

**IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL  
BIKASH BHAVAN, SALT LAKE CITY  
K O L K A T A – 7 0 0 0 9 1**

**Present :-**

**The Hon'ble Mrs. Urmita Datta (Sen)  
MEMBER (J)**

**-AND-**

**The Hon'ble Mr. P. Ramesh Kumar,  
MEMBER( A )**

**J U D G E M E N T**

**-of-**

**Case No. OA-277 of 2014)**

**Dr. Md. Yasin.....Applicant .**

**-Versus-**

**State of West Bengal & Others.....Respondents**

<b>For the Applicant</b>	<b>:-</b>	<b>Mr. P.K. Mukherjee, Mr. G.P. Banerjee, Mrs. P. Saha, Learned Advocates.</b>
<b>For the State Respondents</b>	<b>:-</b>	<b>Mrs. Sunita Agarwal, Learned Advocate.</b>
<b>For the A.G.W.B.</b>	<b>:</b>	<b>Mr. B. Mitra.</b>

**Judgement delivered on: 19<sup>th</sup> July, 2019**

**The Judgement of the Tribunal was delivered by :-  
Hon'ble Urmita Datta (Sen), Member (J).**

**OA-277 OF 2014)**  
**J U D G E M E N T**

The instant application has been filed praying for following relief:-

- a) Declaration that the applicant is entitled to full benefit of 30 years total service and also pensionary benefits of his 33 years “Qualifying Service” as Medical Officer (Ophthalmology) treating him in regular service, during the period from 18.03.1993 to 28.10.2004, when the State Respondents kept him illegally, arbitrarily, and in malafide out of service, pursuant to order of release dated 18.03.1993 and illegal, arbitrary and void order of transfer dated 17.03.1993 and on the face of the interim order dated 02.04.1993 passed by Calcutta High Court in CR No. 4610 (W) of 1993 and thereafter the order dated 11.04.2002 passed in TA-5 of 1999 till 28.10.2004 (Annexure P-7, P-8 respectively).
- b) Declaration that the respondents illegally, arbitrarily and malafide fixed 20 years”total service and qualifying service of the applicant, by way of reducing 13 years from qualifying service and 10 years from his total 30 years service, to which, he is lawfully entitled to.
- c) Declaration that the purported Notification No. HEALTH/MA/700/LAW/5C-20/99 dated 06.03.2008 of the Department of Health & Family Welfare, Govt. of West Bengal is arbitrary, malafide, and violative of principles of Natural justice. Declaration that the aforesaid Notification No. HEALTH/MA/700/LAW/5C-20/00 dated

06.03.2008 issued by Department of Health & Family Welfare, Govt. of West Bengal (Annexure P-12) purporting to grant unilaterally leave from 18.03.1998 to 16.03.1998 to the applicant without any application from the applicant, is illegal, arbitrary, malafide to cover up the misdeeds of the concerned State Respondents to keep the applicant unemployed pursuant to an illegal, arbitrary, malafide and void order of transfer dated 17.03.1993 and its subsequent release order on the face of the said interim order dated 02.04.1993 in CR 4610 (W) of 1993 passed by Calcutta High Court and subsequent order dated 11.04.2002 passed in TA 5 of 1999 passed by the Tribunal is malafide, illegal, arbitrary and not sustainable in law and consequently be declared void and quashed and the applicant is entitled to get full service benefit of this period and also qualifying service upon fresh calculation in respect of the above period.

- d) Declaration that the above Notification dated 06.03.2008 of Health & Family Welfare Department, Government of West Bengal Annexure(P-12) directing that 1345 days Extra Ordinary Leave from 11.07.1994 to 16.03.1998 and subsequent period from 17.03.1998 to 28.10.2004 (being treated illegal as “dies non”) have been eliminated from being counted for earned leave and half pay leave, is illegal, arbitrary, malafide and the applicant is entitled to get benefit of his service and qualifying service of this period upon fresh calculation and the said Notification dated 06.03.2008 being illegal, arbitrary, malafide be declared void and not sustainable in law.

