

(2015) 10 PAT CK 0013

In the Patna High Court

Case No : Letters Patent Appeal No. 228 of 2014 in Civil Writ Jurisdiction Case No. 12354 of 2008 and Letters Patent Appeal No. 263 of 2014 in Civil Writ Jurisdiction Case No. 9947 of 2008

Indrashekhar Thakur and Others

APPELLANT

Vs

Nirmal Prakash Narain and Others

RESPONDENT

Date of Decision : 14-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 309

Citation : (2015) 10 PAT CK 0013

Hon'ble Judges : I.A. Ansari, A.C.J; S.P. Singh, J

Bench : Division Bench

Advocate : Ashok Kumar Singh, Senior Advocate, Prabhat Kumar Singh and Manisha Singh, for the Appellant; Devendra Kumar Sinha, AAG 2, Biresh Kumar Sinha, AC to AAG and Akash Deep, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.P. Singh, J—Both L.P.A. Nos. 228 and 263 of 2014, having arisen out of the order, dated 11.12.2013, passed by a learned single Judge of this Court, in C.W.J.C. No. 9947 of 2008 and C.W.J.C. No. 12354 of 2008, were heard together and are being disposed of by this common order.

2. L.P.A. No. 228 of 2014 has been preferred by Dr. Indrashekhar Thakur and one Dr. Vimal Mukesh, whereas L.P.A. No. 263 of 2014 has been preferred by Dr. Indrashekhar Thakur alone. L.P.A. No. 228 of 2014 arises from C.W.J.C. No. 12354 of 2008, which was filed by Dr. Nirmal Prakash Narain and allowed; whereas L.P.A. No. 263 of 2014 arises from C.W.J.C. No. 9947 of 2008, filed by the appellant Dr. Indrashekhar Thakur, which was dismissed.

3. C.W.J.C. No. 12354 of 2008 was filed by Dr. Nirmal Prakash Narain challenging the seniority list as per Notification No. 868 (17), dated 8.7.2008 (Annexure-10), and the consequential order bearing Notification No. 1023 (17), dated 12.8.2008,

contained in Annexure-11 to the writ petition, whereby he was placed below respondent Nos. 4 to 10 in the seniority list. The petitioner, Dr. Nirmal Prakash Narain, had claimed his place in the seniority list between Dr. P.S. Sinha at Sl. No. 25 and Dr. M.P. Raut at Sl. No. 26 and above private respondent placed at Sl. 29 to 35.

4. On the other hand, C.W.J.C. No. 9947 of 2008 was filed by Dr. Indrashekhar Thakur challenging the very appointment of Dr. Nirmal Prakash Narain (respondent No. 6 to the writ petition) on the post of Assistant Professor, Department of Surgery, Nalanda Medical College and Hospital, vide Memo No. 11/3, dated 8.11.1997, contained in Annexure-9 to the writ petition.

5. As noticed above, C.W.J.C. No. 12354 of 2008, filed by Dr. Nirmal Prakash Narain, was allowed. The Notification, dated 12.8.2008 (Annexure-11), wherein Dr. Indrashekhar Thakur (respondent No. 5 to the writ petition) was shown senior to the writ petitioner (Dr. Nirmal Prakash Narain), was quashed and the respondents were directed to issue a fresh seniority list placing the writ petitioner above respondent No. 5 and to fill up the promotional posts of Associate Professor/Professor in the Department of Surgery, in the Government Medical Colleges of Bihar, on the basis of seniority-cum-choice of the concerned candidates. The relevant extract of the impugned order is quoted hereinbelow for easy reference:

"In the result, for the reasons and discussions, the Court finds that the impugned seniority list (Annexure-10) suffers from serious illegality, and as such the same is hereby quashed to the extent of the seniority of the petitioner vis-a-vis respondent No. 5. Consequently, the Notification dated 12.08.2008 (Annexure-11) also stands quashed with respect to the respondent No. 5. The respondent State is directed to issue a fresh seniority list placing the petitioner just above the respondent No. 5. The promotional post of Associate Professor/Professor be filled up in the Department of Surgery in the Government Medical Colleges of Bihar without delay within a period of four months on receipt/production of the certified copy of the present order on the basis of accepted principle of seniority-cum-choice of the concerned candidate".

6. The writ application, bearing C.W.J.C. No. 9947 of 2008, filed by the appellant, Dr. Indrashekhar Thakur, challenging the appointment of Dr. Nirmal Prakash Narain on the post of Assistant Professor (Surgery) in Nalanda Medical College and Hospital was dismissed. Learned single Judge has dismissed the writ application on the premises that the petitioner had previously also challenged the same very Notification, dated 8.11.1997, with respect to the appointment of Dr. Nirmal Prakash Narain vide C.W.J.C. No. 6784 of 2004 and failed. Being aggrieved, Dr. Indrashekhar Thakur has preferred the present two appeals bearing LPA Nos. 228 of 2014. LPA No. 228 of 2014 has been preferred against the order passed in C.W.J.C. No. 12354 of 2008, whereas LPA No. 263 of 2014 has been preferred against the order passed in C.W.J.C. No. 9947 of 2008. Though this appellant has challenged the order of the learned single Judge

rejecting his prayer for setting aside the Notification, dated 8.11.1997, appointing him as Assistant Professor, the main issue is one of inter se seniority between the two.

