

(2003) 05 PAT CK 0008
In the Patna High Court
Case No : C.W.J.C. No. 8572 of 2001

Dr. Shivendra Kumar Shahi APPELLANT
Vs
The State of Bihar and Others RESPONDENT

Date of Decision : 09-05-2003

Acts Referred:

Bihar Service Code, 1952 — Rule 68, 69, 70
Indira Gandhi Institute of Medical Sciences Act, 1984 — Section 12(5), 3
Indira Gandhi Institute of Medical Sciences Rules, 1984 — Rule 28, 7

Citation : (2003) 3 PLJR 144

Hon'ble Judges : S.N. Jha, J

Bench : Single Bench

Advocate : Sadanand Jha, P.K. Samrendra, Ajay Kumar and Rama Kant Sharma, for the Appellant; J.P. Karn and Sheojee Prasad for IGIMS, Ram Balak Mahto, Ajay and Ganesh Prasad Singh and V.R.P Singh, Respondent Nos. 6 and 7 and S.K. Ghose and Arup Kr. Chongdar for State, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Jha, J.—The dispute in this case relates to seniority between the Petitioner and Respondent Nos. 6 and 7 in the Indira Gandhi Institute of Medical Sciences Sheikhpura, Patna (hereinafter referred to as "the Institute" or IGIMS). The Petitioner, among other things, seeks quashing of the appointment of Respondent Nos. 6 and 7 on the posts of Professor, (Community Medicine) and Professor (Neurology) respectively, in the IGIMS, and a declaration that he is the seniormost professor. Copies of office memorandum dated 3.5.95 and 10.2.97 by which the impugned appointments of Respondent Nos. 6 and 7 were made, have been enclosed as Annexures 13 and 9, respectively, to the writ petition.

2. The Petitioner was appointed as Additional Professor (Micro Biology) in the IGIMS on 6.12.94. On 3.2.97 he was designated as Professor but in the same scale. On 7.6.2000 he was appointed as Professor pursuant to advertisement and selection. The said appointment as Professor was confirmed by the Board of Governors of the IGIMS on 11.9.2000 with effect from 7.6.2000 itself. It may be

mentioned here that under Rule 7(Ga) of the Indira Gandhi Institute of Medical Sciences Rules, 1984 framed under the Indira Gandhi Institute of Medical Sciences Act, 1984 regular appointment on all posts in the Institute are made by direct recruitment on the basis of open advertisement.

3. The case of the Petitioner as regards Respondent No. 6 Dr. Dilip Kumar Yadav is that he was a member of Bihar Health Service Cadre. He was appointed as Assistant Professor (PSM) in the Institute on 12.6.85. On 17.6.85 he joined the Institute on deputation for a period of three years. The period of deputation was extended from time to time and, finally, till further orders vide letter No. 6686 (3) dated 7.7.92 of the Health, Medical Education and Family Welfare Department. On 24.12.93, he was appointed as Additional Professor. After the post of Professor was advertised he applied for the post and on 28.4.95 the Selection Committee recommended him. On 3.5.95 the appointment order was issued. The case of the Petitioner is that Respondent No. 6 lacked teaching experience but, wrongly, allowing him five months' relaxation he was recommended for the post and appointed. Soon thereafter on 12.6.95 he was promoted as Professor in the Bihar Health Service and posted at MGM College and Hospital, Jamshedpur in the preventive Social Medicine (PSM) Department. He submitted his joining at the said College on 26.6.95 but left on the same day to join the IGIMS. He continued in the IGIMS on deputation basis until 22.11.2000 when on his representation his resignation was accepted and lien in the Bihar Health Service was terminated. The case of the Petitioner is that after Respondent No. 6 joined MGM College and Hospital, Jamshedpur-albeit for a day-his continuity of service in the IGIMS stood broken. Besides, he could not hold lien on two posts. He held lien in the Bihar Health Service under the State Government upto 22.11.2000. Till then he was on deputation in the IGIMS. He thus is entitled to count seniority since only 22.11.2000. The Petitioner having been appointed as Professor on 7.6.2000 he should rank senior to him.

