

(2024) 05 GAU CK 0009

In the Gauhati High Court

Case No : Writ Petition (C) No. 2858 Of 2018, 2293 Of 2020

Lohit Kumar Kalita

APPELLANT

Vs

State Of Assam And 9 Ors.

RESPONDENT

Date of Decision : 16-05-2024

Acts Referred:

Citation : (2024) 05 GAU CK 0009

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : J. Patowary, D.P. Borah, D.K. Baidya, T. Wapungle

Final Decision : Allowed

Judgement

1. Both the writ petitions being filed by the same petitioner and connected, an analogous hearing was done and are being disposed of by this common judgment and order. The principal grievance of the petitioner is with regard to the aspect of his promotion to the post of Associate Professor of Oncology in the Guwahati Medical College & Hospital.

2. Before going to the issue involved, it would be convenient if the facts of the cases are narrated in brief.

3. The petitioner is a Master of Surgery (M.S.) in Orthopedics which he had obtained in the year 2008. In the same year, vide an order dated 19.03.2008, the Department of Oncology was created in the Guwahati Medical College Hospital, Guwahati (hereinafter GMCH) with 29 posts including 3 posts of Registrars. Both the petitioner and the private respondent no.7 had applied for the post of Registrar and in the selection so held, the petitioner was selected as the first nominee and was accordingly appointed as Registrar of Oncology on 17.07.2008. After completion of the requisite number of years and having found eligible by the Departmental Promotion Committee (DPC), the petitioner was recommended for promotion to the post of Assistant Professor of Oncology on 05.07.2011 and thereafter was promoted to the same post on 04.08.2011. It is

submitted that the higher post thereafter is the post of Associate Professor for which an eligibility of 2 years of service as Assistant Professor is required and the criteria for promotion is 'seniority cum merit'. In the meantime, vide an order dated 09.09.2014, the respondent no.7 was also promoted as Assistant Professor. An experience certificate dated 27.08.2012 was issued by the Health Department to the petitioner as per which, the petitioner meets the requirement of serving for at least 2 years in the feeder cadre of Assistant Professor. On 22.11.2013, a DPC was held which however had come to a finding that no eligible candidates were found for the post of Associate Professor. Subsequently, on 09.09.2014, another DPC was held with the same remark. As indicated above, in the said DPC, the respondent no.7 was made as Assistant Professor. The petitioner has obtained the note sheet from the original file by invoking the Right to Information Act and as per note dated 08.01.2014, the petitioner was held to be fit for promotion. It also transpires from the said information that the certificate regarding the fitness was not placed before the DPC.

4. Under those circumstances, the petitioner had filed a writ petition being WP(C)/1395/2015 in which the Health Department had taken a stand in the affidavit-in-opposition filed therein that the certificate could not be counted as two years of teaching experience as such experience has to be in the Surgical or Medical Oncology. It is the submission of the petitioner that in the GMCH, there is only one consolidated Department and therefore, the certificate was accordingly given.

5. The aforesaid WP(C)/1395/2015 was disposed of by this Court vide judgment and order dated 19.08.2016 whereby this Court had come to a finding that the promotion exercise requires a relook and accordingly, a direction was given for such an exercise and it should not to be influenced by the stand taken in the affidavit of the State filed in the writ petition. The petitioner had however, preferred a WA/367/2016 for giving retrospective effect of his promotion and the Hon'ble Division Bench vide an order dated 13.07.2017 had directed consideration of the said aspect.

6. It is the case of the petitioner that in spite of the clear direction, no review DPC was held for a long time for which the petitioner had filed a contempt case before this Court. It is only after that on 02.04.2018, a Review Selection Board was constituted and in the discussions held, under serial no.5, even the aspect of promotion of the petitioner from Registrar to Assistant Professor was discussed with an indication of disapproval. The aforesaid Review Selection Board had accordingly taken a decision which was the same which was taken in the earlier promotional exercise and was interfered with by this Court in the earlier writ petition.

7. The petitioner accordingly had instituted WP(C)/2858/2018 in which this Court vide an order dated 09.05.2018 had passed an interim order. During the pendency of the said writ petition vide an order dated 31.12.2019, the private respondent no.7 was promoted to the post of Associate Professor.

8. Challenging the above, the petitioner had instituted writ petition being WP(C)/2293/2020 wherein an order dated 04.06.2020 has been passed by this Court by observing that the promotion made would be subject to the outcome of the writ petition.

9. I have heard Shri J. Patowary, learned counsel for the petitioner whereas the Department of Health and Family Welfare is represented by Shri D.P. Borah, the learned Standing Counsel. Also heard Shri M.S. Hussain, learned counsel on behalf of Shri D.K. Baidya, learned counsel representing the Medical Council of India (MCI) as well as Ms. T. Wapungle, learned counsel for the respondent no. 7.

