

(1995) 12 PAT CK 0024
In the Patna High Court
Case No : C.W.J.C No. 5969 of 1994

Dr. Sudhir Kumar Thakur and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 22-12-1995

Acts Referred:

Citation : (1995) 12 PAT CK 0024

Final Decision : Allowed

Judgement

S.K. Homchaudhuri, J.—Although various points, including the validity of the notification dated 11.11.1979 making reservation in the teaching posts in Medical Colleges for the members of the Scheduled Castes and Scheduled Tribes as well as the provisions of Section 4 of the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991 (hereinafter referred as "the Act"), have been raised in this petition, learned Counsel for the Petitioners has confined his attack only against the purported reservation for other Backward Classes (Extremely Backward Classes, Backward Classes and Women Backward Classes) in the posts of Registrar, Tutor or Assistant Professor of the Medical Colleges made by posting the members of the Bihar Health Services by selection.

2. The Bihar Health Service was constituted by notification No. 2A/A/3- 102/66-2100 (2) H dated 2.5.1967, issued by the Government of Bihar, Health Department, the relevant part where of is as follows:

I am directed to refer to paragraph 3(A) of the Resolution No. PR-G2-26-65-532 F II dated 17th July, 1965 and letter No. 671/F. II dated-30th April, 1966 regarding replacement scale of pay issued from the Fiance Department and to say that Government have been pleased to combine the Bihar Medical Service and Bihar Public Health Service into single cadre, called the "Bihar Health Service" with effect from 1st April, 1964. This cadre will consist of duty and leave reserve post on the administrative side and teaching posts calculated on the basis of actual requirements of deputation to the teaching side. The holders of

teaching posts will be treated to be on deputation to the teaching branch for the time during which they are employed as teachers and will be in the teaching posts on officiating basis. If they cease to be teachers and revert to the Administrative Branch, they will draw pay according to their position in the cadre, that, is they will be either Civil Assistant Surgeon, Selection Grade Officers, Civil Surgeons, Senior Medical Officers or holders of equivalent posts of Deputy Directors, Additional Directors and Director. If any one junior in the cadre to a person on the teaching side draws pay in the administrative post in a scale higher than drawn by the person on the teaching side, other than as purely casual or temporary arrangement in exigencies of public service, the latter will be permitted to draw pay he would have drawn but for his deputation to the teaching side.

By notification No. 3/M-310-07/79 dated 11.11.1979, the Government of Bihar, Department of Personnel and Administrative Reforms, Patna, introduced reservation in the teaching posts in the Bihar Health Service for the members of Scheduled Castes and Scheduled Tribes to the extent of 14% and 10% respectively.

3. Following acceptance of the Recommendation of the Mandal Commission, the State of Bihar enacted the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991. Section 4 of the said Act having bearing in the case is as follows:

4. Reservation for direct recruitment.-All appointments to services and posts in an establishment which are to be filled by direct recruitment shall be regulated in the following manner namely:

(1) The available vacancies shall be filled up,-

(a) From open merit category ... 50%

(b) From reserved category ... 50%

(2) The vacancies from different categories of reserved candidates from amongst the 50% reserved category shall, subject to other provisions of this Act, be as follows:

(a) Scheduled Castes ... 14%

(b) Scheduled Tribes ... 10%

(c) Extremely Backward Class ... 12%

(d) Backward Class ... 8%

(e) Economically Backward Woman ... 3%

(f) Economically Backward ... 3%

Total 50%

Provided that the State Government may, by notification in the official Gazette, fix different percentage for different district in accordance with the percentage of population of Scheduled Castes/Scheduled Tribes and other Backward Classes in such districts:

Provided further that in case of promotion, reservation shall be made only for Scheduled Castes/Scheduled Tribes in the same proportion as provided in this section.

The provision of Sub-section (2) of section 4 of the said Act was amended by Bihar Ordinance No. 18 of 1993 as follows:

(2) The vacancies from different categories of reserved Candidates from amongst the 50% reserved categories shall, subject to other provisions of the Act, be as follows:

- (a) Scheduled Castes ... 14%
- (b) Scheduled Tribes ... 10%
- (c) Extremely Backward Classes ... 14%
- (d) Backward Classes ... 10%
- (e) Women of Backward Classes ... 2%

Total ... 50%

4. Apparently in view of second proviso to Sub-section (2) of Section 4 of the Act, there can be no reservation for the members of the other Backward classes (namely Extremely Backward Classes, Backward Classes and Women Backward Classes) in case of promotion to any post or services. As such, for deciding the question raised in the petition, it is necessary to decide whether posting to the post of Registrar/Assistant Professor/Tutor in the Medical Colleges from amongst eligible members of the Bihar Health Services is made by promotion or by direct recruitment. There is no service rule framed under the proviso to Article 309 of the Constitution of India, which govern the condition of service and appointment to the Bihar Health Service in its various grades. As indicated above, the Bihar Health Service was constituted by an administrative instruction/order as far back as in the year 1967.

