
(2011) 07 PAT CK 0033
In the Patna High Court
Case No : CWJC No. 657 of 2008

Dr. Dharani Kant Isser

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 29-07-2011

Acts Referred:

Citation : (2012) 1 PLJR 424

Hon'ble Judges : J.N. Singh, J

Bench : Single Bench

Advocate : Pushkar Narain Shahi and Ritesh Kumar No. 1, for the Appellant;
Ravi Verma ., for the Respondent

Final Decision : Allowed

Judgement

J.N. Singh, J.—Heard learned counsel for the petitioner as well as learned counsel for the State. In this writ application, petitioner has challenged a notification of the Department of Health contained in Memo No. 968(17) dated 22.10.2005 (Annexure-7) to the extent his working promotion on the post of Associate Professor (E.N.T.) has been regularized with effect from 18.10.2003. He has further prayed for a direction to the respondents to regularize his promotion with effect from the date of his officiating promotion on the post, i.e. 1.8.1998. In the alternative, he has also prayed that he may be allowed officiating pay of the said post from the date of officiating promotion and also for grant of consequentail revision of pension etc.

2. The short facts of the case are that petitioner joined Bihar Health Services in 1912. In due course of posting, he became Resident Surgical Officer in Rajendra Medical College & Hospital, Ranchi in 1975; Registrar in A.N. Magadh Medical College, Gaya in 1982 and thereafter Assistant Professor (E.N.T.) in Patna Medical College & Hospital vide notification dated 2.7.1993, continued there for quite a long time and finally by notification as contained in Annexure-1 dated 25.4.1998, he was posted as Associate Professor, Department of E.N.T. in Nalanda Medical College & Hospital, under working arrangement. Initially he

raised some protest and also moved this Court against his transfer from Patna Medical College to Nalanda Medical College. However he finally joined as Associate Professor in Nalanda Medical College on 1.8.1998. The notification posting petitioner as Associate Professor in Nalanda Medical College under working arrangement stipulated that incumbents were being posted in their own pay-scale.

3. Learned counsel for the petitioner submits that large scale posting of teachers in Medical Colleges under working arrangement came under challenge before a Division Bench of this Court in the case of Saryug Prasad and Others vs. The State of Bihar, in LPA. No. 1001 of 1999. This Court found that widespread practice of posting on ad hoc basis or under working arrangement is not in consonance with law and, therefore, it held that this practice must end and wherever promotions are due, the same must be granted. The respondents did not comply with the order and one contempt application, namely, MJC No. 3140 of 2000 was filed in this Court. Hence, in view of the contempt application, the State Government issued a notification dated 24.6.2003 (Annexure-A to the counter affidavit) cancelling all the postings under working arrangement of the teachers in Medical Colleges made since 1997. Subsequently, in compliance to other part of the order of the Division Bench, the Department issued another notification (impugned herein) dated 22.10.2005, as contained in Annexure-7, by which services of teachers posted under working arrangement against higher posts were regularized. By this notification, petitioner was also regularized. But by it posting of the petitioner on the post of Associate Professor under working arrangement has been regularized from 18.10.2003 and not from 1.8.1998. This shifting of date has caused grievance to the petitioner.

4. Learned counsel for the petitioner submits that petitioner superannuated with effect from 30.6.2003 and his posting under working arrangement is being regularized with effect from a date anterior to his superannuation which clearly shows non-application of mind by the respondents. He further submits that the issue came up before this Court in the case of Dr. Vinod Kumar Singh Vs. The State of Bihar, The Secretary, Department of Health and Medical Education and The Medical Council of India, , held that since the said petitioner had the qualification and eligibility for promotion on the post on which he was posted under working arrangement, he was fit to be treated as promoted on regular basis with consequential monetary benefits. Learned counsel has also placed reliance on an order of this Court dated 19.4.2011 passed in CWJC No. 5451 of 2006* (Dr. Ajit Singh & Ors. vs. State of Bihar). In this judgment, the Court has discussed in detail the order passed by the Division Bench in the case of Saryug Prasad (supra) and has noticed the subsequent notification issued by the State Government dated 24.6.2003 (Annexure-A) by which working arrangements made from 1997 were cancelled. The Court noticed that the effect of the order of the Division Bench was that working arrangements had to end and the incumbents who were holding the post were to be considered for regular promotion almost simultaneously. The Court found that the spirit of the order of

