

K.S. Sunitha and anr. Vs. the State of Karnataka and ors.

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Court : Karnataka

Decided On : May-30-2005

Reported in : ILR2005KAR3194; 2005(6)KarLJ410

Judge : Abdul Nazeer, J.

Acts : Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 - Sections 2 and 14; [Karnataka Societies Registration Act, 1960](#); [Administrative Tribunals Act, 1985](#) - Sections 3, 15 and 19; [Constitution of India](#) - Articles 14, 16, 226, 227 and 309; Post Graduate Medical, Dental, Degree and Diploma Courses Rules, 2003 - Rules 8 and 15; Madhya Pradesh Medical and Dental Post-Graduate Admission (in-service) Rules, 2002 - Rule 2; Karnataka Civil Service Rules; Medical Council of India Regulations, 2000; Post Graduate Medical Education Regulation, 2000 - Regulation 9 and 9(1)

Appeal No. : Writ Petition Nos. 14437 and 14438/2005

Appellant : K.S. Sunitha and anr.

Respondent : The State of Karnataka and ors.

Advocate for Def. : B. Manohar, AGA for R1 and R4; ;N.K. Ramesh, Adv. for R-2, ;C.M. Nagabhushana and ;P.V. Chandrashekhar, Adv. for R-3 and ;Ashok Haranahalli, Adv. for R3

Advocate for Pet/Ap. : P.S. Rajagopal, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Abdul Nazeer, J.

1. Dr. K.S. Sunitha is the petitioner in WP No. 14437/2005 and Dr. A. Padmaja is the petitioner in WP No. 14438/2005. Both the petitioners are holders of MBBS Degree and they were appointed as Medical Officers by an order dated 25.7.1997 issued by the Government of Karnataka pursuant to selection made by the Karnataka Public Service Commission. They had joined the services of the State on 13.8.1997 and 14.8.1997 respectively. The petitioners participated in the Post-Graduate Entrance Test 2005 held on 6.2.2005. Dr. K.S. Sunitha secured 139 marks in the Entrance Test out of 200 marks while Dr. A. Padmaja secured 118 marks out of 200. Both of them appeared for the counselling on 21.4.2005. Dr. K.S. Sunitha was allotted Post-Graduate seat in MS. OBG though she wanted a seat in MD. Radiology. Dr. A. Padmaja secured a seat for the study of MD. Anesthesiology though her first choice was MS. OBG

2. It is the case of the petitioners that the respondent-authorities have made gross violation of the law declared by the Apex Court in State Of Madhyapradesh And Ors. v. Gopal D. Thirthani and Ors., AIR 2003 SC 1952 and the Medical Council of India Regulations while preparing the merit List for medical faculty for In-service candidates as per Annexure-E. It is contended that because of the violation of the law while preparing the merit List, the candidates who were ranked much below in the rank list prepared on the basis of entrance test were pushed to higher ranks. Therefore, the petitioners could not secure a seat in the speciality of their choice. Dr. K.S. Sunitha had contended that she has secured 4th rank in the entrance test conducted by the respondent University whereas the Dr. Mythreesha, the 3rd respondent had secured 133rd rank. However, in the revised rank list prepared on the day of counselling, she was pushed down to 6th rank and Dr. Mythreesha was pushed up to 3rd rank. Thus, Dr. Mythreesha secured a creamy and coveted seat in M.D. Radiology discipline. The petitioner had no other option but to opt for a

seat in M.S. OBG Similar is the plea of Dr. A. Padmaja, the petitioner in the connected writ petition. Therefore, the petitioners have filed these writ petitions for quashing the official memorandum bearing No. HFW 399 HSH 2005 issued by the first respondent (Annexure-F) in so far as it allots MD Course in the discipline of Radiology to the 3rd respondent at the 4th respondent-college in the first writ petition and allotment of seat in MS.OBG to 3rd and 4th respondents in the second writ petition at the 5th and 6th respondent-colleges respectively and for certain other reliefs.

3. The respondent-University has filed its objections. It is contended that the petitioners are in-service Doctors selected for the study of Post Graduate Degree Course for the academic year 2005-06 in the in-service quota. Since the petitioners are Government employees, they cannot maintain writ petitions. They have to approach the Karnataka Administrative Tribunal for suitable relief. It is further contended that the petitioners were informed well in advance the procedure for selection to the course and having participated in the selection process and having selected seats in the available discipline and joined the courses, they cannot now turn round and challenge the selection process. It is further contended that the selection process is completed by the University and at this belated stage they cannot find fault with the selection process. It is further contended that the University has adopted a uniform procedure for selection of the in-service candidates. The selection has been made as per the Government Order dated 18.1.2005. The selected candidates have already joined their courses and are pursuing their studies and that they are not parties to these proceedings.