7. Before we indicate further facts of the case and consider the rival submissions of the parties, it would be apposite to notice the relevant laws covering the subject.

8. Initially, the Health Service, in the State of Bihar, was an integrated cadre consisting of both teaching and non-teaching posts having a combined Medical Service Cadre. The teaching post consisted of Junior teaching post of Residents and Registrars, whereas the Senior teaching post consisted of Assistant Professor, Associate Professor, Professor and Principal. The appointment to the various teaching posts and inter se seniority, in absence of rules, were guided by Notification No. 6509-A, dated 12.12.1934, Notification No. 2763-A, dated 15.7.1944 and Circular No. 15784, dated 26.8.1972.

9. As per the executive instructions contained in the Notifications noticed above, the promoted officers were to hold inter se seniority positions which they had held in the service from which they were promoted. The relevant extract of Notification, dated 12.12.1934, is produced herein below for easy reference:

"(Government of Bihar & Orissa, Appointment Department No. 6509-A dated 12th December, 1934. From Sr. R.B. Russel, Chief Officiating Secretary to Govt.)

The Local Government have recently had under consideration the principles to be followed in determining the seniority of officers of the Provincial and Subordinate Services, when more than one officer is appointed to a service at the same time. It has been decided that the following instructions should be observed in future:-

(a) Where officers are recruited by promotion and by direct appointment at the same time, the promoted officers shall take precedence over the officers directly recruited.

(b) Promoted officers shall keep the position inter-se which they held in the service from which they were promoted.

(c) The decision regarding the seniority of direct recruits shall be made by the authority entitled to appoint at the time of their first appointment. In all cases such decisions shall be final".

10. Again, the Chief Secretary to Government of Bihar, in its executive instructions, dated 15.7.1944, addressed to other Departments of the Government under sub-clause 3(i)(b) reiterated that promoted officers shall keep the position inter se, which they held in service from which they had been promoted. After independence, the Personnel Department, Government of Bihar, vide its Memo, dated 26.8.1972, reiterated the same position. The relevant extract reads as under:

"3. Based on precedent and Government circulars issued from time to time well

recognized principles for fixation of inter-se seniority are-

(i) Existing seniority rules. - Where officers are recruited by Promotion by direct appointment at the same time.

(b) Promoted officers shall keep the position inter-se which they held in the service from which they have been promoted".

11. Being conscious of the need to have a separate Medical Education Cadre and also in view of the repeated directives of this Court, the Government of Bihar framed Bihar Medical Education Service Conditions Cadre and Appointment of Cadre Rules, 1997 (hereinafter referred to as "the 1997 Rules") under Article 309 of the Constitution of India. The Rules were published by the Department of Health, Medical Education and Family Welfare, on 21.5.1997. The teaching posts of Resident Medical and Surgical Officer and Registrar were amalgamated and designated as Lecturer (now re-designated as Senior Resident), which was a Junior Teaching Post. In course of time, the 1997 Rules were amended on 21.2.2003 and 22.3.2004 in exercise of powers under proviso to Article 309 of the Constitution of India.

12. In view of the amendments to 1997 Rules, promotions, granted prior to coming into effect of the 1997 Rules, were to be governed by the criteria of procedure applicable before 21.5.1997.

13. As per Rule 5 read with Rule 8 of 1997 Rules, the Resident Medical/Surgical Officer or Registrar, re-designated as Lecturer w.e.f. 21.5.1997 (now Senior Resident), was the basic grade post. The posts of Assistant Professor, Associate Professor and Professor were the promotional posts to be filled up on the basis of seniority-cum-eligibility.

14. It is relevant to recount that the Government, generally, lagged behind in filling up the different posts of Assistant Professors under different Medical Colleges of Bihar with the result that other promotional posts of Associate Professor and Professor, too, remained substantively vacant. Adhocism became the rule.

15. Consequently, a large number of senior teachers in Medical Education Department were made to act on ad hoc basis on the promotional post in their own scale and substantive rank. This Court, in the case of Dr. Rita Sinha and Another Vs. State of Bihar and Others, (1990) 38 BLJR 776 : (1990) 2 PLJR 243 , noticed that the post of Assistant Professors remained virtually unfilled, as there was a tug of war amongst different candidates on account of variant interest. Some of the candidates were anxious to delay the preparation of panel, whereas some were anxious for early appointments from panel prepared. In order to sort out the problem, the Division Bench, in Dr. Rita Sinha & Anr (supra), fixed a time schedule for appointment with specific direction to fill up the vacancies occurring in the calendar year between 1st January and 31st December strictly in accordance with the year wise panel for that year. Pursuant

to the direction given, in the order, dated 29.1.1990, by the Division Bench, in Dr. Rita Sinha & Anr (supra), the question regarding, fixing a time schedule, for preparation of panel every year, for making appointment against teaching posts in different Medical Colleges, was considered by the Department, which came out with the following time schedule in its counter affidavit, which read as follows:

"6. That the State Govt. has no objection in following the time schedule as indicated in the order dated 29.1.90 for preparing the panel. The State Govt. agrees to invited applications through advertisement by 31st December every year, starting for the year 1991 by 31st December, 1990. The eligibility date will be fixed as 31.1.91 which will be the last date for submitting applications. Applications, so received, will be processed and the Panel will be notified by 31.12.1991 after completion of the necessary formalities. Appointment from the said Panel will be made in respect of vacancies occurring from 1.1.92 to 31.12.92."

