

(2010) 10 SC CK 0105

In the Supreme Court Of India

Case No : Civil Appeal No's. 5579-5586, 5587, 5588-5592 and 8498 of 2001
and Writ Petition (C) No. 566 of 2003

Challa Jaya Bhaskar and Others

APPELLANT

Vs

Thungathurthi Surender and Others

RESPONDENT

Date of Decision : 19-10-2010

Acts Referred:

Andhra Pradesh Medical and Health Services Special Rules, 1982 — Rule 7, 8
Constitution of India, 1950 — Article 309

Citation : (2011) 2 ALD 94 : (2010) 11 JT 633 : (2010) 13 SCC 348 : (2011) 1
SCC(L&S) 386

Hon'ble Judges : Mukundakam Sharma, J;Altamas kabir, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Altamas Kabir, J.—This batch of Civil Appeals arises out of a common judgment passed by the Andhra Pradesh High Court in a batch of Writ Petitions allowing the same and setting aside an order dated 10th March, 1998, passed by the Andhra Pradesh Administrative Tribunal in O.A. No. 3599 of 1995 and other connected matters and consequently setting aside G.O. Ms. No. 325 dated 15th June, 1999. In that view of the matter, these Civil Appeals have been taken up for hearing together along with Writ Petition (Civil) No. 566 of 2003.

2. The question to be decided in all the writ petitions was in regard to the procedure to be adopted in determining the seniority of Civil Assistant Surgeons in the Andhra Pradesh Medical & Health Services.

3. In order to appreciate the aforesaid question, it is necessary to set out the background in which the said question arose.

4. The Appellants and the Respondents are members of the Medical and Health Department in the State of Andhra Pradesh. The Appellants herein were promoted to the post of Associate Professors and Professors by virtue of an order

passed by the Tribunal, which was approved by the High Court and thereby attained finality. The present dispute concerns the methodology which has been adopted by the State Government for determining the seniority of those who were functioning as Civil Assistant Surgeons and, thereafter, opted for teaching and were appointed as Assistant Professors, which was the feeder post for further promotion to the post of Associate Professors and Professors in the Medical Services.

5. The Medical and Health Department in the State of Andhra Pradesh is governed by Special Rules framed under the proviso to Article 309 of the Constitution, which, as indicated hereinabove, are known as the A.P. Medical and Health Services Rules, hereinafter referred to as "the Health Services Rules". Without going into details of the said Rules, it will be sufficient for our purpose to consider the impact of the said Rules and Government Orders on the question of seniority of Civil Assistant Surgeons in the State Health Services.

6. As early as in 1976, the Government of Andhra Pradesh felt the need for separation of the teaching cadre in medical education. Accordingly, G.O.M. No. 1170 dated 16th December, 1976, was issued separating the teaching cadre from the non-teaching cadre and issuing executive instructions to implement the same. This was also felt to be necessary on account of the advice of the Medical Council of India, which otherwise threatened to de-recognize the medical certificates which had been granted to the students. Accordingly, the Special Rules were issued as mentioned hereinabove, by G.O.M. No. 43 dated 16th January, 1982.

7. Originally, there were no posts of Assistant Professors and only the post of Civil Assistant Surgeons (CAS) was used for teaching in the medical colleges. Among them, those Civil Assistant Surgeons who had acquired Post-Graduate qualifications were given the task of teaching in the teaching colleges. According to the Appellants herein, there was no watertight compartment between the teaching stream and non-teaching stream and whoever either had or subsequently acquired the Post-Graduate qualification was shifted to the teaching stream from the non-teaching stream. As this method was contrary to its Rules and Regulations, the Medical Council of India threatened to withdraw recognition to the medical colleges and subsequently the Rules were amended vide G.O.M. No. 182 dated 29th March, 1988. By virtue of such amendment, the said Rules were divided into three parts, of which the first part consists of only one Rule which provides that the service was to be divided into three branches, viz., Teaching cadre, Non-teaching cadre and Laboratories. Part II of the Special Rules prescribes separate rules for each of the three branches and Part III contains general and common provisions for all the three branches. One of the more important aspects of the amendment was that Rules 7 and 8 were deleted. Rule 7 provided for special training as an Assistant Professor for the purpose of promotion to higher post. Rule 8 dealt with the preparation of half-yearly panels. While in the earlier Rules, the post of Assistant Professor in each specialty was to

be filled up only by direct recruitment with persons having requisite qualifications, there was no provision for appointment by transfer from persons in the non-teaching cadre. Under the new Rules, the teaching and non-teaching cadres were separated. The posts of the teaching cadre were separately brought out in a new cadre strength designated as Assistant Professors, whereas non-teaching posts such as Civil Assistant Surgeons, Deputy Civil Surgeons and Civil Surgeons were separately categorized and the qualifications for these posts were also different and distinct. What is of significance is that no channel was provided for interchangeability between these two cadres.

