

CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH

O.A.No.376/93

Wednesday, this the 26th day of October, 1994.

CORAM:

HON'BLE SHRI PV VENKATAKRISHNAN, ADMINISTRATIVE MEMBER

HON'BLE SHRI P SURYAPRAKASAM, JUDICIAL MEMBER

Dr M Sayed Mohammed Koya,  
Ayurvedic Physician,  
Primary Health Centre,  
Androth.

- Applicant

By Advocate M/s K Ramakumar, D Sreekumar & KM Beena

Vs.

1. Union of India represented by  
the Secretary,  
Ministry of Health & Family Welfare,  
Central Secretariat,  
New Delhi.

2. The Administrator,  
U.T. of Lakshadweep,  
Kavarathi.

3. The Director of Medical and  
Health Services,  
Secretariat, Kavarathi.

4. The Collector-cum-Development  
Commissioner,  
U.T. of Lakshadweep,  
Kavarathi.

5. Dr SS Mishra,  
Ayurvedic Physician,  
Indira Gandhi Hospital,  
U.T. of Lakshadweep,  
Kavarathi.

- Respondents

By Advocate Mr MVS Nampoothiry(for R.1 to 4)

By Advocate Mr MR Rajendran Nair(for R-5)

O R D E R

PV VENKATAKRISHNAN, ADMINISTRATIVE MEMBER

Applicant was initially appointed as Ayurvedic Physician on 30.7.1979 in the Directorate of Medical and Health Service of the Union Territory of Lakshadweep. According to a seniority list (A-1) dated 8.3.1990, applicant is shown as senior to the 5th respondent who entered service on 18.12.1982. While so, respondents proposed to constitute a Departmental Promotion Committee for promotion to

contd.

the post of Senior Ayurvedic Physician. Applicant alleges bias against the 4th respondent, Chairman of the DPC and states that 4th respondent would be showing undue favour to the 5th respondent. Applicant also alleges that "..hasty steps are being taking by the respondents to resettle the approved seniority list (A-1) at the instance of the 5th respondent under the guise that no confirmation has been granted to the applicant".

2. Applicant also states that he had been made permanent as early as on 26.1.1980 before the 5th respondent became permanent. However, no orders have been produced before us to substantiate his claim.

3. By interim order dated 2.5.1993 the Tribunal directed status quo as regards filling up the post of Senior Ayurvedic Physician. On 28.5.1993 the interim orders were modified and the respondents were directed to fill up the post of Senior Ayurvedic Physician, Lakshadweep making it clear that it will be provisional and subject to the outcome of the OA and that the appointment will not confer any right on the appointees and this may be specifically informed to the appointees.

4. On 15.7.1993 a notice (A-3) was issued stating that the seniority list of Ayurvedic Physician was proposed to be reviewed placing the 5th respondent above the applicant and asking the applicant to show cause why it should not be done. By order dated 2.11.1993 the Tribunal permitted the department to consider the matter on the objection filed by the applicant and take a final decision, but no action should be taken based on the outcome of the consideration aforesaid. Respondents passed orders on 2.12.1993 (A-6) revising the seniority as proposed and placing 5th respondent above applicant. On 28.6.1994 the Tribunal permitted amendment

of the OA adding a challenge to the orders of the respondents dated 2.12.1993 (A-6) revising the seniority list. On 30.6.1994, the Tribunal called for the letter of appointment issued to the applicant as the latter was material to see the terms and conditions of appointment beyond the period of probation, if any, mentioned in that letter. The Tribunal felt that this was all the more important because in the revised seniority list which has also been challenged by way of amendment, the column under confirmation is left blank in the case of the applicant while certain date is noted against the contesting respondent and the contesting respondent was also shown senior to the applicant while in the earlier seniority list, the applicant was senior to the contesting respondent. The appointment order has not been produced by the applicant. However, 5th respondent has produced the appointment order of the applicant dated 28.1.1980 (Annexure R5A) showing that applicant has been appointed on an officiating basis to a temporary post and that he would be on probation for a period of two years from the date of regular appointment which may be extended or curtailed at the discretion of the competent authority. The order also states that the confirmation will depend on the relative position of the officer in the overall seniority list and on the availability of clear vacancy. The order states further that failure to complete the period of probation to the satisfaction of the competent authority will render him liable to be discharged from service at any time without any notice and without assigning any reason. Fifth respondent has also produced an order dated 31.5.1980 (Annexure R5B) showing that the applicant was appointed temporarily with effect from the forenoon of 25.2.1980 and would be on probation for a period of two years with effect from the above date. That is the stage where the matter stands at present.

