

(2009) 04 PAT CK 0087
In the Patna High Court
Case No : LPA No. 1095 of 2000

Dr. Chandra Mohan Jha

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309
General Clauses Act, 1897 — Section 6
Government of India Act, 1935 — Section 205, 209

Citation : (2009) 4 PLJR 476

Hon'ble Judges : Shiva Kirti Singh, J; Dharnidhar Jha, J

Bench : Division Bench

Advocate : Prashant Sinha, Yogendra Mishra and Raghunath Kumar, for the Appellant; K. Uday Bhanu Roy for the State, for the Respondent

Final Decision : Dismissed

Judgement

Shiva Kirti Singh & Dharnidhar Jha, JJ.—Heard learned counsel for the appellant, learned counsel for the State and learned counsel for the intervenor. This appeal is directed against the judgment and order of learned Single Judge dated 21.7.2000 whereby prayer of the writ petitioner to declare Rule 3 of 1997 Rules as bad in law was rejected and the writ petition was dismissed with a direction to the respondents to fill up the posts of Assistant Professors (Neuro Surgery) in accordance with 1997 Rules at an early date preferably within six months.

2. The facts relating to the claim of the writ petitioner are not at all in dispute. The writ court has also noticed those relevant facts that the writ petitioner was appointed in the Bihar Health Service in April, 1978. He was subsequently appointed against tenure post of Resident Surgical Officer (R.S.O.) (General Surgery) on 23.8.1983 in Darbhanga Medical College & Hospital, Laherisarai where he continued till September, 1986. He was again appointed as R.S.O. (Neuro Surgery) since 27.9.1986 in Patna Medical College & Hospital, Patna till 3.1.1991. Thereafter he was appointed against tenure post of Registrar (Neuro

Surgery) and continued in Rajendra Medical College & Hospital on that post till 30.9.1996. He waited for posting for the period 1.10.1996 to 5.12.1997 and was thereafter posted as Administrative Medical Officer. Later, since 21.8.1998 he was deputed as Assistant Professor (Neuro Surgery) in Patna Medical College & Hospital, Patna. The writ petition was filed in the year 1999 for a direction to the respondents to prepare and publish 1995 panel and to fill up the posts of Assistant Professors in the Department of Neuro Surgery in different Medical Colleges out of such panel. The appellant also prayed for consequential benefits.

3. It is not in dispute that there were vacant posts of Assistant Professors in the Department of Neuro Surgery w.e.f. 19.1.1996 and no panel was prepared to fill up those vacancies as was required under the earlier resolution dated 31.10.1990 which required panel by 31st December of the earlier year for the panel of next year with last date for application as 31st January of the concerned year. The panel was to be prepared and notified by 31st December of the year concerned and the vacancies existing in the next year till 31st December were to be filled up from the panel of the earlier year. The panel for the year 1995 was undisputedly not prepared till the Rules of 1997 were framed in exercise of powers under Article 309 of Constitution of India and notified on 21.5.1997. The Rules of 1997 have been annexed and is available as Annexure-A to the counter affidavit filed on behalf of the State and its officials in this appeal.

4. The defence of the respondents is that in view of provisions in the new Rules of 1997, particularly, Rule 3 it was no longer possible for the respondents to undertake any exercise in accordance with Rules of 1992 for filling up even the vacancies of 1996 because Rule 3 of the 1997 Rules clearly postulated that the Rules will be applicable even in respect of past as well as future vacancies.

5. The learned writ court appreciated the hardship caused to the persons like the writ petitioner who were eligible for being considered for appointment against past vacancies which could not be filled up in accordance with earlier Rules in view of Rule 3 of 1997 Rules but expressed its helplessness to interfere in the matter because the Rules of 1997 being under Article 309 of Constitution of India had legislative flavour and could be effective even with retrospective effect. In view of apparent difficulty in getting any relief on account of Rule 3 of the 1997 Rules, the challenge was made before the writ court to the legality and validity of Rule 3 but the same has already been repelled by the writ court mainly on the consideration that prior to the 1997 Rules also the writ petitioner only had a right to be considered for appointment to the post of Assistant Professor and the new Rules had not taken away any vested right of the writ petitioner. It was noticed and appreciated by the writ court that an individual may face hardship on account of changed Rules of recruitment but on that account alone the rules cannot be held to be arbitrary unless it could be shown that the particular provision under the Rules is violative of Articles 14 and 16 of Constitution of India.

6. Learned counsel for the appellant has advanced two pronged submissions.

Firstly, it was submitted that the 1997 Rules have now been replaced by new Rules of the year 2008 and these new Rules also contain similar provisions as existed prior to 1997 Rules, requiring preparation of yearly panel to fill up the vacancies in the next year. On that basis it has been submitted and argued that since appellant's claim has been pending before the court with a challenge to the 1997 Rules, now on account of replacement of the 1997 Rules with new Rules his claim must be decided and allowed on the basis of 2008 Rules. In support of the proposition learned counsel for the appellant has placed reliance upon a judgment of the Federal Court in the case of Lachmeshwar vs. Keshwar Lal reported in AIR 1941 FC 5 and the following three judgments of the Supreme Court (i) AIR 1955 SC 84 (State of Punjab vs. Monar Singh), (ii) Pasupuleti Venkateswarlu Vs. The Motor and General Traders, , and (iii) Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, .

