

(2003) 07 PAT CK 0107

In the Patna High Court

Case No : C.W.J.C. Nos. 1182, 4615 and 6228 of 2003

Dr. Sureshwar Satti Prasad and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 24-07-2003

Acts Referred:

Citation : (2003) 07 PAT CK 0107

Judgement

Narayan Roy, J.—Heard Counsel for the parties.

2. All these three writ applications since involve common questions of law and facts are being disposed of by this common order.

3. Petitioners of C.W.J.C. No. 1182 of 2003 have prayed for issuance of a direction upon the respondents to consider their cases for appointment on the post of Professor in the Department of Gastro-intestinal Surgery (in short "G.I. Surgery"), and Nephrology in Indira Gandhi Institute of Medical Science (in short "IGIMS") pursuant to advertisement No. 01/2002/Estt. In C.W.J.C. No. 4615 of 2003, the petitioner has prayed for quashing the Screening Committee's report of respondent-IGIMS prepared pursuant to advertisement No. 01-2002/Estt. for the post of Professor in the Department of G.I. Surgery. In C.W.J.C. No. 6228, of 2003, the petitioner has prayed for issuance of a direction upon the respondents-authorities to appoint him on the post of Professor (Anaesthesia) in IGIMS, Patna as recommended by the Selection Committee pursuant to advertisement No. 01/2002/Estt. and also for quashing of the decision of the Board of Governors of IGIMS dated 17-6-2003 as contained in Annexure-7.

4. The dispute in these cases relates to the appointment on the post of Professors in G.I. Surgery, Nephrology and Anaesthesia in IGIMS, Patna on the basis of the advertisement, as referred to above.

5. Substantially the grievance of the petitioners, except the petitioner of C.W.J.C. No. 4615 of 2003, is that despite Selection Committee's recommendation in sealed cover for appointment of the petitioners, no decision is being taken by the

respondents-authorities.

6. From the pleadings of the parties, it appears that the State Government has restrained IGIMS from making appointments on account of non-observance of the reservation policy, roster clearance and also on account of complaints of private practice against some of the doctors of IGIMS. The Board of Governors of the IGIMS thereafter took up the matter in its 63rd meeting on 11-1-2003 and assessed the recommendation of the experts sent to it under sealed cover.

7. The case of the petitioners of C.W.J.C. No. 1182 and 6228 of 2003 is that the Board of Governors deferred the matter on some vague and untenable grounds and the ban put by the State Government vide letter issued by the Personnel & Administrative Reforms Department as contained in Annexure-9 should not be acted upon as it is wholly without jurisdiction and unconstitutional. Their further case is that the petitioners have applied for single post and, therefore, no question arises for reservation of the single post nor there is any requirement of observance of reservation policy and roster clearance as such action of the State-authorities has been held to be unconstitutional by the Apex Court.

8. IGIMS and the State-respondents have filed their counter-affidavit in C.W.J.C. No. 1182 of 2003 and at the same time, counter-affidavit has also been filed by IGIMS in C.W.J.C. No. 4615 of 2003. The fact of C.W.J.C. No. 6228 of 2003 since is identical, Mr. I.K. Sharan, learned Counsel appearing for the respondents - IGIMS, stated that separate counter-affidavit is not required to be filed in view of the earlier counter-affidavit filed by the IGIMS in C.W.J.C. No. 1182 of 2003 and likewise, counter-affidavit was not also required to be filed on behalf of the State.

9. According to the counter-affidavit of IGIMS, the stand is that the posts are not reserved as a matter of fact. Mr. I.K. Sharan, learned Counsel appearing on behalf of the responded- IGIMS, very fairly, stated that the Board of Governors may take a decision on the recommendation in the next meeting of the Board, subject to the direction of the Court. However, learned Counsel at the same time stated that in view of the ban put by the State Government which has binding-effect in terms of Section 24 of the Indira Gandhi Institute of Medical Sciences Act, 1984, (in short, "the Act"), the IGIMS may have certain difficulties in taking decision.