4. The 3rd respondent in WP No. 14437/2005 has filed his objections. The main objection is with regard to acquiescence and estoppel by conduct. It is contended that the 3rd respondent has secured 3rd rank and the petitioner had secured 8th rank. He has opted for seat in MS. OBG and has joined the course on 29.4.2005 without any protest. The writ petition was filed on 13.5.2005. The 3rd respondent has joined the course on 25.4.2005. At this belated stage, the admission of the 3rd respondent cannot be annulled. The petition is liable to be rejected on the ground of delay and laches as also on the ground of acquiescence.

5. I have heard Sr. P. S. Rajagopal, the learned Counsel for the petitioners, Sri. C.M. Nagabhushana, Sri. Ashok haranahalli, Sri. N.K. Ramesh and Sri. B. Manohar, learned Counsel for respondents and perused the materials placed on record.

6. Learned Counsel for the petitioners submits that Dr. K.S. Sunitha, the petitioner in the 1st writ petition has secured 139 marks in the entrance examination and has secured 4th rank. The 3rd respondent Dr. Mythreesha was able to secure only 100 marks in the Entrance Examination and his rank was 133. The selection process for in-service candidates commenced on 21.4.2005. On that day, a fresh rank list was issued by the respondent-University wherein 50% of the marks obtained in the Entrance Test was taken into consideration along with the 50% of the marks obtained by the candidates in the MBBS Course and service weightage was added to the said marks and total was arrived at and on that basis rank list was prepared. The position in the connected writ petition is also more or less similar when compared to the inter-se ranking between the petitioners and respondents 3 and 4 therein. It is further submitted that the procedure adopted was not made known to the candidates in advance. The rank list thus made was not only contrary to the relevant MCI Regulations but also opposed to the decision of the Supreme Court in Gopal D. Thirthani's case (supra). It is further submitted that the University ought to have prepared the rank list in accordance with the MCI Regulations read with the decision of the Apex Court referred to above. It is further argued that taking into account the 50% of marks secured in MBBS Course is contrary to law. Had the rank list been prepared in accordance with the law declared by the Apex Court in Gopal D. Thirthani's case (supra), Dr. K.S. Sunitha would have secured 174 marks and Dr. Mythreesha would have secured only 160 marks. Thus, the petitioners on the basis of better ranking was entitled for allotment of a seat in more creamy and coveted discipline. Similar argument was advanced by the learned Counsel in Dr. A. Padmaja's case.

7. In reply, learned Counsel for the respondents argued that the petitioners were aware of the procedure adopted by the University for the purpose of selection of in-service candidates for the study of Post Graduate Course which is clear from the Notification dated 18.1.2005 (Annexure-B). It is pointed out that the aspirants

for Post-Graduate seat amongst in-service candidates were made known the mode and procedure of preparation of the merit list. The petitioners have not chosen to challenge the said Government Order in time. Secondly, it is argued that having appeared in the counselling and opted the seats of their choice, paid the fees and joined the course without any protest, the petitioners cannot challenge the selection process. The petitions are not only belated but are required to be rejected on the ground of acquiescence. It is further argued that since the petitioners are Government servants, they have to approach the Karnataka Administrative Tribunal for redressal of their grievances. The University as also the State Government have justified the preparation of the merit list as per Annexure-E.

8. In the light of the rival contentions of the learned counsel for the parties, the points for consideration in these writ petitions are as under;

i) Whether the rank list prepared by the respondent -University as per Annexure-E is in accordance with law?

ii) Whether the writ petitions are maintainable.

iii) Whether the petitions are liable to be rejected on the ground of acquiescence or estopped by conduct.

Re. Point No. (i)

9. The Apex Court in Gopal D. Thirtharni's case (supra) has held that the State Government is competent to set apart certain percentage of educational seats at Post Graduate level exclusively for in-service candidates. To the extent of seats set apart, there is a separate and exclusive source of entry or channel for admission. It is not reservation. In-service candidates and the candidates not in the service of the State Government are the two classes based on an intelligible differentia. There is clearly a perceptible reasonable nexus between the classification and the object sought to be achieved.

