
(2007) 04 MP CK 0075

In the Madhya Pradesh High Court

Case No : Writ Petition (S) No. 1099 of 2004

Kishore Lowalekar

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 19-04-2007

Acts Referred:

Citation : (2007) 3 MPLJ 412

Hon'ble Judges : S.K. Gangele, J

Bench : Single Bench

Advocate : D.K. Katare, for the Appellant; Vivek Khedkar, Government Advocate and B.P. Singh, for the Respondent

Final Decision : Allowed

Judgement

S.K. Gangele, J.

Petitioner has filed this petition with regard to promotion on the post of Professor Neurology and further direction to convene a meeting of D.P.C. for the aforesaid purpose.

The petitioner was initially appointed on the post of Resident Medical Officer in Neurology on 11-10-1973. Thereafter the petitioner was appointed as Lecturer Neurology on 3-3-1975 on ad hoc basis. Subsequently, Public Service Commission issued an advertisement with regard to selection and appointment for the post of Lecturer Neurology, copy of the advertisement has been filed as Annexure P/13. Thereafter vide order dated 9-12-1980 the petitioner was appointed as Lecturer Neurology on the pay scale of Rs. 500-1950. When the petitioner was not promoted on the post of Associate Professor because of non-availability of the post, he filed an application before the State Administrative Tribunal. The aforesaid application was registered as O. A. No. 812/95 and disposed of vide order dated 17-9-1998 with a direction to the respondents to create the post of Associate Professor and in the meantime petitioner be given promotion under the Time Bound Scheme. Thereafter vide order dated

4-12-2001 the petitioner was promoted on the post of Associate Professor w.e.f. 1-1-1993 under Time Bound Promotion. The petitioner was again given the benefit of promotion under Time Bound Scheme vide order dated 24th September, 2003 on the pay scale of Rs. 14300-18300 on the post of Professor.

The main grievance of the petitioner is that he was entitled promotion on the post of regular associate Professor and thereafter professor but that has not been given to him arbitrarily.

Respondents have filed the return and stated that petitioner did not had requisite qualification of the post of Professor and Associate Professor. It has further been contended that petitioner was only given the benefit of the post of Associate Professor under Time Bound Promotion, hence he could not be promoted as Professor on regular basis.

Learned counsel for the petitioner submitted that non-promotion of the petitioner on the post of Professor and Associate Professor is arbitrary and illegal. The petitioner had the requisite qualification for the aforesaid posts.

Contrary to this, learned Government Advocate has submitted that the petitioner did not had requisite qualification for the post of Professor and Associate Professor. Hence, the petitioner has been given benefit under Time Bound Promotion, of the post of Associate Professor and Professor.

The petitioner has qualifications of M.B.B.S. and M.D. He passed the M.D. Examination in the year 1972 and thereafter petitioner was appointed on ad hoc basis as Lecturer in Neurology at M. Y. Hospital, Indore. Subsequently, the Public Service Commission advertised the post of Lecturer in Neurology, copy of the advertisement has been filed as Annexure P-13 along with rejoinder. As per the advertisement minimum qualification for the post of Lecturer in Neurology was D.M. (Neurology) or Specialty Board of Psychiatric and Neurology (U.S.A.) or M.D./M.R.C.P. in Medicine with two years special training. The petitioner applied for the aforesaid post, and he was appointed as Lecturer vide order dated 9-12-1980. When the petitioner was not given promotion on the post of Associate Professor, he filed an application before State Administrative Tribunal. The aforesaid application was registered as O.A. No. 812/95 and disposed of vide order dated 17-9-1998 with the following directions:

The respondents, in their return, have submitted that the post of Reader in Neurology department is not available at present the existing rules and they have recommended to create such post in the department to the State Government and the matter is in progress and also under consideration. It is a policy decision. The Tribunal or Court ordinarily should not direct to create such post. It is not in dispute that the applicant did not get time bound scale though, he becomes eligible to get such a higher scale on the same post for which he is working at present. The question of availability of post for granting such post does, therefore, not arise. The respondents must give him time bound scale if the applicant had become eligible for getting such scale under the rules on

completion of the prescribed period and on screening if he is found fit for promotion as provided under the rules.

With the said observation, the petition be and is hereby disposed of finally with the direction that the respondents shall take appropriate steps and peruse the matter for creation of the post as submitted by them. In the meantime, they shall give him time bound scale under the rules if the applicant deserves for such scale from the date when he became eligible for getting such scale. The exercise shall be completed within a period of six months from the date of communication of this order.

When the order of the Tribunal was not complied with, petitioner filed a contempt petition. Thereafter vide order dated 4-12-2001 the petitioner was promoted as Associate Professor under Time Bound Scheme. It was mentioned in the order that petitioner would not be entitled for regular promotion on the post of Professor until and unless he would complete the requisite qualification. It has also been mentioned in the order that the post of Associate Professor has been created in G. R. Medical College, Gwalior w.e.f. 1-1-1993. Subsequently the petitioner also given the benefit of Time Bound Promotion on the post of Professor vide order dated 24th September, 2003 w.e.f 1-1-2001.