7. In the case of Lachmeshwar vs. Keshwar Lal one of the issues related to validity of one of the provisions in old Bihar Money Lenders Act. By the time the matter came to be considered by the Federal Court the new Bihar Act came into force which had replaced the earlier provision under challenge. The Federal Court appreciated the submission that since the rights of the parties were bound to be governed by the provisions of the new Act hence, in the facts of that case it was not necessary to go into the question whether the corresponding provisions of the old Act were void or not. Such a view was taken by the Federal Court in view of its peculiar jurisdiction u/ss. 205 and 209 of the Government of India Act. The Federal Court also observed that the case in question was the very last case of that kind in which such question can arise. From the law laid down in that judgment it cannot be inferred that in service matters the right of consideration for appointment would stand revived after a decade or so if the existing Rules are again replaced by something similar which existed in the past. The judgment of the Supreme Court in the cases noticed above also do not lay down any proposition of law which may help the appellant in claiming a right that in view of Rules of 2008 which are effective only prospectively, a panel for the year 1995 should now be constituted so as to give a chance of appointment to the appellant on the basis of pre 1997 Rules. In the case of State of Punjab vs. Mohar Singh the Supreme Court was considering the consequence of Section 6 of General Clauses Act in case of repeal of an enactment followed by fresh legislation on the same subject. It was held that the consequences laid down in Section 6 of the General Clauses Act will follow unless a different intention appears from the fresh legislation. In the present case there is no scope to interpret the Rules of 2008 so as to revive the process of preparation of panel as existing prior to the 1997 Rules. No provision having force of law creating such an effect has been brought to our notice. In the case of P. Venkateswarlu (supra) the Supreme Court has merely reiterated the salutatory and well established principle that for making the right or remedy claimed by the party just and meaningful and to bring it legally and factually in accord with the current realities, the court can and in many cases must, take cautious cognizance of events and developments

subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. This principle alone cannot help the appellant in absence of any legal provision to make the Rules of 2008 applicable to a period prior to 1997 Rules. If the contention advanced on behalf of the appellant is accepted then it would warrant ignoring the very existence of 1997 Rules for all purposes and also ignoring the rights and liability created under those Rules ignoring selections and appointments already made. The 2008 Rules cannot, by any stretch of imagination, and under any legal philosophy be made applicable for the period prior to 1997 only because they are similar to the provisions in the Rules existing prior to 1997. The judgment in the case of Y.V. Rangaiah (supra) deals with a well established proposition of law that vacancies of a particular period should be filled up in accordance with Rules as they existed at that time. But in this case the difficulty has arisen on account of Rule 3 in the 1997 Rules which bring the earlier vacancies also under the ambit of 1997 Rules. Had this been done by execution fiat this court could have intervened in the matter but the 1997 Rules are in exercise of power under Article 309 of the Constitution of India and hence, in the present case the principle applicable to ordinary rules of recruitment as in the case of Y.V. Rangaiah cannot have any application.

8. The second line of submission on behalf of the appellant relates to a challenge to the vires of Rule 3 of 1997 Rules. It has been submitted that the Rule is arbitrary and violative of Articles 14 and 16 of Constitution of India.

9. In support of this submission it was pointed out that the appellant would have been considered for empanelment for the post of Assistant Professor in the Department of Neuro Surgery for the vacancies till 31st of December, 1996 if the preparation of panel for the year 1995 had not been interfered with by the enactment of the impugned Rule 3 of 1997 Rules. According to learned counsel for the appellant the effect of Rule 3 causes hard ship and prejudice to the appellant and other similarly situated who were eligible for empanelment for the year 1995 and they have also been discriminated vis-avis others who had been earlier empanelled and appointed on the basis of Rules existing prior to 1997.

10. The learned writ court has considered this aspect of the matter and has indicated its reasons for not accepting the submission by pointing out the law on the subject in the following words; "Chances of promotion, if varies on promulgation of Rules, an individual may suffer but that will not render a rule bad in law, nor the same can be challenged, till a particular Rule is shown to be arbitrary, being violative of Articles 14 and 16 of the Constitution of India."

11. Had the grievance raised on behalf of petitioner been caused by executive decision, the matter may have been tested on the basis of aforesaid submissions but requirements to hold the provisions of Rule arbitrary will be different and the onus lied upon the appellant to plead and show that the impugned Rule 3 takes away or effects an existing right of the petitioner by resorting to class legislation. As pointed out by the writ court and noticed above, in the facts of the case the

chance of promotion being adversely effected cannot be treated to be violation of a vested right. In service jurisprudence it is well established that an employee has only a right of being considered with other similarly situated persons for promotion in accordance with law or rule applicable. Further, the Rules apply to all similarly situated persons equally and cover the existing vacancies in all departments affecting all persons similarly situated as the petitioners. Such classification cannot be treated to be class legislation or unreasonable so as to attract Articles 14 and 16 of the Constitution of India. Thus, on consideration of submissions advanced on behalf of appellant noticed above, we find no good ground to interfere with the order of the writ court. The appeal is, therefore, held to be without merit. It is dismissed accordingly but without costs.