16. In other words, the vacancies, for the year 1992, commencing from 1.1.1992 and ending on 31.12.1992 were to be filled from 1991 panel to be prepared latest by 31.12.1991 and, similarly, vacancies from 1.1.1993 to 31.12.1993 were to be filled from 1992 panel and vacancies from 1.1.1994 to 31.12.1994 were to be filled from 1993 panel and likewise. The cut off date of eligibility for each panel was 31st January of the year of empanelment.

17. Having noticed in brief the provisions of law, we would, now, revert to the facts of the present case.

18. The appellant, Dr. Indrashekhar Thakur, who is the main contestant, did his MBBS in the year 1979 and, thereafter, his Master of Surgery. However, the details of his academic qualification are not on record. He was appointed as Medical Officer in the year 1983. He became Resident doctor on 19.5.1990 on which post he continued till 30.7.1996. He became Registrar in 1996. He was placed in the panel of 1993 against the vacancy of 1994, but was appointed from 1992 panel against the vacancy of 1993.

19. Dr. Nirmal Prakash Narain was appointed as Medical Officer in the year 1976 after doing his MBBS. While in service, he enhanced his qualification by obtaining degree of Master of Surgery, D. Orthopedics, Ph.D, DNB, FRCS (England), FRCS (Edin) and FRCS (Glasgow). He was appointed on Junior teaching post of Resident Surgical Officer in 1986 and Registrar in 1990. He was empanelled in 1991 panel for appointment as Assistant Professor, Department of General Surgery along with Dr. P.S. Sinha and Dr. M.P. Raut as Dr. Bhardwaj, who was initially empanelled in 1991 panel, opted out for being empanelled in 1992 panel for his choice posting.

20. A comparative chart of both the Doctors, namely, Dr. Nirmal Prakash Narain and Dr. Indrashekhar Thakur, is drawn herein below for easy reference:

21. The Government prepared panel for the years 1991 to 1994 against

respective advertisements for filling up the posts of Assistant Professor in terms of the directions issued in the case of Dr. Rita Sinha (*supra*).

22. In spite of preparation of panel, as no Notification was being issued, Dr. Nirmal Prakash Narain, moved this Court by way of a writ petition under Article 226 of the Constitution of India, which gave rise to C.W.J.C. No. 10314 of 1995.

23. During the pendency of C.W.J.C. No. 10314 of 1995, the State came out with Notifications, dated 16.7.1997, with respect to 1992, 1993 and 1994 panel, indicating therein posting of candidates of different Departments including general surgery as Assistant Professors. The Notification did not mention posting of any one from the panel of Assistant Professors prepared for the year 1991. In view of orders, dated 11.8.1997 and 18.8.1997, passed in C.W.J.C. No. 10314 of 1995, the State Government issued Notification No. 291, dated 21.8.1997, modifying and amending the Notification No. 236, dated 16.7.1997. The Notification, dated 21.8.1997, mentioned and posted three persons from the panel of Assistant Professors of General Surgery of 1991 panel to different colleges as Assistant Professors, the name of Dr. H.N. Bhardwaj figured at Sl. No. 1, Dr. P.S. Sinha at Sl. No. 2 and Dr. M.P. Raut (SC) at Sl. No. 3. However, the name of Dr. Nirmal Prakash Narain, who also figured in 1991 panel of Assistant Professors, General Surgery, did not find mentioned.

24. The learned single Judge, hearing C.W.J.C. No. 10314 of 1995, filed by Dr. Nirmal Prakash Narain, initiated suo moto contempt being M.J.C. No. 2326 of 1997. The State Government came out with Notification, dated 8.11.1997, amending the Notifications, dated 21.8.1997 and 16.7.1997. Dr. Nirmal Prakash Narain was appointed as Assistant Professor, General Surgery, from 1991 panel and posted at Nalanda Medical College and Hospital, Patna. Dr. H.N. Bhardwaj, who had opted out from 1991 panel for his choice of posting, was appointed as Assistant Professor, General Surgery, at Sri Krishna Medical College and Hospital, Muzaffarpur, from year 1992 panel.

25. In view of the threat of de-recognition of Medical Colleges by the Medical Council of India, the matter, with respect to posting of Associate Professor to higher post, was taken up departmentally. A tentative gradation list of Assistant Professor was published vide Memo No. 1822, dated 26.8.2002, for promotion to the post of Assistant Professor and objections were invited. In the tentative gradation list, Dr. Nirmal Prakash Narain, being of 1991 panel, was placed at Sl. No. 13; whereas respondent Nos. 4 to 10 of C.W.J.C. No. 12354 of 2008 (including appellants), being of 1992 panel, were placed at Sl. Nos. 15 to 22. The appellant, Dr. Indrashekhar Thakur, filed objection claiming seniority over Dr. Nirmal Prakash Narain. However, the seniority positions were not altered. The names of Dr. P.S. Sinha, Dr. Nirmal Prakash Narain and Dr. M.P. Raut of 1991 panel figured at Sl. Nos. 14, 15 and 16 respectively presumably because of the order passed by this Court in the case of Dr. Rita Sinha (*supra*) as well as other orders passed in C.W.J.C. No. 10314 of 1995 and M.J.C. No. 2526 of 1997. The seniority of the appellant, Dr. Indrashekhar Thakur, was placed much below them.

