order dated 16.03.2011 the Ministry of Health & Family Welfare was impleaded as Respondent No. 2. The counsel for the Respondent No. 2 seeks further time to file counter affidavit in response to the petition.

9. However, this Court is of the view that unless the Petitioner is able to establish a right under the Regulations aforesaid, merely because some others even if similarly situated as the Petitioner have been granted the promotion in contravention of the Regulations, would not entitle the Petitioner to the relief

from this Court. The Supreme Court recently in Union of India (UOI) and Others Vs. M.K. Sarkar, reiterated that there can be no claim based on negative equality.

10. The only argument of the Petitioner in this regard is that since Respondent No. 1 MCI has not taken any action against the Government colleges who have promoted Assistant Professors to the post of Associate Professors after only a two years stint as Assistant Professors, they are deemed to have interpreted the Regulations accordingly.

11. In this regard it may be noticed that the Respondent No. 1 MCI in its counter affidavit has pleaded that the present petition is liable to be dismissed for the reason of suppression of material facts by the Petitioner. It is pleaded that the Petitioner had earlier filed W.P.(C) No. 12273/2009 seeking the same relief as in this petition; however when the said writ petition came up before this Court on 02.07.2010 the Petitioner stated that the relief sought by him was essentially in the nature of a Public Interest Litigation (PIL) and accordingly that writ petition was placed before the appropriate Bench; the said writ petition was however not entertained by the PIL Bench of this Court vide order dated 14.07.2010 for the reason of the Petitioner having not challenged the constitutional validity of the Regulations aforesaid. It is stated that the Petitioner thereafter applied for review of the said order which was also dismissed on 01.09.2010. It is thus contended that the Petitioner is not entitled to the reliefs claimed on this ground alone. Else, also it is contended that the Regulations having provided for the teaching experience of four years as a Assistant Professor, the Petitioner is not entitled to promotion as Associate Professor after merely two years of experience as an Assistant Professor as sought.

12. The Petitioner has filed a rejoinder to the aforesaid counter affidavit in which the Petitioner has not denied that the relief claimed in the earlier writ petition was the same as the relief claimed in the present writ petition. The Petitioner at this stage states that he had made a full disclosure on the very first date in this petition on 13.09.2010 and had also stated that he does not wish to challenge the constitutional validity of the Regulations.

13. It is thus clear that in the earlier writ petition claiming the same relief, the Petitioner was held not entitled to the relief without challenging the vires of the Regulations. This second round without challenging the vires of the Regulations is not maintainable and the petition is liable to be dismissed on this ground alone.

14. Even otherwise there is nothing to show that the Respondent No. 1 MCI has after application of mind approved the appointments / promotions in Government Medical Colleges to post of Associate Professor of those with only two years experience as Assistant Professor. The Respondent No. 1 MCI cannot thus be said to have interpreted the Regulations so. If at all those without requisite experiences have been promoted and Respondent No. 1 MCI has failed to take action or still granted approvals to such Medical Colleges, it is a case of mistake / error / overlooking; the same does not entitle the Petitioner to set up a case of

discrimination. The only remedy of the Petitioner was to challenge those appointments / promotions and in which also the Petitioner in the earlier writ petition has failed.

15. The Supreme Court in Union of India and Others Vs. Rakesh Kumar etc., held that if by erroneous interpretation of the Rules, pensionary benefits are granted to someone, it would not mean that the said mistake should be perpetuated by direction of the Court. It was further held that no person can claim any right on the basis of decision which is de hors the statutory rules nor can there be any estoppel.

16. Reference may also be made to Maharshi Dayanand University Vs. Surjeet Kaur, laying down that the Court has no competence to issue a direction contrary to law, nor can the Court direct an authority to act in contravention of statutory provisions. It was held that the High Court cannot be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory Rules & Regulations.

17. The Petitioner at this stage invites attention to Crl. Misc. Application No. 3167/2011 u/s 340 Code of Criminal Procedure. He contends that the counter affidavit filed by the Respondent No. 1 MCI is false. On enquiry as to which part of the counter affidavit is false, the Petitioner invites attention to para 12 of the counter affidavit where it is pleaded that the appointments contrary to the Regulations are not approved / recognized by the Respondent No. 1 MCI. He contends that in fact, the Respondent No. 1 MCI has approved the appointments in Government colleges contrary to the guidelines.

18. The aforesaid cannot be said to be a case u/s 340 Code of Criminal Procedure. It will however be open to the Petitioner to make a representation to the Respondent No. 1 MCI seeking action against the Government Medical Colleges who have promoted faculty members in contravention of the Regulations.

19. There is thus no merit in the petition. The same is dismissed. No order as to costs.