the Division Bench was that both actions had to be taken by the respondents and eligibility of incumbents holding the post of Associate Professor under working arrangement had to be considered as on the date of notification of their posting under working arrangement. The Court found that the notification dated 24.8.2003 did not conform to the letter and spirit of order of the Division Bench. Hence, notwithstanding the notification, the writ application was allowed and directions were issued for treating the said petitioners as promoted on regular basis with effect from the date of their joining on the higher post under working arrangement which was with effect from 1.1.1998. It was also held that they were entitled for all consequential monetary benefits.

5. Learned counsel for the petitioner submits that the case of the present petitioner is identical to those eight petitioners in whose cases this Court found that they were entitled to be treated as promoted on regular basis on the post on which they were posted under working arrangement and as they had eligibility and qualification for regular promotion.

6. A counter affidavit has been filed in this case, it is stated that the petitioner was not promoted under working arrangement, rather he was posted under working arrangement against post of Associate Professor. Therefore, the same could not be treated as promotion for any purpose so as to treat him as promoted on regular basis with effect from the very date of his joining and entitled for monetary benefits of the higher posts.

7. On an earlier date, in view of the reliance placed by learned counsel for the petitioner on the judgments of this Court in the case of Dr. Vinod Kumar Singh (supra) and in the case of Dr. Ajit Singh (supra), learned counsel for the State prayed and was granted one week time to seek instructions from the Principal Secretary of the Department to apprise this Court with regard to the stand of the respondents in the matter. Subsequently, in view of the opportunity granted to the learned counsel for the respondents, a supplementary counter affidavit has been filed, in the supplementary counter affidavit it is stated that the Department proposes to file an appeal against the said judgment of this Court passed in Dr. Ajit Singh's case (supra).

8. Learned counsel for the State-respondents submits that the petitioner was promoted to the post of Assistant Professor with effect from 2.7.1983, he completed his five years of service in 1988 and thus he became eligible for promotion as Associate Professor in 1988. However, since then he did not raise any claim before the authorities of the Department or in this Court for his promotion. Hence, he submits that, the claim of the petitioner for regular promotion with effect from 1.8.1998 has become stale. He also submits that the petitioner superannuated on 30.6.2003 and he has filed this writ application for change of date of promotion in 2008, i.e. with a delay of almost 4 1/2 years.

9. It is true that Annexure-1 by which petitioner and others were posted on the post of Associate Professor does not describe it as a promotion. The notification

only mentions that from the date of joining on the transferred post, as recommended in the notification, they are posted. Petitioner was thus posted from the post of Assistant Professor, Department of E.N.T., Patna Medical College to the post of Associate Professor in Nalanda Medical College. It is not the case of the respondents that at that point of time either he was not eligible or he had no qualification or he was not senior enough in the cadre to be promoted on regular basis as Associate Professor. Of course, notification mentions that they were being posted in their own pay-scale. This meant that although petitioner had qualification and seniority in the cadre to be promoted on the post of Associate Professor on regular basis, he was simply not promoted on regular basis so as to deprive him the benefits of higher post. He was merely posted on the post of Associate Professor in his own pay-scale. This was deprecated by the Division Bench in the case of Saryug Prasad (*supra*) and the Court directed respondents to end this practice of posting under working arrangement against higher post and make regular promotions. The Division Bench clearly held, as also noticed by this Court in the case of Dr. Ajit Singh & Ors. (*supra*), that respondents were expected to comply with the orders in totality. Hence, in compliance to the orders of the Division Bench, simultaneously, working arrangement had to end and cases for regular promotion had to be considered from the dates the incumbents were posted against higher posts under working arrangement.

