

Employees State Insurance ... vs Dr. Vinay Kumar on 18 May, 2022

Bench: K.M. Joseph, Hrishikesh Roy

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4150 OF 2022
(Arising out of SLP (C)No. 15749 of 2021)

EMPLOYEES STATE INSURANCE CORPORATION & ANR.

VERSUS

DR. VINAY KUMAR & ORS.

O R D E R

(1) Leave granted.

(2) On 01.03.2018, advertisements were issued for calling

for online applications to fill up among other posts, post of Associate Professor for the colleges run by the first appellant-corporation. In this case, we are concerned with the Dental College. However, on 21.03.2018, notice was issued to keep the recruitment process in abeyance in regard to the post of Associate Professor and Professor for administrative reasons, according to the appellant. Respondent No. 1 applied for the post of Associate Professor in Dentistry under the Scheduled Caste category at the ESIC Medical College, Bengaluru, by application dated 31.03.2018. Respondent NO. 4 came to be promoted on 12.07.2018 to the Reason: The first respondent filed OA No. 298 of 2019 on 08.03.2019 seeking directions to fill up the post of Associate CA NO. 4150 OF 2022 (@SLP (C)No. 15749/2021) Professor in terms of advertisement dated 01.03.2018. After setting up the pleadings, the Central Administrative Tribunal passed an order in favour of the first respondent. The appellants challenged the said order before the High Court and the High Court dismissed the writ petition for the reasons as follows:

“2. The facts of the case reveal that respondent No. 1 Dr. Vinay Kumar who is working as Assistant Professor in the department of Dentistry came up before the Central Administrative Tribunal claiming appointment to the post of Associate Professor. It was stated in the Original Application that the advertisement was issued by respondent Corporation – Annexure -A.8 dated 1.3.2018 inviting online application

for the post of Professor, Associate Professor and Assistant Professor for its 8 PGIMSR/Medical/Dental Colleges. The post of Dentistry was reserved for the Scheduled Caste candidate.

6. The learned counsel has drawn the attention of this Court towards the Employees State Insurance Corporation (Medical Teaching Faculty Post) Recruitment Regulations, 2015 and his contention is that, as per the schedule appended to the Recruitment Rules, the Department can resort to direct recruitment only if the post cannot be filled up by promotion.

The learned counsel for ESI Corporation has vehemently argued before this Court that Dr. Kamala has been promoted by order dated 12.3.2018 with effect from 19.4.2017, and therefore, no vacant post was available. The learned counsel has also categorically stated that promotion of Dr. Kamala was on account of Office Memorandum issued by Government of India, Ministry of Health and Family Welfare, CHS Division, dated 29th October, 2008, thereby she was given promotion under the scheme of Extension of Dynamic Assured Career Progression (DACP). This Court has carefully gone through the DACP Scheme. Paragraph 3 of the aforesaid Scheme reads as under:

“3. The above mentioned promotions under DACP Scheme will be made by this Ministry without linkage to vacancies. Other conditions for effecting promotions will be governed by the respective Recruitment Rules as amended from time to time and Department of Personnel and Training’s instructions in this regard.” CA NO. 4150 OF 2022 (@SLP (C)No. 15749/2021)

7. The aforesaid paragraph makes it clear that promotions under the DACP Scheme are made by the Ministry without linkage to the vacancies, meaning thereby she has been given promotion under the DACP Scheme and the post has to be treated as available, as the promotion of Dr. Kamala cannot be linked to the vacancy of Associate Professor.

8. In the light of the aforesaid, this Court does not find any reason to interfere with the order passed by the Central Administrative Tribunal, Bengaluru. If there are no promotional candidate is available in the department, it has to be treated as vacant post and as it was reserved for Scheduled Caste category, it has to be filled up only to a person belonging to Scheduled Caste. Resultantly, no case for interference is made out in the matter.” Thereafter, the High Court directed the appellants to have the process concluded positively within a period of 45 days from the date of the receipt of the copy of the order.

(3) We have heard learned counsel for the appellants and the learned counsel for the first respondent. (4) Learned counsel for the appellants would point out that the advertisement was issued on 01.03.2018 but it was put on hold on 21.03.2018. First respondent applied only on 31.03.2018 after the advertisement was put on hold. He would further point out that on account of certain developments which took place, there may really be no need to fill up the post of Associate

Professor and the first respondent may not have a right as such.