5. In support of the contention that the postings to the posts of Registrar Assistant Professor or Tutor are made by promotion, in paragraphs 19 and 20 of the petition, the Petitioner contended as follows:

19. It is stated that there is only one integrated cadre of Doctors in the State of Bihar. Doctors who are members of the cadre and have rendered not less than two years continuous service are only eligible to be considered for selection and posting against teaching post. There are other criteria as well, such as qualification, publication of articles in the Journal and rural service etc. regarding which there is no dispute in the present writ application and, therefore, it is not stated in details. Suffice it to say that even though a Doctor may have number of qualifications to this credit, unless he is a member of cadre having completed two years of service, he is not eligible to be considered for selection and posting to a teaching post. (In other words, the selection and posting to teaching posts of Resident. Registrar and Assistant Professor is not open to candidates in general market but it is strictly to the members of the cadre. The two posts of two different sides are interchanegable and Doctors on teaching side can be transferred to non-teaching post, though it cannot happen vice-versa, for the simple reason that posting to a teaching post requires special skill, whereas, there is no such requirement in a non-teaching post. Therefore, right from initial entry into the cadre till Doctors ceases to be a member irrespective as to whether he is on non-teaching side he remains in the same cadre. There is a common gradation list of all Doctors in the cadre including these on the teaching side and promotion in the time scale is given strictly on the basis of gradation of the members in the cadre. In other words, when a member of the cadie on non-teaching side is promoted his equivalent it on the teaching side is also promoted. It is further clarified that evet though a Doctor may not be promoted to the post of Associate Professor or Professor as the, case may be on account of non-availability of posts. however, if his junior on the teaching side has been promoted, he is also promoted in terms of time scale of pay and increment in time scale of pay is equated with Doctor of non-teaching side who has been promoted along with him.

20. That the post of Registrar and Assistant Professor is the post in the higher pay scale of junior selection grade and is really a promotional post. Even though promotion to the post of Registrar and Assistant Professor is based on a selection based on comparative merit it has all the ingredient of promotion and not direct recruitment.

6. In paragraph of the counter-affidavit, Respondents No. 1 to 4, amongst others, contended as follows:

The Medical Officers appointed under the State health services has a combined Cadre known as Bihar State Health Cadre. The duties and functions of the Junior Teaching Posts in Medical Colleges are quite different in nature from that of the Medical Officers in the administrative side. The State Health Services has two wings namely,

- (a) Medical Education and Family Welfare wing.
- (b) Administrative wing.

The Medical Officers originally belong to be a member of the State Health Services Cadre treated to be on deputation after their selection and posting in teaching wing e.g. appointed to the teaching posts in the Medical College. Due to inadequate representation of S.C./S.T. and other backward community on the Junior teaching posts and other higher posts like Associate Professors, Professors and Principals as well are lying vacant. The Government decided to allow to have adequate representation of the S.C./S.T. and other backward Classes as Junior teaching posts of Medical College by implementing reservation policy. It is thus evident that substantial question of law in the present writ are not tenable at all under the Act referred to hereinabove.

In paragraph 7 of the counter-affidavit, Respondents No. 1 to 4 have contended that the posts of Associate Professors are filled up by promoting the Assistant Professors of the concerned discipline in accordance with the seniority prepared on the basis of the teaching experience as Assistant Professor and the posts of Professors are filled up similarly by promoting Associate Professor on the basis of seniority in a particular discipline. But the post of Registrar/Assistant Professor/Tutor are filled up strictly on merit and according to policy decision of the Government taken from time to time. Though the posts of Tutors, Registrars and Assistant Professors carry higher pay scale than the basic grade pay scales, these posts do not come under the purview of promotion. The higher pay scale of Tutor, Registrar and Assistant Professor are equivalent to the pay scale allowed to Junior Selection Grade in the Cadre. This higher pay scale has been allowed irrespective of their seniority/Cadre position in the Bihar Health Service. These posts are filled up by preparing a panel as per the criteria laid down by the State Government in its circulars issued from time to time and on the basis of which advertisement inviting applications from the Medical Officers of the Bihar Health Services Cadre for empanelment of their names for Junior Teaching Posts is made. Promotional avenues in teaching wing is quite different from the administrative wing. The structures of the pay scales of the Administrative wing and Teaching Wing, mentioned in the said paragraph, are as follows:

Administrative side

Posts.-----Pay Scales

1. Civil Assistant Surgeon (Basic Grade)-----2425-4000
2. Deputy Superintendent and Ors. (20% Junior Selection Grade)-----3000-4500
3. Civil Surgeon and other posts of 12% (Senior selection Grade.)
----- 3700-4500
4. Deputy Director(Super time scale of 2 1/2%)-----4100-5300
5. Joint/Additional Director-----4500-5700

Medical College (Teaching side)

Posts-----Pay Scales

1. Resident Medical Officer-----2425-4000
2. Tutor, Registrars/Asstt. Professors-----3000-4500
3. Associate Professors-----3700-4500
4. Senior Selection Grade-----4300-5000
5. Super time Professor-----4300-5300
6. Principal-----4500-5700

7. Learned Counsel for the Petitioners submitted that the posting of eligible members of the Bihar Health Service to the junior grade of Teaching posts, namely, Registrar/Assistant Professor/or Tutor carrying pay scale of Junior Selection Grade, is made by promotion not by direct recruitment; inasmuch as after posting against Junior grade teaching post, an incumbent remains a member of the same service and a common gradation list is prepared and promotion to next higher post carrying pay scale of senior selection grade and super-time scale. An incumbent In the Bihar Health Services posted in the teaching wing can at his option be reverted to the administrative wing. Merely because for posting, the members of the Service in the junior grade of teaching post, a selection is made from amongst the eligible members of the Bihar Health Services, that does not mean that posting in junior grade of teaching post are made by direct recruitment.

In support of his contention, learned Counsel for the Petitioner drew, my attention to the observation of the Hon"ble Supreme Court in paragraph 13 of the decision in the case of G.S. Venkata Reddy v. State of Andhra Pradesh, reported in 1993 (Suppl.) 3 S.C.C. 425 wherein the Hon"ble Supreme Court observed as follows:

A person is said to be "Recruited Direct" to a post, category or class in a service, in case his first appointment thereto is made otherwise than (i) by promotion (ii) by transfer or (iii) by reemployment.

Learned Counsel for the Petitioner also drew my attention to the decision of the Hon"ble Supreme Court (sic) in the case of Basant Lal Malhotra Vs. State of Punjab and Others, wherein the Punjab and Haryana High Court held:

The dictionary meaning of the wort "recruit" is "fresh supply of number of persons either as additional to the previous number or to make up for the decease. So "recruitment" is only for the purpose of making up the deficiency which occurs in the cadre (sic) "appointment" means an actual act of posting a person to particular office.

At paragraph 10 of the said decision, it was observed as follows:

After giving my thoughtful consideration to all the relevant provisions of the subject, I am led to an irresistible conclusion that the terms "recruitment" and "appointment" are not synonymous and connote different meanings. The term recruitment connotes and clearly signifies enlistment, acceptance, selection or approval for appointment and not actual appointment or posting in service while appointment means an actual act of posting a person to a particular office. In this view of the matter the word recruited existing in Rule 4.2 of the Punjab Civil Services Rules, Vol. 2 does not mean actual appointment and the Petitioner should be deemed to have been recruited on the 26th of March, 1936.

8. Learned Advocate General submitted that admittedly the teaching posts in the Junior Selection Grade, namely, Tutor, Registrar and Assistant Professor are filled up by inviting applications from amongst the eligible Medical Officers in the Bihar Health Services, who should not only possess the qualifications laid down by the Indian Medical Council, but also the additional qualifications as laid down by different circulars issued by the Government and no member of the Bihar Health Service by virtue of seniority can be posted to junior grade of teaching post. As such, posting to the posts of the Registrar, Tutor and Assistant Professor in the teaching wing of the Bihar Health Services are made by direct recruitment and not by promotion. Although a Member of the Bihar Health Service posted in the teaching wing at his option may be transferred to the administrative wing, which rarely happens, but a member of the Administrative wing of the Bihar Health Services cannot by virtue of his seniority be posted in the teaching wing. Unless a member of the Bihar Health Services is selected by competition for posting in the Junior Selection Grade post in the teaching post, he cannot be appointed to the post in teaching wing in any time of his whole career. Mr. Advocate General also drew my attention to the averments made in paragraphs 5 and 7 of the counter-affidavit filed on behalf of Respondents No. 1 to 4.