10. Shri Patowary, learned counsel for the petitioner has submitted that the issue involved was already decided by this Court in the judgment dated 19.08.2016 passed in the first round of litigation, namely, WP(C)/1395/2015. It is submitted that while the stand of the State taken in the affidavit-in-opposition was negated, the Hon'ble Division Bench in WA/367/2016 had directed consideration of the retrospective aspect of such promotion. It is submitted that only because of filing of the contempt case by the petitioner, in a hurry, the Review Selection Board was constituted which, by the impugned order dated 02.04.2018 had taken the same decision of the earlier DPC which was interfered by this court in WP(C)/1395/2015. Shri Patowary, the learned counsel has alleged bias and mala fide in the decision making process inasmuch as, in the impugned meeting dated 02.04.2018, under serial no.5, even the aspect of promotion of the petitioner from Registrar to Assistant Professor has been discussed with disapproval which was not even the subject matter of remand and there was no occasion to re-open the said aspect of promotion which was done in the year 2011.

11. The learned counsel for the petitioner has submitted that the impugned Review Selection Board constituted had a Member Secretary who was holding the substantive post of Joint Secretary, Health & Family Welfare (B) Department and it is this authority who had earlier issued the certificate to the petitioner dated 27.08.2012 (Annexure 4). It has further been pointed out that the member against Sl. no.6, namely, Principal-cum-Chief Superintendent, GMCH of the Committee had also issued four numbers of certificates towards the eligibility of the petitioner for being considered and promoted to the post of Associate Professor. The learned counsel has reiterated that in the GMCH, there is only one consolidated Department of Oncology and therefore the certificates were accordingly granted. It is submitted that the Department cannot take a hyper technical approach that the experience has to be in Surgical or Medical Oncology as there is no such Division in the GMCH.

12. The learned counsel for the petitioner has also submitted that on 31.12.2019, the benefits of promotion has been given to the respondent no.7 to the post of Associate Professor who, though appointed as Registrar with the petitioner on the same date was placed lower to the petitioner in the merit list for appointment to the post of Registrar when the Department of Oncology was opened in the year 2008. It is contended that while the petitioner was promoted

to the feeder cadre of Assistant Professor on 04.08.2011, the respondent no.7 was given such promotion to the post of Assistant Professor on 09.09.2014. Therefore, for all practical purposes, the petitioner was to be given promotion to the post of Associate Professor much earlier and from 09.09.2014 i.e. the date of the DPC which was also directed by this Court as the criteria is 'seniority-cum-merit' and he has fulfilled the requirement of serving 2 years in the feeder cadre of Assistant Professor.

13. In support of his submission, the learned counsel for the petitioner has relied upon the following case laws-

i. (1979) 2 SCC 150 [The Distt. Registrar, Palghat and Ors. Vs. M.B. Koyakutty and Ors.]

ii. (2018) 1 SCC 552 [Union of India and Ors. Vs. Major General Manomoy Ganguly, VSM]

14. The case of M.B. Koyakutty (supra) has been cited in support of the prayer / contention that a positive direction for promotion can be granted in an appropriate case.

15. The case of Major General Manomoy Ganguly (supra) has been cited to bring home the contention that a review DPC is to be treated as an extension of the original DPC.

16. Per Contra, Shri D.P. Borah, the learned Standing Counsel, Health Department has submitted that the decision taken by the Review Selection Board on 02.04.2018 is based on reasons which are sustainable and therefore no interference is required. He also submits that the promotion of the respondent no.7 to the post of Associate Professor has been done on 31.12.2019 by following the due process.

17. By referring to the affidavit-in-opposition filed on 05.03.2021, the learned Standing Counsel has submitted that the respondent no. 7 is an M.S. in the E.N.T. subject. The learned Standing Counsel has however fairly conceded that he has no instructions as to on what criteria the respondent no. 7 was promoted, though he was initially appointed as Registrar and thereafter as Assistant Professor in the same Department of Oncology in the G.M.C.H.

18. The learned Standing Counsel however highlights that the eligibility criteria requires teaching experience and not working experience.

19. The respondent no. 7 is represented by Ms. Wapungle, learned counsel who submits that affidavit-in-opposition has been filed on 03.8.2020. The learned counsel has however fairly submitted that for the period from 11.11.2004 to 25.07.2009, respondent no.7 has worked in the B. Borooah Cancer Institute.

20. Shri Patowary, learned counsel for the petitioner in his rejoinder has submitted that he may not press on the legality and validity of the promotion of the respondent no. 7 as Associate Professor but his principal claim is for his

promotion as Associate Professor with retrospective effect. He reiterates that the certificate dated 04.8.2016 is of the composite Department. Reference to the certificate dated 10.07.2017 has also been made which was issued by the Principal-cum-Superintendent, G.M.C.H. and is on the aspect of both working and teaching. It is submitted that the impugned decision is not supported by the existing service rules or even the MCI Regulations inasmuch as, such benefit of promotion to the rank of Associate Professor has been given to the respondent no.7 who admittedly is junior to the petitioner in the feeder cadre of Assistant Professor and also was having similar experience of working and not of teaching even if a hyper-technical approach is taken.

