
(2006) 07 MP CK 0094
In the Madhya Pradesh High Court

Dr. G.P. Dwivedi and Others	Vs	APPELLANT
State of M.P. and Others		RESPONDENT

Date of Decision : 11-07-2006

Acts Referred:

Constitution of India, 1950 — Article 320

Citation : (2006) 07 MP CK 0094

Hon'ble Judges : R.K. Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.K. Gupta, J.—Parties are heard.

In the present case, the petitioners have challenged the orders Annexure A-1, dated 26-5-2001 as well as Annexure A-2 to the petition. Petitioners have also prayed for a direction to the respondents to hold a review D.P.C. for promotion to the post of Dean from the cadre of Professors after publishing the final seniority list. It is also prayed that while publishing the seniority list for the post of Dean and considering the promotions of the Professors, the name of respondent No. 4 should not appear.

2. It may be submitted that Annexure A-1 is the order passed by the State Government by which respondent No. 4 has been assigned higher seniority over the petitioners on the post of Associate Professor. By this order, respondent No. 4 is also promoted to the post of Professor. By another order dated 2nd November, 2002 respondent No. 4 has been promoted to the post of Dean on the basis of the seniority reckoning in pursuance to order dated 26-5-2001, Annexure A-I to the petition.

3. Petitioners have further challenged the order Annexure A-17 dated 31st October, 2005 by which the respondent No. 4 is promoted on the post of Director, Medical Education, Bhopal in the services of the State Government.

4. The necessary facts leading to the present case are that the petitioners and the respondent No. 4, all were in the services of the State Government in the Medical Education Department. The State Government issued a letter dated 2-12-1996, which is Annexure A-12 to the petition. Respondent No. 4 submitted an application to the State Government, which is Annexure A-13. By this application, the respondent No. 4 requested the State Government that she is opting for her services in the Regional Institute of Ophthalmology. By moving the said application she specifically gave an undertaking to the State Government that she will be treated to be an employee of the said Institute and shall not Claim any benefit with the State Government.

5. The option of the respondent No. 4 was accepted by the State Government on certain conditions. The relevant conditions for the adjudication of the present case are that the respondent No. 4 shall not Claim any benefit of promotion in the other Medical Colleges but would Claim promotion within the Regional Institute of Ophthalmology. Subsequently, respondent No. 4 again moved an application to the State Government. The said application is filed as Annexure A-14 to the petition dated 16-6-1997. In the said application to the State Government, the respondent No. 4 reiterated that she only Claims her promotion in the Institute as Director.

6. After when the State Government passed an order acting upon the option submitted to the State Government by the respondent No. 4, it appears that the respondent No. 4 applied for grant of her seniority on the post of Reader and Professor and also Claimed other consequential benefits. The State Government acceded to the request of respondent No. 4 and passed an order Annexure A-1 by which respondent No. 4 was considered for her promotion and was assigned seniority on the post of Associate Professor by placing her above to the petitioners. By order Annexure A-1 dated 26-5-2001, respondent No. 4 was granted seniority from 30th December, 1985 on the post of Associate Professor. The State Government also passed the consequential orders. On the basis of the seniority conferred on her by order Annexure A-1, dated 26-5-2001 respondent No. 4 was promoted to the post of Dean by an order dated 2-11-2002 and further to the post of Director, Medical Education by an order dated 31st October, 1985.

7. There is no dispute between the parties that the respondent No. 4 was also given proforma promotion with effect from 22-7-1989. Subsequently, on the basis of that promotion, respondent No. 4 was further promoted to the post of Dean by an order dated 2-11-2002 and then to the post of Director, Medical Education, copy of which is Annexure A-17 to the petition dated 31st October, 2005.

8. On the basis of the aforesaid facts, learned Counsel for the petitioners made the following submissions:

(i) Since respondent No. 4 has already waived her right to Claim promotion with

the State Government in the Medical Education Department by submitting her option to the State Government to accept the post of Director with the Regional Institute of Ophthalmology and the State Government also accepted her option, therefore, she could not have been promoted to the post of Dean by an order dated 2-11-2002. Learned Counsel for the petitioners very fairly submitted that with regard to any promotion given to respondent No. 4 till 2-12-1996 no legitimate grievance against the said action of the State Government can be made by the petitioners.