10. The Stand of the respondent-State as taken in its counter-affidavit and supplementary counter-affidavit is that IGIMS being autonomous body created under the provisions of IGIMS Act itself is competent to take a decision in the matter for recruitment of professors, subject to the provisions of Section 24 of the Act and in that context, necessary directions have been issued vide its letter No. 189(1) dated 29-3-2003 and letter No. 197 (1) Sated 3-4-2003, respectively.

11. Dr. S.N. Jha, learned Counsel appearing on behalf of the petitioners of C.W.J.C. No. 1182 of 2003, submitted that the petitioners have requisite qualifications and experience for appointment to the post of Professors in the Department of G. I. Surgery and Nephrology respectively and the IGIMS being

autonomous body is competent to take decision in the matter and since the petitioners have applied for their appointment on the single post of Professor, the reservation policy and the roster clearance are not required to be followed, as directed by the State Government in terms of Section 24 of the Act. Learned Counsel further submitted that no reservation is permissible for a single post in super-speciality post for which the petitioners are required to be considered. In support of his proposition, learned Counsel firstly relied upon the cases of *Indra Sawhney and Ors. v. Union of India and Ors.*, (1992 Sppl. (3) Supreme Court Cases 217) and *Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and Ors.*, (1998) 4 Supreme Court Cases 1.

12. In *Indra Sawhney & Others*, (supra) the Constitutional Bench of the Apex Court held:

"While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained herein-above, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

As a matter of fact, the impugned memorandum dated August 13, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may, we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors- and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply but on that account the implementation of the impugned Officer Memorandum dated August 13, 1990 cannot be stayed or withheld."

13. In the case of *Post Graduate Institute of Medical Education & Research, Chandigarh* (supra), again the Constitutional Bench of the Apex Court after

examining all the judgments on the subject held:

"In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible under the constitutional framework. Until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of a single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such posts is kept out of bounds to the members of a large segment of the country who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact, on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society. The view taken in Chakradhar case is approved that there cannot be any reservation in a single post cadre. Contrary decisions in Madhav, Brij Lal Thakur and Bageshwari Prasad cases, upholding reservation in a single post cadre either directly or by device of rotation of roster, are not approved. The impugned decision in the case of Post-Graduate Institute of Medical Education and Research etc. Vs. K.L. Narasimhan and another etc., cannot also be sustained. It is, therefore, set aside."

14. The legal question which has cropped up in these cases, thus, has been set at rest by the Apex Court, as referred to above, holding that no reservation is permissible for super-speciality post and there cannot be any reservation in a single post cadre. The earlier view taken by the Apex Court in Dr. Chakradhar Paswan v. The State of Bihar, (1988) 2 Supreme Court Cases 214, that there cannot be any reservation for a single post, thus, has been approved.

15. In C.W. J.C. No. 6228 of 2003, Mr. Jagdanand, learned Counsel for the petitioner submitted that the petitioner has applied for a single post of Professor in the Department of Anaesthesia and his case has been recommended by the Selection Committee and he has the requisite qualification and experience to be considered for the post of Professor in the Department of Anaesthesia. Learned Counsel further submitted that the ban put by the State Government vide letter issued by the Personnel & Administrative Reforms Department in terms of Section 24 of the Act must be held to be wholly without jurisdiction and not binding upon the authorities of the IGIMS. Learned Counsel also submitted that the case of the petitioner is slightly distinct from the case of the writ petitioners of C.W. J.C. No. 1182 of 2003 inasmuch as that the petitioner never served IGIMS and, therefore, the complaint of private practice was not relevant in his case. Learned Counsel further submitted that the petitioner, pursuant to the

earlier advertisement No. 08/E.M.P./95, was selected for the post of Additional Professor in Anaesthesia but finally was not offered appointment on certain unsustainable grounds. The post was again advertised in the year, 1996 but he was not called for in the interview and again he apprehends that on unsustainable ground, his selection is being delayed though he is the single candidate of the post of Professor in Anaesthesia.