4. The case of the Petitioner vis-a-vis Respondent No. 7 Dr. Ajay Kumar Singh is as follows. Pursuant to advt. No. 12/EMP/95 he applied for the post of Professor/Additional Professor (Neurology). The interview was held on 11.9.95. The Selection Committee found him qualified for the post of Professor. On 31.10.95 he was appointed as Additional Professor (Neurology). On 10.2.97 however, he was appointed as Professor (Neurology) on the basis of same selection. According to the Petitioner, on his appointment as Additional Professor on 31.10.95 the selection process and the recommendation of the Selection Committee got exhausted and Respondent No. 7 could not be appointed again on the basis of same advertisement, application and selection. According to the Petitioner, further, Respondent No. 7 was appointed as Additional Professor (Neurology) without sanction of post.

5. The case of Respondent No. 6 is that he was appointed as Professor on 3.5.95 as against 7.6.2000. The State Government vide notification dated 21.6.95 the Health, Medical Education and Family Welfare Department directed that his join-

ing at the MGM College, Jamshedpur would be treated as compliance of the notification dated 12.6.95 (by which he had been pro-moted as Professor in Preventive Social Medicine (PSM) in Bihar Health Service and he was allowed to continue in the IGIMS on deputation). Neither his appointment as Professor in the IGIMS dated 3.5.95 nor the said notification dated 21.6.95 was challenged by the Petitioner or any one else. At this stage, it is not open to the Petitioner to challenge the validity of his appointment as Professor and claim seniority over him.

6. The case of Respondent No. 7 is that one post of Professor/Additional Professor (Neurology) was advertised pursuant to which he applied. Though the selection Committee found him qualified for the post of Professor, allowing him relaxation of experience, the Board of Governors resolved that he should be appointed as Professor on completion of the required periods if his performance is satisfactory and meantime he was appointed as Additional Professor on 31.10.95. Later, after he came to possess the requisite experience, on 10.2.97 he was appointed as Professor. According to the Respondent the selection process did not get exhausted by reason of his appointment as Additional Professor because the Board of Governors had already taken decision to appoint him as Professor after he acquires the requisite experience.

7. At this stage before considering the respective case of the parties, it is relevant to mention that the thrust of the Petitioner's case in the writ petition was that the appointment of Respondent Nos. 6 and 7 as Professor (PSM) and Professor (Neurology) was illegal because they did not possess the requisite experience but wrongly giving them relaxation of the experience qualification they were recommended and appointed on the post. This aspect of the case, however, was not pressed at the time of hearing in view of a Bench decision of this Court in the case of Dr. Sunil Kumar Singh v. State of Bihar and Ors. LPA No. 1423/99 decided on 9.5.2001. Apart from that, in my opinion, the impugned appointment of the Respondents as Professor having been made long back on 3.5.95 and 10.2.97, respectively, i.e. six/four years prior to the filing of the present case, it is too (sic) in the day to question the appointment. However, I do not want to short-circuit consideration of the case of the parties on the ground of delay and I would accordingly deal with the contentions of the parties on merit.

8. Coming to the merit of the case, so (sic) as Respondent No. 6 is concerned, challenge to validity of his appointment on the basis of relaxation having been given up, (sic) that remains is the claim of inter se (sic) ority. The facts of the case as briefly noted hereinabove are not in dispute. It is not in dispute that Respondent No. 6 joined IGIMS on 16.7.95 on deputation and remained so until 22.11.2000 when his lien in the State Government was terminated and his deputation came to an end. Earlier he stood appointed as Professor (PSM), on 3.5.95. Dr. Sadanand Jha, learned Counsel for the Petitioner submitted, with emphasis, that Respondent No. 6 cannot count his seniority as Professor since

3.5.95 on account of break-in-service on 26.6.95 when he joined MGM College and Hospital, Jamshedpur-albeit for a day. Secondly, the period of service prior to 22.11.2000 also cannot be counted as he held lien under the State Government and he could not hold lien on two posts at the same time.

9. On behalf of Respondent No. 6 it was submitted by Shri Ram Balak Mahto that the fact that Respondent No. 6 held lien under the State Government would only mean that he could not be confirmed in the IGIMS. It was also submitted that though he was on deputation till 22.11.2000 his appointment as Professor with effect from 3.5.95 and the resultant experience cannot be done away with. It was further submitted that Respondent No. 6 joined MGM College, Jamshedpur and rejoined IGIMS in the light of the notification of the State Government dated 21.6.95 (supra) which was never challenged by the Petitioner or any one else.