(ii) Second submission of the learned Counsel for the petitioners is that once the State Government has accepted the undertaking of the respondent No. 4 on her option that she will not Claim any benefit with the Medical Education Department and she will only Claim promotion in the Regional Institute of Ophthalmology then without amending or reviewing the letter dated 2-12-1996 by the State Government, the State Government cannot review the whole situation without amending or withdrawing the said order.

(iii) Learned Counsel for the petitioners further submitted that the post of Director with the Regional Institute of Ophthalmology is a permanent post. Respondent No. 4 has been appointed as a Director on the said permanent post, therefore, taking into account Fundamental Rule 14(A)(d), the respondent No. 4 has lost her lien in the Medical Education Department by the operation of the said provision. Therefore, if the lien of the respondent No. 4 is ceased to have existed by the operation of the said provision of law then under no stretch of imagination after 2-12-1996 respondent No. 4 can be promoted to any post in the Medical Education Department including the post of Dean wherein she is appointed on the post of Dean by an order dated 2-11-2002. It is submitted by him that she could only be entitled to benefit till her lien could be retained in the Medical Education Department, i.e., for the period prior to 2-12- 1996 and then no benefit of any nature could go in favour of the respondent No. 4 after 2-12-1996.

9. In the present case, learned Counsel for respondent No. 4 Shri Hemant Shrivastava informed this Court that he does not want to argue the matter as no return has been filed by him. However, learned Counsel for the respondent No. 4 made the following submissions:

(a) Fundamental Rule 14(A)(d) would apply only in the eventually if an incumbent is appointed on the permanent post substantively. In the present case, the appointment of the respondent No. 4 since was not on substantive basis, therefore, said provision of Rule 14 (A)(d) shall not apply in the present case.

(b) It is also submitted that in spite of the letter dated 2-12-1996 (Annexure A-12) passed by the State Government, the State Government frequently was withdrawing their employees by passing order by withdrawing them from the Regional Institute of Ophthalmology, therefore, on this basis, it is submitted by

him that the State Government was not serious about the conditions imposed while accepting the options with regard to the conditions enumerated in the letter dated 2-12-1996 (Annexure A-12).

The aforesaid submissions of the learned Counsel for the parties are considered.

10. In the present case, it may be seen that the State Government accepted the undertaking submitted by the respondent No. 4. It is not a case that without there being any undertaking submitted the State Government directed the respondent No. 4 for her transfer on administrative ground in the Regional Institute of Ophthalmology. An application was moved by the respondent No. 4, copy of which is filed as Annexure A-13, dated 20-1-1997 on record (wrongly mentioned in the petition as 20-1-96), itself indicates that while accepting the conditions as enumerated by the State Government in its letter dated 2-12-1996, the respondent No. 4 herself has submitted that she will accept the post of a Director with Regional Institute of Ophthalmology. She did not object to any of the conditions as enumerated in the letter dated 2-12-1996. The letter dated 2-12-1996 Annexure A-12 also indicates that the incumbents whose options have been accepted by the State Government, shall not be transferred to any other Medical Colleges of the State Government. This was the specific condition and respondent No. 4 acted upon the conditions as enumerated by the State Government in its letter dated 2-12-1996 (Annexure A-12). Respondent No. 4 never objected to the conditions as enumerated in the said letter. Apart from this there had been a specific condition, i.e., the condition No. 1, which would be relevant to decide the present question, itself indicates that the employees whose options have been accepted and have opted to be posted with the Regional Institute of Ophthalmology, they shall not be transferred in any case to any of the Medical Colleges of the State Government, then after 2-12-1996 the respondent No. 4 cannot be treated to be an employee of the Medical Education Department and has to be treated as in the cadre of the Regional Institute of Ophthalmology. Thus, the respondent No. 4 has waived her right to Claim her lien back with the State Government in the Medical Education Department. Waiver of such right once has been opted by the respondent No. 4 not to Claim any promotion in the Medical Education Department and it was never earlier objected, then the respondent No. 4, cannot thereafter Claim any benefit of any nature including that she should be treated to be an employee of the Medical Education Department of the State Government after 2-12-1996.