As per Indian Medical Council of India the minimum qualification for the post of Professor in Neurology Department as per Regulations 1998 for the post of Professor is as under:

(A) Professor

D.M. (Neurology)

(i) As Reader/Associate Professor in Neurology for four years in a recognised medical college/teaching institution. Desirable

(ii) Minimum of four Research publications indexed in Index Medicus/national journal and one in International Journal

(B) Reader/ Associate Professor

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(i) As Assistant Professor/Lecturer in Neurology for two years in a recognised medical college/teaching institution. Desirable

(ii) Minimum of four Research Publications indexed in Index Medicus/national journals.

(C) Assistant Professor/ Lecturer

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Requisite recognized specialization qualification in the subject. Three years teaching experience in Neurology in a recognized Med. College as Resident/

Registrar/Demonstrator/ Tutor.

N.B.

M.R.C.P., M.R.C. (Path.), F.R.C.S., F.F.A.R.C.S., refer to the Diploma of Membership and Fellowship awarded by all the Royal Colleges of U.K., Prior to 11-11-1978.

Holders of Specialty Board of U.S.A. qualifications should complete the entire requirements of the Board concerned.

In the case of qualifications in higher specialties (M. Ch.D.M.), the holder should have also obtained M.D. (Gen. Medicine) or M.S. (Gen. Surgery) or an equivalent qualification as prescribed by the Council in its recommendations on Post-graduate Medical Education. This requirement may be relaxed in suitable cases in casts of conditions who have obtained M. Ch./D.M. after a direct 5 years course, which are recognized by the Council.

After 31st May, 1977, for all teaching appointments to posts higher than tutor in higher specialties i.e. Cardiology, Neurology, Thoracic- Surgery, Neuro-Surgery, Plastic-Surgery, Paediatric-Surgery, Urology, the candidates must possess post-graduate degree qualifications in the specialty concerned i.e. D.M./M. Ch. Approved by the Council from time to time. Where teachers with DM/M. Ch qualifications are not available in respect of the courses which have not yet been started, matter regarding relaxation of qualification and experience of Post-graduate teachers may be taken up with the Medical Council of India. Provided that the requirements of possessing a post-graduate degree qualification in the concerned higher specialty shall not be applicable for higher appointments in the case of existing teachers holding regular teaching posts whose appointment was initially made on the basis of two years special training in the speciality after the requisite M.D./M.S.

All British qualifications obtained after 11-11-1978 will cease to be recognized qualifications.

From January, 1985 all fresh entrants as teachers in medical college should have the requisite recognized Indian Post-graduate medical qualifications (recognized by the Medical Council of India).

The petitioner was appointed as Lecturer and the minimum qualification for the post of Lecturer when the petitioner was appointed in the year 1980 as per the advertisement of Public Service Commission was of the same as fixed by the Medical Council of India as mentioned above in the order. Petitioner passed M.D. Degree in the year 1972. He also completed the Specialty Training in Neurology faculty of G. R. Medical College, Gwalior. Neurology faculty in G. R. Medical College, Gwalior was established in 1973. As per certificates issued by Professor R. S. Dharkar dated 7th April, 1977, copy of which has been filed as Annexure P/16. The petitioner was working in upgraded specialty of Neurology at Gwalior since October, 1973 and performed the specialized investigative techniques

namely - Carotid Angiography, Pnemo-Encephalography and Myelography. Similar certificates have been issued by Professor R. L. Agarwal and other authorities, who were Heads of the Department. From the aforesaid certificates, it is clear that the petitioner had completed two years specialty training. In such circumstances, as per the qualification laid down by M.C.I, in proviso (4) quoted above, petitioner had qualification for the post of Associate Professor and Professor. The post of Professor in Neurology Faculty at G. R. Medical College, Gwalior is lying vacant since 1988, which is clear from the order passed by this Court in P.I.L., W. P. No. 455/2002. On the basis of affidavit filed by the Principal Secretary the Hon"ble Court noted as under:

Petitioner has filed this petition praying therein that the posts lying vacant in the department of Neurology and Neurosurgery be filled as per rules. Principal Secretary has informed the Court that posts of Professor of Neurology is lying vacant from the year 1988. Similarly, posts of Professor of Neurosurgery is also lying vacant from the year 2001. Other posts are also lying vacant in the department of Neurology and Neurosurgery. It is stated that those Assistant Professors who are eligible for promotion shall be considered for promotion by D.P.C. and orders will be issued for their promotion. As regards filling of the posts of Professor, qualifications and other conditions fixed by Medical Council of India is to be adhered to in filling the posts.

The post of Associate Professor was created in the year 1993, which is clear from the order Annexure P/5 dated 4-12-2001. In such circumstances, in my opinion, petitioner was entitled to be considered for regular promotion on the post of Associate Professor, Professor. Unfortunately, respondents have not considered the case of the petitioner, reasons best known to them. It is highly deplorable that in spite of having qualifications, petitioner has been denied the benefit.

