IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7249 OF 2024

Dr. Deelip Mhaisekar]
Age – 63 years,Working as Director,]
Medical Education and Research,]
Mumbai, Directorate of Medical]
Education and Research, Mumbai]
R/at Flat No.31, Sagar Building, 8th]
floor, Opposite Sydennum College,]
Churchgate, Mumbai.] … Petitioner.

V/s

1] Dr. Ajay Sahebrao Chandanwale]
Age – 62 years, Occ – Service]
R/at Flat no.401, Pride, Near Guru]
Ganesh Nagar, Kothrud, Pune – 38]
]
2] State of Maharashtra]
through Principal Secretary,]
Medical Education and Drugs]
Department, 9th Floor, New Mantralaya,]
GT hospital Premises, Lokmanya Tilak]
Road, Mumbai – 400001.] …. Respondents.

Mr. Ashutosh A. Kumbhakoni, Senior Adocate with Mr. Tejas D. Deshmukh, Mr. Sagar Kursija, Mr. Harishchandra D. Chavan, Mr. Anshuman Deshmukh, Mr. Sulgana Mohanty and Ms. Kshema Mauli, Advocates for the petitioner.

Mr. R. R. Shetty with Mr. Sandeep Dere, Ms. Divya Shetty & Ms. Aarti S. Dere for respondent No.1.

Mr. P. P. Kakade, Government Pleader with M.M. Pable, AGP for respondent No.2.

CORAM: A.S. CHANDURKAR & RAJESH S. PATIL, JJ.

Date on which the arguments were heard : 28th June, 2024
Date on which the judgment is delivered : 11th July, 2024.

JUDGMENT: (Per A. S. Chandurkar, J.)

1] Rule. Rule made returnable forthwith and heard learned counsel for the parties.

2] The challenge raised in this writ petition filed under Article 226 of the Constitution of India is to the judgment dated 07/05/2024 passed by the Maharashtra Administrative Tribunal (for short, "the Tribunal") in Original Application No.1226 of 2023. By that judgment, the Original Application preferred by the 1st respondent raising a challenge to the order dated 21/09/2023 divesting him of the additional charge of the post of Director, Directorate, Medical Education and Research – DMER and giving that additional charge in favour of the petitioner has been set aside.

3] Facts relevant for considering the challenge raised in the writ petition are that the post of Director – DMER was lying vacant for a

considerable period of time. The Recruitment Rules framed on 28/05/1973 were under re-consideration and were intended to be amended/revised. On the superannuation of the earlier Joint Director (Medical) – DMER on 30/06/2021, additional charge of the said post was given to the petitioner on 05/07/2021. It is the case of the petitioner that he was required to avail medical leave for some days from 14/07/2023. In view of this, the additional charge was directed to be handed over to the 1st respondent by an order dated 13/07/2023. After the petitioner re-joined at the end of his medical leave on 20/09/2023, another order was passed on 21/09/2023 by which the additional charge was taken back from the 1st respondent and was directed to be given to the petitioner. The 1st respondent being aggrieved by this order dated 21/09/2023 approached the Tribunal by filing Original Application No.1226 of 2023. The Tribunal after hearing all parties found that the order dated 05/07/2021 by which additional charge was directed to be given to the petitioner was itself not issued in accordance with requirements of the Circular dated 05/09/2018. On finding that the 1st respondent was senior to the petitioner, the Tribunal set aside the order dated 21/09/2023 and directed that additional charge of the post of Director, DMER be given by following

the procedure prescribed in the Circular dated 05/09/2018. Being aggrieved, the petitioner has challenged the aforesaid judgment.

4] Shri A. A. Kumbhakoni, learned Senior Advocate for the petitioner after referring to the relevant facts submitted that pursuant to the order dated 05/07/2021 the petitioner had been given additional charge of the post of Director, DMER. Though the name of the 1st respondent was also taken into consideration before passing the order dated 05/07/2021, he did not challenge that order by which the petitioner was given additional charge.. As a result, the petitioner continued to hold additional charge of the post of Director, DMER for a period of almost two years. It was only on account of medical exigency that the petitioner was required to proceed on medical leave. It was for this reason that the additional charge was given to the 1st respondent on 13/07/2023. On reporting back for duty, the additional charge was rightly restored to the petitioner. In absence of any such challenge being raised to the initial order dated 05/07/2021 by the 1st respondent, the Tribunal was not justified in examining the manner in which that order was passed. The Tribunal ought to have considered the fact that giving of additional charge to an officer would not amount

to a promotion nor would the grant of such additional charge create any legal right in such officer. Consequently, it could also not be treated as an order of reversion and hence there was no reason for the 1st respondent to be aggrieved by the order dated 21/09/2023. In this backdrop, the Tribunal ought not to have entertained challenge to that order. It was then submitted that during pendency of the Original Application, the Tribunal has stayed the order dated 21/09/2023 by passing an interim order. As a result, the petitioner continued to hold additional charge till the Original Application was decided. Even thereafter, the earlier interim order was continued till 22/05/2024. Thereafter, in the present writ petition an ad-interim order was passed as a result of which the petitioner continued to hold the additional charge of the post of Director, DMER. The petitioner was to superannuate on 31/07/2024 and hence it was submitted that for a short duration he may not be divested of the additional charge. To substantiate his contentions, the learned Senior Advocate placed reliance on the decsions in *Ramakant Shripad Sinai Advalpalkar vs. Union of India and others,* **1991 (Supp) (2) SCC 733** and in *State of Haryana vs. S.M. Sharma and others* **1993 Supp (3) SCC 252**. It was thus submitted that the relief sought by the petitioner be granted.

