
(1995) 09 PAT CK 0052
In the Patna High Court
Case No : C.W.J.C. No. 11045 of 1994

Dr. (Prof.) Shyam Prasad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-09-1995

Acts Referred:

Citation : (1995) 2 PLJR 610

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

Bench : Single Bench

Advocate : Sadanand Jha, Chittaranjan Sinha, No. 1, Sanjay Prasad and Subodh Kumar, for the Appellant; Yugal Kishore and D.K. Tiwary, for the Respondent

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—This is an unusual case of transfer of the Petitioner by the impugned order dated 12th December, 1994 as contained in Annexure-15 to the writ petition, by which the Petitioner has been transferred to the vacant post of Professor of Surgery, Nalanda Medical College Hospital, Patna (hereinafter called the N.M.C.H., Patna) from Patna Medical College Hospital, Patna (hereinafter called the P.M.C.H.).

2. This case Was admitted for hearing by a Division Bench on 21st December, 1994 fixing the case for final hearing on 30th January, 1995. Learned Counsel for the Petitioner submits that the writ petition was admitted after a very contested hearing but even then since 21st December, 1994 no counter affidavit has been filed by the State Respondents. By the said order of this Court dated 21st December, 1994, the impugned order of transfer dated 12th December, 1994 was stayed. Today when the hearing commenced as a part heard matter, learned Counsel for the State Respondents was asking for time to file counter affidavit. The Court has rejected the said prayer and proceeded to decide the matter finally on the materials available on the record.

3. From the uncontroverted averments made in the writ petition, it appears that

the Petitioner has a remarkable academic career, the details of which may not be necessary to be indicated here. It is not in dispute that the Petitioner was appointed as Resident Surgical Officer in P.M.C.H. in the year 1967 and continued on the various teaching posts there. However, the Petitioner was transferred to Ranchi Medical College Hospital, Ranchi by order dated 28th December, 1974 where he was posted as a Tutor in the Department of Surgery. Thereafter he was posted as Assistant Professor in the N.M.C.H. by order dated 16th December, 1977 to which post the Petitioner joined on 16th January, 1978. Thereafter the Petitioner was promoted as Associate Professor in the year 1980. Along with the Petitioner one Dr. A.A. Hai was also appointed as an Associate Professor and it is not in dispute that the said Dr. Hai is junior to the Petitioner as would appear from Annexure-3 to this writ petition. Thereafter by an order dated 22nd July, 1986 the Petitioner along with Dr. A.A. Hai and Dr. Sachchidanand Sinha was confirmed as Associate Professor. The said order also shows that Dr. A.A. Hai is junior to the Petitioner. Thereafter by order dated 23rd September, 1991 the Petitioner along with Dr. A.A. Hai and Dr. Sachchidanand Sinha were promoted as Professor of Surgery on ad hoc basis in anticipation of the approval of the Bihar Public Service Commission. The Petitioner, at that time, was retained in the N.M.C.H. whereas Dr. A.A. Hai and Dr. Sachchidanand Sinha, who were junior to the Petitioner, were retained at P.M.C.H. Learned Counsel for the Petitioner submits that at the time of such promotion posting is given on the basis of merit-cum-choice. Stating the aforesaid fact the Petitioner made a representation dated on 23rd September, 1991 after joining the post of Professor in the N.M.C.H. In the said representation, the Petitioner wanted his posting in P.M.C.H. Thereafter the Petitioner by another representation dated 6th January, 1992 gave a reminder to his previous representation dated 23rd September, 1991. Thereafter the matter was placed before the Establishment Committee which considered the case of the Petitioner and the said Establishment Committee by an order dated 23rd October, 1992 felt that injustice has been caused to the Petitioner by not posting him in P.M.C.H. and recommended in favour of his posting at P.M.C.H. on the post which fell vacant with effect from 1st April, 1992 on the retirement of Dr. Narendra Prasad. Thereafter presumably on the basis of the said recommendation of the Establishment Committee, the order dated 5th August, 1994 was passed posting the Petitioner as Professor in the Department of Surgery on a vacant post in the P.M.C.H. The said order has been annexed as Annexure-9 at page 49 of the writ petition. It is not in dispute that pursuant to the said order the Petitioner handed over the charge as Head of the Department, Surgery in N.M.C.H. to Dr. B.B. Pandey on 6th August, 1994 and there after joined the post of Professor of Surgery in P.M.C.H. on the same date i.e. on 6th August, 1994 and the petitioner's joining was accepted in the P.M.C.H. The Petitioner has also annexed a certificate given by Dr. R.N. Tiwary to the effect that the Petitioner has been teaching with distinction the students of Post Graduate Medical College and the petitioner's article has been published in the prestigious medical journal, namely, British Journal of Surgery. The said certificate given to the Petitioner has been annexed as Annexure-14 to the writ

petition.

