(1991) 11 KL CK 0014

In the High Court Of Kerala

Case No : O.P. 3418/88

Gopalakrishna Pillal and Another — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision : 07-11-1991

Acts Referred:
Constitution of India, 1950 — Article 14, 16
Kerala Health Services (Indian Systems of Medicine) Rules — Rule 2, 28(7)

Citation : (1991) 11 KL CK 0014

Hon'ble Judges : K. Sreedharan, J

Bench : Single Bench

Advocate : S. Eswara Iyer and S. Subramoni, for the Appellant; V.A. Mohammed, Government Pleader for Respondents 1 and 2 and K. George Varghese, for 3rd Respondent, for the Respondent

Judgement

K. Sreedharan, J.—Petitioners, two in number, are Chief Medical Officer (Ayurveda) and Senior Medical Officer (Ayurveda) respectively in the Department of Indian Systems of Medicine. They have approached this Court inter alia praying for the issuance of a writ of mandamus restraining Respondents 1 and 2 from promoting Respondents 3 to 5, who are Chief Medical Officers, in preference to the Petitioners as District Medical Officers in the Department of Indian Systems of Medicine. It is also prayed for declaring the Special Rules for Kerala Health Services (Indian Systems of Medicine) as ultra vires of the Constitution of India to the extent of prescribing the post of Senior Medical Officer (Specialist) falling under Category 7 as one of the eligible categories for promotion as District Medical Officer in Category 4 of the Special Rules.

2. The service particulars of Petitioners and Respondents 3 to 5 are as shown in the table below:

Entry in service as Medical Officer Senior Medical Officer Chief Medical Officer District Medical Officer

(1) (2) (3) (4) (5)

1st Petitioner 17-10-1961 17-3-1981 13-4-1987 ..

2nd Petitioner 11-9-1969 14-10-1982 .. ..

3rd Respondent 1-8-1976 Jan., 1981 28-2-1986 12-5-1988

4th Respondent 27-7-1976 1982 6-2-1988 1989/90

5th Respondent 31-7-1976 1982 6-2-1988 1989/90

Petitioners entered service as Medical Officers (Ayurveda). Respondents 3 to 5 entered service as Medical Officers (Specialists). Being specialist, Respondents 3 to 5 could get promotion to the cadre of Senior Medical Officer (Specialist) while Petitioners and other similarly situated persons had to continue in the entry cadre for long number of years. Appointment of Respondents 3 and 4 to the cadre of Chief Medical Officer (Ayurveda) was challenged by one Dr. P.V. Lakshmanan, a person similarly situated as the Petitioners herein, by filing O.P. 1681/1986. His contention was that a Medical Officer (Ayurveda) in General Category had to wait for long number of years while Medical Officers (Specialists) are getting promotion to the higher cadres in lesser time. That challenge was repelled by this Court holding that the differential treatment meted out to the Specialists cannot be considered to be violative of the principles contained in Articles 14 and 16 of the constitution. That decision was affirmed in W.A. 72/1988. The Supreme Court did not interfere with that decision, by dismissing SLP (Civil) 10178/1988. In view of that decision, Petitioners are not entitled to question the promotion given to Respondents 3 to 5 to the cadre of Chief Medical Officer.

3. Senior Medical Officer (Specialist) and Senior Medical Officer (Ayurveda) are Categories 7 and 6 respectively in the Special Rules for Kerala Health Services (Indian Systems of Medicine). The post of Chief Medical Officer (Ayurveda), Category No. 5, in that Rule is to be filled up by appointment from Category 6 or Category 7. The distinction between Medical Officer (Specialist) and Medical Officer (Ayurveda) is, as per the Special Rule, maintained upto Category 6 and 7. While coming to Category 5, the differentiation is given a go by. Depending on the seniority among Senior Medical Officer (Specialist) and Senior Medical Officer (Ayurveda), appointment to the cadre of Chief Medical Officer (Ayurveda) is effected.

4. The question whether the post of Chief Medical Officer (Ayurveda) is higher in cadre compared to Senior Medical Officer (Ayurveda) or Senior Medical Officer (Specialist) arises for consideration. The post of Chief Medical Officer is not a promotion post of either Senior Medical Officer (Ayurveda) or Senior Medical Officer (Specialist). That post is to be filled up by appointment from those categories. Chief Medical Officer (Ayurveda) is not on a higher scale of pay. The scale of pay higher to that of a Senior Medical Officer is the scale of pay of District Medical Officer. In O.P. 7007/1987 this Court had to consider this aspect.