5] Per contra, Shri R.R. Shetty, learned counsel appearing for the 1st respondent opposed the writ petition. According to him, admittedly the 1st respondent was much senior to the petitioner and was rightly given additional charge of the post of Director, DMER on 13/07/2023. There was no justification whatsoever on the part of the State Government to have taken away that additional charge from the 1st respondent on 21/09/2023 and directed the same to be given to the petitioner. Inviting attention to the Circular dated 05/09/2018, it was submitted that it was necessary for the Department to have followed the directives issued therein if it was intended that additional charge should be given to the petitioner who was junior in service than the 1st respondent. Reasons were required to be recorded for by-passing the seniority of the 1st respondent. It was also urged that the order dated 13/07/2023 giving additional charge to the 1st respondent was not on the ground that the petitioner had gone on medical leave. The order did not refer to any such contingency and hence it was impermissible to read this contingency therein. There was no justification in divesting the 1st respondent of the additional charge and restoring the same in favour of the petitioner on 21/09/2023. It was also pointed out that

the 1st respondent was suffering from disability to the extent of 52% and merely on the ground that the same was being questioned, he could not be denied benefit of holding additional charge. The learned counsel placed reliance on the decision in *Shiv Kumar Sharma and another vs Union of India and others,* (1997) 11 SCC 112 to urge that the Tribunal was justified in granting relief to the 1st respondent. Since the Tribunal exercised jurisdiction vested in it in accordance with law, there was no reason to interfere in exercise of writ jurisdiction. It was thus submitted that the writ petition was liable to be dismissed.

6] Shri P. P. Kakade, learned Additional Government Pleader for the 2nd respondent referred to the affidavit-in-reply filed by the 2nd respondent before the Tribunal. According to him, considering the administrative exigencies, additional charge was given to the petitioner on 21/09/2023.

7] We have heard learned Counsel for the parties at length and with their assistance we have also perused the documentary material on record. The dispute raised in the present proceedings is with regard to the entitlement to hold additional charge of the post of Director, DMER.

It may at the outset be noted that conferring of additional charge is normally with a view to meet administrative exigencies and that by itself would not give any legal right either to seek grant of such additional charge or to raise a grievance that such additional charge is not given. Discharge of duties pursuant to grant of additional charge cannot be treated as promotion to the said post. It is on this premise that the challenge raised to the order passed by the Tribunal setting aside the order dated 21/09/2023 by which additional charge was directed to be given to the petitioner would have to be examined.

8] At the outset, it must be noted from the record that on 05/07/2021 the petitioner was given additional charge of the post of Director – DMER. The 2nd respondent did not raise any challenge whatsoever to the said order which is evident from his pleadings in para 6.6 of the Original Application preferred by him before the Tribunal. The 2nd respondent has merely referred to such additional charge being given to the petitioner on 05/07/2021 without raising any grievance in that regard. The petitioner continued to hold that additional charge for a period of more than two years till such additional charge was given to the 2nd respondent on 13/07/2023. In

our view, the 2nd respondent by his conduct of not challenging the order dated 05/07/2021 for a period of more than two years was estopped from making any grievance whatsoever about the same. By such conduct, the second respondent acquiesced to the fact that though he was senior in service, additional charge was given to the petitioner and not him. In this backdrop therefore Tribunal was not justified in examining the manner in which the order dated 05/07/2021 came to be passed. The Tribunal has, in fact, referred to the notings in the file maintained in that regard and has thereafter observed that guidelines issued in the Circular dated 05/09/2018 had not been followed. It is on this basis that it has proceeded to observe that putting the petitioner back to hold the additional charge would result in restoring the position as per the order dated 05/07/2021.

In paragraph 16 of the impugned judgment of the Tribunal, it is observed as under:

> "16……. Thereafter, a further decision to give Additional Charge to Respondent No.2, Dr. Dilip Mhaisekar as a successor of Dr. T. P. Lahane by superseding more than 20 persons was not challenged nearly for two years. However, it is challenged now by the

Applicant." (emphasis supplied)

We however find that such a challenge to the order dated 05/07/2021 is absent in the Original Application nor was it amended to raise any such challenge. Therefore, having regard to the conduct of the 2nd respondent in not protesting against the order dated 05/07/2021 and permitting that position to operate for a period of more than two years, the Tribunal was not justified in examining that aspect in the absence of any challenge to the same in the Original Application. In our view, by doing so the Tribunal has travelled beyond the pleadings and the scope of the Original Application.