10. At this stage, reference may be made to the relevant provisions of the Bihar Service Code relating to lien. It may be mentioned here that u/s 12(5) of the IGIMS Act, the Director and other officers and the employees of the Institute are governed by such conditions of service in respect of leave, pension, provident fund and other matters as may be prescribed. The term "prescribed" has been defined in Section 3(viii) of the Act to mean "prescribed by rule". The IGIMS Rules, however, do not contain any specific provision relating to service conditions or lien and therefore we have to fall back on the Bihar Service Code which is the mother of all rules applicable to government servants in the State of Bihar. Indeed, counsel for the parties also made their submissions with reference to those rules.

11. Rule 28 defines lien to mean the title of a Government servant to hold substantively either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively. Rule 68 provides that unless in any case it be otherwise provided in these rules, a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired to any other post. Rule 69 lays down that unless his lien is suspended under Rule 70 or transferred under Rule 72, a Government servant holding substantively a permanent post retains a lien on that post-

(a)

(b) while on foreign service

(c)

Rules 70 and 71 also be noticed so far as relevant.

70 (a) The lien of a Government servant on permanent post which he holds substantively shall be suspended if he is appointed to a substantive capacity-

(1)

(2) to a permanent post outside the cadre on which he is borne, or

(3)

71 (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 (sic) or a suspended lien upon a permanent post.

12. It would appear that the afore mentioned provisions of the Service Code recognises the right of a government servant, holding a substantive appointment (sic) return to his post held by him-whelth substantive or tenure-while he is holding another appointment/post including on foreign service. Under Rule 68, upon (sic) substantive appointment to any other permanent post he ceases to hold lien pre(sic)ous post and acquires lien on the (sic) post. Under Rule 70 the Government (sic) power to suspend the lien in a case whether inter alia, the government servant is pointed to a permanent post outside (sic) cadre on which he is borne. However, in circumstance his lien can be termin(sic) even with his consent if it relates in loss(sic) lien or suspended lien on the permanent post.

13. Thus, on appointment of Respondent No. 6 as Professor on 3.5.95 his lien the post(s) held by him under the State Government in the Bihar Health Sen(sic) Cadre could be treated as suspended (sic) under Rule 70 read with Rule 69(b) of the Bihar Service Code but it could not (sic) in loss of lien unless it is held that acquired lien on the post of Professor his appointment to the post, under rule of the Bihar Service Code. These pen- sions relating to lien cannot be used to detriment of Respondent No. 6 because observed above, they are meant to (sic) their right and not to abrogate them.

14. As observed by the Apex Court Ramlal Khurana v. State of Punjab 1989 SC 1985,

Lien is not a word of Article (sic) connotes the right of a civil servant hold the post substantively to which is appointed. Generally when a (sic) with a lien against a post is appointed substantively to another post, he acquires a lien against the latter post. Then the lien against his previous post automatically disappears. The principle being that no Government servant can have simultaneously two liens against two posts in two different cadres. It is a well accepted principle of service jurisprudence.

(sic) earlier in the said judgment while considering the scope of Rule 3.14 of the Punjab Civil Services Rules (Vol. I) Part I corresponding to Rule 70 of the Bihar Service Code the Court observed,

Rule 3.14 provides that a competent authority shall suspend the lien of the government servant when he is ap-pointed in a substantive capacity to a permanent post outside the cadre of which he is borne. It seems to us that this rule cannot be operated to the preju-dice of a Government servant who on his own has acquired legal right to an (sic) cadre post. Indeed, the rule is for the benefit of a Government servant who intends to return back to his parent department.

15. So far as the so called break-in-vice on 26.9.95 is concerned, this as-(sic) of the Petitioner's case has only aca(sic) importance inasmuch as even if appointment of Respondent No. 6 as Profesinal reckoned from 27.6.95-when he (sic) the Institute after his one day's (sic)ng at MGM College and Hospital, shedpur, the Petitioner on the basis of appointment as Professor on 7.6.2000 not claim seniority over him. The only (sic) is that till 22.11.2000 he held lien (sic)post(s) in the State Health Cadre under State Government and his status in the (sic)s was that of deputationist.

