

(1998) 04 PAT CK 0001
In the Patna High Court
Case No : C.W.J.C. No. 12324 of 1996

Dr. Girindra Prasad Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-04-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Indian Medical Council Act, 1956 — Section 33

Citation : (1998) 2 PLJR 222

Hon'ble Judges : A.K. Ganguly, J

Bench : Single Bench

Advocate : P.K. Shahi and Sarvadeo Singh, for the Appellant; A.K. Singh and P.K. Singh, for the Respondent

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—This writ petition has been filed with a prayer for quashing the memo No. 322(17) dated 21st September, 1996, whereby the respondent No. 3 has decided that the petitioner is not entitled to promotion to the Post of Associate Professor with effect from 3rd September, 1987. The petitioner has also prayed for a direction upon the respondents for promoting him to the post of Associate Professor in the department of Pharmacology with effect from 3rd September, 1997 and for grant of consequential benefits arising out of such promotion. The petitioner has come before this Court with this prayer for the third time. Prior to filing of this writ petition the petitioner filed two previous writ petitions which are numbered as C.W.J.C. No. 7206 of 1991 and C.W.J.C. No. 795 of 1993.

2. The case of the petitioner is that after passing the M.B.B.S. examination he obtained the post graduate qualification in Pharmacology from Patna University in 1981. Thereafter, by notification dated 18.2.1983 the petitioner was posted as Tutor in Magadh Medical College, Gaya and the petitioner also joined the said post of Tutor in the said College on 21st February, 1983. The petitioner having

the post graduate degree in Pharmacology expects his appointment to the post of Assistant Professor, as such he was aggrieved by his posting as tutor. So he made representation to the State Government for his appointment as Assistant Professor.

3. On the petitioner's representation the State Government sought opinion from the Medical Council of India (hereinafter called the M.O.I.) about the eligibility of; the petitioner for holding the post of Assistant Professor. Such opinion was sought by the respondent by communication dated 28th May, 1984. In the said communication it was made clear that in view of dearth of qualified tutor in Non-Clinical Department, the eligibility of the petitioner and another person, namely. Dr. Dilip Kumar Yadav may be considered for their appointment to the post of Assistant Professor. Pursuant to the said communication by the State Government the M.C.I, opined that the petitioner is eligible for appointment as lecturer in respect of the department, as the petitioner has obtained the recognised post graduate qualification in terms of the Schedule of Indian Medical Council Act, 1956.

4. It is not in dispute that the post of Lecturer is equivalent to the post of Assistant Professor. Thereafter further communication was made by the State Government to the Secretary M.C.I, requesting the said authority of the M.C.I, to inform the State Government whether the petitioner and said Dr. Yadav are eligible for appointment to the post of Assistant Professor in their respective Departments.

5. The M.C.I, wrote to the State Government that the petitioner is eligible for appointment as lecturer provided he possesses recognised post-Graduate qualification. The petitioner does possess Post Graduate Degree in Pharmacology and therefore, according to the opinion of the M.C.I, the petitioner was eligible for appointment to the post of the Lecturer. It is also stated that the State Government has changed the designation of the Lecturer to that of Associate Professor/Assistant Professor. Thereafter, a request was made to clarify about the eligibility of the petitioner for his appointment to the post of Assistant Professor.

6. The M.C.I, on receipt of the aforesaid request wrote to the State Government that the petitioner is eligible for appointment to the post of Assistant Professor if the post of Assistant Professor is not higher than that of Lecturer.

7. Even though the said clarification was given by the M.C.I, for the second time on 12.9.1984, the respondent delayed the matter, and ultimately by notification dated 19.4.1986 the petitioner was promoted to the post of Assistant Professor on ad hoc basis for a period of six months and continued his posting in A.N.M. Medical College, Gaya. Thereafter, by the order dated 14.5.1991 the petitioner was appointed on substantive basis as Assistant Professor in the department of Pharmacology.

8. At that moment the grievance of the petitioner starts, in as much as, the petitioner was made Assistant Professor with effect from 19th April, 1986. The

petitioner then represented that his date of promotion to the post of Assistant Professor should be with effect from the date he was made tutor, namely 21.2.1983, as the petitioner obtained his post graduate degree by that time. The petitioner states that in any event he should be promoted from the date when the recommendation of the M.C.I, was made in favour of the petitioner, i.e. from the month of June 1984 and the grievance of the petitioner is that without deciding the said representation of the petitioner grada" on list of Assistant Professor in the department of Pharmacology was published. The gradation list shows that the petitioner was appointed as tutor with effect from 21st March, 1983 and he was appointed as Assistant Professor with effect from 21st April, 1986. From the said gradation list it would also appear that Dr. Dilip Kumar Singh, Shambhu Nath Singh are junior to the petitioner.