26. In the meanwhile, the appellant, Dr. Indrashekhar Thakur, was appointed as Officer-on-Special Duty to the then Departmental Minister on 10.2.2003. Again, the seniority list was prepared at the department level, which was approved by the Departmental Minister, on 30.8.2003. However, in view of protests made by several doctors, the Departmental Minister, on 3.11.2003, directed enquiry by the then Additional Director, Medical Education. After due enquiry, the Additional Director came to the conclusion that the seniority of Dr. Nirmal Prakash Narain, respondent No. 1, could not be below respondent No. 5 (appellant No. 1 in both the appeals), which is mentioned at page 225 and 226 of the Departmental file No. 17/A-1-14/2002. The report of Additional Director also received approval of the Departmental Minister on 9.12.2003.

27. Being aggrieved, the appellant, Dr. Indrashekhar Thakur, filed a writ petition, under Article 226 of the Constitution of India, which came to be registered as C.W.J.C. No. 6784 of 2004. By this writ petition, Dr. Indrashekhar Thakur, challenged the order, dated 8.11.1997, whereby Dr. Nirmal Prakash Narain was appointed as Assistant Professor in the Department of General Surgery out of 1991 panel in modification of the earlier orders, dated 21.8.1997 and 16.7.1997, of the department concerned. The learned single Judge dismissed the writ application as premature on the ground that the matter of seniority between Dr. Nirmal Prakash Narain and Dr. Indrashekhar Thakur, in the cadre of Assistant Professor, General Surgery, was yet to be finally decided by the State of Bihar. The learned single Judge further observed that even if the matter of seniority is decided against the writ petitioner, i.e., Dr. Indrashekhar Thakur, he would be at liberty to challenge such determination on all points raised in the writ petition as well as other grounds available to him under law.

28. In the year 2005, the appellant, Dr. Indrashekhar Thakur, along with other doctors filed yet another writ petition, under Article 226 of the Constitution of India, which gave rise to C.W.J.C. No. 2688 of 2005, questioning the Government's decision to permit interchangeability of doctors between the parent specialty of general surgery and its super specialty. This Court, while disposing of the writ application, observed that the appointment of persons from 1992 panel cannot be called in question after a long delay and that a person appointed from a later panel cannot be granted seniority over the person appointed from earlier panel. The learned single Judge accordingly directed the State respondents to decide the question of seniority/promotion as per 1997 Rules. It appears that subsequent to the order, dated 17.11.2006, and also in view of the pendency of M.J.C. No. 157 of 2007, the Health Department, Government of Bihar, issued revised tentative seniority lists vide letter, dated 21.1.2008, inviting objections to the same. The seniority of respondent Nos. 4 to 10 of C.W.J.C. No. 12354 of 2008 including the appellant was shown at Sl. Nos. 29 to 35, whereas that of Dr. Nirmal Prakash Narain (respondent No. 1 herein) was shown at Sl. No. 36. Dr. Nirmal Prakash Narain and others filed objections thereto. The Government finally republished Notification No. 868 (17), dated 8.7.2008, wherein the position of Dr. Nirmal Prakash Narain and the appellant,

Dr. Indushekhar Thakur, remained as they were.

29. Being aggrieved, Dr. Nirmal Prakash Narain approached this Court with the further writ petition, made under Article 226 of the Constitution of India, which gave rise to C.W.J.C. No. 12354 of 2008. In this writ petition, Dr. Nirmal Prakash Narain challenged the seniority list, dated 8.7.2008, wherein he was shown below respondent Nos. 4 to 10 (including the two appellants herein).

30. On the other hand, the appellant, Dr. Indrashekhar Thakur's writ petition filed, under Article 226 of the Constitution of India, came to be registered as C.W.J.C. No. 9947 of 2008, whereby Dr. Indrashekhar Thakur put up challenge to the Notification, dated 8.11.1997, whereby Dr. Nirmal Prakash Narain was appointed as an Assistant Professor, Department of Surgery, Nalanda Medical College and Hospital, Patna, from the select panel of the year 1991.

31. The writ application, bearing C.W.J.C. No. 12354 of 2008, filed by Dr. Nirmal Prakash Narain was allowed and the seniority list showing respondent Nos. 4 to 10, including the appellant above Dr. Nirmal Prakash Narain, was quashed; whereas the writ application, bearing C.W.J.C. No. 9947 of 2008, filed by Dr. Indrashekhar Thakur was dismissed.

32. Being aggrieved, the appellants, Dr. Indrashekhar Thakur and Dr. Vimal Mukesh, filed L.P.A. No. 228 of 2014 against order, dated 11.12.2013, passed in C.W.J.C. No. 12354 of 2008. The appellant, Dr. Indrashekhar Thakur, has also filed separate L.P.A. No. 263 of 2014 against the order, dated 11.12.2013, passed in C.W.J.C. No. 9947 of 2008, dismissing his writ application. It is relevant to point out that during pendency of the writ application, respondent No. 4, Dr. M.P. Raut, died and two others, namely, respondent Nos. 8 and 9 superannuated. Respondent No. 6 did not choose to challenge the order passed in C.W.J.C. No. 12354 of 2008, whereby their seniority, over Dr. Nirmal Prakash Narain, was quashed.