10. On the basis of the aforesaid decision, a Government Order dated 18.1.2005 (Annexure-B) was issued providing the rules, procedure and pattern for the

conduct of Post Graduate Entrance Test, 2005 for in-service candidates. Clause 5 of the Government Order provides for preparation of rank list in respect of in-service candidates. The norms prescribed in Clause (5)(d)(i) of Brochure of the Rajiv Gandhi University of Health Sciences for Post Graduate Entrance Test for admission to Post Graduate Medical, Dental, Degree and Diploma Courses, was to be followed for preparing merit list. The said clause is as follows;

'Separate rank list in respect of in-service candidates may be published. The norms prescribed in Clause 5(d)(i) of the brochure for PGET-2005 for admission to medical PG Degree and Diploma Courses and Dental P. G Degree Courses of the RGUHS shall be followed inasmuch as merit list is prepared first on the basis of the individual cumulative performance at the first, second and third MBBS/BDS examinations (50% weightage) and the marks obtained in the Entrance Test (50% weightage). The second merit list will be prepared on the basis of the individual cumulative performance at first, second and third MBBS/BDS Examinations.'

11. The University before issuance of the Government Order had already issued a Brochure for the Post-Graduate Medical, Dental, Degree and Diploma Courses in Government Quota and Government seats in Colleges within the State of Karnataka. The Brochure provides for determination of merit, publication of results and provisions of re-totalling amongst others. Clause 5(d)(i) of the said Brochure provides for preparation of the merit list, which is as follows.

'd) Determination of Merit, publication of Results and Provision of retotalling:

i) Merit lists are prepared for Medical Candidates as hereunder:-First on the basis of marks obtained in Entrance Test-The minimum percentage of marks for eligibility for admission is 50% for General merit candidates and 40% for candidates belonging to SC, ST and OBC. Out of the remaining candidates a second, merit list will be prepared on the basis of the individual cumulative performance at the first, second and third MBBS examination (50% weightage) and the marks obtained in the Entrance Test (50% weightage). The minimum percentage of combined weightage marks for admission will be 50% for all candidates. Then, out of candidates still left, a third merit list will be prepared on the basis of the individual cumulative performance at the first, second and third

MBBS examinations, if such examinations have been passed from RGUHS.'

12. The conduct of Entrance Test for admission to Post-Graduate Medical, Dental, Degree and Diploma Courses is regulated by the Karnataka Conduct of Entrance Test for admission to Post Graduate Medical, Dental, Degree and Diploma Courses Rules 2003. The said rules have been made in Exercise of powers conferred under Section 14 of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, Section 2(g) of the said Rules defines in-service candidates as follows:

'2(g) 'In-service candidate' means, persons belonging to the Health and Family Welfare Services, the Karnataka Medical Education Services, Employees' State Insurance (Medical) services, Mahanagara Palike Services, Boards and Corporations Services and autonomous Medical Institutions registered under the Karnataka Societies Registration Act 1960 including the persons deputed from such services to any other foreign services.

13. Rule 8 of the said Rules Provides for constitution of Selection Committee for in-service candidates for admission to Post Graduate Medical, Dental, Degree and Diploma Courses. Rule 15 of the said rules states that the selected candidates shall get themselves admitted to the colleges concerned within the dates notified by the Selection Committee, failing which their selection shall stand automatically cancelled.

14. As noticed above, the University has prepared the rank list as per Annexure-D on the basis of the marks secured in the Entrance Test. The Government Order dated 18.1.2005 provided for award of service weightage to contract Doctors. The award of service weightage to contract Doctors was challenged before this Court in the case of Dr. T. Pratap and Ors. v. State of Karnataka and Ors., ILR 2005 Kar. 2628. This Court by order dated 21.4.2005 declared that service weightage of four marks for every completed one year of service on contract basis granted to the contract Doctors during their contractual period of service is illegal and unenforceable.

15. The Karnataka Administrative Tribunal by an interim order dated 20.4.2005 passed in Dr. Kalpana v. Chief Secretary, Government of Karnataka and Ors., Application No. 1669/2005 directed the University to hold counselling only for those students who have secured 50% and above in the Post Graduate Entrance Test in terms of the Post Graduate Medical Education Regulation, 2000 of the MCI and the Government Order dated 18.1.2005.