9. The petitioner has also made several representations after publication of the said gradation list praying therein that his date of promotion to the post of Assistant Professor should be either from the date when he joined as tutor or from 1984 when M.C.I, gave the clarification as aforesaid.

10. In the meantime a resolution of the State Government has come to the effect that the Assistant Professors who are promoted from the post of Tutor and who have post graduate qualification on the subject in question, such persons should be deemed to be the Assistant Professor from the date of obtaining the said degree. It was made very clear that such decision of the State Government was appertaining to non-clinical department and Pharmacology is admittedly a discipline in non-clinical department.

11. The case of the petitioner is that on the basis of the said resolution of the State Government dated 30th October, 1990, the petitioner is entitled to be promoted to the post of Assistant Professor from the date he obtained the post graduate degree. Therefore, on the basis of the said resolution the appointment of the petitioner as Assistant Professor should date back from the date he was appointed as tutor. The grievance of the petitioner is that without considering all these facts, the department promotion committee considered the question of promotion from the post of Assistant Professor to the post of Associate Professor and took a decision that the petitioner does not have minimum requisite qualification of three years as Assistant Professor and as such his case is not fit to be considered for promotion as Associate Professor. The petitioner has stated that by the said decision of the departmental promotion committee (Annexure-12) persons junior to the petitioner namely, Smt. Veena Prasad and Dr. Dilip Kumar Trivedi were promoted with effect from 3.9.1987 and they have become Associate Professor from 3.9.1987 by notification of the same date. In fact, from the notification dated 3.9.1987 it will appear that both those persons namely, Dr. Dilip Kumar Trivedi and Smt. Veena Prasad were promoted to the post of Associate Professor straight way from the post of tutor.

12. The case of the petitioner is that the finding of the departmental promotion committee is vitiated for non-consideration of the State Government's decision

dated 30.10.1990, as such he filed representation to the State respondent on 19.11.1990 on the strength of the Government Resolution dated 30.10.1990. As nothing happened on that representation, the petitioner has to file writ application namely, C.W.J.C. No. 7201 of 1991 before the Hon"ble High Court. The aforesaid writ petition was disposed of on 17.8.1992. From a perusal of the order dated 17.8.1992 it appears that the court was informed by the learned Counsel for the State that the State Government has taken a decision to promote the petitioner as Associate Professor in the department of Pharmacology prospectively and so far the claim of the petitioner for retrospective promotion is concerned, the same was under consideration.

13. On the basis of such stand being taken by the counsel for the State, the Division Bench disposed of the writ petition with a direction to issue notification regarding petitioner's prospective promotion by 31st August, 1992, and also directed the respondent's to consider the petitioners claim for retrospective promotion and to decide the same by 7th September, 1992.

14. Thereafter, the State Government issued notification dated 8th September, 1992 appointing the petitioner on ad hoc basis for six months as Associate Professor. As the respondent did not consider the petitioner's prayer for retrospective promotion, the petitioner had to file another writ petition before this Hon"ble High Court which was numbered as C.W.J.C. No. 7951 of 1993 praying therein for a direction upon the respondent to promote the petitioner to the post of Associate Professor (Pharmacology) retrospectively with effect from 3rd September, 1987.

15. In that case stand of the respondent has been that the petitioner's case for promotion with retrospective effect cannot be considered in view of pendency of two writ petitions before this Hon"ble Court, namely, C.W.J.C. No. 8028/1990 and C.W.J.C. No. 4141/199T. Again the Division Bench of this Court examined the matter and found that the aforesaid pleas raised by the respondent are not correct and as such disposed of the writ petition with a direction to the authorities concerned to consider the case of the petitioner for retrospective promotion with effect from 3rd September, 1987 "afresh", and issue an appropriate order within a period of three months The said order of the Division Bench was passed on 24.11.1994.

16. As usual the State Government did not comply with the Court's order within the time specified, and therefore the petitioner filed before this Court a contempt petition which was numbered as M.J.C. No. 2210 of 1995. When the said M.J.C. came up for hearing before this Court, learned counsel appearing for the State gave an undertaking before this Court that the order of this Court will be complied with within a period of two weeks, and by recording the said undertaking the contempt proceeding was disposed of. Even here the undertaking to comply with the Court's order within two weeks by the State Government was flouted and the impugned order which is challenged in this proceeding was passed on 21st September, 1996 in which the petitioner's prayer

for retrospective promotion was rejected. The said impugned order dated 21.9.1996 passed by the respondent has been assailed by the petitioner on various grounds.