- e) Order may be passed by the Hon'ble Tribunal, cancelling/setting aside the purported Notification No. HEALTH/MA/700/LAW/5C-20/99 dated 06.03.2008 of the Department of Health & Family Welfare, Govt. of West Bengal (Annexure P-12), and further directing the Respondent authority to recalculate and give the entire service benefit of 30 years service treating him in service from 18.03.1993 to 28.10.2004 and also full pensionary benefits treating him to be entitled to the benefit of full qualifying service of 33 years and to issue fresh order sanctioning such service benefits of the applicant for his 30 years' service and pensionary benefits for 33 years qualifying service with 15 % interest on 10 years service benefits and 13 years qualifying service from which the applicant has been continuously depriving in committing their tortuous activities by thrusting their wrong doing of depriving the weight age service book from 18.03.1993 to 28.10.2004 during which the applicant was not arbitrarily and illegally given employment.
- f) State of West Bengal and the concerned respondent authorities of the West Bengla Government in Health & Family Welfare Department, having failed to perform their duty to give appropriate postings in terms of the interim order dated 02.04.1993 passed in CR No. 4610(W) of 1993 by the Hon'ble Calcutta High Court and the order dated 11.04.2002 passed by the Hon'ble Tribunal in TA 5 of 1999 are liable compensate the applicant by way of payment damages in the form of interest as stated above.

- g) Pass an order directing the respondents to pay cost and incidentals to this application, as the Hon'ble Tribunal may deem fit proper.
- h) To pass such or further order or orders as the Hon'ble Tribunal may deem fit and proper.

As per the applicant, he being M.B.B.S., D.O. (M.S) (Cal) M.D in Ophthalmology was appointed on 02.09.1974 by Health & Family Welfare Department, Govt. of West Bengal temporarily as Medical Officer in the Cadre of West Bengal Health Services under West Bengal Health Services Cadre Pay & Allowances Rules, 1958. As per the P.S.C.'s recommendation dated 17.01.1977, his service was regularized w.e.f. 17.09.1974 vide order dated 18.04.1974 (P-2) with a special increment for his specialized category. Thereafter, he was posted on different places and was appointed in the post of Lecturer North Bengal Medical College & Hospital, Susrut Nagar and worked till 13.11.1989. Thereafter, he was transferred to N.R.S. Medical College & Hospital and promoted to the post of Assistant Professor at N.R.S. Medical College & Hospital on 04.02.1990.

In the meantime, West Bengal State Health Services Act, 1990 came into force, which consist of 1) West Bengal Medical Education Services 2) West Bengal Health Services and 3) State Health-cum-Administration. Subsequently West Bengal Health Services Rules, 1993, West Bengal Medical Education Services (Option) Rules, 1993, West Bengal Health Services (Pay & Allowance, Age of Superannuation & Pension) Rules, 1993 came into force. As there was certain formalities in the provision of the said West Bengal Health Services Act, 1990, the applicant could not exercise his option for West Bengal Medical Education Services though he was interested to exercise his right of option as per the West Bengal Medical Education Services (Option Rules), 1993. In this regard, the applicant made a representation dated 07.08.1990 to the respondents.

However, the applicant was suddenly transferred from the teaching post of Assistant Professor of N.R.S. Medical College & Hospital to the post of Medical Officer (Ophthalmology) at Islampur S.D. Hospital, Dakshin Dinajpur and was subsequently released vide order dated 18.07.1993. As per the applicant, in the said hospital there was no post of Medical Officer (Ophthalmology) as the only post of Ophthalmology was already occupied by Dr. Ashok Kumar Majumder. Being aggrieved with, he made representation to the Director of Health Services and Secretary, Health & Family Welfare Department asking for certain clarification of the order of transfer dated 17.03.1993 (An. P/5) as well as release order dated 18.03.1993. As the respondents did not responded his representation, the applicant filed one writ petition before the Hon'ble High Court, Calcutta in C.O. No. 4610 (W) 1993 and the High Court passed an interim order dated 02.04.1993 observing that the respondents would be free to transfer the petitioner to such a post according to his status, seniority and pay and to equivalent post that he is holding without prejudice and subject to the result of the writ petition.

However, the respondents failed to comply with such interim order and in this situation the applicant had to remain idle without any lawful vocation in the equivalent post or otherwise. The applicant again vide his letter dated 21.07.1995 requested the Director of Health Services to release his salary from April, 1993 and to give him a suitable posting as per the interim order passed by the Hon'ble High Court dated 02.04.1993. Assistant Director of Health Services, however, asked the applicant to report pursuant to the said order at Islampur S.D. Hospital as Ophthalmologist and thereafter the petitioner prays for release of his salary.