L.P.A. No. 263 of 2014

33. L.P.A. No. 263 of 2014 has been preferred against the common order, dated 11.12.2013, passed in C.W.J.C. No. 9947 of 2008, whereby the learned single Judge upheld the preliminary objection, raised on behalf of the respondent No. 1 Dr. Nirmal Prakash Narain, with respect to maintainability of second writ application challenging the very appointment of Dr. Nirmal Prakash Narain, which was not interfered with in C.W.J.C. No. 6784 of 2004 filed by the writ petitioner-appellant (Dr. Indushekhar Thakur). The writ application was accordingly dismissed. In C.W.J.C. No. 9947 of 2008, the appellant had challenged the Notification, dated 8.11.1997, appointing respondent No. 6, Dr. Nirmal Prakash Narain, as Assistant Professor, Department of Surgery, Nalanda Medical College and Hospital, Patna.

34. The case of appellants, Dr. Indrashekhar Thakur and Dr. Vimal Mukesh, is that though Dr. Nirmal Prakash Narain was of 1991 panel, he could not have

been appointed as a candidate from 1991 panel. According to the appellants, which is also not disputed by the contesting respondent, that there were only three vacancies of Assistant Professors for General Surgery for the year 1992 to be filled from 1991 panel. Two of the posts were for general category candidates and one for reserved category. As such, Dr. H.N. Bhardwaj and Dr. P.S. Sinha, who belong to general category and were above respondent No. 1, came to be appointed against the two posts of Assistant Professors under general category and both were accordingly posted as Assistant Professors, Nalanda Medical College and Hospital, Patna, by Notification, dated 21.8.1997. The reserved category candidate, Dr. M.P. Raut, was also posted at Nalanda Medical College and Hospital, Patna. The appellant further submits that as the two vacancies of Assistant Professors of general category candidate, arising in the year 1992, were filled up, respondent No. 1, though being a select candidate from 1991 panel, could not have been posted as Assistant Professor vide Notification, dated 8.11.1997, of Health Department, Government of Bihar.

35. In opposition to the submissions of the writ petitioner-appellant, respondent No. 1 contends that the appellant, Dr. Indrashekhar Thakur, earlier had moved this Court, in C.W.J.C. No. 6784 of 2004, challenging the very Notification, dated 8.11.1997, whereby Dr. Nirmal Prakash Narain was posted as Assistant Professor, which was dismissed as the Court held that Dr. Indrashekhar Thakur (appellant) was really not aggrieved by appointment of Respondent No. 6. Besides this, Dr. H.N. Bhardwaj, a general category candidate, who was appointed as Assistant Professor from 1991 panel, did not join and was shifted to 1992 panel leading to a vacancy against which, respondent No. 1 Dr. Nirmal Prakash Narain joined as Assistant Professor, General Surgery, under the Notification, dated 8.11.1997.

36. We have heard learned counsel for the parties.

37. The appellant, Dr. Indrashekhar Thakur, has reiterated his submission before the Court, which was placed before the learned single Judge. He submits that in C.W.J.C. No. 6784 of 2004, he had also made alternative prayer that appointment of Dr. Nirmal Prakash Narain from 1991 panel may not adversely affect him in any manner for determination of inter se seniority or while posting or while considering their cases for promotion in future. In other words, according to this appellant, this Court, in C.W.J.C. No. 6784 of 2004, had left the issue of seniority wide open. He next submits that unless the merit of the Notification, dated 8.11.1997, is decided, the dispute regarding inter se seniority cannot be decided alone as the issues are interrelated and cannot be adjudicated separately. He also submits that Dr. H.N. Bhardwaj could not have been shifted from 1991 panel to 1992 panel as the Division Bench of this Court, in the case of Satyendra Kumar Sinha v. State of Bihar (C.W.J.C. No. 3487 of 1994), had held that shifting of one person from panel to the other may adversely affect the right of others. Further-more, the appointment of Dr. Nirmal Prakash Narain, on the post of Assistant Professor, as contained in the Notification No. 11, dated 8.11.1997, was, in fact, not decided by this Court in C.W.J.C. No. 6784 of 2004.

According to him, in any view of the matter, shifting of Dr. H.N. Bhardwaj from 1991 panel to 1992 panel, was bad in law in the face of Dr. Rita Sinha's case (supra).

38. We find that the petitioner-appellant, in C.W.J.C. No. 6784 of 2004, made two prayers. Firstly, he challenged the Notification, dated 8.11.1997, whereby Dr. Nirmal Prakash Narain was appointed as Assistant Professor, in the Department of General Surgery, from 1991 panel in modification of the earlier Notification, dated 21.8.1997, which, in turn, modified another Departmental order, dated 15.7.1997. Secondly, he prayed that the appointment of Dr. Nirmal Prakash Narain from 1991 panel may not adversely affect him in determining inter se seniority or while posting or considering their cases, in future for promotion. Learned single Judge, upon hearing the parties, observed that the petitioner-appellant, Dr. Indrashekhar Thakur, was not aggrieved by appointment of Dr. Nirmal Prakash Narain showing him to be an appointee from 1991 panel, but the real apprehension is that on the basis of said Notification, Dr. Nirmal Prakash Narain may not be shown senior to him. The learned single Judge further observed that the matter of seniority between the petitioner-appellant (Dr. Indrashekhar Thakur) and Dr. Nirmal Prakash Narain, in the cadre of Assistant Professors, General Surgery, has not yet been finally decided by the State. However, the learned single Judge observed that if the matter of seniority between the appellant, Dr. Indrashekhar Thakur, and Dr. Nirmal Prakash Narain is decided by the State Government against the former, he would be at liberty to challenge such determination on all points raised on his behalf in the writ petition or on other grounds available to him under the law. The writ application, as such, was dismissed premature. The relevant extract of order of learned single Judge is quoted hereinbelow:

"From the submissions made on behalf of the petitioner it transpires that petitioner is really not aggrieved by appointment of Respondent No. 4 vide Annexure-1 showing him to be an appointee from 1991 panel but the real apprehension of the petitioner is that on that basis Respondent No. 4 may not be shown senior to the petitioner".