17. In the counter affidavit which has been filed by the respondent in this proceeding the factual details about the petitioner's career more or less are accepted, but the petitioner's prayer for dating back his promotion is Associate Professor with effect from the earlier date namely, 3rd September, 1987 has been resisted and the impugned order dated 21st September, 1996 has been supported mostly on the following grounds : -

I. Granting promotion to the petitioner to the post of Associate Professor with effect from 3rd September, 1987 would amount to allowing level jumping.

II. The subsequent Government Resolution dated 20th June, 1996 has superseded the previous resolution dated 30th January, 1990, and as such the petitioner's prayer for his designation as Assistant Professor with effect from the date of appointment as tutor is not tenable.

III. The promotion of the petitioner to the post of Associate Professor with effect from 3rd September, 1987 would affect in the case of another officer, namely, one Dr. Shambhu Nath Singh.

IV. The recommendation of the Medical Council of India is not binding on the State Government.

18. In the impugned order which is at Annexure-1 virtually one ground has been urged in its support namely, that the appointment of the petitioner on the post of Associate Professor with effect from 3rd September, 1987 would amount to level jumping. In the impugned order there is no whisper that the petitioner lacks teaching experience.

19. On a closer scrutiny of the aforesaid grounds it appears that they are not tenable for the reasons discussed below.

The problem of level jumping was considered by the State Government in Its resolution dated 20th June, 1996, and an attempt was made to prevent such cases of level jumping in the case of promotion. In the said resolution dated 20.6.1996, hierarchy of post is indicated in the following manner:

(a) Tutor Cum-Anaesthetist.

(b) Assistant Professor.

(c) Associate Professor.

(d) Professor.

It has been stated that in case of giving direct promotion of a tutor/Anaesthetist to the post of Associate Professor, a case of level jumping will be made out.

20. In the instant case, the petitioner is not claiming that he should be promoted directly from the post of tutor to that of Associate Professor. The petitioner is claiming that as he was having a post graduate degree in a specialised subject while he was a tutor, therefore he should be designated as Assistant Professor. In fact, the petitioner was claiming such right on the basis of the Government Resolution dated 30.10.1990 (Annexure-11), and the said right has not been totally taken away by the subsequent resolution dated 20th June, 1996. In para-1 of this subsequent resolution dated 20.6.1996, it has been stated that such tutor/anaesthetist with passes teaching experience in specialised subject for three years as tutor/anaesthetist and has obtained the post graduate degree in the specialised subject has to be designated as Assistant Professor.

21. From the undisputed facts of this case it is dear that the petitioner has obtained the PH.D. degree in Pharmacology from the Patna University in the year, 1981. The petitioner has teaching experience from 17.3.1979 to 28.11.1981 before his appointment to the post of tutor. After his appointment to the post of tutor if four months are added from 21.2.1983, the petitioner completes the teaching experience of three years.

22. Reference in this connection may be made to the letter dated 28th May, 1994 written by the Commissioner-Cum-Secretary, Health Department Government of Bihar (Sri V. S. Dubey) to the Secretary Medical Council of India. In the said letter dated 28th May, 1994 the teaching experience of the petitioner from 17.3.1979 has been mentioned. In that letter the opinion on the Medical Council of India (hereinafter called M.C.I.) was sought whether the petitioner can be appointed to the post of Assistant Professor in Pharmacology. To that, M.C.I, the Apex body opined by its letter dated 15.6.84 that the petitioner is eligible for appointment as lecturer in the respective department provided :he petitioner possesses the post graduate degree. It is not in dispute that the post of lecturer and the Post of Assistant Professor is equivalent.

23. So on the basis of these materials this Court is of the opinion that the petitioner can legitimately claim that he should have been designated as Assistant Professor with effect from 15th June, 1984, the date on which the M.C.I, granted its approval for his appointment as Assistant Professor.

24. A stand has been taken in the counter affidavit by the State Government that the recommendation of the M.C.I, is not binding unless they became resolution u/s 33 of the M.C.I. Act. This may be true where the recommendation of the M.C.I, are of general character or in regard to general policy. But in the instant case, specific opinion of the M.C.I, was sought in respect to individual cases with reference to the bio-data of the individual medical officers. In such cases, the recommendation of the M.C.I, is entitled to great weight and in the absence of any cogent reason the same cannot be departed from. Here the M.C.I, authorities have applied their mind to individual cases and came to the conclusion that the petitioner is eligible for being appointed to the post of lecturer which is equivalent to the post of Assistant Professor. So here the valued

opinion of M.C.I, cannot be brushed aside casually as has been done.

