

(2011) 02 PAT CK 0025

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No's. 1763 of 1998 and 5144 of 2005

Dr. Sudhir Kumar Singh and Others

APPELLANT

Vs

The State of Bihar and Others
 Dr. Ganesh Narayan Jha
and Dr. Chandra Mohan Jha Vs The State of Bihar and Others

RESPONDENT

Date of Decision : 23-02-2011

Acts Referred:

Bihar Medical Education (Service Cadre and Recruitment of its Post) Rules, 1997 — Rule 10

Citation : (2011) 59 BLJR 733 : (2011) 3 PLJR 931

Hon'ble Judges : Navaniti Prasad Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Navaniti Prasad Singh, J.—The two writ petitions relate to the same Respondent and raised basically the same dispute, the issue of seniority and posting and, as such, with consent of parties have been taken up together for final disposal.

2. The pleadings which are voluminous are complete and the parties have argued extensively on all issues arising as would be noted hereunder.

3. In the first writ petition, that is, C.W.J.C. No. 1763 of 1998, originally there were six writ Petitioners. Petitioner No. 4, Dr. Rajib Ratan Choudhary withdrew from the writ petition in the very beginning itself. Petitioner No. 1, Dr. Sudhir Kumar Singh, Petitioner No. 2, Dr. Ram Shankar Sinha, Petitioner No. 5, Dr. Indudhar Narain Jha and Petitioner No. 6, Dr. Sambhu Nath Jha are not interested in pursuing the matter, inasmuch as they have been allotted Jharkhand cadre on bifurcation of the State of Bihar. That leaves only Petitioner No. 3, Dr. Vibhu Priyadarshi as the Petitioner. Similarly amongst the four private-Respondents, namely, Respondent No. 3, Dr. Kames war Prasad, Respondent No. 4, Dr. Ramdeo Sahu and Respondent No. 5, Dr. Shankar Prasad Sinha who were at Dhanbad having been allotted Jharkhand cadre, the question of their seniority has not been put to issue. That leaves Respondent No. 6, Dr. A.K. Gupta as the

sole private-Respondent.

4. Thus, the contest in this first writ petition is with regard to Petitioner No. 3, Dr. Vibhu Priyadarshi and Respondent No. 6, Dr. A.K. Gupta.

5. It may be mentioned here that substantial part of the pleadings in this writ petition is in relation to challenge to the seniority as given to Respondent Nos. 3,4&5, inter alia, on the ground that their past experience as teachers in Private Medical Colleges which were subsequently taken over by the Government was wrongly counted for the purposes of seniority. Those issues have now become irrelevant and the surviving issue is the contest between the sole surviving Petitioner and sole surviving private Respondent, as noted above.

6. In the second writ petition, that is, C.W.J.C. No. 5144 of 2005, the two Petitioners who are Doctors in the Darbhanga Medical College & Hospital (D.M.C.H.), Darbhanga challenge the ad hoc appointment of Dr. A.K. Gupta (Respondent No. 7 in this writ petition) to be In charge of medical emergency, O.P.D. and research guide of Post Graduate students in the Department of General Medicine in D.M.C.H. as not being in consonance with the seniority.

7. In the first writ petition, very briefly stated, the challenge is that when both the Petitioner No. 3 and Respondent No. 6 applied for positions as Assistant Professor in Government Medical College and Petitioner having been empanelled just above the Respondent that would determine the inter se seniority at all stages.

8. In the second writ petition, the ground of attack is that Petitioners are in the Department of Medicine whereas Respondent was in the Super Specialty Department of Cardiology at D.M.C.H. and, as such, the Respondent could not be made In charge of Department of Medicine though undisputed the Respondent was much senior to these two Petitioners.