11. The Apex Court has applied the Rule of estoppel in case of loss of lien. It would be profitable here to mention the judgment of the Apex Court as reported in Anil Bajaj Vs. Post Graduate Institute of Medical Education and Research and Another, , the relevant Para 3 of which, is as under:

It is an admitted fact that the appellant did not come back till after 1998. It is also an admitted fact that his request for extension was rejected specifically in 1997. This being the position the principle of estoppel, apart from anything else, would clearly be applicable in a case like this. A person who gets an advantage,

namely, of a sanction to go abroad on service on the condition that he will come back within two years and if he does not come back, his lien will automatically be regarded as being terminated, he then cannot turn around and challenge the said condition on the basis of which sanction to go abroad was granted. Of course, if there is a dispute with regard to the question whether he had in fact come back within the stipulated period or an extension had been specifically granted an inquiry may be necessary but where the facts are not in dispute the inquiry would be an empty formality. In any case the principle of estoppel would clearly apply and the High Court was right in dismissing the writ petition filed by the appellant wherein he had challenged his termination.

12. Of course, in the present case, she would be entitled to the benefit accrued to her prior to 2-12-1996 but on the basis of that benefit she cannot claim any further benefit to any further post after 2-12-1996. It is not a case that the respondent No. 4 was not aware of the consequences of the conditions mentioned in the order of the State Govt. dated 2-12-1996 and while accepting the option of the respondent No. 4 the State Govt. put certain rigorous conditions in the letter dated 2-12-1996 (Annexure A-12) to the petition. In view of the aforesaid, the first submission as submitted by the learned Counsel for the petitioner deserves to be accepted.

13. Another question which the learned Counsel for the petitioners has submitted is that by virtue of operation of law as per Fundamental Rule 14(A)(d) on appointment of the respondent No. 4 to the post of Director in the Regional Institute of Ophthalmology, her lien is automatically lost. Learned Counsel for the petitioners has shown, during the course of arguments, the circular issued by the Government of India, Ministry of Health and Family Welfare dated 16-5-1979. A set up has been provided in the said Rules in the Institute. According to the same, the post of Director of the Institute is a post within the administrative set up of Regional Institute of Ophthalmology. Nothing has been pointed out by the learned Counsel for the respondents that the Institute is not a permanent one and is a temporary project. On the basis of the aforesaid circular, it is submitted that once the appointment of the respondent No. 4 on the post of Director even assuming that it was an officiating arrangement, then her appointment was on a permanent post.

14. Fundamental Rule 14(A)(d) reads as under:

A Government servant's lien on a post shall stand terminated on his acquiring a lien in a permanent post (whether under a State Government or the Central Government) outside the cadre on which he is borne.

A bare reading of the aforesaid sub-clause itself indicates that the Government servant shall lose his lien on a post and the lien as such shall stand terminated on his acquiring a lien on the permanent post on his appointment to a new permanent post.

15. The Apex Court in a judgment reported in Jagdish Lal and others Vs. State of

Haryana and others, considered the question in relation to loss of lien by the force of Fundamental Rule 14 (A)(d). In Para 11 of the judgment, the Apex Court has observed as under:

...On availability of permanent post, he gets appointed to the post and thereafter ceases to be a member of the feeder/lower cadre. In this regard, under Fundamental Rule 14A(A) a Government servant's lien on a post may, in no circumstances, be terminated, even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post. Under Fundamental Rule 14A(d) a Government servant's lien on a post shall stand terminated on his acquiring a lien on a permanent post (whether under the Central Government or a State Government) outside the cadre on which he is borne. A conjoint reading, thus, would establish that a Government servant shall always have a lien on the post and, simultaneously, he shall not have right to hold any lien on more than one post....

The ratio of the aforesaid judgment is fully applicable in the present case. Thus, on appointment of respondent No. 4 with the Regional Institute Ophthalmology on a permanent post her lien stands terminated. She has acquired a lien while working in the said department, therefore, the loss of lien on the parent post or cadre is automatic.

