
(2015) 09 TP CK 0008
In the Tripura High Court
Case No : WP(C) 253 of 2008

Tapan Majumder

APPELLANT

Vs

The State of Tripura and Others

RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 09 TP CK 0008

Hon'ble Judges : Deepak Gupta, C.J

Bench : Single Bench

Advocate : Somik Deb, for the Appellant; P. Roy Barman, N. Majumder, S. Bhattacharji and K. Nath, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Deepak Gupta, C.J—By means of this writ petition, the petitioner has prayed for issuance of appropriate writ for quashing the notification dated 17.5.2008 whereby the State of Tripura upgraded the private respondent No. 5 from the post of Tutor in the Department of Microbiology, Agartala Government Medical College to the post of Assistant Professor in the scale of Rs. 10,000-325-15,200/-. The petitioner has also challenged the joining report given by the respondent No. 5.

2. The facts relevant for decision of this case are that on 20.12.2004 an advertisement was issued by the Director of Health Services for filling up the post of Assistant Professor/Lecturer in various subjects in the Agartala Medical College but we are only concerned with the subject of Microbiology. It would be pertinent to mention that in this advertisement there is no reference to the eligibility criteria. The fact of the matter is that the petitioner Dr. Tapan Majumder and the respondent No. 5 Dr. Arun Kr. Ghosh both appeared in the interview and it appears that Dr. Arun Kr. Ghosh was found the most suitable. However, the Government on the administrative side found that there was no need to fill up the post of Assistant Professor in various departments including

the Department of Microbiology and a decision was taken to only appoint the selected candidates as full time Tutors. Respondent No. 5 Dr. Arun Kr. Ghosh was also offered appointment as full time Tutor in the Department of Microbiology on 26.5.2005. He accepted the said offer and joined as Tutor on 28.5.2005.

3. Thereafter, another advertisement was issued on 01.12.2005 inviting applications for the posts of Professor/Associate Professor/Assistant Professor in various departments including the Department of Microbiology. In this advertisement, it was mentioned that the details would be available on the Government Website. Another advertisement in this regard was also issued on 03.4.2006. In this advertisement, amongst other posts applications were invited for filling up one post of Assistant Professor in the Department of Microbiology. In this advertisement issued in 2006, it was mentioned that the upper age limit for being appointed as Assistant Professor was 50 years. Respondent No. 5 Dr. Arun Kr. Ghosh had by then attained the age of 50 years and, therefore, was not eligible to be considered pursuant to this advertisement. He, however, did not challenge the advertisement. The petitioner Dr. Tapan Majumder applied for the post and was selected for the same vide notification dated 29.4.2006. After the petitioner was selected as Assistant Professor in the subject of Microbiology, respondent No. 5 Dr. Arun Kr. Ghosh filed WP(C) 221 of 2006 in which he prayed for quashing of the notification dated 29.4.2006 whereby Dr. Tapan Majumder had been offered the post of Assistant Professor in Microbiology and also prayed that he (Dr. Arun Kr. Ghosh) be appointed as Assistant Professor in Microbiology in the regular pay scale. The relevant prayers made by Dr. Arun Kr. Ghosh in WP(C) 221 of 2006 are as follows:-

"(iii) Issue Writ directing the Respondents and each of them to quash and set aside the Notification No. F.4(7-2)-AGMC/Academic/Faculty/2006/9706-25, dated 29/4/2006 so far the Respondent No. 3 is concerned forthwith and in no time;

(iv) Issue Writ directing the Respondent Nos. 1 and 2 to appoint the Petitioner in the post of the Assistant Professor in Microbiology on regular scale forthwith and in no time as per the select panel prepared in pursuance to the advertisement dated 20/11/2004 forthwith and in no time;

(v) Issue Writ prohibiting the Respondent Nos. 1 and 2 from allowing the Respondent No. 3 to act as the Assistant Professor in Microbiology any further and to fill up the vacancy in the post of the Assistant Professor in Microbiology till the Petitioner is appointed;"

4. This writ petition was contested by the State and the stand of the State in the said writ petition was that Dr. Arun Kr. Ghosh had no right to claim the post of Assistant Professor. It was stated that the State had the legislative competence to fix the maximum age limit of 50 years and since Dr. Arun Kr. Ghosh had crossed this age, he had no locus to challenge the appointment of Dr. Tapan Majumder. It was also urged that mere selection in the earlier writ did not give any right to Dr. Ghosh to be appointed. In fact, it was contended on behalf of the

State that the advertisement dated 20.12.2004 was not a proper advertisement since no eligibility criteria was prescribed therein. Relevant portion of the affidavit of the State in this regard reads as follows:-

"Suffice it to say that by the Advertisement dated 20.12.2004 (Annexure-3 to the writ petition) there was no eligibility prescribed and no appointment has been made pursuant to the said Advertisement; reasons whereof are stated hereinafter."