9. Briefly noticed in respect of the first writ petition, the stand of the Respondent would be that notwithstanding empanelment, as Petitioner has himself given up the appointment and placement offered and chose to wait for a place of his liking he forgoes his seniority. He would further submit that right in the beginning Government took a policy decision and made it known to all that seniority would be worked out on basis of period of teaching experience and Petitioner never having challenged it, cannot now plead otherwise. Apart from this, it would be submitted on behalf of Respondent that Petitioner having been inappropriately appointed and posted at the very initial stage, much after Petitioner's appointment, he cannot steal a march over Respondent. Further the cadre list/ gradation list is a joint cadre list /gradation list and there being no cadre bifurcation the seniority of Respondent has been correctly determined.

10. So far as the second writ petition, being C.W.J.C. No. 5144 of 2005 is concerned, the Petitioner's assertion is that Petitioner having chosen cardiology and there being a Super Specialty Department of Cardiology at D.M.C.H.

Respondent had to be placed therein and could not Head the Medicine Department of D.M.C.H., to which, the Petitioners belong. The response of the Respondent to this would be the same as in the first writ petition that there exists no separate cadre and seniority is determined by joint cadre list/joint gradation list and that there is no declared/notified Super Specialty Cardiology Department at D.M.C.H. whereas it is only a part and parcel of the Department of Medicine.

11. State supports its action and joins the Respondents in the issues as against the Petitioners in both the writ petition.

12. The first writ petition was filed when the provisional seniority list of Assistant Professor (General Medicine) dated 19.12.1997 was published by the State for the purposes of promotion to the next higher post of Associate Professor, which is Annexure-2 to the said writ petition. During pendency of the writ petition, both the parties were given due promotion to the post of Associate Professor and lastly Respondent, Dr. A.K. Gupta has been made Professor of Medicine.

13. It may be noted at one stage that this Court required the State to file affidavit as to why the Petitioner, Dr. Vibhu Priyadarshi was not made Professor of Medicine. The response under affidavit was that there were posts of Professor vacant at Patna Medical College & Hospital (P.M.C.H.) itself where Dr. Vibhu Priyadarshi was posted and he was duly qualified to be considered being the next senior most but it would take a few month time (about three months) to get roaster clearance and recommendation from Departmental Promotional Committee (D.P.C.), but even though six months have gone by since the said affidavit, the State is still waiting for something undisclosed to wake up to its responsibility. Had the State taken timely action, this litigation would not have been forced upon this Court for the simple reason Dr. Vibhu Priyadarshi was never interested in leaving P.M.C.H. and going to Darbhanga and if he had been made Professor here itself, in all probabilities he would have given up the challenge to the seniority of Respondent.

14. The relevant facts pleaded and pressed in course of argument in respect of the first writ petition is as hereunder.

15. Hereafter in this judgment reference to Petitioner would be to the remaining Petitioners and private-Respondent would be Dr. A.K. Gupta in both cases.

16. Petitioner, Dr. Vibhu Priyadarshi was appointed as Civil Assistant Surgeon on 22.09.1977 under the Bihar Health Service Cadre. On 25.01.1982 he was appointed as Resident Medical Officer at the P.M.C.H. and then on 22.02.1984 as the Registrar of P.M.C.H.

17. Respondent-Dr. A.K. Gupta was appointed as Civil Assistant Surgeon on 11.10.1977. On 02.02.1982 he was appointed as Resident Medical Officer of D.M.C.H., Darbhanga and on 01.02.1984 he was appointed as Registrar of D.M.C.H., Darbhanga.

18. It may be noted here that at this time there did not appear to be a separate cadre for Doctors-Teachers of Government Medical Colleges which inter alia included the post of Assistant Professor with its qualification stated therein. There were vacancies in respect of, inter alia, Assistant Professor (Cardiology) and Assistant Professor (General Medicine) for which the basic eligibility was the same being M.B.B.S. followed by M.D. On or about 29.12.1987 an advertisement was issued by the State, inter alia, for these two posts apart from others which is Annexure-42(1) to the writ petition. Clause-14 of the said advertisement inter alia, specified that if any applicant does not join the recommended post within three months he would be then declared ineligible for being considered for any appointment to any teaching post under the Government for a period of five years.