16. It is the case of the University that taking note of the aforesaid orders, it prepared the rank list as per Annexure-E on 21.4.2005. The ranks assigned to the petitioner and the 3rd respondent in the first writ petition in the two rank lists illustrates one instance of the disparity between two rank lists. The ranks of the petitioner and the 3rd respondent on the basis of entrance examination is as follows:

Rank	Reg.No.	Name	of	the	Candidate	PGET	Marks
Category							
0004	MMO377	SUNITHA K.S	139	GM(petitioner)	005133	0133	MB3995
MYTHREESHA			100			GM(respondent-3)	

The rank list prepared in terms of the Government Order dated 18.1.2005 on the day of counselling is as follows:-

Reg.No.	Name	of the	50%	50%	Ser	Total	Cat	Candidate	PGET	MBBS
WTG										
MB3995	MYTHREESHA	25.0	+	31.937	+	60	=	116.937	GM(respondents.3)	00040005000600070008
MM0377	SUNITHA K.S	34.8	+	31.180	+	35	=	100.930	GM(petitioner)	00090010

17. The Post Graduate Medical Education Regulation 2000 framed by the Medical Council of India provides for eligibility criteria for selection of Post Graduate students amongst others. Regulation (9) of the aforesaid Regulation is as under:

'9. Selection of Post-Graduate Students

(1) Students for post-graduate medical courses shall be selected strictly on the basis of their academic merit.

For determining the academic merit, the University/Institution may adopt any one of the following procedures both for degree and diploma course:

(i) On the basis of merit as determined by a competitive test conducted by the State Government or by the competitive authority appointed by the State Government or by the University/group of Universities in the same State:

(ii) On the basis of the merit as determined by centralised test held at the National level or (in) On the basis of the individual cumulative performance at the first second and third MBBS examinations, if such examinations have been passed from the same University: or (iv) Combination of (i) and (iii)

Provided that whatever entrance test for postgraduate/admissions is held by a State Government or a University or any other authorised examining body., the minimum percentage of marks for eligibility for admission to Post-Graduate medical course shall be fifty per cent for all the candidates;

Provided further that in non-Governmental institutions fifty per cent of the total seats shall be filled by the competent authority and the remaining fifty-percent by the management of the institution on the basis of merit'.

18. It is well settled that MCI Regulations are mandatory in nature In Dr. Preethi Srivastava v. State of Madhya Pradesh and Ors., : AIR 1999 SC2894 . In Gopal D. Thirthani's case (supra), the Apex Court has held that when there is only one University in a State, the standard of assessment can reasonably be assumed to have been the same for assessing the academic merit of the students passing from that university. When there are more universities than one in a State, the standards of different Universities and their assessment methods cannot obviously be uniform and may differ. It would be futile to assess the comparative merit of individual performances by reference to Clause (iii). It has been held as follows:

'Clearly the State of Madhya Pradesh was not justified in holding and conducting a separate entrance test for in-service candidates. Nor could it have devised a formula by combining Clause (i) and (iii) of Regulation 9(1) by resorting to Clause(iv). Recourse can be had to Clause (iii) when there is only one University. Where there is only one University in one stage, the standard of assessment can reasonably be assumed to have been the same for assessing the academic merit of the students passing from that University. When there are more Universities than one in a Stage, the standards of different Universities and their assessment methods cannot obviously be uniform and may differ. Then it would be futile to assess the comparative merit of individual performances by reference to Clause (iii). The High Court is therefore right in its opinion that in the State of Madhya Pradesh, where five Universities exist, the method of evaluation contemplated by Clause (iii) is not available either in substitution of or in addition to Clause (i). The candidates qualified at the pre-post Graduate or entrance test held in common for in-service and open category candidates, would then be divided into two separate merit lists to be prepared for the two categories and merit inter-se of the successful candidates shall be available to be assessed separately in the two respective categories.'

(emphasis supplied)

19. The 1st rank list was prepared on the basis of the Entrance Test Examination. Then second rank list was prepared after taking into account 50% of the marks secured in entrance test and on the basis of the individual cumulative performance at the first, second and third MBBS examination (50% weightage) and adding service weightage. It is not in dispute that all the in-service candidates have not passed from the same University. The formula devised by the University while preparing the merit list is contrary to law in as much as combining Clause (i) and (iii) of Regulation 9(1) by resorting to Clause (iv). Recourse can be had to Clause (iii) when all the candidates have secured their MBBS degree from the same University Thus the merit list (Annexure-E) is contrary to the law declared by the Apex Court in Gopal D. thirthani's Case.

