

(2024) 06 CAT CK 0009

In the Central Administrative Tribunal

Case No : Original Application No. 61, 972 Of 2021

Dr. Shyam Singh

APPELLANT

Vs

Union Territory Of Jammu & Kashmir Through Additional
Chief Secretary, Financial Commissioner, Health & Medical
Education Department, Civil Secretariat, Jammu-180001/
Srinagar & Ors.

RESPONDENT

Date of Decision : 12-06-2024

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Jammu And Kashmir Civil Services (Classification, Control And Appeal) Rules, 1956 —
Rule 24, 24(1)
Constitution Of India, 1950 — Article 14

Citation : (2024) 06 CAT CK 0009

Hon'ble Judges : B. Anand, Member (A); Sanjeev Gupta, Member (J)

Bench : Division Bench

Advocate : Sudesh Magotra, F A Natnoo

Final Decision : Partly Allowed

Judgement

Sanjeev Gupta, Member J

1. The applicant has filed the present Original Application under Section-19 of the Administrative Tribunals Act, 1985 praying for following reliefs:-

(a) Direct the respondents to effectuate the appointment of the applicant as Lecturer Cardiothoracic Surgery, Government Medical College, Jammu with effect from 05.06.2008 i.e. the date of interview and fix his seniority as Professor Cardiothoracic Surgery.

(b) Necessary directions to Chief Judicial Magistrate Jammu for proceeding against respondent No. 5, then Deputy Secretary, Health & Medical Education Mr. Naseem Supplies and Consumer Affairs Jammu for negligence of authoring the letter Annexure – (11) – stating that the applicant cannot be treated as in-service candidate as he is borne on the establishment of autonomous

organization on basis of which, J&K PSC cancelled the applicant's candidature vide Order No. 92-OSC of 2013 dated April 03 2013, thereby inflicting suffering and harassment upon the applicant. The said letter of then Deputy Secretary J&K Health & Medical Education was against the J&K Health & Medical Education department's own order No. 820-HME/2003 dated 22.07.2003, Order No. 36-MED of 1979 dated 1st February 1979, Communication dated 4-3-1986 as also judgement reported as of SLJ (2005), Volume 1, page 282

(c) Directing the respondents to pay Exemplary costs to the applicant.

(d) Any other appropriate order or relief which this Hon'ble Tribunal deems fit and proper.

2. During the course of arguments, the applicant submitted that he is limiting his prayer to relief (a) and (d) made in the O.A. and relief with regard to pay protection and other consequential benefits as prayed for in the supplementary affidavit filed in the instant O.A. on 22.02.2024.

3. Applicant Shyam Singh appeared in person before the Bench and submitted that as per averment made in the O.A., he had responded to advertisement notification No. 02-PSC of 2007 dated 06.03.2006 for the post of Lecturer Cardio Thoracic Surgery in Government Medical College, Jammu for which the qualification was M.Ch. in Speciality concerned after MS/FRCS or an equivalent qualification in Surgery with three years special training in the speciality concerned; or speciality board (USA) in the specialist concerned after post graduation and age as on 01.01.2006 for the post was 45 years for the candidates already working in Health and Medical Education Department.

4. It is the case of the applicant that he had applied for the post of Lecturer Cardio Thoracic Surgery through proper channel as he was working in Sher-E-Kashmir Institute of Medical Science (SKIMS), Srinagar as Assistant Professor and thereafter, he had attended the interview for the aforesaid post on 05.06.2008.

5. It is further the case of the applicant that two other candidates namely Dr. Arvind Kohli and Dr. Isthiyak Ahmad Mir who were ineligible for the post of Lecturer Cardio Thoracic Surgery were also called for interview. Aggrieved of the action of the respondents of calling the aforesaid ineligible candidates for interview, applicant challenged the same before the Hon'ble High Court by filing SWP No. 513 of 2007 on the ground that M.Ch. Degrees obtained by Dr. Arvind Kohli from JIPMER Pondicherry University and Dr. Isthiyak Ahmad Mir from SKIMS were not recognized by the Medical Council of India at that time, whereas, M.Ch. Super-Speciality qualification obtained by him from University of Mumbai was recognized by the Medical Council of India. That the Hon'ble High Court vide order dated 10.11.2010 allowed the SWP No. 513 of 2007, against which, the respondents preferred LPA bearing No. 175 of 2010 and 181 of 2010 which were dismissed by the Division Bench of Hon'ble High Court vide order dated 08.09.2011. The Special Leave Petition/Appeal bearing No. 29969 of 2011

and 30950/2011 filed by Dr. Arvind Kohli and Dr. Isthiyak Ahmad Mir were withdrawn by them on 30.01.2013.