19. It is not in dispute that both Petitioner and the Respondent who were M.B.B.S. M.D. applied for the post of Assistant Professor (Cardiology) and as well as Assistant Professor (General Medicine).

20. Petitioner asserts that two separate panels were prepared one each for General Medicine and Cardiology. This is disputed by the Respondent and the State is not in a position to clear the confusion. This Court assumes Petitioner to be correct. On behalf of Petitioner, it is stated that Petitioner was at serial No. 2 and Respondent was at serial No. 3 in both the panels.

21. The panel could not be acted upon because of various controversies that were raised and the litigations that ensued. Ultimately, it was pursuant to directions of this Court that in 1990 the appointment process was taken up from the panel aforesaid. It is not in dispute, rather Petitioner has accepted, that as per his choice he was offered the position as Assistant Professor (Cardiology) at D.M.C.H. but that was not acceptable to him and he gave up his appointment there. At P.M.C.H., Patna there was only one post of Assistant Professor (Medicine) available and that went to one Dr. J.K.L. Das who was empanelled as number one. Petitioner waited because he did not want to move out of P.M.C.H. where he was Registrar. On 30.06.1990 Respondent was appointed as Assistant Professor (Cardiology) at D.M.C.H. where he joined on 02.07.1990. Apparently, as would Respondent submit, that Petitioner realized the consequence of Clause-14 of the advertisement of not accepting to join the post, he managed to persuade the Government to appoint him as Assistant Professor (Medicine), for which there was no post or vacancy at P.M.C.H., in the vacant post of Associate Professor of Cardiology at P.M.C.H. This appointment and joining was done on 11.10.1990. This is Annexure-7 to the writ petition. This unusual method of appointment was subject to serious criticisms by the Respondent for obvious reason.

22. Now, on 17.12.1990 the State Government came up with a policy resolution with regard to criteria for promotion of Assistant Professors to the post of Associate Professors. This is Annexure-22 to the writ petition itself. Petitioner does not challenge the same. One of the criterion for seniority consequently the

promotion as fixed was the length of teaching experience. In other words, the length of teaching experience as Assistant Professor would be the determinative factor for reckoning the seniority for promotion to the post of Associate Professor.

23. It is apparently on basis of this promotional policy that initially the impugned provisional gradation list was published on 19.12.1997, which is Annexure-2 to the writ petition. A reference to the said list would show that parties have been positioned on basis of length of teaching experience as Assistant Professor. Petitioner had teaching experience of 6 years 5 months 20 days as on the cut off date on 31.03.1997, having joined the post on 11.10.1990, whereas the Respondent had teaching experience of 6 years 8 months 20 days, having joined as Assistant Professor on 02.07.1990. As noted above, the differences in date of joining as between the two was not because of any difficulty on part of State but because of own volition of the Petitioner in not joining available post and when he later agreed to join he joined in a very peculiar and curious manner, as noted above. Petitioner filed his objection and this writ petition as well. In the meantime, both were appointed as Associate Professors effectively from the same date, that is, 27.04.1998. Provisional combined gradation list of Associate Professors was then published on 31.11.2008 (Annexure-55) in which again Respondent was shown above the Petitioner. The Petitioner objected and then final combined gradation list for Department of Medicine for Associate Professor was published on 08.07.2008 (Annexure-57) to the writ petition, which is also Annexure-27 to the second writ petition in which again Respondent was shown above the Petitioner.

24. The sequence of facts relevant being complete I need only to notice one more fact that the Respondent was appointed as Assistant Professor (Cardiology). Subsequently, he is shown as Associate Professor (Medicine) which is then interchanged. This and independent of this has led the Petitioners in both the writ petitions to submit that the Respondent being in a so called Super Specialty, Cardiology Department could not move in as Associate Professor Medicine or could not Head Department of Medicine. In my considered view, there is a total misunderstanding of the situation in this regard, for the reasons noted hereinafter.