The Hon"ble Supreme Court reported in State of Bihar and Another Vs. Ramesh Chandra and Another, , has held with regard to special training as under:

9. Even otherwise we find that Dr. Choudhary had received more than two years" training in Neurosurgery after obtaining the degree of MS and the High Court was, therefore, wrong in. holding otherwise. May be, because all the supporting material which has been placed before us by the Government and Dr. Choudhary in their respective appeals was not placed before the High Court and, therefore, the High Court held that the material placed before it was not sufficient to establish that Dr. Choudhary had received two years" special training in Neurosurgery. Apart from the assertions made earlier by Dr. Choudhary and the Government in that behalf, the material on record discloses that Neurosurgical Unit was established in Patna Medical College Hospital in May, 1975. One Dr. Verma was appointed as the Head of that unit and Dr. Choudhary was appointed as Resident Surgical Officer in that unit in December, 1976. The certificate issued by-. Dr. Verma further discloses that Dr. Choudhary had received intensive theoretical and practical training during his tenure of three years as Resident Surgical Officer and that during that period he had independently dealt with

Neurosurgical investigations and performed operations. The material also discloses that the Neurosurgical Unit had an independent Neuro Out-Patient Department, routine and emergency operation theaters and wards with facilities for critical cases. The operation register for the year 1976 of the Neurosurgical Unit shows that during that year as many as 67 major and 4 minor operations had been performed. The post of Resident Surgical Officer is a teaching post and Dr. Choudhary had continued on that post in that unit till his appointment as Assistant Professor on 5-2-1980. It is therefore, not correct to say that the training which Dr. Choudhary received as Resident Surgical Officer between 1976 and 1980 cannot be regarded as "special training" in Neurosurgery. The High Court was not right in taking the view that Neurosurgical Department did not exist in Patna Medical College Hospital during that period and that it came into existence only after 1980. What the High Court has failed to appreciate is that though the Neurosurgical Department was not an independent department prior to 1982 it was an independent unit having all the facilities for dealing with neurosurgical cases. Therefore, in view of the certificate issued by Dr. Verma, the Head of the Neurosurgical Unit and the other material on record we hold that Dr. Choudhary did not have "special training" in Neurosurgery for two years.

From the aforesaid judgment, it is clear that the petitioner had completed two years specialty training. In such circumstances, in my opinion, petitioner would be entitled regular promotion on the post of Associate Professor and Professor.

Now, the main question is that what relief this Court can grant to the petitioner. It is clear that petitioner had been promoted as Associate Professor under Time Bound Scheme vide order dated 4-12-2001 w.e.f. 1-1-1993. In my opinion, it would be just and proper to hold that petitioner would be entitled to be treated as regularly promoted Associate Professor w.e.f. 1-1-1993 because the criteria for promotion is the same.

The Hon"ble Supreme Court has held as under with regard to grant of relief of promotion in Harigovind Yadav Vs. Rewa Sidhi Gramin Bank and Others, :

The next question that arises for consideration is the relief to be granted. The appellant was first considered for promotion during 1991 and was not promoted, by wrongly adopting the principle of merit-cum-seniority. The said procedure was found to be erroneous by the Single Judge, Division Bench and by this Court. The Bank was directed to consider the case of the appellant for promotion on the basis of seniority-cum-merit. Thereafter, in the contempt proceedings initiated by the appellant, the Bank undertook to comply with the order directing consideration of the appellant's case by the procedure of seniority-cum-merit. But the Bank, again by adopting the merit-cum-seniority method, failed to promote the appellant and promoted the third respondent. The procedure adopted by the Bank had been found to be faulty on three occasions by this Court and the High Court, one of which was in the case of the appellant himself. The appellant had been denied promotion for more than 16 years by repeatedly adopting such an erroneous procedure. In the circumstances, we do not think it

necessary to drive the appellant once again to face the process of selection for promotion. This Court in *Comptroller and Auditor General of India v. K. S. Jagannathan* observed thus: (SCC pp. 692-93, para 20)

There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the parties concerned, the Court may itself pass an order to give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

The petitioner was further promoted as Professor Time Bound vide order dated 24th September, 2003 w.e.f. 1-1-2001.

With regard to relief of professor the petitioner has been given the benefit of Time Bound Promotion of the post of Professor and he is discharging the same duties. In my opinion, it would be just and proper to direct the respondents to consider the case of the petitioner for the post of Professor and for other further benefits.

Consequently, petition of the petitioner is allowed. It is hereby directed that petitioner be treated as Associate Professor w.e.f. 1-1-1993 and he shall be considered accordingly for the post of Professor as per his entitlement. If petitioner be found fit, he be given all the consequential benefits including the benefit of salary and further promotion if the petitioner be found entitled after promotion on the post of Professor. Looking to the facts of the case, this is a fit case where cost has to be awarded to the petitioner. Hence, petitioner is also entitled a cost of Rs. 5000/- (Rs. Five Thousand) only. Let necessary orders be passed within three months from the date of receipt of certified copy of this order.

Petition allowed.