39. The following two positions emerge from the order, dated 26.7.2006, passed in C.W.J.C. No. 6784 of 2004:

(i) The petitioner is not really aggrieved by the appointment of Dr. Nirmal Prakash Narain vide Notification, dated 8.11.1997;

(ii) The State Government has not come out with final gradation list, and if the same is decided against the appellant, he would remain at liberty to challenge such determination on all points or on other grounds available in law.

40. We find that in C.W.J.C. No. 9947 of 2008, the appellant (Dr. Indrashekhar Thakur) has, once again, made similar prayer, as made in C.W.J.C. No. 6784 of 2004, which is quoted herein below:

"That the writ application is for issuance of writ in the nature of certiorari and/or order/direction for quashing the Memo No. 11 dated 8.11.1997 whereby and wherein the respondent No. 6 was appointed as Assistant Professor, General Surgery, from 1991 panel".

41. It is, thus, evident that the appellant, once again, has sought quashing of the Notification No. 11, dated 8.11.1997, whereby Dr. Nirmal Prakash Narain was appointed as Assistant Professor, General Surgery, from 1991 panel, which was directly and substantially one of the two issues in C.W.J.C. No. 6784 of 2004, heard and decided between the parties.

42. In view of the above, we find that the learned single Judge did not err in coming to the conclusion that the second writ application (C.W.J.C. No. 9947 of 2008) on the same ground was not maintainable in the eyes of law. It is well-settled that principle of res judicata is based on public policy and justice and the parties cannot be allowed to litigate again and again on the same cause of action nor can they agitate any issue, which was necessary for a decision in earlier litigation. Reference can be made to the case of Shiv Chander More and Others Vs. Lieutenant Governor and Others, AIR 2014 SC 2669 : (2014) AIRSCW 4067 : (2014) 4 JT 143 : (2014) 3 SCALE 663 , wherein the Apex Court, while considering the second petition on the same ground or the ground, which could have been agitated in the earlier writ petition, observed that (a) there must be a finality of adjudication by competent court; and (b) no men should be vexed for the same cause. The Apex Court further observed that these two principles attract the principle of res judicata even to such inter party decisions, which may be erroneous on the question of law. Again, in the case of Orissa Power Transmission Corporation Limited and Others Vs. Asian School of Business Management Trust and Others, (2013) 9 AD 353 : (2013) 11 JT 25 : (2013) 4 RCR(Civil) 61 : (2013) 10 SCALE 96 : (2013) 8 SCC 738 , the Apex Court has observed that the second writ petition, filed seeking substantially the similar relief, which was dismissed in the earlier writ petition, is not permissible. In the case of Ramchandra Dagdu Sonavane (Dead) by L.Rs. and Others Vs. Vithu Hira Mahar (Dead) by LRs. and Others, AIR 2010 SC 818 : (2009) 13 JT 338 : (2009) 10 SCC 273 : (2009) 15 SCR 222 : (2009) 10 UJ 4896 , the Apex Court held that though the doctrine of res judicata, as codified in Section 11 of the Code of Civil Procedure, generally, comes into play in relation to civil suits, the said principle has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries.

43. Elucidating the principle engrafted in Section 11 of the Code of Civil Procedure, the learned Judge observed, in the present case, that the provisions not only cover the case of direct res judicata, but also of constructive res judicata. In other words, if any judgment or order in issue has been directly and explicitly decided, the decision operates as res judicata and bars a trial of an identical issue in subsequent proceedings between the same parties.

44. In view of such settled position, we find that the learned single Judge rightly

came to the conclusion that the second writ application of the appellant, bearing C.W.J.C. No. 9947 of 2008, with the same prayer as made in C.W.J.C. No. 6784 of 2004, was not maintainable.

45. In the result, we find no merit in L.P.A. No. 263 of 2014 and it is accordingly dismissed.

L.P.A. No. 228 of 2014

46. Coming to this appeal, which has been preferred by Dr. Indrashekhar Thakur and Dr. Vimal Mukesh, against the order, dated 11.12.2013, passed in C.W.J.C. No. 12354 of 2008, quashing the Notification, dated 8.7.2008, and also the consequential Notification dated 12.8.2008, of the Health Department, whereby the writ petitioner, Dr. Nirmal Prakash Narain, was placed below the appellant, Dr. Indrashekhar Thakur, and four others in the seniority list of Assistant Professors, General Surgery. We may reiterate and point out at this stage that respondent No. 4, Dr. M.P. Raut, died during the pendency of the writ petition. Respondent Nos. 6 and 7 of writ petition superannuated from service, whereas Respondent No. 5, Dr. Awadhesh Kumar, did not choose to challenge the order of the learned single Judge. The challenge to the order is by the appellants only.