It was observed therein:

In the case of Medical Officer in Indian Systems of Medicine, the scale of pay in the entry grade is 1050-2000. On completing 10 years of service, he must get the first higher grade promotion. That grade promotion is to that of Senior Medical Officer in the scale of pay of Rs. 1250-2500. On completing the period of 20 years of service or on completing 10 years of service as Senior Medical Officer whichever happens earlier, the incumbent must get the second higher grade promotion. That higher grade is the one available for District Medical Officers in the scale of pay of Rs. 1500-2685. In other words, the second higher grade promotion of Medical Officer in the Department of Indian Sytems of Medicine can never be to the scale of pay of Rs. 1250-2500 plus special pay of Rs. 50.

The Chief Medical Officer (Ayurveda) gets only a special pay of Rs. 50 while in the scale of pay of Rs. 1250-2500, which is that of a Senior Medical Officer. The decision in O.P. 7007/1987 was affirmed in W.A, 436/1988. From these decisions, it is evident that Senior Medical Officer (Specialist), Senior Medical Officer (Ayurveda) and Chief Medical Officer (Ayurveda) are on the same scale of pay. As per Exhibit P-1, Chief Medical Officer is entitled to an allowance when the bed strength of the institution to which he is posted is 30 and above.

5. Category 4 in the Special Rules is District Medical Officer, Indian Systems of Medicine. As per the Special Rule, that post is to be filled up by promotion from category 5 Chief Medical Officer (Ayurveda), Category 6 Senior Medical Officer (Ayurveda) or Category 7 Senior Medical Officer (Specialist). How the inter se seniority among those in Categories 5 to 7 is to be decided is provided in the Note attached to the rule. It reads:

The order of preference for promotion from among Category 5, 6 and 7 shall be determined on the basis of the length of service in respective category.

From this Note, it is evident that personnel in the three different categories form one group. He, who has maximum length of service in any of the categories, is to be preferred to the other. But, Government has taken a stand that persons in the cadre of Chief Medical Officer (Ayurveda) are to get preference for promotion to the cadre of District Medical Officer, Indian Systems of Medicine. This stand is under challenge. Government have sought to sustain their stand by referring to Note (vi) to Rule 28(b)(7). That Note is in the following terms:

When there are more than one feeder category carrying different scales of pay, they shall be shown in separate lists and persons in a lower scale of pay shall be appointed only after appointing all persons on a higher scale of pay, unless the Special Rules prescribe a ratio or any special order of preference for each feeder category.

This can apply only where persons belong to different scales of pay in the feeder categories are to be promoted to the higher scale. That Note has no application to the instant case, because Chief Medical Officer (Ayurveda), Senior Medical

Officer (Ayurveda) and Senior Medical Officer (Specialist) are on the same scale of pay. Therefore, the State is clearly in error in taking the view that Chief Medical Officer (Ayurveda) have preference over Senior Medical Officer (Ayurveda) and Senior Medical Officer (Specialist) for promotion to the cadre of District Medical Officer. Persons who is having longer service among officer''s in the three categories must be promoted to the post of District Medical Officer.

6. As between Petitioners and Respondents 3 to 5, the third Respondent got appointment to the cadre of Senior. Medical Officer (Specialist) in January 1981. First Petitioner became Senior Medical Officer (Ayurveda) on 17th March 1981 and the second Petitioner on 14th October 1982. Respondents 4 and 5 became Senior Medical Officer (Specialist) in 1982. While considering them for the post of District Medical Officer, third Respondent has to be preferred to the Petitioner because he became Senior Medical Officer earlier than the Petitioners. But, Respondents 4 and 5 were preferred for the post of District Medical Officer on the ground that they became Chief Medical Officers on 6th February 1988. This approach made by the Government is clearly in error. So, the promotion given to Respondents 4 and 5 has to be reviewed. Persons Who are having more length of service in the cadre of Senior Medical Officer (Ayurveda), Senior Medical Officer (Specialist) and Chief Medical Officer (Ayurveda) together has to be preferred for the post of District Medical Officer.

7. In State of Andhra Pradesh Vs. Dr. N. Ramachandra Rao and Others, . Their Lordships made the following observation:

Furthermore, Rule 2 does not expressly exclude the service in Class II cadre for preparing panel for consideration for promotion to posts with which we are concerned. We also consider that it would be unreasonable and unjust to exclude the service and overlook the vertical seniority in the substantive cadre to which everyone was selected by the Public Service Commission. In medical profession there are specialities, and specialities but it is generally accepted that they are not of equal importance or utility. However, the promotions are followed on the basis of the respective specialities and the availability of promotional vacancies in such specialities. A junior with, relatively less important speciality may be fortunate enough to get quick promotion than his senior with a different speciality. We are of the opinion that the juniors who get accelerated promotion on account of fortuitous circumstances depending upon their speciality and availability of vacancies in such speciality should not be allowed to march over their seniors for appointment to administrative posts. Any advantage gained by juniors on such fortuitous circumstances of having some speciality and promotion should not impair the rights of their seniors for promotion to posts where speciality or teaching experience is not called for. The seniority determined in order of speciality should not therefore be the basis for promotion to administrative posts. Any rule providing for the contrary may be vulnerable to attack on the ground of arbitrariness.