(5) Per contra, Shri Shailesh Madiyal, learned counsel for the first respondent took us through the order passed in the CA NO. 4150 OF 2022 (@SLP (C)No. 15749/2021) Tribunal. He would contend that the only case set up by the appellants was that direct recruitment could not be resorted to when there is somebody available for being promoted. But, in this case, the vacancy in question viz., the vacancy reserved for members of the Scheduled Caste community could not be said to be available for promotion by mere reason that it was filled up by promotion by reason of the fact that the fourth respondent was given the benefit of Dynamic Assured Career Progression (DACP). It is only a form of certain financial benefits and it is not vacancy based. In other words, the ground raised by the appellants for not proceeding with the procedure of direct recruitment is untenable.

(6) The cardinal principle we must bear in mind is that this is a case of direct recruitment. A candidate who has applied does not have a legal right to insist that the recruitment process set in motion be carried to its logical end. Even inclusion of a candidate in the select list may not clothe the candidate with such a right. This is, however, different, no doubt, from holding that the employer is free to act in an arbitrary manner. But, at the same time, in the first place, direction which is given by the High Court to conclude the recruitment within 45 days is clearly untenable. This is for the reason that, as noticed, the advertisement dated 01.03.2018 was put on hold on 21.03.2018 before the last date indicated for filing the CA NO. 4150 OF 2022 (@SLP (C)No. 15749/2021) application by advertisement dated 01.03.2018. As the very advertisement was put on hold, it is quite likely that any candidate who may have being desirous of applying, may not have applied being discouraged by the fact that the advertisement has been put on hold. Therefore, the direction to conclude the proceedings within 45 days is unsupportable.

(7) Question would arise as to whether the direction could be given to proceed with the recruitment process by giving peremptory direction to the appellant. Here again, we cannot be oblivious to the first principle which we have indicated viz., the absence of any legal right with the candidate who has merely made an application. At the same time, we do feel trammled by the fact that the case which is sought to be set up viz., that there may not be any need for filling up the post, was not as such set up before the High Court or the Tribunal. Such an attempt is being made before this Court. In such circumstances, we are of the view that a fair and time bound decision must be taken by the appellants not oblivious to the fact that persons have applied and they would also look forward to a fair treatment at the hands of the body like the appellant. Accordingly, we allow the appeal. We set aside the judgment and we direct the appellants to take a decision bearing in mind all relevant aspects within a period of two months from today and if it is decided to fill up the post in question, the needful CA NO. 4150 OF 2022 (@SLP (C)No. 15749/2021) shall be done within such time so that all interested parties may apply pursuant thereto.

We make it clear that the ground as such taken that since direct recruitment could be resorted to only if there is nobody to be promoted and the vacancy stands filled up by granting of benefits to the fourth respondent under the DACP, will not be available to the appellant. In other words, the vacancy as such would be treated is available for direct recruitment for scheduled castes. As to whether it should be filled up is of course another matter. The appeal is allowed as above.

....., J.

[K.M. JOSEPH], J.

[HRISHIKESH ROY] New Delhi;

May 18, 2022.

CA NO. 4150 OF 2022 (@SLP (C)No. 15749/2021) ITEM NO.6 COURT NO.9 SECTION IV-A S U P
R E M E C O U R T O F I N D I A RECORD OF PROCEEDINGS (Arising out of SLP (C)No.
15749/2021) (Arising out of impugned final judgment and order dated 01-02-2021 in WP No.
6872/2020 passed by the High Court of Karnataka at Bengaluru) EMPLOYEES STATE
INSURANCE CORPORATAION & ANR. Appellant(s) VERSUS DR. VINAY KUMAR & ORS.
Respondent(s) Date : 18-05-2022 This matter was called on for hearing today. CORAM :

HON'BLE MR. JUSTICE K.M. JOSEPH HON'BLE MR. JUSTICE HRISHIKESH ROY
For Appellant(s) Mr. Manoranjan Paikaray, Adv.

Mr. Tejaswi Kumar Pradhan, AOR For Respondent(s) Mr. Shailesh Madiyal, AOR
Ms. Neha Jain, Adv.

Mr. Pratik Samajpathi, Adv.

Mr. Rajan Parmar, Adv.

UPON hearing the counsel the Court made the following O R D E R Leave granted.

The appeal is allowed in terms of the signed order.

(NIDHI AHUJA)

AR-cum-PS

(RENU KAPOOR)

BRANCH OFFICER

[Signed order is placed on the file.]