
(2000) 09 PAT CK 0003
In the Patna High Court
Case No : L.P.A. No. 273 of 2000

Dr. Lala Sumnendra Nath

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 14-09-2000

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2001) 1 BLJR 256

Hon'ble Judges : Nagendra Rai, J;I.P. Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—This Letters Patent Appeal is directed against the order dated 10.1.2000, passed by a learned Single Judge of this Court in C.W.J.C. No. 10684 of 1996, by which he has dismissed the writ application filed by the appellant for a direction to the respondents to regularize his promotion on the post of Professor in the Department of Eye Nalanda Medical College and Hospital, Patna (for short "N.M.C.H.") with effect from 14.9.1987.

2. The controversy in this appeal is with respect to the filling up the post of Professor in the Department of Eye, N.M.C.H., Patna.

3. The case of the appellant is that an Associate Professor was eligible for being promoted to the post of Professor, which is done on the basis of recommendation of the Bihar Public Service Commission (for short "the Commission") and after clearance by the Vigilance Department and after performing other formalities. The appellant was promoted on ad-hoc basis to the post of Professor in the Eye Department of the N.M.C.H. vide Notification dated 14.9.1997 for a period of six months and thereafter, he continued on the said post on ad-hoc basis. He was paid salary in irregular manner. The regular promotion could not be made due to non-observance of other formalities; such as concurrence by the Commission. Thereafter, he filed the writ application, out of which this appeal arises, for a

direction to the State Government to complete the formalities for regularization of his promotion on the said post with effect from 14.9.1997.

4. The stand of the State Government is that promotion of the appellant on the post of Professor was on ad-hoc basis and the same cannot be regularized due to the reason that as a result of working arrangement, the appellant was posted on the post of Professor and that was not on the basis of any process of selection. The Government framed a rule vide notification dated 21.5.1997 in exercise of the power under Article 309 of the Constitution of India, wherein it has been clearly provided that the post of Professor shall be filled up by an open advertisement on all-India basis through the Commission and as such, the appointment is to be made in terms of the aforesaid Rules.

5. The learned Single Judge held that the appellant's appointment was purely on ad-hoc basis and the regular appointment has to be made on the basis of the new Rules, 1997 and, accordingly, steps should be taken to fill up the said post. However, he directed that as the appellant was working on the post of Professor since 1987, he would be entitled to the full salary for the period he had worked.

6. Learned Counsel for the appellant submitted that as the vacancy on the post arose prior to framing of the Rules in 1997, the same has to be, filled up in accordance with the procedure applicable prior to the operation of the Rules.

7. Learned Counsel for the State submitted that the new Rule will apply to all the vacancies, which were in existence on the date of operation of the new Rule and as the post of Professor, which the appellant occupied, was vacant on the date the new Rule came into force, the same has to be filled up according to the new Rule.

8. Learned Counsel for the appellant in support of his submission relied upon the judgments of the Supreme Court in A.A. Calton Vs. Director of Education and Another, P. Mahendran and others Vs. State of Karnataka and others, and B.L. Gupta and Another Vs. M.C.D., .

9. There was no separate teaching cadre in the Bihar Health Service and the Doctors posted in the Bihar Health Service used to be deputed on the teaching post, as a result of which there was a lot of confusion and controversy. The Government of Bihar in exercise of power under Article 309 of the Constitution of India issued a notification creating a separate cadre of teaching staff in the Bihar Health Service and providing the procedure for filling up the said post. The said Rule is known as Bihar Medical Education Service Cadre and Recruitment Rules, 1997. It provides that the said Rule will come into force from the date of its publication in the notification. It was published on 21.5.1997. So far as the filling up the post of Professor is concerned, it provides that all the posts of Professor shall be filled up by direct recruitment from the eligible Associate Professors by making an open advertisement on all-India basis. The qualification for the same has been provided therein.