25. As noted earlier, at the time when advertisement was issued in 1987 there was no separate cadre for Doctors teaching in Medical Colleges & Hospitals. They were taken in from Bihar Health Services. The rules were for the first time framed only in 1997, that is, the Bihar Medical Education (Service Cadre and Recruitment of its Post) Rules, 1997. While making these rules also Rule-10 thereof recognized a sort of transitory stage which was more apparent earlier. It clearly stipulated that till properly constituted and notified Super Specialty Departments are not created a Doctor of any Super Specialty subject would be treated as a Doctor in the parent Department. This would apply to seniority as well. This aspect of the matter, in my view, has been fully dealt with in the case of N.K. Singh and Others Vs. The State of Bihar and Others wherein discussing

this interchangeability and taking note of the situation prevailing in Bihar it is said that Rule-10 is a transitory provision. It is rightly clarified in the said judgment that General Medicine and General Surgery are two separate genus, but under each one there are numerous specialty and Super Specialty but till those departments are not fully established and notified as held in Dr. Binay Karak's case, being C.W.J.C. No. 1385 of 1999 disposed of on 20.07.2000, till then, there would be a common gradation list or a joint cadre list of the parent departments, being a joint cadre list for Medicine and a joint cadre list for Surgery. It may be specifically noted here that it is not the case of either of the Petitioners that ever a separate cadre or a separate cadre list/gradation list was prepared in this State for medicine or any of its specialty or super specialty. All the gradation lists, provisional or final, for Assistant Professor and Associate Professor as relied on by the Petitioners would itself show that they were joint cadre gradation list of Medicine. Before the argument of this interchangeability can be considered by this Court, it was for the Petitioner to establish the separation of cadre and, thus, the separation of the cadre list/gradation list, which as noted above, does not exist, till then the transitory provisions would rule. In the judgment of N.K. Singh (Supra) in no uncertain terms it has been held that super specialty units are under the control of the parent department and it recognizes two parent departments, that is, General Medicine and General Surgery and inter se seniority has to be thus decided as per this joint cadre gradation list.

26. Thus seen, the stand of the Petitioners that the Respondent being in Cardiology can only head Department of Cardiology and not Medicine cannot be heard or sustained.

27. At this juncture, I may also deal with contention of the Petitioners in both the writ petitions that Cardiology Department is a Super Specialty Department at D.M.C.H. I am afraid that this is factually incorrect. State has categorically taken a stand that there has been no such consideration much less a notification establishing the Super Specialty Cardiology Department at D.M.C.H., Darbhanga. The stand of the State is that the Department of Cardiology is a Department under the parent Department of Medicine at D.M.C.H. The Petitioners could not establish to the contrary.

28. We can also look at this issue in slightly different manner. If a Super Specialty Department in one College or the others is created and notified that will not change the position unless that is followed by a cadre bifurcation of the teachers. Here, as noted above, neither the Super Specialty Department of Cardiology has been notified nor has there been a cadre bifurcation and what exists is the joint cadre gradation list alone. In fact, this would be the answer in support of the 4th contention of the Respondent.

29. Now coming to the challenge as thrown by the Petitioner in the first writ petition. It is submitted that in the panel prepared originally for medicine (accepting what Petitioner states that there was separate panel for Cardiology)

Dr. J.K.L. Das was at serial No. 1 followed by Petitioner, Dr. Vibhu Priyadarshi and thereafter at serial No. 3, Dr. A.K. Gupta. It was submitted that this being the position in the panel this should determine their inter se seniority and, as such, when the gradation lists were published showing Dr. A.K. Gupta senior to Dr. Vibhu Priyadarshi, it was against settled decisions in this regard. On the first impression the Petitioner appears to be correct because it is well settled that if a panel is prepared for appointment then irrespective of the date of appointment/joining the seniority as shown in the panel would be the seniority of that batch but, in my view, this part of service jurisprudence though is of universal application, it has its own exceptions. One of them being it would apply where in one transaction people are appointed and they join on different dates but will not apply where people of their own volition refuse appointment and join later. It would also not apply where the seniority rule provides otherwise. Both these exceptions operate in the factual matrix of the present case.