In the meantime the said writ petition was transferred from High Court to this Tribunal under TA-5 of 1999, which was

ultimately disposed of by judgement dated 11.04.2002 by way of setting aside the transfer order dated 17.03.1993 with a liberty to the respondents to transfer him afresh taking into consideration his seniority and pay to any equivalent post which he was holding at the relevant time. It was further directed that the applicant shall have the right to exercise his option to educational services and if the petitioner so exercise his option, the authority concerned has to consider the same in accordance with rules and post him to the suitable post of West Bengal Medical Education Services within three months from the date of his representation. It was also observed that the authority concerned shall regularize the services of the applicant in accordance with rules and to pay the arrear salary within three months. However, as the respondents did not comply with the said order, the applicant filed one contempt petition being No. CCP-18 of 2003 and which was finally disposed of vide order dated 14.03.2008. (Annexure -P/10). As in the meantime, the applicant retired from service on 01.11.2004, the A.G.W.B. was asked to process the payment of C.V.P. as well as regular pension (Annexure-P/10).

The contempt proceeding was heard and complied with also. On 21.06.2010, the Director of Health Services wrote a letter to the A.G.(A & E), W.B requesting him for revision of pension of the petitioner in view of the regularization of his adhoc period and alleged non practicing period towards calculation of the pensionary benefit.

However, as per the applicant, the respondents had wrongly and illegally given the twenty years qualifying service thus the applicant is getting lesser pension otherwise he would be entitled to full pension after granting benefit of thirty three years of service. It has been further submitted that from the perusal of his service book (Annexure P-12) in terms of the Notification dated 06.03.2008, his leave period has been treated in the following way :-

As per the applicant though this Tribunal directed the respondents to regularize the absence period as per rules after quashing impugned transfer order and the applicant had retired in the meantime in the year 2004, however, the respondents while calculating the pensionary benefits had wrongly calculate the qualifying service as twenty years for which he is getting less pension. Being aggrieved with, he has filed the instant application.

The respondents have filed their written statement wherein they have stated that as the Tribunal had directed to regularize the absence period as per rules, the respondents had rightly regularize the period of absence of 1875 days from his leave account and his pension was calculated accordingly. Further, as there was clear cut off date for preference of option and the applicant had given his option beyond the cut off date, therefore, his option for West Bengal Medical Education Service could not be accepted. Therefore, as per the respondents, the applicant has been paid the correct pension treating his qualifying service as twenty years as he had not rendered any service from 18.03.1993 to 30.10.2004.

The applicant has filed his rejoinder and vehemently denied and disputed the contention made in the reply. It has been further submitted that though the Hon'ble High Court as well as Tribunal had directed the respondents to post him in a proper post according to his status but the respondents failed to post him in proper post, therefore, he could not join his service and ultimately he was forced to join.

We have heard both the parties and perused the records. It is noted that the applicant had initially challenged the transfer order before the Hon'ble High Court and the Hon'ble Court vide order dated 02.04.1993 had passed the following order :

*“Considering the submissions of the learned lawyers of both sides and as so and*



*agreed, it is directed that this be listed as contested application hence. Let the affidavit-in-opposition be filed within five weeks from this date; affidavit –in-reply within two weeks thereafter.*

*There will be an ad-interim order to this extent that the respondents will be free to transfer the petitioner but will post him according to his status, seniority and pay and to equivalent post that he is holding, without prejudice and subject to the result of the writ application.*

*It is made clear that if the petitioner challenges the West Bengal Health Service Rules, he is to refer the same before the Hon'ble Supreme Court for effectual and complete adjudication of the matter in dispute.*

*It is for the parties to ask for transfer of this case before the Apex Court for comprehensive disposal of the matter in dispute. “*

Subsequently the writ petition was transferred to this Tribunal and was finally disposed of vide order dated 11.04.2002 by way of setting aside the impugned transfer order dated 17.03.1993 by the following order :-

- 1. “That the impugned order of transfer so far it concerns to the petitioner is set aside. The respondent authority will be free to transfer him afresh taking into consideration his status, seniority and pay to any equivalent post he was holding at the relevant time.*

*As regards his retention in the WBMES. I am not in a position to pass any order as the petitioner did not exercise his option as required under the rules. In such peculiar circumstances as the instant case is I am inclined to hold that the petitioner shall have the right to exercise his option for Medical Educational Service, if the petitioner so exercises his option, the authority concern is to consider the same in accordance with the rules and to post him to the suitable post of WBMES within three months from the date of his representation in the light of observation made above. It is also made clear that the authority concern shall regularize the service of the petitioner in accordance with rules and to pay the arrear salary within the three months from the date of communication of the order/judgement.*

*The application is thus disposed of. In the circumstances, I pass no order as to the cost.”*

However, as the respondents did not complied with the order, the applicant approached this Tribunal in a contempt application being No. CCP-18 of 1997 and the Tribunal on 14.03.2008 had observed the following :-