6. It is also the case of the applicant that instead of complying with the order of the Hon'ble High Court, the respondents No. 3 & 4 issued Order No. 92-PSC of 2013 dated 03.04.2013 whereby the candidature of the applicant for the post of Lecturer Cardiothoracic Surgery in Government Medical College, Jammu advertised by notification No. 03-PSC of 2006 dated 20.06.2006 read with notification No. 02-PSC of 2007 dated 06.03.2007 was rejected declaring him not eligible against the post on the ground that applicant was over-age on the cut-off date, besides the applicant being Associate Professor CVTS SKIMS, Srinagar cannot be treated as in-service candidate being borne on the establishment of an autonomous organization, and by the same order the candidature of Dr. Ishtiaque Ahmed was also rejected and interview of all the three candidates viz applicant, Dr. Ishtiaque Ahmed Mir and Dr. Arvind Kohli conducted by Respondent No. 3 on 05.06.2008 for the post of Lecturer CVTS in Health and Medical Education Department was cancelled ab-initio. That the Hon'ble High Court vide order passed on 15.10.2015 in a Contempt Petition No. 509 of 2011 filed by the applicant, held that order No. 92-PSC of 2013 dated 03.04.2013 whereby applicant's candidature has been cancelled/rejected does not amount to compliance of the High Court judgement dated 10.11.2010. The Appeal filed against the aforesaid order was dismissed by the Division Bench of Hon'ble High Court of Jammu & Kashmir on 19.08.2016. The Special Leave Petition was also dismissed on 31.03.1997.

7. It is further stated in O.A. that on the recommendation of Respondent No. 3 vide communication dated 14.11.2017, sanction was granted by the Government vide order No. 375-HME of 2018 dated 24.12.2018 for the appointment of the applicant against the post of Lecturer in Cardiothoracic Surgery in Government Medical College, Jammu.

8. It is the submission of the applicant that though the respondents accorded sanction of the appointment to the applicant on the post of Lecturer in Cardiothoracic Surgery in Government Medical College, however, the order has not been given the effect of appointment retrospectively, from the date when the interview was conducted i.e. 05.06.2008. It is the further contention of applicant that he was entangled in litigation from 2007 to 2017, due to the fault of the respondents, as such the respondents are bound to give him appointment with retrospective effect from 05.06.2008 along with all consequential service benefits.

9. In the counter filed by Respondent No. 1, it has been averred that selection process in pursuance of advertised posts could not be finalized due to litigation involved in the matter. The candidature of applicant for appointment as Lecturer Cardiothoracic Surgery in GMC, Jammu on the recommendation made by J&K Public Service Commission on 14.11.2017 was accepted by Respondent No. 1 and the applicant was appointed as Lecturer, Cardiothoracic Surgery in GMC Jammu on 24.12.2018 prospectively as such, question of giving retrospective

effect from 05.06.2008 to the appointment of the applicant for the aforesaid post does not arise, in as much as, such action will adversely affect seniority of persons appointed earlier.

10. In the reply filed by Respondent No. 3 & 4, it has been stated that after the appointment of applicant as Lecturer Cardiothoracic Surgery, Government Medical College, Jammu vide order dated 24.12.2018 on the recommendation of Respondent No. 3 on 14.11.2017, the Respondent No. 3 & 4 have no role with regard to fixation of seniority of the applicant and the same has to be considered by Respondent No. 1 as the applicant is seeking his appointment retrospectively w.e.f. 05.06.2008 i.e. date of interview for the purpose of his seniority as Lecturer Cardiothoracic Surgery.

11. The applicant has filed rejoinder to the reply filed by the respondents giving point by point rebuttal to the stand taken by the respondents in their respective counters.

12. The applicant on 22.04.2024 has also filed a supplementary affidavit in which in addition to his claim of notional seniority and service benefits as projected in the main O.A., he has also sought monetary benefits from 2019 and pay protection and release of difference of arrears along with consequential service benefits that contribute towards pension. Along with the supplementary affidavit Annexures S/1 to S/10 have been also enclosed.

13. The applicant in this O.A. thus, seeks twin reliefs viz; his seniority retrospectively w.e.f. 05.06.2008 and secondly his pay protection, with all consequential benefits.

14. We have heard the applicant and the learned counsels for the respondents and carefully perused the record.

15. The applicant's case is that since he was recommended for appointment as Lecturer Cardiothoracic Surgery by the Respondent No. 3 on the basis of his performance in the interview for the said post conducted on 05.06.2008, therefore, applicant should be given seniority with retrospective effect from 05.06.2008 along with all service benefits and not from the date of his appointment as Lecturer in terms of Government Order dated 24.12.2018.