20. There is yet another aspect of the matter, which requires consideration. In Gopal D. Thirthani's case (supra), the rules called 'Madhya Pradesh Medical and Dental Post-Graduate Admission (in-service) Rules 2002. Came up for consideration amongst others. Rule (2) of the said rules provided for award of weightage of marks for the purpose of selection of in-service candidates. 30% of the marks was awarded on the basis of individual performance at the first, second and third MBBS examination. 30% of the marks were given on the basis of length of service in the rural and tribal areas and balance of 40% on the basis of written examination. In so far as award of marks on the basis of length of rural and tribal areas is concerned, there was no specific challenge on the quantum of weightage. The court has held that while re-casting and re-framing the rules, the State Government shall take care to see that weightage assigned is reasonable and is worked out on a rational basis. The Court declared as follows:

'4. It is permissible to assign a reasonable weightage for service rendered in rural/tribal areas by in-service candidates for the purpose of determining inter se merit within the class of in-service candidates who have qualified in the Pre-PG test by securing the minimum qualifying marks as prescribed by the Medical Council of India.'

(Emphasis Supplied)

21. In the present case, service weightage up to maximum 60 marks was given, out of the total 160 marks. As held earlier, award of weightage on the basis of the performance at MBBS examination is not permissible as the candidates are not from one University. A reading of the Government Order dated 18.1.2005 makes it clear that it has been made for the academic year 2005-2006, pending amendment of the existing rules namely 'Karnataka Conduct of Entrance Test for Admission to Post Graduate Medical and Degree and Diploma Courses Rules 2003.' For the reasons stated above, I hold that the rank list prepared by the University as per Annexure-E is contrary to law. State Government/University will have to see that the weightage assigned is reasonable and on a rational basis. Point No. (1) is answered accordingly.

Re. Point No. (ii)

22. The Administrative Tribunals Act. 1985 provides for the adjudication or trial by Administrative Tribunal of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority and for matters connected therewith or incidental thereto. Section 15 of the Act deals with the jurisdiction, powers and authority of State Administrative Tribunals. The Administrative Tribunal for a State is empowered to exercise the jurisdiction, powers and authority in relation to recruitment and matters concerning recruitment to any civil service of the State or to any civil post under the State and all service matters concerning a person appointed to any civil service of the State or any post under the State and pertaining to the service of such person in connection with the affairs of the State or of any local or other authority under the control of the State Government or of any corporation owned or controlled by the State Government as provided in the said Section. 'Service matters' has been defined in Sub-section(q) of Section 3, as follows:

'Service matters', in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or, as the case may be, of any corporation (or society) owned or controlled by the Government, as respects:

- i) remuneration (including allowances), pension and other retirement benefits;
- ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;
- iii) leave of any kind;
- iv) disciplinary matters; or
- v) any other matter whatsoever.'

'Service rules as to redressal of grievances' in relation to any matter means the rules, regulations, orders or other instruments or arrangements as in force for the

time being with respect to redressal, otherwise than under this Act, of any grievances in relation to such matters.

23. In *L. Chandra Kumar v. Union of India and Ors.*, : [1997]228ITR725(SC) a 7 Judge Constitution Bench of the Apex Court has held that the power of judicial review over legislative action vested in the High Court under Article 226 of the [Constitution of India](#) as an integral and essential feature of the Constitution constituting part of its basic structure. It has been further held that the power vested in the High Court to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. At paragraph 93, it has been held that the Tribunals will, however, continue to act as the only Court of first instance in respect of the areas of law for which they have been constituted, and that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations except the question regarding the virus of the parent statutes. Therefore, in all service matters, the Tribunal alone has jurisdiction, power and authority in relation to recruitment and all matters concerning recruitment in civil services of the State and all service matters concerning a person appointed to any civil services of the State. The aggrieved person has to make an application under Section 14 of the Act to the Administrative Tribunal constituted under the Act for the redressal of his grievance.