*In the operative part of the judgement, there was reflection of four situations, such as :-*

*Firstly, impugned order of transfer, so far it relates to the present petitioner, was set aside with a direction to the Respondent to transfer him afresh taking into consideration his status, seniority, and pay to an equivalent post he was holding at the relevant time.*

*Second direction was there that the petitioner shall have the right to exercise his option for Medical Education Service. If the petitioner so exercises his option, the authority concerned is to consider the same in accordance with the rules and to post him to the suitable post or W.B.M.E.S. within 03 months from the date of his representation, in the light of observation made above.*

*Third direction was there to regularize the service of the petitioner in accordance with rules.*

*And the fourth direction was to pay the arrear salary within 03 months from the date of communication.”*

*The main grievance of the petitioner is to the effect that although he exercised option for being included in Medical Education Service, yet, ignoring the directing of the Tribunal, the same has not been accepted by the concerned authority, and in that, according to the petitioner, there was violation of the order passed by this Tribunal by over-stepping the jurisdiction.*

*Against such claim, however, it was contended on behalf of the State Respondents, that this Hon'ble Tribunal directed the concerned authority to consider the option of the petitioner in accordance with the rules, and according to them, in terms of the West Bengal Health Services Act, 1990, a cut-off date upon 21<sup>st</sup> March, 1992 has been fixed for exercising such option, and the said Act, has also provided that those who did not exercise option for Medical Education Service within the cut-off date, would be deemed as opted for West Bengal Health Services.*

*In this connection, it was further contended on their behalf that when there is a clear cut-off date fixed in the statute, the authority concerned has no right*

*or authority to disregard the same, until and unless the statute has been declared as ultra vires by the Court. So, in a given situation, the action of the concerned contemnor respondents in not accepting option exercised after the cut-off date by the petitioner, cannot be held to be a willful or deliberate violation so as to attract rigour of the provisions of the Contempt of Courts Act.*

*In this connection, they have placed their reliance on a judgement reported in 1996(1) C.L.J. at page 111, in the case of West Bengal Pensioners Association and Another Versus A. Gupta, Secretary to the Department of Finance, Government of West Bengal as also another Judgement of the Apex Court (2002)2 Supreme Court Cases 179 between the same parties, wherein the views regarding cut-off date taken by the Calcutta High Court were affirmed.*

*On the strength of the aforesaid decisions, it was forcefully contended on behalf of the contemnor respondents that for aforementioned reasons and specially for cut-off date fixed as last date for submission of option, which cannot also be said to be as arbitrary, the action taken by the contemnor respondents could not be said to be illegal, since there was direction to consider the same as per rule, and by any stretch of imagination, it cannot be said to be willful or deliberate violation of the order of the Tribunal.*

***That being the position, I am to accept the contention made on behalf of the contemnor respondents in this regard, and accordingly, I hold that even if there was direction to consider the same, but the consideration as made, cannot at all be said to be in violation of the order passed by this Tribunal in as much as, there was clear direction to consider the case of the petitioner as per rules. So, the claim of the***

***petitioner in this regard cannot at all be accepted. ....***

*Now despite taking a stand, as above, the contemnor respondents did not take any other effective steps for regularization of the service of the present petitioner in accordance with the extant rules, nor they have given any admissible benefits in favour of the present petitioner in terms of the order of the Tribunal. But it was submitted before me from the side of the contemnor respondents that his other retiral benefits excluding the aforementioned period would be released.*

*So, coming to the issue of compliance with regard to the aforesaid two direction, I find at least some violation of the order of this Tribunal has been made by the contemnor respondent in as much as regularization of the service of the petitioner has not been made as yet and the admissible salary even for admitted period has not been paid to the petitioner to show their bonafides. I could have accepted the stand of the contemnor respondents provided from the side of the contemnor respondents, those admissible benefits as per their own calculation, have been paid to the petitioner within the specified period or little thereafter, but the same having not been done by the contemnor respondents as yet, I am prompted to take a view that there has been deliberate violation at least in respect of those two counts, i.e. regularization of the service, and the payment of the arrear salary. So, I hold and find that the concerned contemnor respondents are guilty of violation of order passed by this Tribunal, for which, they are liable to be punished under Contempt of Courts Act.*

*Now, coming to the question of punishment for Contempt of Court, it may be indicated that in consideration of the nature and gravity of the violation, I am of the clear opinion that ends of justice would be sub-served if last opportunity is granted to the contemnor respondents to comply with the order of this Tribunal so far as it relates to the regularization and the payment of arrear salary, together with other admissible benefits as per the order of the Tribunal within a period of six weeks from the date of communication of this order, failing to do the same, appropriate order of punishment would be inflicted on the contemnor respondents, and accordingly, I direct both of them to file aforesaid compliance report positively within six weeks from the date of communication of this order.”*