8. It is in this background that vacancies arose to the posts of Associate Professors and Professors. As the Department was not implementing the Rules, various Original Applications were filed before the Andhra Pradesh Administrative Tribunal, which were disposed of on 28th April, 2003, with directions to the Departments to strictly follow the Rules issued under G.O.M. No. 154 dated 4th May, 2002. However, there were certain deviations which resulted in Civil Assistant Surgeons also being made part of the teaching cadre, thereby making such persons eligible to be promoted as Associate Professors and, thereafter, to the post of Professors. It is this issue which is at the centre of controversy in all these matters and which has given rise to various questions relating to the main issue as to whether persons who had joined earlier as CAS, with only M.B.B.S. qualifications, and could not be appointed as Assistant Professors since they did not have Post-Graduate qualifications, and were subsequently appointed as Assistant Professors after attaining such qualifications, would be entitled to seniority over others who had already been appointed as Assistant Professors earlier. In other words, would those CAS with only M.B.B.S. qualification be given seniority over those appointed as Assistant Professors from CAS, who already had Post-Graduate qualification, but were appointed after those CAS with only M.B.B.S. qualification?

9. It is the case of the Appellants that the teaching cadre constitutes a separate category for the purpose of appointment, seniority and promotion. It consists of an administrative post in Category I, such as Additional Director of Medical and Health Services and non-administrative post in Category II, such as Professors, Clinical and Non-clinical. According to the Appellants, the feeder category for the post of Professor is Deputy Civil Surgeon, since re-designated as Associate Professor, and in case Associate Professors were not available, Assistant Professors belonging to Category VII. The minimum qualification for appointment to the cadre of Assistant Professor is a Post-Graduate degree. The Appellants when they were appointed as Assistant Professors already had a Post-Graduate qualification and in view of the existing practice, those Civil Assistant Surgeons, who had Post-Graduate qualification were selected and appointed as Assistant Professors. It is the further case of the Appellants that they had all been appointed as Assistant Professors on various dates ranging between 1982 and 1995. It is during this period only that some of the Civil Assistant Surgeons, who did not have Post-Graduate qualification, got admission in the Post-Graduate

classes and completed their Post-Graduate courses during the years 1989 to 1995. The Appellants have mentioned that many of these CAS were students of the Appellants in the Post-Graduate degree course. After acquiring the Post-Graduate degree, the said Respondents became qualified and eligible to be appointed as Assistant Professors. Accordingly, they were appointed as Assistant Professors on different dates between 1989 and 1995.

10. It is also the case of the Appellants that in accordance with the Rules, after having completed five years of teaching as an Assistant Professor, a candidate who acquired the Post-Graduate qualification after his appointment as CAS, would become eligible for a further five years of teaching experience in the next category of Associate Professor, which would then make them eligible for higher promotion to the post of Professor. The Appellants have also tried to make out a case that according to the Rules, Deputy Civil Surgeons, presently re-designated as Associate Professors, and Assistant Professors, would have separate seniority in order of specialty. Accordingly, it is only the seniority in the category of Assistant Professors alone which is relevant for the purpose of promotion to the post of Professor.

11. In addition to the above, it has been contended that the said issue is no longer res integra and that it has been held by the Tribunal that in computing seniority in the category of Civil Assistant Surgeons, the period during which Civil Assistant Surgeons did not have a Post-Graduate degree, could not be taken into consideration for promotion to the post of Professor, since Civil Assistant Surgeons could not be appointed as Assistant Professors till they acquired the Post-Graduate qualification. Accordingly, not having functioned as Assistant Professor or Associate Professor after their appointment as CAS, the said period, prior to their acquisition of Post-Graduate qualification, could not be counted for the purpose of promotion to the post of Professor.

12. According to the Appellants, the High Court erred in counting the previous service of those Civil Assistant Surgeons, who had acquired their Post-Graduate degree subsequent to their entry into service as Civil Assistant Surgeons. Since for the purpose of promotion to the post of Associate Professor or Professor, a post-Graduate qualification was necessary, the period during which they had functioned as Civil Assistant Surgeons, without having obtained a Post-Graduate degree, could not logically be taken into consideration for computing seniority for elevation to the post of Professor.

13. Another point which has been taken on behalf of the Appellants is that without going before the Central Administrative Tribunal, the Petitioners in the Writ Petition could not have challenged the Government Order by filing a Writ Petition directly in the High Court. It has been canvassed that, in any event, without any formal order having been challenged, the proceedings before the Writ Court were not maintainable.