16. Respondent No. 4 has not been able to point out during the course of argument that after the appointment of the respondent No. 4 as a Director, she has not acquired a lien on the said post. Such a stand has not been taken in the return filed by the respondent No. 4. The set up as produced by the learned Counsel for the petitioners also indicates that the post of Director is a permanent post in the set up of the Regional Institute of Ophthalmology. Thus, there is stipulation in the said Sub-clause (d) as quoted hereinabove that lien on an earlier post shall automatically be lost on appointment of an incumbent to a permanent post. It only provides that on appointment to a permanent post earlier lien on the post is lost by the operation of law. Thus, the submission as made by the learned Counsel for the respondent No. 4 in the light of the aforesaid discussion also deserves to be rejected.

17. Since this Court has already accepted the submission of the learned Counsel for the petitioners that after 2-12-1996, respondent No. 4 cannot be treated to be an employee of Medical Education Department of the State Government and would be an employee of Regional Institute of Ophthalmology where she has acquired a lien on a permanent post of the Director, therefore, the promotion of the respondent No. 4 on the post of Dean by an order dated 2-11-2002 (Annexure P-16) and so also her subsequent promotion by an order dated 31st October, 2005 (Annexure A-17) are, themselves, bad in law.

18. Learned Counsel for the respondent No. 4 further submitted that the respondent No. 4, in fact, was sent on deputation. The same was also the argument of the State but no order by the respondents has been filed to show

that at any point of time, the State Government sent the respondent No. 4 on deputation to the Regional Institute of Ophthalmology. This Court has also given a finding that the State Government issued a letter dated 2-12-1996 by which a specific condition was given that the respondent No. 4 shall accept her promotion only with the Regional Institute of Ophthalmology and not with the State Government. Therefore, respondent No. 4 has waived her right to claim any promotion in the Medical Education Department after 2-12-1996.

19. It may also be seen in the present case that Rule 16 of Madhya Pradesh Medical Education (Gazetted) Service Recruitment Rules, 1987 provides consultation with the Commission. Accordingly, the recommendations of the Departmental Promotion Committee presided over by a member of the Commission shall be deemed to be compliance of the requirement of consultation of the commission under Sub-clause (6) of Clause (3) of Article 320 of the Constitution and separate consultation with the commission shall not be necessary. Thus, any promotion effected under the aforesaid Rule has to be in consultation with the Public Service Commission. The Public Service Commission, i.e., respondent No. 3 has also mechanically exercised its effect of power of consultation. The consultation is not merely a formality but the consultation has to be with application of mind with regard to the recommendations submitted by the Departmental Promotion Committee. It was, thus, necessary for the Commission also to apply its mind with respect to eligibility of respondent No. 4 to the extent whether she still was into the cadre strength of the Medical Education Department. In the present case, the Public Service Commission has not chosen to file the return. At the time of argument, the learned Counsel for the Public Service Commission stated that he does not want to argue in the matter. Such an act of the Commission also deserves to be taken note of that the Commission exercising the powers under the Rules having the force of law, without there being any application of mind, mechanically acted on the recommendations. It may also be seen that at the time of argument also it was not demonstrated as to how the consultation by the Commission was based upon the valid reason with the application of mind.

20. On the basis of the findings arrived at as aforesaid, the present petition is allowed and the action of the State Government in passing the order dated 2-11-2002 (Annexure A-16) promoting the respondent No. 4 as Dean is quashed. Similarly, the order dated 31st October, 2005 (Annexure A-17) promoting the respondent No. 4 as Director, Medical Education is also set aside. Consequently, the order passed by the State Government dated 26-5-2001 (Annexure A-1) is partly set aside to the extent that the benefit arising out of the said order shall alone be admissible till 2-12-1996 to respondent No. 4 and not for any later date, to 2-12-1996 as this Court has already arrived at a finding that after 2-12-1996, respondent No. 4 was no more an employee of the Medical Education Department of the State Government. Since the promotion of respondent No. 4 to the post of Dean as well as Director, Medical Education stands quashed.

The State Government shall also immediately hold a review DPC to consider the case of all eligible candidates excluding the respondent No. 4 to the post of Dean, Medical Education and Director, Medical Education. The post held by the respondent No. 4 of the Director stands vacated by her and till the review DPC is not held, the State Government shall appoint any senior person to function as a Director. Since the present petition has been allowed on the aforesaid grounds, therefore, challenge of the petitioners for assigning higher seniority to the respondent No. 4 on the post of Professor is of no consequence. The petition is, thus, allowed for the aforesaid reasons to the extent as above.