5. The stand of the State in the earlier writ petition is clearly reflected in para-3 which reads as follows:-

"3. The State respondents have within their legislative competence and within the prescribed contours of their constitutional right fixed the age limit for appointment to the posts of Assistant Professor in different disciplines and there is no impediment in such formulation of age prescription. The power has been exercised by the State respondents being within their legislative competence and no judicial review lies in such prescription. The petitioner has not also been able to show that such formulation is violative of any of the provisions of law. The State respondents have prescribed the age limit with reasons as are stated hereinafter. The State respondents state that the respondent No. 1 in exercise of its executive power has fixed the upper age limit fixing the age eligibility for applying the posts of Assistant Professor in Agartala Government Medical College and the said executive action is not repugnant to and does not contradict any of the legislative actions has as such all the force of legislation.

On issuance of the notification dated 02.04.2006 (Annexure-13 to the writ petition), the writ petitioner was eliminated from participating in the selection process. No proceeding having been brought by him, the presentation of the writ petition at a subsequent stage only in the month of May, 2006 ipso facto reflects the gross delay and laches attributable to the writ petitioner and hence, on this short premise, it is submitted that the writ petition is liable to be dismissed. It is submitted that it is trite that delay and laches in appropriate cases, impede the exercise of jurisdiction under Article 226 of the Constitution of India. In the instant case, gross delay and laches is manifest and therefore, the writ petition is liable to be dismissed.

At this stage, it is relevant to mention herein that although on an earlier occasion, an advertisement was issued for filling up the vacancy of Assistant Professor in Microbiology in Agartala Government Medical College, the said post was not filled up. Then another notification was issued on 29.11.2005 (Annexure-12 to the writ petition) whereby it was notified that the aforesaid post would be filled up. It is submitted that the writ petitioner did not lodge any challenge against the issuance of the said notification dated 28.11.2005. From a plain reading of this fact, it is manifest that the writ petitioner has accepted the adoption of fresh selection process for filling up the post of Assistant Professor in Microbiology in Agartala Government Medical College by the Executive

Government to be legal and valid and therefore, under the principles of estoppel of fact and acquiescence, the challenge made by the writ petitioner, as to the selection and appointment of the respondent No. 3, which admittedly, has been made pursuant to the notification dated 02.04.2006 (Annexure-13 to the writ petition), is unsustainable in law."

Dr. Tapan Majumder also contested the petition on various grounds.

6. Thereafter, a learned Single Judge of this Court vide judgment dated 27.6.2007 passed in WP(C) 221 of 2006 dismissed the writ petition. The relevant portion of the judgment reads as follows:-

"32. In view of the aforesaid analysis, I find force in the submissions of the learned counsel for the respondents. The State Government cannot be directed to appoint a person to a post only on the ground of inclusion of a candidate in the select panel list even if the petitioner might have been shown as successful in one selection process in reference to the advertisement dated 20-12-2004 more so, when the same select list was not acted upon and subsequently, in terms of different advertisement, the post of Assistant Professor, Microbiology was filled up. The State Government, in its wisdom, chose not to give effect to those selections in reference to the earlier advertisements except the selection in question which was conducted in reference to the advertisement dated 2-4-2006. Prescribing the age limit is not in derogation to the Medical Council of India Rules and when the petitioner was not even qualified and eligible as required under the advertisement dated 2-4-2006 and has not participated in the selection process in reference to the advertisement dated 2-4-2006 and, for the reasons best known to him, has also not challenged the said advertisement and he is only aggrieved by the outcome of the said selection and the appointment of respondent 3. Therefore, being a non-participant, without challenging the advertisement dated 2-4-2006, the petitioner has no locus standi to challenge the outcome of selection, whereby, the respondent No. 3 has already been appointed and started functioning. In view of the above discussions and observations, I do not find any force in the submissions of learned counsel for the petitioner."

7. Dr. Arun Kr. Ghosh filed Writ Appeal No. 61 of 2007 challenging this judgment. He thereafter filed C.M. Application 25 of 2008 in the Writ Appeal seeking permission to withdraw the writ appeal and the same was dismissed as withdrawn on 07.5.2008. Within a few days thereafter, i.e. on 17.5.2008 the State took a decision to upgrade Dr. Arun Kr. Ghosh and the notification dated 17.5.2008 reads as follows:-

"No. F.13(310)-HFW/81 (Sub-2008) Government of Tripura Health & Family Welfare Department

Dated, Agartala the 17th May 2008

NOTIFICATION

The Governor, Tripura is pleased to upgrade Dr. Arun Ghosh, Tutor, Department of Microbiology, Agartala Govt. Medical College to the post of Assistant Professor in the Scale of pay of Rs. 10,000-325-15,200/- plus admissible usual allowance along with Special Allowances in the Department of Microbiology, Agartala Govt. Medical College under the Health & Family Welfare Department, Govt. of Tripura with effect from 28-5-2005.