16. In view of the provisions of the Bihar Service Code and the observations (sic) Supreme Court the fact that Respondent No. 6 held lien under the State Government cannot be a relevant consideration to deny Respondent No. 6 benefit of his appointment in the Institute. It is true that the status of the Respondent No. 6 was that of deputationist in the eye of law till 22.11.2000 but that too in my opinion would not affect either validity of his appointment as Professor or consequential benefits thereof. In any case, I have grave doubts if the Petitioner can challenge the appointment of Respondent No. 6 as Professor after so many years. It is worth pointing out that the said appointment was approved by the Board of Governors at a meeting in which the Petitioner participated as Additional Professor.

17. In these premises, I do not find any merit in the Petitioner's claim of seniority over Respondent No. 6.

18. Now coming to the claim vis-a-vis Respondent No. 7, from the records it appears that single post of Professor/Additional Professor (Neurology) was advertised. I could not lay my hand on the application submitted by Respondent No. 7 for appointment pursuant to the said advertisement. The memorandum by which he was appointed as Additional Professor refers to the interview for the post of Additional Professor with the word "Additional" scored out. This for a while created a doubt as to whether interview was only for the post of Additional Professor. However, from the minutes of the Selection Committee dated 11.9.95 it appears that he was considered for the post of Professor. The minutes runs as under:

Dr. A.K. Singh qualifies for Professor in Neurology based on qualification and experience relaxation in selection is allowed.

The minutes at the first instance appears to be slightly confusing but on close consideration it would appear that what the selection committee actually meant was that Respondent No. 6 qualified for the post of Professor (Neurology) on the basis of his qualification. As regards the experience the committee was of the view that relaxation should be allowed. It is an admitted position that on the date of interview Respondent No. 7 did not possess the requisite experience-which aspect of the case was not pressed on behalf of the Petitioner in view of the decision in the case of Dr. Sunil Kumar Singh (supra).

19. In view of the recommendation of the Selection Committee the Director,

IGIMS on 22.11.95 took the view that the appointment of Respondent No. 6 as Professor may be approved subject to condition that he serves as Additional Professor till such time, he acquires the requisite experience. On 30.12.95 in its 38th meeting the Board of Governors was pleased to resolve that his appointment as Professor be approved subject to condition that he has to serve as Additional Professor till such time he acquires the required experience. In the circumstances, Respondent No. 7 was initially appointed as Additional Professor. On completion of the requisite experience in its 40th meeting the Board of Governors approved his appointment as Professor.

20. Learned Counsel for Respondent No. 7 submitted that if in view of the decision in Dr. Sunil Kumar Singh's case, Respondent No. 7 could be appointed as Professor at the very first instance-allowing him relaxation of experience-as recommended by the Selection Committee, the subsequent decision of the Board of Governors approving his appointment as Professor on acquisition of the requisite experience, taken in continuance of the earlier resolution dated 30.12.95 cannot be said to be illegal. I find substance in the submission. Had there been two posts of Professor and Additional Professor, after his appointment as Additional Professor, Respondent No. 7 could not be appointed again on the basis of same selection on the post of Professor but that is not the case here. The selection was for the single post of Professor or Additional Professor. Respondent No. 7 undisputedly possessed the academic qualification but lacked in experience for the post of Professor. The Selection Committee recommended his name on the post of Professor by giving relaxation. The Board of Governors however, resolved that he may be appointed as Professor after he acquires the requisite experience. His subsequent appointment as Professor dated 10.2.97 must be held to be a continuing process and result of the same selection which commenced pursuant to advt. No. 12/EMP/95.

21. So far as the controversy as to sanction of post is concerned, it appears from the records that appointment was made in exigency of work in anticipation of the government approval against the existing equivalent post of Additional Professor (Urology). The State Government accorded permanent sanction for the post of Professor, (Neurology) from the financial year 1997-98 vide its letter No. 3721 dated] 21.3.98. Therefore, the fact that the appointment was made against post in an other discipline does not appear to have much relevance. In any case as Respondent No. 7 was appointed on the post Professor on 10.2.97 i.e. much prior to the Petitioner, the Petitioner cannot claim seniority over him either.

22. In the result, I do not find (sic) merit in the writ petition which is accordingly dismissed.