30. Firstly, from the facts as stated above, it would be seen that on Petitioner's own pleading he chose not to accept appointment in Cardiology for which he had also applied. He gave up his appointment but fearing repercussions of Clause-14 of the advertisement, which debarred a person not accepting appointment, he apparently panicked. Again he did not want to move out of P.M.C.H. where after appointment of Dr. J.K.L. Das there was no post of Assistant Professor (Medicine) left. Instead for some curious reasons even though no post was available of Assistant Professor (Medicine) he was inappropriately accommodated by the State as Assistant Professor (Medicine) in the vacant post of Associate Professor (Cardiology). Thus, his initial entry itself was inappropriate. These actions of the Petitioner himself in delaying his joining which delay was not because of State but because of his own predilections makes him junior to Dr. A.K. Gupta who joined about three months earlier.

31. This is not the only ground to deny him seniority. Independent of this, as noted above, on 17.12.1990 vide Annexure-22 to the writ petition, Government formulated promotion policy and it in no unambiguous terms laid down that length of service as a teacher (Assistant Professor) would determine seniority. At this juncture, I may point out that basically under service jurisprudence the fundamental rule of seniority is the length of service. Here, as noted above, the Government resolved that it is the length of teaching experience as Assistant Professor, which would be determinative factor for determining the seniority. This principle has not been challenged by the Petitioner. If this be the guiding factor, as laid down by the State, which is neither arbitrary nor fanciful nor contrary to the service jurisprudence then applying this to the fact of the present case there can be no manner of doubt that the Petitioner has lesser teaching experience as Assistant Professor than the Respondent, Dr. A.K. Gupta and as such cannot claim seniority merely on ground of his position in the panel. Looked at it from yet another view point when Dr. Gupta, the Respondent became eligible for promotion as Associate Professor on completion of 5 years of teaching experience the Petitioner at that time lacked the basic eligibility for promotion

and was thus unfit for promotion. This establishes the seniority of the Respondent over the Petitioner.

32. Thus, keeping in view these points, which only support the Respondent, I have no option but to hold that the provisional and the final joint gradation list of Medicine showing Petitioner junior to Respondent, Dr. A.K. Gupta needs no interference.

33. However, before parting, I would only to remind the State of its obligation to give timely promotion to deserving candidates where the promotional posts are available. As noted earlier in August, 2010 State had given an affidavit that they were to consider promoting Dr. Vibhu Priyadarshi as Professor of Medicine which posts were available at P.M.C.H. itself and they needed three months times to get roaster clearance and put the matter before D.P.C. but even though six months have gone by they are still waiting for something which is nobody's guess. That is most unfortunate. I am sure that State will come alive to their responsibility in this regard and take necessary actions expeditiously in this regard.

34. Now coming to the second writ petition, that is, C.W.J.C. No. 5144 of 2005. Here, it is not in dispute that the two Petitioners are much junior to Respondent, Dr. A.K. Gupta. Their only contention was that Dr. A.K. Gupta being in the Cardiology Department could not be made In charge of Medicine even though he had the requisite seniority over them in the joint cadre gradation list. I have already considered this argument while dealing with similar contention raised in the first writ petition. Dr. N.K. Singh's case (supra) is a complete answer to this. So long as Super Specialty Department is not set up and notified and so long as there is no cadre division, the seniority inter se has to be determined as per the joint cadre gradation list and person from specialty would be treated as a person in the parent department of Medicine itself.

35. Here, I may mention an additional fact. The Respondent Dr. A.K. Gupta has brought on record that he has been and is working in the Department of General Medicine from time to time. Those facts have not been disputed. He, thus, has the requisite seniority and the requisite experience to head the Medicine Department. 36. Thus, there is no merit in both the writ petitions as well. The result is both the writ petitions stands dismissed.