He will be given the financial benefit for this upgradation from the date of submission of Charge Report in G.F.R.-33.

His pay will be fixed as normal Rules.

By order of the Governor,

Sd/- (Illegible) (16.5.08) Under Secretary to the Government of Tripura."

8. It is this notification which is under challenge. It is, indeed, shocking that the State has taken a totally inconsistent stand in this case. Whereas earlier when Dr. Arun Kr. Ghosh had filed a writ petition, the State had opposed the petition tooth and nail but now the State in the counter affidavit filed to this petition has taken a stand which is totally contrary to the stand taken by the State in the earlier petition.

9. The State is supposed to be impartial while dealing with its employees. In case, the State had felt that injustice had been caused to Dr. Arun Kr. Ghosh, the State should have clearly come out with such a stand in the petition filed by Dr. Arun Kr. Ghosh. As pointed out above, the said petition was vehemently opposed by the State on various grounds. Now, the State has taken a summersault and has totally changed its stand. Earlier the stand of the State was that it was found that there was no need for appointing Assistant Professor in the Department of Microbiology but now the State has upgraded the post held by Dr. Arun Kr. Ghosh to the post of Assistant Professor. This is, indeed, a very shocking state of affairs. When Dr. Arun Kr. Ghosh had filed the writ petition, the State had filed the reply on the affidavit of Smti. Bina Basfore, Under Secretary to the Government of Tripura in the Department of Health and Family Welfare. Now in the present petition, the same Officer Dr. Bina Basfore has filed the affidavit taking a totally contradictory stand. This is highly improper conduct both of the officer and the State.

10. Even more shocking is the fact that by the impugned notification, the State has virtually set at naught the judgment passed by a learned Single Judge of this Court which had attained finality because the appeal filed by Dr. Arun Kr. Ghosh was withdrawn by him. One must keep in mind the fact that in that writ petition the petitioner had not only challenged the appointment of Dr. Tapan Majumder but had also prayed that he should be appointed as an Assistant Professor. This prayer was opposed and was rejected by the Court. Dr. Arun Kr. Ghosh had voluntarily accepted the post of Tutor and had not filed any writ petition at that time praying that he should be appointed as Assistant Professor. It is only after

Dr. Tapan Majumder was appointed as Assistant Professor that he filed the writ petition. That writ petition was dismissed and the judgment passed in the writ petition effectively decided all the issues raised. This Court cannot go into the correctness of that judgment because that has become final.

11. If the rule of law is to prevail in this country, then the executive has to obey the orders of the Court. The judgments passed by the Court cannot be set aside by executive fiat. I had called for the records of the case which shows rather disturbing factors. I have perused the file which contains the notings which has resulted in the notification dated 17.5.2008. It appears that after Dr. Arun Kr. Ghosh lost the case before the learned Single Judge and after he had filed the appeal, he submitted a representation to the then Principal Secretary, Health and Family Welfare praying that he be appointed as Assistant Professor (Microbiology). In sum and substance, this representation was just a copy of his writ petition which had already been dismissed by the Court. Comments of the Principal of the Agartala Government Medical College were called for and in his comments the Principal referred to the Para-32 of the judgment passed by the learned Single Judge of this Court in WP(C) 221 of 2006 and also mentioned that Dr. Arun Kr. Ghosh had filed an appeal against the said judgment which was pending. In the note dated 04.4.2008 of the Principal it is mentioned as follows:-

"2. What Dr. Arun Ghosh has mentioned in his representation is far from the truth.

3. It is fact that Dr. Arun Ghosh appeared in the Interview held on April 2005 and he topped the list but no appointment was issued to him like other toppers of the Dept. of Orthopaedics, Paediatrics, Community Medicine, Radiotherapy & PMR as no Asst. Prof. from these discipline were required at inception as per MCI guideline.

4. However, Dr. Ghosh was assigned in the post of Tutor in the Dept. of Microbiology as per decision of the Govt. for those candidates who qualified in the interview for the Asst. Prof. held on April 2005 but could not be appointed due to non requirement at inception as per MCI norms."