14. In support of the first contention regarding the counting of the period of

service as Civil Assistant Surgeons prior to having obtained the Post-Graduate degree for computing seniority, reliance was placed on a decision of this Court in *N. Suresh Nathan and another Vs. Union of India and others*, wherein, in similar circumstances, this Court held that diploma holder Junior Engineers, who had obtained degrees while in service, were not entitled to count their service prior to obtaining the degree for computing the period of three years for the purpose of promotion. It was also laid down that in interpreting Service Rules, a construction which is in keeping with long standing practice prevailing in the concerned Department is to be preferred. The same view was taken by a three-Judge Bench of this Court in *Shailendra Dania and Others Vs. S.P. Dubey and Others*, wherein it was reiterated that the reckoning of three years' experience required for promotion in the quota of Graduate Engineers, would be from the period when such degree was acquired irrespective of the number of years of service rendered as a diploma holder. The Appellants have, therefore, prayed for setting aside the said judgment and order of the High Court on the ground that the same had been delivered in contravention of the Medical Service Rules.

15. Mr. H.S. Gururaja Rao, learned Senior Advocate, who appeared for some of the respondents, submitted that the entire procedure adopted for recruitment to the post of Assistant Professors was contrary to the 1982 Rules which were promulgated under G.O. Ms. No. 43 dated 16.1.1982. Mr. Rao urged that no appointment had been made in the post of Assistant Professors, but an option was given to Civil Assistant Surgeons who had acquired Post-Graduate qualification to go over to the teaching cadre on an ad-hoc basis. The selected candidates were chosen for the purpose of providing them with five years' teaching experience, but such selection was not done according to the Rules which only provided for direct recruitment. Mr. Rao submitted that there were neither any Rules nor guidelines providing for transfer from non-teaching to teaching posts. Mr. Rao denied the case of the Appellants that there was no watertight compartment between Teaching and Non-Teaching disciplines and that whoever acquired Post-Graduate qualifications was deputed to the Teaching side from the Non-Teaching side. Mr. Rao submitted that even under the 1988 Rules appointment of Assistant Professors was to be by way of direct recruitment.

16. Mr. Rao then contended that, in any event, as had been held by this Court in *State of Andhra Pradesh Vs. Dr. N. Ramachandra Rao and Others*, in the medical world there are specialities and specialties and it is generally accepted that they are not of equal importance or utility. But promotions are allowed in the specialized disciplines and a junior with a relatively less important speciality may be fortunate enough to get faster seniority than his senior in a different speciality. However, juniors who get accelerated promotion on account of such fortuitous circumstances should not be allowed to steal a march over their seniors for appointment to administrative posts.

17. Mr. Rao urged that "posting" and "appointment" are two different concepts and often one is mistaken for the other. Referring to the decision of this Court in

S.N. Dhingra and Others Vs. Union of India and Others, , Mr. Rao submitted that in the said case this Court had, inter alia, held that seniority would have to be counted on the basis of continuous length of service from their initial appointment. Mr. Rao submitted that those candidates from amongst Civil Assistant Surgeons who had acquired the Post Graduate qualifications and had been permitted to opt for the Teaching line, could claim seniority in the cadre of Assistant Professor only from their entry into the teaching stream, and their previous service as CAS would not count in reckoning their service in the post of Assistant Professor, for the purpose of future promotion.

18. Mr. A.D.N. Rao, learned Advocate for the Respondent Nos. 14 to 17 in C.A. No. 5589 of 2001, denied the submissions made on behalf of the Appellants that the transfers from the Non-Teaching to the Teaching line were initiated by the method of pick and choose adopted for selection of candidates for appointment as Assistant Professors. Learned Counsel also urged that these points had not even been urged before the Tribunal or the High Court. Mr. A.D.N. Rao reiterated Mr. Gururaja Rao's submissions that a person posted for gaining experience for several years, may not be entitled to the benefit of the said period for counting his seniority until he is actually appointed to the cadre.

19. Mr. Anoop Chaudhari, learned Senior Advocate, appearing for the State of Andhra Pradesh, submitted that the decision to allow teachers from the Non-Teaching line to cross over to the Teaching line after they acquired Post-Graduate qualification, was a matter of policy of the State Government and the Court should not normally interfere with such policy matters, unless some grave injustice or mala fide intention was proved.

20. Mr. Chaudhari submitted that seniority list in the teaching stream had been prepared on the basis of appointment of the candidates as Assistant Professors and the Respondents could not, therefore, claim that their service as Civil Surgeons be counted for seniority though they had not acquired the Post-Graduate degree and were not, therefore, entitled to be appointed against a teaching post prior thereto. Mr. Chaudhari submitted that the decision in Dr. N. Ramachandra Rao's case (supra) cited by Mr. Gururaja Rao had no application to the facts of this case since it dealt with the 1982 Rules and a person who did not have the requisite qualification for being transferred to the teaching cadre could not claim the benefit of seniority over those who had already been transferred to the teaching cadre since they had the requisite qualifications. Mr. Chaudhari urged that this was not a case of vertical upgradation in the same category but a lateral transfer from the non-teaching line to the teaching line after the candidate in the non-teaching line had acquired the requisite qualifications for such transfer, as would be evident from Rule 14 of the 1988 Rules.