5. Applicant contends that it is well settled by various decisions of the Apex Court that confirmation should not be the basis

of seniority. Following such decisions, respondents have issued an order dated 4.11.1992 (A-5) delinking seniority from confirmation and citing the Supreme Court decision rendered in the case of Class II Direct Recruits Engineering Officers Association Vs State of Maharashtra, (1990) 13 ATC 348. According to this order seniority of a person regularly appointed to a post according to rules would be determined by the order of merit indicated at the time of initial appointment and not according to the date of his confirmation. However, the order states that it shall take effect from the date of issue and that seniority already determined according to the existing principles on the date of issue of the order would not be reopened even if in some cases seniority has already been challenged or is in dispute and it will continue to be determined on the basis of the principles already existing prior to the date of issue of the order.

6. It is the contention of the respondents that the seniority of respondent 5 being fixed from 27.12.1984, he would be governed by the earlier instructions and not by the order dated 4.11.1992. Respondent 5 would further argue that applicant has not even been declared as having completed his probation and the question of his seniority being fixed would not therefore arise, whereas respondent 5 has completed his probation on 27.12.1984 by order dated 13.2.1989 and he was confirmed with effect from the same date by order dated 25.2.1991. As such, according to respondent 5, the case of the applicant has no merit and since he is the only person in the cadre who has been confirmed, he should be considered for the promotion. The Secretary (Administration) in a note (A-6) states that:

"These orders are effective from the date of issue of the OM i.e. 4.11.1992. Dr Mishra has been confirmed with effect from 27.12.1984 i.e. with retrospective effect from the date of completion of probation as per orders of confirmation issued on

25.2.1991. As a matter of fact, the seniority list of Ayurvedic Physicians should have been revised consequent on the issuance of orders of confirmation on 25.2.1991. It has been ordered in para 4 of the OM that seniority already determined according to the existing principles on the date of issue of the above orders will not be reopened even if in some cases seniority has already been challenged or is in dispute and it will continue to be determined on the basis of the principles already existing prior to the date of issue of these orders. The accepted principle till the issue of latest orders on 4.11.1992 was that seniority follows confirmation. Hence the argument that the permanent Govt. servants shall take rank above the temporary officiating Government servants holds good till 4.11.1992. Dr Mishra's representation dated 26.8.1992 was received in office on 27.8.1992, which shows that he had put forth his claim prior to 4.11.1992. Thus the cause of action commenced well before 4.11.1992."

(Emphasis added)

The second respondent, Administrator, agreed with this note, dismissed the objection of the applicant and ordered the revision of the seniority list by which the revised seniority list dated 15.7.1993 became final.

7. It is seen from the above that the fixation of seniority of the 5th respondent based on his date of confirmation on 27.12.1984 cannot be faulted. That has been done in accordance with the rules. However, the question of inter se seniority between the applicant and 5th respondent is still left open. The contention of the respondents is that applicant is still on probation. It would, therefore, mean that applicant has been on probation for 14 years. Learned counsel for applicant relied on a decision of the Supreme Court in State of Punjab Vs Dharam Singh, AIR 1968 SC, 1210. In that case a Constitution Bench held at page 1212 that:

"Where, as in the present case, the service rules fix a certain period of time beyond which the

probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

(Emphasis added)

8. However, the order of appointment of the applicant (R-5A) while stating that the probation may be extended at the discretion of the competent authority, does not prescribe any maximum limit for such extension. We do not find from the pleadings whether in the case of the applicant the rules prescribed a maximum period beyond which probation cannot be continued. In the absence of this information, it will not be possible to apply the above decision cited by the applicant in this case. Even so, the fact is that the applicant has been allowed to continue for 14 years on probation.

In A-6, respondents state:

"He has never represented about continuance of this position and to get permanency for the reasons best known to him."

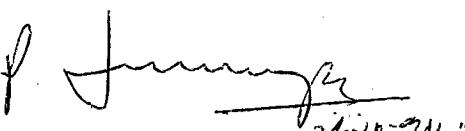
We cannot agree that this is a good reason for not confirming the applicant. Respondents have a duty to take a decision on the continuance of probation of the applicant, even if there is no request made by him. It appears from the reply of respondents 1 to 4 that the delay in confirmation was due to the currency of a penalty and an appeal to the President of India. But that appeal was disposed of long since. It would appear proper that respondents 1 to 4 should take a decision on the completion of probation and confirmation of

the applicant without further delay. After such a decision the seniority of the applicant will have to be determined either under the old rules or under the rule dated 4.11.1992 depending on the facts of the case.

9. We accordingly direct the second respondent to take a decision on the confirmation of the applicant and consequential fixation of his seniority within three months. The DPC for promotion to the post of Senior Physician shall be held only after this is done and the case of the applicant would have to be considered by the DPC based on the orders passed fixing his seniority.

10. Application is disposed of accordingly. No costs.

Dated the 26th October, 1994.

  
26-10-94  
P SURYAPRAKASAM  
JUDICIAL MEMBER

  
P VENKATAKRISHNAN  
ADMINISTRATIVE MEMBER

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