16. It is contended by the applicant that he was eligible for the advertised post from very beginning and the High Court has also held his basic eligibility genuine, besides the stand of Respondent No. 3 & 4 that the applicant was not to be treated as in-service candidate, being born on the establishment of an autonomous organization (Sher-e-Kashmir Institute of Medical Science, Soura, Srinagar), having crossed upper age limit prescribed under rules was rejected by the Hon'ble High Court and also by the Hon'ble Supreme Court. Elaborating his arguments further applicant has submitted that the Respondents No. 3 & 4 could not finalize the selection for the post due to litigation involved in the matter and since, applicant was only eligible candidate in terms of advertised post and the

rules governing the matter, therefore, no fault can be attributed to the applicant and the respondents are bound under law to fix the seniority of the applicant as Lecturer Cardiothoracic Surgery, Government Medical College Jammu w.e.f. 05.06.2008 with all consequential benefits.

17. It is further contended by the applicant that Respondent No. 1 has used two yardsticks one for fixation of pay of the applicant and other for Dr. Isthiyak Ahmed Mir and Dr. Arvind Kohli. According to the applicant, he was relieved from SKIMS as Additional Professor Cardiothoracic and Vascular Surgery and joined Government Medical College, Jammu on 14.01.2019 with the assurance at the time of submission of his service book that his pay will be protected as was earlier done in the case of Dr. Ishtyak Ahmed Mir and Dr. Arvind Kohli who were appointed as Lecturer in the Department of Thoracic Surgery, GMC, Jammu in 2012 & 2013 respectively. According to the applicant, Dr. Isthiyak was earlier working as Assistant Professor, Department of General Surgery, GMC Jammu whereas, Dr. Arvind Kohli started his career as an Assistant Surgeon Cardiothoracic and Vascular Department of GMC, Jammu in the year 2000. The applicant as such contended that he entitled to monetary benefits from 2019 by pay protection with consequential service benefits with difference of arrears.

18. Adverting, first to the issue of seniority of the applicant, it appears from the pleadings and documentary material on record that the applicant was subjected to a prolonged litigation which could have been avoided and that resulted in his getting appointment to the post of Lecturer in Cardiothoracic Surgery in Government Medical College only in the year 2018 i.e. more than ten years after issuance of initial notification in 2007 for the said post. The question falling for consideration is whether applicant is entitled for benefit of notional seniority retrospectively w.e.f. 05.06.2008 or whether he is entitled for seniority from the date, he entered service.

19. Rule 24 of the J&K Civil Services (Classification, Control and Appeal) Rules, 1956 (in short CCA Rules) deals with fixation of seniority and provides as under:-

"24. Seniority: (1) The seniority of the person who is subject to these rules have reference to service, class, category or grade with reference to which the question has arisen.

Such seniority shall be determined by the date of his first appointment to such service, class, category or grade as the case may be."

20. A clear reading of Clause (1) of Rule 24 suggests that the seniority shall be determined from the date of first appointment. In the instant case, the applicant has been appointed on 24.12.2018 and his claim for appointment fructified only when Public Service Commission vide its communication dated 14.11.2017 recommended his name for appointment on the basis of overall performance at the interview, academic merit, experience and other relevant factors in pursuance of his interview conducted on 05.06.2008. The appointment of the applicant has followed the recommendation of the PSC and the same was

prospective. The principle underlying Clause 1 of Rule 24 of CCA rules is that the appointment of a civil servant takes effect from the date of issuance of order or from such prospective date as the order might indicate. There is no law, rule or regulation whereby the Government has power, authority or competence to order the appointment of a person with retrospective effect than the date of order or the date when the person actually assumes charge, unless there is a clear legislative or regulatory mandate, besides direction of court permitting such retrospective seniority.

21. The applicant in the present case has been appointed on 24.12.2018. The mere availability of a post at time of the interview of applicant does not confer any automatic rights to seniority from that date. In other words, the seniority of the applicant is to be calculated from the actual date of appointment and commencement of service, therefore, his seniority would be reckoned from that date only viz; date of first appointment. Further, in the light of rule position stated above, his appointment cannot be ante-dated or given retrospective effect from a date, when he was not even born in service because such an action may prejudice and adversely affect the seniority of persons appointed earlier.