10. It is true that by Annexure-A, which was issued on 24.6.2003, i.e. hardly six days prior to the date of superannuation of petitioner, all postings on working arrangements since 1997 were cancelled with immediate effect. It means that till 24.6.2003 petitioner was held validly working against higher post under working arrangement. Now looking to the impugned notification dated 22.10.2005 (Annexure-7), it is clear that all the incumbents working against higher posts of Associate Professor under working arrangement have been regularized from different dates. This shows that the notification dated 24.6.2003 was never acted upon and the incumbents, posted against higher posts of Associate Professor under working arrangement, continued on their posts till date of issue of notification on 22.10.2005. Had it not been so and Annexure-A dated 24.6.2003 had been given effect to, this notification would have clearly mentioned that they are being promoted against the post of Associate Professor on regular basis from the relevant dates. It does not mention about the promotion on regular basis and makes their promotion on working arrangement as regular. The words of the impugned notification in this regard are significant and are appropriate to be reproduced here itself as under:-

(Emphasis supplied)

11. This notification also clearly mentions that promotion from the dates mentioned in the notification as working promotion were being made regular. The words " " show that the postings of the petitioner and others by Annexure-1 were in fact promotion on working basis. Thus the first submission of the learned counsel for the respondents falls flat in the light of the wordings of the impugned

notification (Annexure-7) itself.

12. The second submission of the learned counsel for the respondents that the petitioner did not seek his claim from 1988 when he completed 5 years as Assistant Professor has no legs to stand. Petitioner might have completed five years of service but he may not be senior enough in the cadre to be considered for promotion at that time. Annexure-1 shows that his case and case of many others were considered by the Department and he was posted on the post of Associate Professor though under working arrangement which, as per words of Annexure-7, was working promotion.

13. The next submission of learned counsel for the State that as Annexure-A was issued in 2003 itself and six days prior to date of superannuation of the petitioner, whereas he has filed this writ application in 2008, as such the writ application suffered from delay and laches, has also no substance. Issuance of notification as contained in Annexure-A was a part compliance of the judgment of the Division Bench in the case of Saryug Prasad (supra), as already held by this Court in the case of Dr. Ajit Singh (supra) which was general notification cancelling all working arrangements made since 1997. As a follow-up action, respondents were required to consider the cases of persons who were posted against higher post of Associate Professor under working arrangement for their regular promotions. Though by notification dated 22.10.2005 working promotion of the petitioner was regularized, but from a date much after his superannuation and not from the date he was posted under the working arrangement on the higher post. Cause of action of the petitioner arose at this stage and notification dated 22.10.2005 (Annexure-7), to the extent the date mentioned therein in respect of petitioner, has been challenged in this writ application which was filed on 7.1.2008. This delay of a little more than two years is not fatal for the case of the petitioner so as to frustrate his claim. As noticed earlier, issue has already been settled by this Court in the two judgments of this Court relied upon by learned counsel for the petitioner in the cases of Dr. Vinod Kumar Singh (supra) and Dr. Ajit Singh (supra), which have been delivered noticing spirit of the order of the Division Bench in the case of Saryug Prasad (supra). The Department may be contemplating to file appeal against the judgment in the case of Dr. Ajit Singh (supra) but that clearly is still to take birth and the proposal is apparently at a nascent stage. Therefore, that cannot be a ground to deny relief to the petitioner in this writ application, to which he is otherwise found to be legally entitled on merits. The writ application is, therefore, allowed. Respondents are directed to shift the date of regularisation of the working promotion of the petitioner, as mentioned in the impugned notification (Annexure-7), to the date he was posted on the post of Associate Professor under working arrangement by Annexure-1 and pursuant to which he joined in Nalanda Medical College. In this regard the necessary notification and consequential orders must be issued within three months from the date of receipt/ production of a copy of this order.