25. Having regard to the teaching experience of the petitioner also taking into account the fact that the petitioner acquired the requisite post graduate qualification this Court is of the opinion that the petitioner is entitled to be designate I as Assistant Professor even in terms of Paragraph-1 of the subsequent resolution of the State Government dated 20th June, 1996. It is, however, true that for such designation as Assistant Professor the petitioner will not be entitled to any monetary benefit. This Court is of the opinion that on a proper consideration of the petitioner's case the respondent should have designated him as Assistant Professor with effect from the date on,, which recommendation of the M.C.I, was received, i.e. with effect from the month of June, 1984. If the petitioner is so designated as Assistant Professor then on completion of three years as Assistant Professor, the petitioner should be promoted as Associate Professor, with effect from September, 1987.

26. Learned counsel for the petitioner has relied upon a judgment of this Court in the case of Dr. S. K. Verma vs. State of Bihar & Ors, reported in 1992 (1) RL.J.R. Page-657. In the said case a Division Bench of this Court held that there should not be any difference with regard to the teaching experience when such teaching experience is acquired on the basis of regular appointment or when such teaching experience is acquired on the basis of ex-officio designation. Following the said principle this Court holds that since the petitioner is entitled to be designated as Assistant Professor even in view of the subsequent circular of the State Government dated 20th June, 1996 with effect from June, 1984, namely the date when the M.C.I, clearance comes in his favour, the petitioner must be considered to have acquired three years teaching experience as Assistant Professor by September, 1987.

27. This Court, therefore, is of the opinion that there cannot be any bar on his being appointed as Associate Professor with effect from 3rd September, 1987. So there is no question of level jumping in the case of the petitioner if he is made the Associate Professor with effect from 3rd September, 1987.

It would have been the case of level jumping if the petitioner had been promoted straight way from the post of tutor to the post of Associate Professor. In fact, such cases of level jumping has been allowed by the respondent authority in the case of Dilip Kumar Trivedi and also in the case of one Dr. Veena Prasad.

28. From the gradation list which has been annexed to this writ petition, it appears that the petitioner is senior to Dr. Shambhu Nath Singh, having regard to the fact that the petitioner possibly became Assistant Professor earlier than Dr. Singh. This Court has not been told whether Dr. Shambhu Nath Singh has acquired post graduate qualification like the petitioner but from Annexure-10 the writ petition it appears that the said Shambhu Nath Singh was junior to the petitioner. Therefore, the plea taken in the impugned order that if the petitioner becomes Associate Professor with effect from 3rd September, 1987, that will

affect the case of Dr. Singh is not acceptable to this Court.

29. It goes without saying that acquiring of the Post Graduate degree is a positive element of merit which is recognised in the Government Resolution dated 30.10.1990 by giving the petitioner right to be designated as Assistant Professor with effect from the date of acquisition of the said qualification. The said right is also recognised in the subsequent resolution dated 20th June, 1996. It is also pointed out that M.C.I, gave its approval for appointment of the petitioner to the post of Assistant Professor also on consideration of the said fact of post graduate qualification. Therefore, merit of the petitioner in acquiring the post graduate qualification must be given the proper appreciation and weight in the matters of his promotion. So this court holds that the impugned order by which the petitioner's case for being promoted to the post of Assistant Professor with effect from 2nd September, 1987 was turned down by the respondent, was passed on incorrect appreciation of the resolution of the State Government, and also the recommendation of the M.C.I, which is entitled to great weight as valued opinion in individual cases.

30. The petitioner has come to this court twice before for his grievance, and this is his third attempt. This court has found that in both cases, the petitioner's case was not properly considered by the respondents, and on technical pleas the petitioner's claim was defeated by the respondent. So in the fact of this case, the Court is unfortunately of the opinion that if the matter is sent back again to the respondent for fresh consideration, the direction of this Court may have the same fate.

Therefore, taking into account the facts of this case, this Court, proposes to rely on the ratio in the case of Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, . After discussing the nature and extent of the power of Writ Court while issuing a Writ of Mandamus, Justice Madon, (as His Lordship then was) delivering the judgment of the Court in paragraph-20 page-540 of the report, laid down the following principles : - There is thus no doubt that the High Courts in India exercising their jurisdiction under Article-226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise "or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to

the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

(emphasis added)

Respectfully relying on the aforesaid ratio, this Court is of the view that in the instant case ends of justice demand a direction on the respondent authorities to date back the promotion of the petitioner to the post of Associate Professor Pharmacology with effect from 3rd September, 1987. In fact, such promotion to the post of Associate Professor, Pharmacology has already been given to the petitioner with effect from 1992, but this Court in the peculiar facts and circumstances of this case holds that the petitioner is entitled to be promoted with effect from 3rd September, 1987 to the post of Associate Professor, Pharmacology with all consequential benefits. This writ petition thus succeeds and the impugned order at Annexure-1 is quashed. There will be no order as to costs.