24. The definition of 'in-service candidates' as provided in Karnataka Conduct of Entrance Test for admission to PG Medical and Dental Degree and Diploma Courses Rules 2003 includes not only the persons belonging to health and family welfare services but also the persons belonging to Medical Education services, Employees of State Insurance (Medical Services) Mahanagar palike Services and certain other Boards and Corporation Services and autonomous Medical Institutions under the [Karnataka Societies Registration Act, 1960](#) including the persons from any other service. The aggrieved person in this petition is a person belonging to health and family services.

25. It is not in dispute that the conditions of service of a civil servant may be prescribed either as per the rules framed under the Proviso to Article 309 of the

[Constitution of India](#) or under the executive power of the State. The Karnataka Civil Service Rules provides for deputation for training or study within India. It does not provide for the selection of in-service candidates for the study of Post Graduate course in Medicine. The Government order dated 18.1.2005 provides the rules of procedure and the pattern for the conduct of PGET-2005 for admission to Post Graduate Medical and Dental Degree and Diploma course for In-service candidates. The Rules framed under Section 14(i) of the Capitation Fee Act (Annexure-A) also provides certain procedure for selection of in-service candidates for admission to Post Graduate Medical and Dental Courses. The question is whether the conditions prescribed in the Government Order of the rules referred to above is a condition of service in connection with the affairs of the State?

26. The expression 'condition of service' is of wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc. However, any matter connected with service will not be a condition of service e.g., promotion is a condition of service, mere chance of promotion is not a condition of service. Whether or not any particular rule is a condition of service and creates a right is a matter to be decided in each case. In *State of Maharashtra v. Chandrakanth*, AIR 1981 SCI 990 the Hon'ble Supreme Court has held as follows:

'Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not.'

27. In *State of Punjab and Ors. v. Kailash Nath* the, : 1989 CriLJ813 Apex Court has stated the purview of the terms 'conditions of service' as follows:-

' In the normal course what falls within the purview of the term 'Conditions of service' may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay scale, leave, provident fund, gratuity, confirmation, promotion, seniority, tenure or termination of service, compulsory or premature retirement, superannuation, pension changing the age of

superannuation, deputation and disciplinary proceedings.'

28. In *Dr. Duriyodhan Sahu and Ors. v. Jithendra Kumar Mishra and Ors.*, : (1998)IILLJ 1013 SC after considering the decision of the Apex Court in *L. Chandra Kumar (Supra)* it has been held that the powers of the High Court under Article 226 and 227 of the [Constitution of India](#) are not taken away by the Administrative Tribunal Act. The Apex Court has upheld the decision of the Orissa Administrative Tribunal in *Amitarani Khuntia v. State of Orissa*, (1996)1 OLR (CSR) 2 wherein it was held that a private citizen or a stranger having no existing right to any post and not intrinsically concerned with any service matters is not entitled to approach the Tribunal.

29. In *Secretary, Central Board of Direct Taxes and Ors. v. B. Shyam Sundar*, : AIR 2001 SC3288 the Apex Court has held that 'Service matters' include remuneration 'including allowances, pension and other retirement benefits'. The reward amount being ex-gratis payment, it is difficult to treat it as remuneration and it is not a service matter.

30. At this State, learned Counsel for the petitioners has placed reliance on an interim order of the Tribunal dated 29.4.2005 in Application No. 3426/2005, wherein the Tribunal has refused to grant an interim order in a similar matter. The writ petition filed challenging the said order in WP No. 14299/2005 is pending. It is evident from the interim order referred above that there is no consideration as to the maintainability of the application before the Tribunal.

31. From the discussion made above, it is clear that allotment of a Post Graduate seat to an in-service candidate is not made a part of the Karnataka Civil Service Rules. An in-service candidate has a chance to secure a seat for higher studies. He cannot claim a seat as a matter of right. It is not intrinsically connected with conditions of service. I am of the view that petitioner's entitlement to a seat for Post-Graduate course as in-service candidate is not a condition of service. Therefore the writ petitioners filed by the petitioners are maintainable. Point No/(ii) is accordingly answered.