However, the contempt petition was finally disposed of with following observation:-

“In view of this compliance report, we do not want to keep this contempt application pending any longer and we shall drop the contempt proceeding at this stage with liberty to the petitioner that in case of any difficulty in getting his pension and commuted value of pension, he may approach this Tribunal at any time. As office of A.G.W.B. is required to process the payment of C.V.P. and as we find that A.G.W.B. has already issued the C.V.P. and regular pension, we direct the petitioner to make inquiry at his bank for getting the benefit of those amounts.

With this we dispose of this application.”

It has further observed that though at the time of disposal of the contempt petition, the respondents had filed status report indicating the leave salary, leave encashment, group insurance etc. vide their status report dated 10.12.2008 (Annexure-P/11) as well as 20.01.2009 and have submitted that they have released admissible benefits. However, no details of payment of pension was submitted before the Tribunal as Tribunal has granted liberty to the applicant, thereafter the applicant has approached this Tribunal challenging the counting of his qualifying service as well as

pensionary benefits properly. However, it is noted that the applicant did not challenge the observation as made by the Tribunal while disposing of the contempt petition, therefore, he cannot challenge the same now.

In view of the above, we are not in a position to reconsider the same submission with regard to the other aforementioned issues except the issue related to pension. As the pension has to be fixed on the basis of the qualifying service, we have gone through the order of regularisation of the period of absence made in his service book (Annexure-P/12). From the perusal of the said regularisation order, it is noted that his period of absence was regularised in following way

1. In terms of notification No. Health/MA/700/Law/5C-20/99 dated 06.03.2008 granted the following leaves :

- (i) E.L. 120 days from 18.03.1993 to 15.07.1993 under Rule 169 of WBSR-I.
- (ii) HPL – 360 days from 16.07.1993 to 10.07.1994 under Rule 173 of WBSR-I
- (iii) E.O.L - 1345 days from 11.07.1994 to 16.03.1998 under Rule 175 of WBSR-I.

2. In terms of notification No. Health/MA/700/Law/5C-20/99 dated 06.03.2008 the leaves as follow have been granted :-

- (i) E.L. – 120 days 18.03.1993 to 15.07.1993.
- (ii) H.P.L. – 360 days 16.07.1993 to 10.07.1994.
- (iii) E.O.L. – 1345 days 11.07.1994 to 16.03.1998.
- (iv) Dies Non – 11.07.1994 to 16.03.1998.

From the perusal of the aforesaid regularization, it is noted that his period of absence was regularized by granting E.L., H.P.L. & E.O.L. beyond the period of 18.03.1993 to 16.03.1998 and rest of the period i.e. 17.03.1998 to 28.10.2004 was treated as dies non. As per the settled law, the period of dies non may be treated for continuation of the service but cannot be treated as

qualifying service. As per the aforesaid admitted position of the respondents, in our considered view the period from 18.03.1993 to 16.03.1998 has to be considered as qualifying service for the purpose of pension except the period of dies non as mentioned above. However, the state respondents vide Memo dated 21.06.2010 addressed to the Principal Accountant General (A & E), West Bengal had stipulated the length of qualifying service as twenty years, which is not acceptable as per the admissible position of regularization of service by the respondents themselves.

Further, the Joint Secretary to the Govt. of West Bengal vide his Memo dated 22.12.2009 (Annexure-P/3) had conveyed approval of the Governor that the adhoc service from 17.09.1974 to 16.01.1977 followed by regular appointment in the West Bengal Health Service w.e.f. 17.01.1977, would also be counted towards his pensionary benefits. Therefore, while calculating the qualifying service for pension and other pensionary benefits, the total period of qualifying service would be from 17.09.1974 to 16.03.1998, thus total qualifying service for pension and pensionary benefits would be 23 years 06 months before the period of dies non.

Admittedly, the qualifying service of the applicant is beyond twenty years. Therefore, we direct the respondents to re-calculate the qualifying service as per the observation made herein above and to revise the pension and other pensionary benefits and make payment thereof within a period of eight weeks from the date of receipt of the order. Accordingly, OA is disposed of with the above observation and direction with no order as to costs.

**P. RAMESH KUMAR**  
**MEMBER (A)**

**URMITA DATTA(SEN)**  
**MEMBER (J)**