21. The rival submissions have been duly considered.

22. There is no manner of doubt that the criteria laid down for promotion to the post of Associate Professor is 'seniority-cum-merit' with two years of service in the feeder cadre of Assistant Professor. Admittedly, the Department of Oncology was introduced in the G.M.C.H. in the year 2008 and in the recruitment process, both the petitioner and the respondent no.7 had applied and in the selection, the petitioner was selected as the first nominee. Both the petitioner and the respondent no.7 were accordingly appointed as the Registrar on 17.07.2008. It is also on record that while the petitioner was promoted as Assistant Professor of Oncology on 04.08.2011, the respondent no.7 was given such promotion much later on 09.09.2014. In the DPC held on 22.11.2013, even though the petitioner had completed two years of service as Assistant Professor of Oncology having been appointed on 04.08.2011, the DPC had given a remark that no eligible candidates were found. The said remark was also made in the subsequent DPC held on 09.09.2014.

23. The issue which is presently under consideration was raised in the first petition WP(C)/1395/2015 regarding the DPC dated 09.09.2014 wherein this Court by its judgment dated 19.08.2016 had directed for a relook to the promotion exercise and not to be influenced by the stand of the State taken in the affidavit-in-opposition filed in the said writ petition. As observed above, the Hon'ble Division Bench had also directed to consider the retrospective aspect of giving such promotion. Under such facts and circumstances, it is really surprising as to how the Review Selection Board in its meeting dated 02.04.2018 could take a stand which was already interfered with by this Court earlier. In this regard, the submissions made by the petitioner that such a decision is triggered by initiation of the contempt proceeding by the petitioner does not appear to be wholly irrelevant and rather it appears to the Court that such action of the petitioner had irked the respondent authorities. What is even more surprising is that under Sl. no. 5, a discussion has been made on the aspect of the promotion of the petitioner from Registrar to Assistant Professor which was made in the year 2011 when the same was not even the subject matter of remand.

24. In that view of the matter, the decision taken by the Review Selection Board dated 02.04.2018 followed by the order of the same date passed by the

Department do not appear to be in accordance with law. Even though the issue has been settled by this Court by the judgment dated 19.08.2016 against which no appeal was preferred, the stand of the respondent authorities is not in sync. with the facts and situation prevalent. Apart from the certificates issued to the petitioner by the respondent authorities, it is seen that there is no dispute regarding the composite nature of the Department of Oncology in the GMCH involving both the Surgical and Medical aspect. The experience of the petitioner both on the field of working and teaching has been clearly certified by the Principal-cum-Superintendent GMCH vide the certificate dated 10.07.2017. This Court finds force in the submission made on behalf of the petitioner that the Review Selection Board which had a Member Secretary, who was substantially the Joint Secretary of the Department had earlier issued a certificate dated 27.08.2012 to the petitioner towards his eligibility and further the Principal-cum-Chief Superintendent, GMCH against Sl. no. 6 had also issued four numbers of certificates to the petitioner regarding his eligibility. Under those facts and circumstances, even the reasons prescribed to support the impugned action appear to be wholly unreasonable and unacceptable.

25. In view of the aforesaid discussions and the facts and circumstances noted above, this Court is of the considered opinion that the impugned decision of the Review Selection Board dated 02.04.2018 and the order of the same date of the Department are unsustainable in law and accordingly set aside and quashed. With regard to the grievance raised in the subsequent writ petition being WP(C)/2293/2020, learned counsel for the petitioner has fairly submitted that instead of going to the aspect of legality of the promotion of the respondent no.7, a direction for giving promotion to the petitioner to the rank of Associate Professor with retrospective effect would serve the interest of justice. This Court has also noted that the respondent no.7 in his affidavit-in-opposition filed on 03.08.2020 has disclosed that for the period from 11.11.2004 to 25.07.2009, he was working at the B. Borooah Cancer Institute and therefore it is clear that in spite of not having the teaching experience as may be technically required, the said respondent no.7 was duly considered and promoted to the post of Associate Professor. The learned Standing Counsel has also admitted that he has no instructions as to how the respondent no.7 was promoted to the rank of Associate Professor though he was placed in similar circumstances and was actually junior in rank to the petitioner in the feeder cadre of Assistant Professor.

26. In view of the above, while the impugned action of the Review Selection Board dated 02.04.2018 and consequent order dated 02.04.2018 of the Department have been set aside, the respondent authorities are directed to immediately hold another review DPC to consider and promote the petitioner to the rank of Associate Professor. Such promotion is required to be given effect from 09.09.2014 as directed this Court in the judgment and order dated 19.08.2016 passed in WP(C)/1395/2015. Consequently, all notional benefits including the seniority and proper fitment are to be given to the petitioner in the rank of Associate Professor from the said date 09.09.2014.

27. The conduct of the Department clearly appears to be unreasonable and vindictive and as such the aspect of imposing cost was also considered. However, this Court has reluctantly decided not to impose cost.

28. The writ petitions accordingly stand allowed.