21. From the submissions made on behalf of respective parties what emerges is that the Medical Service under the Medical and Health Department in the State of Andhra Pradesh is governed by the Special Rules framed under the proviso to Article 309 of the Constitution and issued under G.O. Ms. No. 43 dated 16th

January, 1982. Under the said Rules, there was no post of Assistant Professor and provision had been made only for appointment of Civil Assistant Surgeons, both for teaching and non-teaching purposes in the medical colleges. The Medical Council of India threatened to withdraw recognition to the medical colleges unless separate provision was made to separate the teaching and the non-teaching cadre by appointment of Assistant Professors, which resulted in the amendment of the Rules vide G.O. Ms. No. 182 dated 29th March, 1988. The said Rules provided for the division of the medical services into teaching cadre, non-teaching cadre and laboratories. Under the new Rules, the teaching cadre was separately constituted into a new cadre strength designated as Assistant Professors, whereas non-teaching posts such as Civil Assistant Surgeons, Deputy Civil Surgeons and Civil Surgeons were separately categorized and the qualifications for these posts were also different. As vacancies arose in either of the cadres, several applications were filed before the Andhra Pradesh Administrative Tribunal, which were disposed of with directions to the Department to strictly follow the Rules issued under G.O. Ms. No. 154 dated 4th May, 2002.

22. In this state of facts, those Civil Assistant Surgeons, who had acquired the Post-Graduate degree and were subsequently included in the teaching cadre, claimed that for reckoning seniority, their past service as non-teaching staff should also be taken into consideration. According to the Respondents, the doctrine of eclipse would apply in a case like this. According to the Respondents, the date of reckoning of seniority in the teaching and non-teaching posts which formerly formed one cadre, the period during which candidates from the non-teaching line did not have the Post-Graduate qualifications, would be the period of eclipse and upon acquisition of such qualification, the right to seniority would stand revived and would get precedence over those who may have already been appointed as Assistant Professors since they had the requisite qualification.

23. We are unable to accept such a proposition on behalf of the Respondents since although there was no formal separation between teaching and non-teaching staff, there was this existing distinction that those belonging to the non-teaching line could not be appointed in the teaching line till they had acquired the Post-Graduate degree. This distinction always remained till the 1988 Rules when teaching and non-teaching posts were treated as different cadres and the seniority in the teaching cadre was calculated from the date of their appointment as Assistant Professors. Even if the feeder post for appointment of Assistant Professors was Civil Assistant Surgeons at the initial stage, the said situation stood altered with the amendment of the Rules whereunder Assistant Professors could be recruited only by way of direct recruitment. We do not, therefore, agree with the submissions made on behalf of the Respondents that such candidates, who had obtained lateral transfer from the non-teaching to the teaching line, would be entitled to carry their period of service as non-teaching staff for the purpose of computing their seniority in the cadre of Assistant Professors, since the basic qualification for being appointed as Assistant Professors in the teaching

line was a Post-Graduate degree, which the Respondents acquired during the course of their service as Civil Assistant Surgeons and were thereafter transferred to the teaching line. The view of the Tribunal to the contrary cannot be supported having particular regard to the view expressed by this Court in N. Suresh Nathan's case (supra) and in Shailendra Dania's case (supra), wherein the same view which we have taken, was taken by this Court upon holding that those diploma holder Junior Engineers who had obtained degrees while in service were not entitled to count their service prior to obtaining the degree for computing the required period for the purpose of promotion.

24. The other decisions cited by Mr. Gururaja Rao in Dr. N. Ramachandra Rao's case (supra), as stated hereinbefore, would not have application to the facts of this case since in the instant case it is a case of lateral transfer from one discipline to another where seniority would have to be reckoned from the date of joining the teaching line. Even the decision of this Court in S.N. Dhingra's case (supra), cited by Mr. H.S. Gururaja Rao, cannot be of any application for the same reason.

25. The Appeals and the Writ Petition No. 566 of 2003, must, therefore, succeed and are allowed. The judgments and orders of the Andhra Pradesh Administrative Tribunal dated 10th March, 1998 in O.A. No. 3599 of 1995 are, therefore, set aside along with G.O. Ms. No. 502 dated 13th September, 2003, and G.O. Ms. No. 325 dated 15th June, 1999, is restored together with all consequences arising therefrom.

26. In the circumstances of the case, the parties will bear their own costs.