47. While quashing the Notification, dated 8.7.2008, and also the consequential Notification, dated 12.8.2008, of the Health Department, whereby the writ petitioner, Dr. Nirmal Prakash Narain, was placed below the appellant, Dr. Indrashekhar Thakur, and four others in the seniority list of Assistant Professors, General Surgery, the learned single Judge has observed that the writ petitioner was all along senior to the present appellant, Dr. Indrashekhar Thakur, and has been wrongly shown, in the seniority list, below respondent Nos. 4 to 10 of the writ petition.

48. The learned single Judge noticed that the writ petitioner-respondent No. 1 was in the select panel of 1991, whereas appellant was in the select panel of 1993 and, subsequently, shifted to 1992 panel and appointed against vacancy of 1993. However, in view of decision in the case of Dr. Rita Sinha (*supra*), respondent No. 1 was appointed against the vacancy of Assistant Professor, General Surgery, occurring in 1992 as Dr. H.N. Bhardwaj, who was in the select panel of 1991 and above the writ petitioner, opted, instead, for 1992 panel so as to receive his choice posting at Sri Krishna Medical College and Hospital, Muzaffarpur. Further-more, the minimum qualification, for being eligible for appointment to the post of Assistant Professor, was of 3 years of teaching experience as Registrar or Resident, which post was subsequently designated as Lecturer, and, again, re-designated as Resident/Registrar. The writ petitioner had 3 years experience in the year 1990, whereas the respondents-appellants, admittedly, acquired eligibility after 1990 and, as such, they were not in the select panel of 1991. However, none of the names of selected candidates of 1991 panel of General Surgery was mentioned in Notification, dated 16.7.1997. It was only in view of observations of the Court in C.W.J.C. No. 10314 of 1995, made in

the light of Dr. Rita Sinha's case (supra), that the Notifications, dated 16.7.1997 and 16.8.1997, were modified by the Notification, dated 8.11.1997, appointing writ petitioner-respondent No. 1, Dr. Nirmal Prakash Narain, from 1991 panel. The learned single Judge observed that the writ petitioner-respondent No. 1 should not suffer on account of mistake on the part of the authorities concerned in omitting to issue requisite Notification with respect to his appointment to the post of Assistant Professor, General Surgery. The learned single Judge, therefore, directed the writ petitioner to be placed above the private respondent Nos. 5 to 10.

49. The appellants have challenged the order of the learned single Judge primarily on the following grounds:

(i) The learned Single Judge failed to notice that the appellant was appointed as Assistant Professor, General Surgery, on 21.7.1997 and the respondent, Dr. Nirmal Prakash Narain, was appointed only vide Notification, dated 8.11.1997, and, as such, by no stretch of imagination, the appellant, Dr. Indrashekhar Thakur, could have ranked over Dr. Nirmal Prakash Narain in the seniority and, as such, having entered the cadre earlier, Dr. Nirmal Prakash Narain would rank senior to the writ petitioner.

(ii) There were only three vacancies in General Surgery for the year 1992, out of which only two posts were available in the general category and one post was for reserved category. Dr. H.N. Bhardwaj and Dr. P.S. Sinha were, admittedly, above Dr. Nirmal Prakash Narain in the select merit list of 1991 panel and there was no room for appointing Dr. Nirmal Prakash Narain against the vacancies in the general category from 1991 panel.

(iii) It would not be correct to assume that the learned single Judge in C.W.J.C. No. 14197 of 2003 accepted the validity of Notification, dated 8.11.1997, appointing the writ petitioner from 1991 panel in modification of earlier Notification, dated 16.7.1997, whereby the appellants were earlier appointed as Assistant Professors, General Surgery and that is why, the issue of seniority was kept wide open by the learned single Judge in C.W.J.C. No. 6784 of 2004, which was further clarified by the order, dated 1.11.2006, passed in M.J.C. No. 2196 of 2006.

(iv) The writ petition is hit by non joinder of Dr. H.N. Bhardwaj as a party, who was above the writ petitioner in seniority list.

(v) Further-more, Dr. H.N. Bhardwaj, for inexplicable reasons, was shifted to 1992 panel from 1991 panel and posted at Sri Krishna Medical College and Hospital. Muzaffarpur, although the Division Bench of this Court, in the case of Dr. Satyendra Kumar Singh vs. State of Bihar & Ors (C.W.J.C. No. 3487 of 1996), disposed of, on 12.7.1994, the writ petition by observing that shifting of one person from one panel to the other may adversely affect rights of others. Thus, Dr. H.N. Bhardwaj could not have been shifted to 1992 panel and the writ petitioner could not have been appointed as no vacancy could have survived in

such a situation.

50. On the other hand, it is submitted, on behalf of the writ petitioner-respondent No. 1, Dr. Nirmal Prakash Narain, that the learned single Judge rightly quashed the Notification, dated 8.7.2008 and 12.8.2008, whereby Dr. Nirmal Prakash Narain was placed below private respondent Nos. 4 to 10 in the seniority list of Assistant Professors.

51. We need to bear in mind that the appellants have challenged the order of the learned single Judge, whereby they have been directed to be placed below the writ petitioner in the seniority list of Assistant Professors by quashing the part of the Notifications, dated 8.7.2008 and 12.8.2008, whereby they were placed above the writ petitioner in the seniority list.