9. Mr. Ram Balak Mahto, learned Counsel for the Interveners, supported the submission of the learned Advocate General that the appointments to the post of Registrar, Tutor and Assistant Professor in the teaching wing are made by direct recruitment; inasmuch as although selection is confined to the members of the Bihar Health Services, this selection is made by advertisement inviting applications from the eligible members of the Bihar Health Services, who possess not only minimum qualification prescribed by the Indian Medical Council, but also additional qualification as laid down by the State Government. As such in the matter of selection of Junior Grade of teaching posts in the Medical Colleges, reservation for the members of other Backward Classes (namely extremely Backward Classes, Backward Classes and Women Backward Classes) is applicable.

10. I have considered the submissions made on behalf of the Petitioners, learned Advocate General on behalf of the Respondent-State and Mr. R.B. Mahto, learned Counsel for the interveners. Following facts are not disputed : Teaching staff of the Medical Colleges as well as the Medical Officers working in the administrative wing belong to the same Medical Services, namely, Bihar Health Services and

that a common gradation list is maintained and that when a member of the Bihar Health Services in the Administrative wing is promoted to higher pay scale, a member of the Bihar Health Services, posted in the teaching wing, who is senior to the former, shall be entitled to the benefit of the higher pay scale irrespective of the fact whether any post in the teaching wing carrying that higher pay scale exists or not. Again a member of the Bihar Health Services posted in the teaching wing may at his option, be posted in the administrative wing.

No doubt, the posts carrying pay scale of Junior Selection Grade in the teaching wing, namely, Registrar/Tutor/Assistant Professor, are filled up by selection from amongst the eligible members of the Bihar Health Services. But such posting as Registrar/Tutor/or Assistant Professor results in benefit of next higher pay scale of higher grade (Junior Selection Grade) in the Bihar Health Services.

Promotions to the higher grade in a Service are made either on the basis of seniority-cum-merit or by selection and that for promotion to the higher grade, selection through a competitive test amongst eligible members of the lower grade in the Services can also be resorted to. Direct recruitment is made by making selection from amongst all eligible candidates both from outside and inside service and direct recruitment, generally, is not confined to the members of a particular service. By direct recruitment and consequent appointment, a person takes birth into the service or in a particular cadre in the service. In the instant case, there is no separate cadre of teaching posts in the Bihar Health Services. It cannot be said that because of posting as Registrar/Tutor/Assistant Professor after selection, an incumbent takes birth in the Bihar Health Services or a particular cadre in that Services. The promotion connotes advancement to higher grade/post in the service. In the instant case, the members of the Bihar Health Services on their posting as Assistant Professor/Registrar/Tutor get advancement in higher grade (Junior Selection Grade) in the Bihar Health Services. Respondents No. 1 to 4 in paragraph 5 of the counter-affidavit contended that the posting of a member to the teaching wing in the Bihar Health Services after selection is treated to be on deputation. The observation of the Hon'ble Supreme Court in paragraph 13 of the judgment in the case of G.S. Venkata Reddy (supra) supports the contention of the Petitioners that the postings of the members of the Bihar Health Services in the teaching wing to the Junior Selection Grade, namely, to the post of Registrar/Tutor/Assistant Professor are not made by way of direct recruitment.

The decision in the case of State of U.P. Transport Development Corporation v. I.B. Mishra, reported in 1995 LIC 1625 on which the learned Advocate General placed reliance, has no application to the facts of the instant case.

11. For the reasons stated above, I am inclined to hold that the posting in the teaching wing of the Bihar Health Services to the post of Registrar/Tutor/Assistant Professor by making selection from amongst eligible members of the Bihar Health Services is a case of promotion to higher grade and is not made by direct recruitment. That being so, there can be no reservation for the members

of the other Backward Classes (namely, extremely Backward Classes, Backward Classes and Women Backward Classes) in the posts of Registrar/Assistant Professor/or Tutor of the Medical Colleges.

The petition is allowed to the extent indicated above. I make no order as to costs.