Re.Point No. (iii)

32. It is not in dispute that the counselling for in-service candidates was taken up on 21.4.2005 and the merit list as per Annexure-E was prepared before the commencement of the counselling. Dr. K.S. Sunitha has opted for a seat in MS. OBG speciality at Bangalore Medical College, Bangalore. She has paid the fees at the said College on 29.4.2005. Likewise Dr. A. Padmaja has opted for a seat in MS (Anaesthesia) and she was initially allotted to JJM Medical College, Davanagere. She has appeared for re-counseling on 25.5.2005 and has opted to join Kempe Gowda Institute of Medical Sciences, Bangalore in the specialty selected by her earlier. Paragraph-5 of the Government Order dated 18/1/2005 extracted above gives a clear indication as to the procedure to be followed for selection. The petitioners have not challenged the aforesaid Government Order though issued on 18/1/2005. They have appeared for the Entrance Test knowing fully well the procedure prescribed for selection of in-service candidates. Likewise, the private respondents in both the writ petitions have also selected the seats in the counselling. They have paid the fees and it is stated at the Bar that they have been prosecuting their studies. Likewise, other in-service candidates who have selected the seats in the counselling have joined the colleges concerned. The petitioners have filed these writ petitions on 13.5.2005. At this stage even if the 3rd respondent has to be displaced from the seat secured by him, he is not in a position to select any other seat as the counselling has come to an end. It is submitted by the learned Counsel for the 3rd respondent that the 3rd respondent is not interested in pursuing MS. OBG course. If the petitioners had challenged the Government Order in time and if the rank list was set right, the 3rd respondent and other similarly situated students had the opportunity to opt for a course of their choice out of the available seats at the time of their counselling. Learned Counsel for the 3rd respondent submits that the 3rd respondents would have at least opted for MS Surgery course or MD General Medicine and not MS OBG.

33. The Apex Court in *Mridul Dhar (Minor) and Anr. v. Union of India and Ors.*, : AIR 2005 SC666 has fixed the time schedule for admission to Post Graduate and super speciality courses. As per the time schedule, first round counselling should be over by 25th April 2005 and the last date for joining the allotted college and the course is 1st May 2005. The last date up to which the students can be admitted due to the vacancies that may arise, is on 31st May 2005.

34. Placing reliance on the decision of the Apex Court in *Rajkumar and Ors. v. Shakthiraj and Ors.*, : AIR 1997 SC2110 and *Mohanlal Agarwal and Ors. v. Bhuvaneshwari Prasad Mishra and Ors.*, 2002(2) LLJ 463 learned counsel for the petitioners submits that when the State Government has committed glaring illegalities while preparing the rank list as per Annexure-E the principles of estopped by conduct or acquiescence is not applicable. He has relied on a decision of this Court in *Dr. T. Pratap v. State of Karnataka* (supra) for the similar proposition. These are the cases where time was too short between declaration of policy and the selection process. The candidates has no other option but to participate in the selection process. In the present case, Government Order is dated 18.1.2005 indicating the norms prescribed for preparation of merit list. Merit list was prepared on 21.4.2005. The process of selection was completed on 25.4.2005 and writ petitions were filed on 13.5.2005. Hence, these decisions are not applicable to the facts of the present case.

35. Placing reliance on a decision of the Apex Court in *General Manger, South Central Railway, Secunderabad and Anr. v. A.V.R. Siddhantti and Ors.*, AIR 1974 SCC 335 he submits that since the relief claimed is against the State Government and University with regard to preparation of a rank list, the other candidates are not necessary parties to the writ petitions. It is submitted that the candidates who are going to be directly effected have been made parties, hi this decision some of the railway employees challenged the administrative rules of general application regulating absorption in permanent departments, fixation of seniority, pay etc. The policy decisions were impeached on the ground of there being violative of Articles 14 and 16 of the Constitution. The list or order fixing seniority was challenged. In the present case selection is Challenged by the petitioner. Further, if the petitioners were to succeed, re-adjustment is not possible. The candidates who are going to be displaced from the allotted seats should be allowed to choose the available seats which is not possible due to time schedule. Hence, this decision is not applicable to the present case.

36. On the other hand, learned counsel for the respondents have relied on several decisions of the Apex Court and of this Courts in support of their contentions. In *Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.*, AIR 1989 SC 1043 the

petitioner had appeared for the examination without protest. He filed the petition only when he had realised that he would not succeed in the examination. The respondent-candidates were not responsible for the conduct of the examination. In the circumstances, the Apex court has held that the petitioner is not entitled for any relief. The relevant passage is as follows;

'Moreover, this is a case where the petitioner in the writ petition should not have been granted any relief. He had appeared for the examination without protest. He file the petitioner only after he had perhaps realised that he would not succeed in the Examination. The High Court itself has observed that the setting aside of the results of examinations held in the other districts would cause hardship to the candidates who had appeared there. The same yardstick should have been applied to the candidates in the District of Kanpur also. They were not responsible for the conduct of the examination.'