22. Coming to the contention of applicant that facts of his case are identical to the facts of case titled Sanjay Dhar Vs. J&K PSC and another, dealt by the Hon'ble Supreme Court, in its judgement dated 10.10.2000 (Annexure S/1), after carefully going through the said judgement, it is apparent that the case of the applicant cannot be equated with the petitioner therein, as the facts and circumstances of the two cases are distinguishable. In the supra case, one post of Munsif was kept reserved by the High Court in a writ petition filed by the petitioner therein. While allowing the appeal filed by the petitioner, the Hon'ble Apex Court directed that the petitioner shall be deemed to have been appointed along with other appointees under the appointment order dated 06.03.1995 and assigned a place of seniority consistently with his placement in the order of merit in the select list prepared by J&K PSC. Even otherwise, law is fairly settled by the Hon'ble Supreme Court in the case of Suraj Prakash Gupta vs. State of Jammu & Kashmir AIR 2000 SC 2386 in para 4 of the judgement by stating that a direct recruitment can claim seniority only from the date of his regular appointment and he cannot claim seniority from the date when he was not born in the service.

23. In Ganga Vishan Gujrati and Ors. Vs. State of Rajasthan and Ors (2019) 16 SCC, the Hon'ble Supreme Court opined as under:-

"41. A consistent line of precedent of this Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not borne on a cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. This principle emerges from the decision of the Constitution Bench of this Court in Direct Recruit Class II Engineering Officers' Association v State of Maharashtra. The principle was reiterated by this Court in State of Bihar v Akhoury Sachindra Nath and State of Uttaranchal v Dinesh Kumar Sharma."

24. In so far as the plea of the applicant that his pay was not protected as has been done in the case of Dr. Isthiyak Ahmed Mir and Dr. Arvind Kohli, after his joining on 14.01.2019 despite assurance by the authorities, it is not disputed that applicant was relieved through proper channel from SKIMS with retention of lien at SKIMS till he was fully absorbed in the new institution i.e. GMC, Jammu. According to the applicant, he had received his last salary as Additional Professor of SKIMS, Soura for the month of January 2020 amounting to Rs. 2,01,736/- and despite verification of his service record after his appointment and number of requests, the applicant had for the first time on 09.01.2024 got Rs. 86,746/- as salary for the month of December 2023 and continued to receive his monthly salary in the following months almost at the same rate. However, the applicant has not drawn a single penny from his account on the failure of the authorities to provide him any reply regarding using two yardsticks for fixation of salary. It is the submission of the applicant that respondent be directed to allow monetary benefits from 2019 by pay protection and release difference of arrears along with all consequential service benefits that also contribute towards his pension.

25. The record shows that the applicant was drawing more salary as Additional Professor in his previous organization in SKIMS, and he had joined the lower post of Lecturer in GMC, Jammu in the month of 2019 only with the hope that his last drawn pay would be protected by the respondents as was done by the respondents in the case of other two Doctors namely Dr. Arvind Kohli and Dr. Isthiyak Ahmad Mir. However, to the utter dismay of the applicant, after four years of joining GMC, Jammu and when he could not go back to his parent department, the respondents sprung a nasty surprise on him by holding that his past pay would not be protected.

26. The respondents have taken different yard stick for the applicant as against the other two Doctors namely Dr. Arvind Kohli and Dr. Isthiyak Ahmad Mir, by protecting their last drawn pay, whereas, in the case of the applicant, respondents are not willing to protect the last drawn pay of applicant from SKIMS, in as much as, the protracted litigation was forced upon the applicant by the conduct of the respondents for more than ten years and a long wait for the post for the Lecturer. The applicant cannot be punished for the rest of his life by taking whatever was due to him. The element of discrimination is writ large on the conduct of the respondent No. 1, which is evident from the copy of Government Order No. 264-HME of 2019 dated 01.03.2019 (Annexure 4) whereby several doctors working earlier in health department, medical education department on being appointed in new Government Medical Colleges were given protection of the higher pay, which they were getting in the parent services as would accrue to them on the new posts in the new Government Medical Colleges. Further, the Government Order No. 527-MG of 1993 dated 09.06.1993 (Annexure 3) issued by Respondent No. 1 and placed on record along with supplementary affidavit also supports the case of the applicant. Thus, there is violation of fundamental rights of applicant under Article 14 of Constitution of India.

27. From the facts and circumstances of the case and in the light of discussion made above, this O.A. is partly allowed by holding that applicant is not entitled to the relief of notional seniority by fixing his seniority retrospectively w.e.f. 05.06.2008 but he is entitled to the relief of pay fixation on the same analogy from January 2019, as followed in the case of several doctors named in Government Order No. 264 -HME of 2019 dated 01.03.2019 (Annexure 4) and also in terms of Government Order No. 527-MG of 1993 dated 09.06.1993 (Annexure 3) -placed on record along with supplementary affidavit. He is also entitled to monetary benefits from January 2019 by pay protection and release of difference of arrears along with consequential service benefits that contribute towards his pension. This exercise shall be implemented within a period of eight weeks from the date of receipt of a copy of this order.

28. No order as to costs.