52. As per guidelines prescribed by the Court in case of Dr. Rita Sinha (*supra*), a select panel of Assistant Professors was to be published latest by 31st December each year for filling up vacancies occurring in the subsequent years. In other words, panel of the year 1991 was to be finally prepared and published by 31st December, 1991 and the vacancies, occurring between 1st January, 1992 and 31st December, 1992, could only be filled up from 1991 panel and so on. Similar position was to be adopted for the subsequent years. The writ petitioner, Dr. Nirmal Prakash Narain, was in the select list of the year 1991. There were three vacancies of Assistant Professors, General Surgery, for the year 1992. Two posts were for general category and one post was for the reserved category. It is not in dispute that two of the general category candidates, namely, Dr. H.N. Bhardwaj and Dr. P.S. Sinha, were above the writ petitioner in the select list and, as such, there was no vacancy for the third person from the general category for appointment to the post of Assistant Professors, General Category. However, Dr. H.N. Bhardwaj was shifted to 1992 panel as per his choice leading to one vacancy under the general category to which the writ petitioner was appointed vide Notification, dated 8.11.1997, as a select candidate of 1991 panel. The State Government, initially, vide Notification, dated 16.7.1997, only notified the appointment and posting of select panel of candidates from 1992, 1993 and 1994. However, in view of observations of this Court vide orders, dated 11.8.1997 and 18.8.1997, passed in C.W.J.C. No. 10314 of 1995, the State Government published another Notification, on 21.8.1997, notifying postings of Assistant Professor from 1991 panel. Again, the name of the writ petitioner was conspicuously missing. Subsequently, in view of order, dated 18.8.1997, passed in C.W.J.C. No. 10314 of 1995, the State Government, realizing that Dr. Nirmal Prakash Narain ought to have been appointed from 1991 panel, issued the Notification, dated 8.11.1997, in modification of the earlier Notifications and posting the writ petitioner as Assistant Professor.

53. The appellant, Dr. Indrashekhar Thakur, challenged the Notification, dated 8.11.1997, appointing Dr. Nirmal Prakash Narain as Assistant Professor, General Surgery, in C.W.J.C. No. 6784 of 2004. He further prayed that the appointment of Dr. Nirmal Prakash Narain could not adversely affect inter se seniority. The

learned single Judge observed that really the dispute involved between parties was with respect to inter se seniority. As the State had not come out with the final gradation list, the writ application was dismissed with liberty to the appellant to challenge the same if he is adversely affected by application of gradation list.

54. The appellants did not challenge the observations of the Court wherein it was held that "really the dispute involved between parties was with respect to inter se seniority". The impugned Notification, dated 8.11.1997, which was put to challenge in the writ application bearing C.W.J.C. No. 6784 of 2004, was not interfered with. As such, the validity of the notification appointing Dr. Nirmal Prakash Narain, in modification of the earlier notifications, could not have been challenged, again, in subsequent writ petitions as being barred by the principle of *res judicata*, which has already been dealt with by us in connection with L.P.A. No. 263 of 2014.

55. The appellants, next question shifting of Dr. H.N. Bhardwaj from 1991 panel to 1992 panel, which provided an opportunity to the writ petitioner, Dr. Nirmal Prakash Narain, to be appointed against the vacancy becoming so available, because of shifting of Dr. H.N. Bhardwaj from 1991 panel to 1992 panel.

56. It is relevant to state that Dr. H.N. Bhardwaj was shifted to 1992 panel vide Notification, dated 8.11.1997. The appellants after 18 years could not have agitated before this Court that the said Notification is bad, more so, when he is not a party to this Court. Dr. H.N. Bhardwaj never questioned the selection of Dr. Nirmal Prakash Narain from 1991 panel. Further-more, the appellant, Dr. Indrashekhar Thakur, was himself shifted from 1993 panel to 1992 panel, which would be illegal in teeth of his own submission that Dr. H.N. Bhardwaj ought not to have been shifted from 1991 panel to 1992 panel, leading to appointment of the writ petitioner to the post of Assistant Professor. The State Government, by subsequent Notification, dated 8.11.1997, issued in modification of earlier Notifications, dated 16.7.1997 and 21.8.1997, rightly corrected the anomaly and appointed the writ petitioner-respondent No. 1, Dr. Nirmal Prakash Narain, as Assistant Professor from 1991 panel. The plea of the appellants that as they were appointed vide Notification, dated 16.7.1997, prior to the appointment of the writ petitioner, on 8.11.1997, and had entered the cadre of Assistant Professor is not sustainable for the reason that the writ petitioner was from 1991 select panel as compared to the appellants who were from 1992 panel. Further-more, the writ petitioner could not have been allowed to suffer on account of mistake of the Government in not notifying his appointment as Assistant Professor, at least, along with the appellants who were of 1992 panel. The Government, realizing the dichotomy, modified its earlier Notifications and made good the discrepancies. The learned single Judge was right in taking the view that the writ petitioner ought not to have suffered on account of mistake of the Government, when the writ petitioner was all along senior to the appellants.

57. For the reasons discussed above, we too find no merit in L.P.A. No. 228 of

2014 and it is accordingly dismissed.

I.A. Ansari, Actg. C.J.

I agree.