10. In the case of P. Mahendran (supra), the apex Court held as follows:

It is well-settled Rule of Construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rule showing the intention to affect existing rights the Rules must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment, Rule cannot be given retrospective effect except in matter of procedure.

11. In the case of Calton (supra), it has been held that the process of selection for direct recruitment commences from the stage of calling for the application till the selection is made and the entire process from beginning to end is an integrated one.

12. In the case of N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, , it has been held that if the vacancy had occurred prior to the amendment of the Rule then the said vacancy would be governed by the old Rule and not by the amended Rule.

13. The same view has been reiterated in the case of B.L Gupta (supra), wherein the process of appointment started in terms of the Recruitment Rules of 1978 and the same was amended in 1995. Taking into consideration the said Rules, it was held by the Supreme Court that the Rule was prospective in operation and the vacancies, which had occurred prior to the amendment of the Rules, will be filled up by the old Rules and not by the amended Rules.

14. None of the aforesaid three cases, in my view, is applicable in the facts of this case. In this case, the relevant statutory provision, shows that all posts of Professor shall be filled up according to the new Rule. It means that the posts, which became vacant prior to the enforcement of the Rule, were existing on the date when the new Rule came into force, are to be filled up by the new Rule. In other words, the Rule has been given retrospectively to the extent indicated above.

15. In the case of P. Ganeshwar Rao and Others Vs. State of Andhra Pradesh and Others, , the question before the apex Court was as to whether the vacancies, which were notified, are to be filled up according to the Rules as existing at the time process of selection started or in accordance with the amended Rules. The amended Rule provided, inter alia, that 37 1/2 per cent of the substantive vacancies arising in the category of the Assistant Engineers shall be filled up by direct recruitment. The apex Court held that the words vacancy arising in the category indicated that the future vacancies have to be filled up according to the amended Rule and not the vacancies existing prior to the amendment. In this connection, it was observed as follows:

...If the above clause had read 37 1/2 per cent for the substantive vacancies in

the category of Assistant Engineers shall be filled by the direct recruitment, perhaps there would not have been much room for discussion. The said clause then would have applied even to the vacancies which had arisen prior to the date of amendment but which had not been filled up before that date....

16. The said decision fully applies in the facts of this case. There is nothing in the Rule of 1997 providing that the vacancies arising in the N.M.C.H. have to be only filled up, on the other hand, it provides that all posts of Professor are to be filled up according to the new Rules. Thus, the new Rule applies even to the vacancies, which had arisen prior to its coming into force.

17. In the case of Jai Singh Dalal and Others Vs. State of Haryana and Another, the recruitment to the Haryana State Services through special procedure started and the Haryana Public Service Commission was in the process of making selection on the basis of the Rule that was existing. In the meantime, the new Government came to power and decided to withdraw the decisions of the earlier Government to fill up the posts on the ground that it wanted to revise the criteria for selection and later on a notification was issued for filling up the said posts on the basis of the new criteria. A three-Judge Bench of the apex Court dealing with the said matter in paragraph 7 held as follows:

The law is settled that even candidates selected for appointment have no right to appointment and it is open to the State Government at a subsequent date not to fill up posts or to resort to fresh selection according to revised criteria. In the present case, the selection was yet to be made by the Commission. Therefore, the petitioners cannot even claim that they were selected for appointment by the Commission. The selection process had not been completed and before that the State Government reviewed its earlier decision and decided to revise the eligibility criteria for appointment. No right of petitioners has been violated.

Thus, in the said judgment, the apex Court upheld the stand of the State Government to fill up the vacancies, which were existing prior to the revised criteria according to the new Rule.

18. Thus, the stand of the appellant that as the vacancy on the post of Professor in the Eye Department of N.M.C.H. had occurred prior to coming into force of the new Rule, it has to be filled up in accordance with the Rule prevalent at that time when the vacancy arose and not according to the new Rule has to be rejected in view of the settled law on the point as indicated above.

19. For the reasons aforementioned, I do not find any merit in this appeal and it is, accordingly, dismissed.