37. In Chandra Prakah Tiwari and Ors. v. Shakuntala Shukla and Ors., : [2002]3SCR948 it has been held that even if the doctrine of estoppel by conduct is not be applicable, that does not bar the contention as regards the right to challenge an appointment upon participation at the interview/selection. When a candidate appears at the examination without protest and he subsequently found not successful in the examination, the question of entertaining a petition challenging the said examination would not arise.

38. In Uma M.G. @ Uma V. Shivapur v. High Court of Karnataka and Anr., ILR 2002 Kar 1251 the petitioner was an aspirant for the post of District Judge. He sought for a declaration that the method adopted for disqualifying for interview on the basis of minimum prescribed marks for passing in the written test is bad in law. This Court observed that the petitioner accepted the written examination and 50% minimum requirement of marks for the viva-voce examination. Having accepted the position, it is not open for him to contend contra in the writ proceeding.

39. In State of Kerala v. W.I. Services & States Limited and Ors., : AIR 1999 SC562 the Apex Court was considering a case of selection of a project for allotment of liquid fuel linkage for their Independent Power Projects (IPPs). The case of respondent No. 1 was not recommended to the Central Government.

Respondent No. 1 filed a writ petition, without impleading the other applicants whose IPPs have been selected for recommendation. The Court held that the writ petition is not maintainable in the absence of the applicants who have been selected as parties. It is held as follows;

'...In view of the said affidavit filed on behalf of respondent 4, we have to proceed on the basis that the liquid fuel quota that has been allotted to the State of Kerala has already been allocated for the IPPs of the applicants which had been selected and in the event of its being selected respondent 1 would be displacing one of the applicants who has been selected. Since none of the applicants has been impleaded as a party to the writ petition, we are of the opinion that the learned Judges on the Division Bench of the High Court were in error in granting relief to respondent 1 in the said writ petition. We are in agreement with the judgment of the learned Single Judge in this regard.'

40. Placing reliance on the decision of the Apex Court in the case of State of Maharashtra and Ors. v. Prabhu, : (1995)ILLJ622SC learned Counsel strenuously argued that the petitioner as also the private respondents have selected the seats and have been pursuing their studies. At this stage they should not be disturbed from their respective colleges. This Court should not exercise discretionary power at this stage of the proceeding. In this decision the Court has held that despite the infirmities in the order, quashing the same would have been more harmful to the society. Therefore, the Apex Court has refused to interfere with the order of the authorities concerned in its discretionary jurisdiction.

41. It is needless to state that Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary. It is perfectly open for the Court exercising the flexible power to pass such order as public interest dictates and equity projects.

42. In the pleadings, petitioners have not alleged any malafides against any of the authorities concerned. Admittedly, the petitioners have joined the course and have been pursuing their studies. In so far as Dr. K.S. Sunitha is concerned she has joined the course on 29.4.2005 at Bangalore Medical College, Bangalore. Dr. A. Padmaja was allotted a seat at JJM Medical College, Davangere, at the first

instance. She had appeared for re-counseling on 25.5.2005 and has obtained a seat at Kempe Gowda Institute of Medical Sciences, Bangalore. The Government Order dated 18.1.2005 gives a clear indication as to the procedure that is going to be adopted for the purpose of the selection of in-service candidates for the study of Post Graduate Course. The petitioners have not challenged the same. Even after the allotment of the seats petitioners have paid the fees without any protest. Petitioners and the private respondents are in-service candidates and all of them have been allotted PG seats in one discipline or the other. Petitioners have not impleaded other selected candidates who may be displaced from the disciplines in which they are prosecuting their studies. If the select list is quashed at this stage, there is virtually no time left for re-counseling. Thus, it will be more harmful to all the selected candidates than remedying the situation. Having regard to the facts and circumstances of the case, I am of the view that the petitions are not only belated, but are also liable to be dismissed on the grounds of acquiescence and estoppel by conduct. In the totality, this is not a fit case for interference of the select list at this stage under Article 226 of the [Constitution of India](#).

43. Accordingly, these writ petitions are dismissed. I direct the State Government/University to prescribe the norms for the selection of in-service candidates for the study of Post Graduate Degree and Diploma courses in medicine in accordance with law and in the light of the observations made in the course of this order.