4. It appears that thereafter a representation was made by Respondent No. 6, who at the material time, was Minister, Road Construction Department, Government of Bihar, Patna, to the Chief Minister, Government of Bihar. The said representation was made by the Minister immediately after the joining of the Petitioner in the P.M.C.H. In fact the said representation was made on 16th August, 1994. In the said representation it has been stated that the Petitioner be transferred back to N.M.C.H. so that Dr. Hai, who has been working in P.M.C.H. since the beginning of his teaching career, continues there as No. 2 in the Department of Surgery.

5. The Court has very carefully looked into the said representation made by Respondent No. 6 to the Chief Minister and on going through the same, the Court is of the view that the said representation has not been made either to protect the public interest or to streamline the administration of P.M.C.H. It seems that the said representation has been made by Respondent No. 6 in order to protect the interest of Dr. Hai. This Court is of the view that an elected representative of the people can make a representation to the Chief Minister pointing out any lapses in administration of a public institution in the public interest. He may also make a representation before the Chief Minister if it comes to his notice that the continued posting of any person in a particular place is subversive of discipline or purity of administration of that organisation but in the instant case the situation is just the reverse. The Petitioner has been posted in P.M.C.H. on 6th August, 1994 and within ten days thereafter the representation is made to dislodge him from the said posting in favour of one Dr. A.A. Hai, who has been posted there for more than last tens years. Such a request, in my view is opposed to the public interest. The view which I am taking is supported by a decision of the Division Bench of this Court in the case of Brahamchari Yashpal Vs. The State of Bihar and Others to which I was a party and in a somewhat similar situation the said decision was arrived at.

6. However, the Chief Minister on the basis of the said request, called for a comment from the Secretary, Department of Health, Government of Bihar, Patna and thereafter the impugned order to transfer of the Petitioner dated 12th December, 1994 has been passed in super session of the earlier order dated 5th August, 1994 by which the Petitioner has been posted as Professor of Surgery in the P.M.C.H.

7. This Court is unable to understand how can the order dated 5th August, 1994 be superseded by an order dated 12th December, 1994. The order dated 5th August, 1994 is not a rule or regulation framed under the Act which can be superseded by a subsequent rule or regulation and it is nobody's case that either the order dated 5th August, 1994 or the order dated 12th December, 1994 is a piece of subordinate legislation. In fact such a contention is wholly absurd. Therefore, the Court is unable to appreciate how an executive order appointing the Petitioner to a particular post, pursuant to which the Petitioner has joined the

post and the order has been worked out, can be superseded by a subsequent executive order. This shows that the authority concerned, while passing the impugned order, has not applied his mind properly in the facts and circumstances of the case. Apart from that this Court holds that the impugned order dated 12th December, 1994 has not been passed in public interest. It has, of course, been repeatedly held by the Apex Court that in matters of transfer the scope of interference by this Court is extremely limited but one thing has been made clear that if the impugned order of transfer is palpably not in public interest and is manifestly mala fide, in that case the Court can interfere with the order of transfer. In the Instant case, it is obvious that the government machinery has been sought to be moved in the interest of Dr. A. Hai. As such the impugned order of transfer of the Petitioner cannot be said to be in the public interest.

8. The impugned order of transfer, therefore, is vitiated, if not by malice in fact but certainly by malice in law as the same has been passed on irrelevant and extraneous considerations and not in public interest.

9. Learned Counsel for the Respondent has said that Dr. Hai has not been made party to this writ petition and as such this writ petition is not maintainable.

10. In the instant case, learned Counsel for the Petitioner has categorically stated that he is not seeking any relief against Dr. Hai, in the sense that he is neither asking to post him in place of Dr. Hai nor he is making any prayer to dislodge Dr. A. A. Hai from the P.M.C.H. On the other hand in paragraph 38 of the writ petition it has been categorically stated that, the Petitioner has no grudge against the continuance of Dr. A.A. Hai or Dr. Sachchidanand Sinha in the P.M.C.H. and as such In this writ petition Dr. Hai has not been made a party.

11. This Court is of the view that Dr. Hai is certainly not a necessary party to this writ petition inasmuch as no relief has been sought for against him. This Court also does not make any observation or aspersion against Dr. Hai.

12. This Court is quashing the impugned order of transfer dated 12th December, 1994 inasmuch as Respondent No. 6 who has been made a party, has made undue interference with public administration in the matter of posting and transfer of Professor in P.M.C.H. and such interference has been caused on extraneous consideration and the Court finds that there is a close nexus between such representation made by Respondent No. 6 and the impugned order of transfer which has been passed in respect of the Petitioner. The said order of transfer having been passed within four months of the Petitioner joining a vacant post in P.M.C.H. at the instance of Respondent No. 6 is an order, which is opposed to public interest.

13. The impugned order of transfer dated 12th December, 1994 as contained in Annexure-15 is, therefore, quashed. This writ petition is accordingly allowed. However, there will be no order as to cost.