9] Notwithstanding the aforesaid conduct of the 2nd respondent of accepting the order dated 05/07/2021 passed in favour of the petitioner and thus acquiescing to the said situation which the Tribunal failed to note, we find that there are other reasons for holding the impugned order unsustainable. The entire premise of the impugned order is failure on the part of the State Government to follow the procedure prescribed under the Circular dated 05/09/2018 while conferring additional charge to the petitioner on 21/09/2023. It is however seen from the record that even when such additional charge

was given to the 2nd respondent on 13/07/2023, the procedure prescribed under the Circular dated 05/09/2018 had not been followed. In paragraph 20 of the impugned order the Tribunal has noted that in the seniority list, the 2nd respondent was placed below one Dr. Vivek Pakmode. The name of the 2nd respondent was at serial no.2. A finding has been recorded that the note prepared and approval granted for handing over additional charge to the 2nd respondent on 13/07/2023 was without following the procedure under the Circular dated 05/09/2018. It is thus clear that on both occasions, namely on 13/07/2023 and thereafter on 21/09/2023 the Medical Education and Drugs Department did not follow the procedure prescribed by Circular dated 05/09/2018. On this premise therefore it cannot be said that the 2nd respondent is entitled to the benefit of the order dated 13/07/2023 granting him additional charge. If the order dated 21/09/2023 passed in favour of the petitioner is to be faulted for the reason that it was issued without considering the Circular dated 05/09/2018, then even the earlier order dated 13/07/2023 in favour of the 2nd respondent suffers from the same defect. The 2nd respondent therefore cannot be heard to say that the order dated 21/09/2023 was passed without complying with the Circular dated 05/09/2018 as he was placed in a

similar situation and was a beneficiary of an order passed without following the said Circular. The Tribunal however failed to notice this aspect while granting relief to the 2nd respondent.

10] In paragraph 19 of the impugned order passed by the Tribunal, it has considered the failure on the part of the Department in not initiating any departmental inquiry against the 2nd respondent notwithstanding the allegations of corruption against him. After observing that there was no satisfactory reason for the Department not to initiate any departmental proceedings against the 2nd respondent, it proceeded to observe that the 2nd respondent did not challenge the initial order dated 05/07/2021 passed in favour of the petitioner on account of political pressure and vindictive attitude, which it has referred to as his fear of being victimized. We are afraid that this conclusion has been drawn by the Tribunal without the 2nd respondent even pleading the same. In absence of any pleadings whatsoever, the 2nd respondent could not have been permitted to urge that in view of the likelihood of being victimized, he did not challenge the said order. The said finding recorded is without any pleadings.

11] We thus find that as the only challenge raised in the Original Application was to the order dated 21/09/2023 granting additional charge to the petitioner, the Tribunal was not justified in proceeding to examine the validity of the earlier order dated 05/07/2021 which was not under challenge by the 2nd respondent. In absence of any pleadings whatsoever for failure to challenge that order, the Tribunal ought not to have gone into that aspect. The 2nd respondent himself was a beneficiary of an order that was issued without following the Circular dated 05/09/2018. It is thus clear that the Tribunal committed an error in examining the validity of the order dated 05/07/2021 in the absence of any challenge to it. The impugned order is thus liable to be set aside.

12] It is seen that by the earlier order dated 05/07/2021 the petitioner was found eligible for being handed over the additional charge of the post of Director – DMER. He discharged the duties for a period of more than two years till the time he was required to avail medical leave. After the end of his medical leave, the order dated 21/09/2023 came to be passed giving him that additional charge from the 2nd respondent. It can be gathered from the circumstances on

record that in view of the non-availability of the petitioner on account of availing medical leave, the additional charge was given to the 2nd respondent only for the same to be restored to the petitioner on his re-joining on duty. By virtue of the interim orders passed in the Original Application, the petitioner continued to hold additional charge of the post of Director – DMER. The said interim order passed by the Tribunal has been subsequently continued in the present writ petition. The petitioner is to superannuate on 31/07/2024. Having found the impugned order passed by the Tribunal liable to be set aside for the reasons indicated infra, the petitioner is entitled to continue on the said post till his superannuation, subject to his suitability and satisfaction of the Department.

The other directions contained in Clauses (B) and (C) of the operative order passed by the Tribunal do not call for interference and the Medical Education and Drugs Department through its Principal Secretary shall take appropriate steps to comply with the same.

13] Hence, for aforesaid reasons, Clause (A) of the judgment of the Tribunal dated 07/05/2024 is set aside. The petitioner is entitled to

hold additional charge of the post of Director – DMER till he continues to be suitable to do so or till his superannuation, whichever is earlier. The Department of Medical Education and Research through its Principal Secretary shall take necessary steps to fill-in the post of Director – DMER on a substantive basis as directed by the Tribunal expeditiously and preferably within three months from today.

14] Rule is made absolute in the aforesaid terms with no order as to costs.

[RAJESH S. PATIL, J.] [A.S. CHANDURKAR, J.]