16. The learned Counsel while summing up his submission urged that in view of the ratio laid down by the Apex Court in the case of *Indra Sawhney & Others*, (supra) and *Post Graduate Institute of Medical Education and Research* (supra), reservation policy and roster clearance are not permissible for the post of Professor of Anaesthesia for which the petitioner has applied for and the restriction imposed by the State Government vide letter issued by the Personnel & Administrative Reforms Department as contained in Annexure-9 in terms of Section 24 of the Act, must be held to be unconstitutional and not binding upon the authorities of the IGIMS.

17. The writ petitioner of C.W. J.C. No. 4615 of 2003, on the contrary, has prayed for quashing of advertisement No. 01/2002/Estt. and virtually has opposed the prayer of the petitioner No. 1 of C.W. J.C. No. 1182 of, 2003 by filing an intervention petition as well. In this writ application, the petitioner has virtually challenged the candidature of respondent No. 5, who is petitioner No. 1 of the C.W. J.C. No. 1182 of 2003, on the ground that he has less than 14 years of experience of GI Surgery and is above 50 years whereas the petitioner has better experience and qualification than respondent No. 5 for the post of Professor of G.I. Surgery.

18. Mr. N.K. Agrawal, learned Counsel appearing for the intervenor-writ petitioner, Dr. Chiranjeev Khandelwal, submitted that interview conducted by Dr. T.K. Chattopadhyay would not be sustainable as he was not empanelled expert in the list of experts of IGIMS and respondent No. 5 (petitioner No. 1 of C.W.J.C. No. No. 1182 of 2003) is not eligible for the post of Professor, G.I. Surgery. The prayer of this petitioner, however, has been opposed by respondent No. 2, Director, IGIMS, Patna stating therein that Dr. T.K. Chattopadhyay is an expert in the field of G.I. Surgery and since he does not belong to the State of Bihar, he was invited as an expert as per the general recommendation and the IGIMS is not aware that Dr. T.K. Chattopadhyay, and respondent No. 5 had worked since 1976 to 1976 in the same Institute. It is also stated in the counter-affidavit that objection raised by this petitioner has not been rejected and has been kept on agenda for perusal and consideration by the Board of Governors. In paragraph 5 of the counter-affidavit, it is specifically stated that respondent No. 5, petitioner No. 1 of C.W.J.C. No, 1182 of 2003, is having required complete experience of 16 years and 8 months and accordingly, he was found eligible. The objection raised by the writ petitioner, Dr. Chiranjeev Khandelwal in the intervention petition and the writ petition, appears to be premature as his objections have not been overruled by the Board of Governors and his case is yet to be considered by the

Board of Governors as he is also one of the applicants for the post of Professor of G.I. Surgery and therefore, this writ application is liable to be dismissed as premature.

19. From the discussions aforesaid, it appears that writ petitioners of C.W.J.C. Nos. 1182/2003 and 6228/2003 have applied for the post of Professor in the Department of G.I. Surgery, Nephrology and Anaesthesia, respectively, and their cases have been recommended by the Selection Committee and they have been found to be eligible for the aforesaid posts but final decision is not being taken in the matter on account of the restriction imposed by the State Government as contained in Annexure-9 in terms of Section 24 of the Act. It also appears that the petitioners have applied for a single super-speciality post for which reservation policy and roster clearance are not permissible in view of the ratio laid down by the Apex Court, as referred to above, in the cases of Indra Sawhney and others and Post Graduate Institute of Medical Education and Research (supra). The embargo put by the State Government vide its letter issued by the Personnel & Administrative Reforms Department, as referred to in Annexure-9 to the writ applications, thus, is held to be wholly without jurisdiction, unreasonable, arbitrary and not binding upon the respondent-IGIMS.

20. For the reasons and discussions aforementioned, therefore, the respondent-Indira Gandhi Institute of Medical Science, Patna and the Board of Governors, IGIMS, Patna, are directed to consider the cases of the petitioners of C.W.J.C. No. 1182 and 6228 of 2003 for their appointment on the post of Professors in the disciplines they have applied for, within a period of six weeks from the date of receipt/production of a copy of this order.

21. With the aforesaid directions and observations, C.W.J.C. Nos. 1182/2003 and 6228/2003 are allowed and C.W.J.C. No. 4615/2003 is dismissed. No order as to costs.