12. Another note was also submitted by the Principal, Agartala Government Medical College on 01.01.2008 and relevant portion of the same reads as follows:-

"2. In reference to Sl. No. 6 to 9 and 11 of the representation of Dr. Arun Ghosh, it may be mentioned that on the basis of performance of the candidates during the interview & academic achievements the Selection Committee recommended the names of some candidates for appointment to the post of Assistant Professor in various Deptt. As there was no requirement of Assistant Professor for the Department of Microbiology, Paediatrics, Orthopaedics, PMR, Community Medicine and Radiotherapy at "Inception", the H&FW Deptt., Govt. of Tripura did not consider the case of Assistant Professors in these departments. So, question of issuing offer of appointment to Dr. Arun Kr. Ghosh for the post of

Asstt. Prof., Microbiology did not arise. Moreover, it is to be mentioned here that none of the candidates in the aforesaid disciplines were given any offer of appointment.

3. In reference to Sl. No. 10 of the representation of Dr. Arun Ghosh, it may be mentioned that Dr. Ghosh, was offered a post of Tutor in the Dept. of Microbiology which was accepted by him without raising any objection.

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9. In reference to Sl. No. 23 of the representation of Dr. Arun Ghosh, it may be mentioned that as the post of Asstt. Prof. in the Dept. of Microbiology was not filled up as it was not required at inception as per MCI norms there was no other alternative but to hand over the charge of Dept. of Microbiology by Prof. (Mrs.) Rehana Begum, Prof. & Head during her leave period from 17th to 21st Oct 2005 and 6th to 9th Aug 2005 to Dr. Arun Ghosh the only Tutor in that Dept.

It may be mentioned here that Asstt. Prof. in the Dept. of Microbiology was appointed on 2nd May 2006 as per requirement in 1st Renewal Inspection by MCI which was held on 3rd & 4th May 2006.

10. In reference to Sl. No. 24 & 25 of the representation of Dr. Arun Ghosh, it may be mentioned that advertisement to the post of Professor/Assoc. Prof/Asstt. Prof. for different departments including Microbiology as per the requirement of MCI for the 1st Renewal Inspection 2006. It may be further mentioned that regarding maximum age limit clarification has already been given at para 5.

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12. Lastly it may be mentioned here that Dr. Arun Ghosh filed a Writ Petition in the Hon''ble Guwahati High Court vide WP(C) No. 221 of 2006 against the Government challenging the appointment of Dr. Tapan Majumder as Asstt. Prof. in the Dept. of Microbiology in AGMC and Hon''ble High Court issued the judgment on 27.6.2007 and the Writ Petition of Dr. Arun Ghosh was dismissed (copy of the Judgment was enclosed at Flag "F")."

13. It appears that Dr. Arun Kr. Ghosh met the then Principal Secretary, Health to the Government of Tripura and submitted that he would not contest the case in the High Court. Thereafter, the Principal Secretary, Health issued a detailed note dated 24.4.2008 recommending that Dr. Arun Kr. Ghosh may be upgraded from the post of Tutor to the post of Assistant Professor in the Department of Microbiology w.e.f. 28.5.2005. He was not to be given any financial benefit retrospectively. This note was approved. Surprisingly, in this note of the Principal Secretary, Health there is no discussion as to what is the effect of the judgment passed by the Court in the writ petition.

14. I am of the considered view that the order of the Principal Secretary, Health on the basis of which the notification was issued is totally illegal since the Principal Secretary did not make any reference to the judgment passed by the

learned Single Judge of the Court in WP(C) 221 of 2006 which had clearly decided the issue between the parties. The reliefs claimed by Dr. Ghosh were specifically rejected. The result was that Dr. Tapan Majumder would be senior to Dr. Ghosh. The Principal Secretary, Health virtually overturned the judgment of the learned Single Judge which he had no power to do and recommended that Dr. Arun Kr. Ghosh be upgraded as Assistant Professor from 28.5.2005, i.e. prior to the appointment of the petitioner Dr. Tapan Majumder. He has done this without even giving a hearing to Dr. Tapan Majumder. The rights of Dr. Tapan Majumder have been adversely affected. He has become junior to Dr. Arun Kr. Ghosh and he was not even given a hearing before passing an order which was totally adverse to him.

15. In view of the above discussion, the notification dated 17.5.2008 upgrading Sri Arun Kr. Ghosh as Assistant Professor is held to be totally illegal, contrary to the judgment passed by a learned Single Judge of this Court in WP(C) 221 of 2006 and also violative of the rules of natural justice and, therefore, the same is quashed and set aside with costs assessed at Rs. 20,000/- (rupees twenty thousand). Exemplary costs have been imposed because of the totally inconsistent stand of the State and in view of the fact that the State has virtually overturned the judgment of the learned Single Judge which it had no power to do. The State is directed to give all benefits to the petitioner in terms of this judgment within 3(three) months from today.

16. The writ petition is disposed of in the aforesaid terms.