On the basis of this observation, Shri E. Subramoni, learned Counsel

representing the Petitioners, advanced an argument that the post of District Medical Officer is an ''administrative post'' and in filling up that post, juniors to Petitioners like Respondents 3 to 5, who got accelerated promotion on account of fortuitous circumstances depending upon their speciality, should not be allowed to steal a march over the Petitioners. According to learned Counsel, Respondents 3 to 5 got promotion to the cadre of Senior Medical Officer on account of their speciality. Within 5 to 6 years of their entry into service, they became Senior. Medical Officers (Specialist). That fortuitous circumstance cannot confer on them any benefit when the claim for filling up administrative posts is considered. Learned Counsel went to the extent of saying that seniority of the Petitioners with reference to the date of appointment to the entry cadre should be reckoned for effecting promotion. I find it difficult to accept this argument. It is true that Respondents 3 to 5 entered service as Medical Officers (Specialist) long after the Petitioners were appointed as Medical Officers. On account of the speciality, to which Respondents 3 to 5 were appointed, they got promotion to the cadre, of Senior Medical Officer (Specialist) within 5 to 6 years of their entry into service. Their appointment, as in the case of the Petitioners, was to the Subordinate Service. They were appointed to the State Service as Senior Medical Officers (Specialist). When they became members of the State Service, the seniority in that service is to be reckoned on the basis of the length of service in that State Service. The seniority for promotion to a higher cadre in the State Service cannot be decided on the basis of the length of service rendered by an officer in the Subordinate Service. For one to get entry into State Service, he may have to possess, in certain services higher qualification and to pass obligatory tests. Only on acquiring such qualification, can one aspire a posting in the State Service After coming over to State Service, for further promotion to administrative posts, if entire service rendered in Subordinate Service is also to be counted, it will lead to absurd results. Such a result cannot flow from the observations made by the Supreme Court, quoted above. What Their Lordships have stated is that juniors who got accelerated promotion should not be allowed to march over their seniors for appointment in administrative posts. Who are their seniors? Seniority can be fixed only with reference to the service. Has any junior in the State Service been preferred over the Petitioners for the post of District Medical Officer? If any such preference was made, that will be, in the light of the observations made by Their Lordships, open to challenge as arbitrary. In the instant case, third Respondent is senior to Petitioners in State Service. So, his promotion to the cadre of District Medical Officer earlier to Petitioners is unassailable. Respondents 4 and 5 got promotion to the cadre of Senior Medical Officers (Specialist) subsequent to the Petitioners. They cannot be preferred to the Petitioners for the post of District Medical Officer on account of their speciality. Nor can they claim earlier promotion on account of their getting a posting as Chief Medical Officer. As found earlier Chief Medical Officer is not on a higher scale of pay as compared to Senior Medical Officer (Ayurveda). So, Note (vii) to Rule 28(b)(7) should apply. This is made specific by the Note added to category 4 of the Special Rules.

8. Petitioners pray for excluding category 7 from the feeder category for promotion to the cadre of District Medical Officer in Indian Systems of Medicine. Senior Medical Officer (Specialist) is category 7 in the Special Rules. That is in the same scale of pay as Senior Medical Officer (Ayurveda), which is category 6. Categories 6 and 7 are in the same scale of pay as Chief Medical Officer (Ayurveda). But, Chief Medical Officer (Ayurveda) is entitled to a special allowance depending on the number of beds in the institution to which he is posted. Thus it is clear that categories 5 to 7 are on the same grade with same scale of pay. Government have thought it proper to include these three categories in the feeder categories for promotion to category No. 4, viz., District Medical Officer. This action of the Government in framing the Special Rule, as it stands now, is not shown to be arbitrary or violative of any provision of law. Equals have been treated equally. So, I do not find any vice in the Special Rule for this Court to interfere with. The prayer for exclusion of category 7 for promotion to category 4 is declined.

9. In view of what has been stated above, I direct Respondents 1 and 2 to review the promotions given to Respondents 4 and 5 and to consider the Petitioners'' claim for promotion to the cadre of District Medical Officer in preference to them. This must be done as expeditiously as possible, at any rate, within two months from the date of receipt of a copy of this judgment.

Original Petition is disposed of in the above terms. No costs.

