
(2014) 08 PAT CK 0040
In the Patna High Court
Case No : CWJC No. 6298 of 2011

Nawal Kishore Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 19-08-2014

Acts Referred:

Constitution of India, 1950 — Article 14 16 16(1) 226

Citation : (2015) 3 PLJR 545

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : S.K. Ghosh, Prabhat Kumar Singh and Prem Ranjan Raj, Advocate for the Appellant; Dhruva Mukherjee and Ganesh Singh, Advocate for the Respondent;

Final Decision : Allowed

Judgement

Shivaji Pandey, J.

1. The present case has a chequered history and the litigation has confined to who will lead the Patna Dental College, Patna Thereinafter in short, referred to as the "College") as the Principal. The petitioner and the respondent No. 5 are teachers of different faculties and there is no inter se seniority dispute with respect to who will be made Lecturer, Tutor or Professor. Only dispute is confined to who is the senior most teacher in the College would, be appointed as the Principal.

2. Prayer has been made in the present writ petition for quashing the Notification contained in Memo No. 17/Court-41/65-899(17) dated 25th October, 2010 whereby Dr. Dharmendra Kumar Singh, respondent No. 5 has been declared as senior to Dr. (Smt.) Mridula Verma and has also been declared as Lecturer, Prosthetics with effect from 12th August, 1991 in contradistinction to the decision taken by the Departmental Promotion Committee (hereinafter, in short, referred to as the "DPC") dated 4th August, 2006 as the DPC considering the

case of Dr. D.K. Singh, respondent No. 5 to the post of lecturer, Prosthetics with effect from 12th August, 2001. Claim has been made that though it has been decided in between Dr. (Smt.) Mridula Verma and Dr. Dharmendra Kumar Singh, respondent No. 5 affecting interest of the petitioner to the post of Principal of the College. Claim has also been made that the petitioner is the seniormost teacher in the College, in view of the order dated 26th September, 1998 passed in CWJC No. 762 of 1987 holding that Dr. K. Singh, respondent No. 5 is not eligible for the post of Tutor Dentistry.

3. During the pendency of this writ petition, I.A. No. 5183 of 2611 was filed making a prayer for quashing, the Notification No. 773(17) dated 27th July, 2011 (Annexure-29) by which the seniority list of teachers in the College has been published which is contrary to the order dated 20th September, 2010 passed in CWJC No. 6642 of 2003 by which the direction was given to the Principal Secretary, Health Department to issue a tentative gradation list of teachers of different Departments of the College which would be circulated and any person seeking any modification or change therein will have a right to file a representation and additionally petitioner Dr. N.K. Singh and respondent No. 5 Dr. D.K. Singh, being the two contesting persons have right of personal hearing before the Principal, Secretary, Health Department, Government of Bihar and the said impugned Notification No. 773(17) dated 27th July, 2011 (Annexure-29) would remain stayed and thereafter a further Interlocutory application i.e. I.A. No. 3382 of 2013 has been filed whereby challenged a reasoned, order has been passed by the Principal Secretary, Health Department, Government of Bihar, Patna dated 1st December, 2011 thereby Dr. D.K. (Respondent No. 5) has been declared senior to the petitioner.

4. In view of the aforesaid string of facts, the challenge that has been made by the petitioner is of inter se seniority between Dr. D.K. Singh, respondent No. 5 and Dr. (Mrs.) Mridula Verma whereby Dr. D.K. Singh has been declared to be senior to Dr. (Mrs.) Mridula Verma holding that Dr. D.K. Singh, Respondent No. 5 has been appointed as Professor with effect from 1991 and thereafter the seniority decided in between the petitioner and Dr. D.K. Singh, respondent No. 5 and ultimately the impugned order was passed by the Principal Secretary, Wealth Department, Government of Bihar, Patna.

5. For testing the validity of the action of the Government, this Court will have to examine background of facts of the case to arrive at a right conclusion. As Dr. Nawal Kishore Singh, petitioner is in the Oral Surgery Department and Dr. D.K. Singh, respondent No. 5 belongs to Prosthetics (Dentistry) Department. Both of them are separate to each other.

6. For deciding the inter se seniority it will be appropriate to discuss their entry in service. As per the facts emerging from the records, Dr. N.K. Singh, the petitioner passed B.D.S. Examination in the year 1974 and in 1977 he Joined the Bihar Dental Service as Dental Surgeon being not on the teaching side. Petitioner passed MDS in Oral Surgery in the year 1979 whereas on 20th December, 1979,

Dr. D.K. Singh, respondent No. 5 and Dr. (Mrs.) Mridula Verma, were appointed as Tutor Dental Hygienic and Tutor Technician respectively for six months on ad hoc basis. The same was extended from time to time and ultimately on the recommendation of Bihar Public Service Commission the State Government, vide Notification No. 616(2) dated 14th May, 1980 (Annexure-R-5/4) appointed Dr. D.K. Singh, respondent No. 5 and Dr. (Mrs.) Mridula Verma as Dental Surgeon. Dr. D.K. Singh was posted, at Naugachia, Bhagalpur in the Sub-Divisional Hospital. In the meantime the Health Department, vide letter dated 11th August, 1980, directed the Principal of the College not to relieve respondent No. 5 and Dr. (Mrs.) Mridula Verma from the place of working and resultantly respondent No. 5 continued as Tutor, Dental Hygienist at Patna Dental College, Patna. Thereafter, the Government vide Notification No. 333(2) dated 1st August, 1981 allowed both the persons to continue with the post of Tutor Dental Hygienist Dental and Dental Technician on temporary basis till further orders and they continued to withdraw the same salary as they were getting earlier.

7. It will be appropriate to mention here that vide letter No. 2936 dated 16th December, 1980, the Government of Bihar has granted "No objection" to Dr. D.K. Singh, Tutor Hygienist to pursue the MDS course. Dr. D.K. Singh, respondent No. 5 completed his MDS course in Prosthetics stream on 1st February, 1984. The Government of Bihar vide notification No. 17C 301/84-68(17) dated 19th February, 1987 appointed Dr. D.K. Singh, respondent No. 5 and Dr. (Mrs.) Mridula Verma as Tutor Dentistry with effect from 1st August, 1981 which was challenged by the petitioner before this Court in CWJC No. 762 of 1987 and this Court has accepted the plea of the petitioner, accordingly quashed the same and in this manner, respondent No. 5 no longer remained as Tutor Dentistry.

8. The said order passed by the Single Judge was challenged before the Division Bench in LPA No. 30 of 1989 and it was dismissed as not pressed. In the meanwhile, in pursuance of order passed in CWJC No. 762 of 1987 dated 26th September, 1989 the Government of Bihar vide Notification No. 560 dated 7th January, 1992 appointed Dr. N.K. Singh, the petitioner as Tutor Dentistry (Oral Surgery). In this way, Dr. D.K. Singh, respondent No. 5 in pursuance of order passed in CWJC No. 762 of 1987 he was no longer Tutor Dentistry and he remained as Tutor Dental Hygienist. While they were performing the duty as Tutor Dental Hygienist, the case of Dr. D.K. Singh, respondent No. 5 and Dr. (Mrs.) Mridula Verma was placed for consideration to the post of Lecturer, i.e. only vacant post of Lecturer in Prosthetics (Dentistry). The same was considered by the DPC in its meeting held on 29th August, 1981 and, accordingly, recommended the name of Dr. D.K. Singh, respondent No. 5 to the post of Lecturer, Prosthetics (Dentistry) on ad hoc basis, vide Annexure-R-5/9.

9. The Government of Bihar, vide its letter No. 590(17) dated 24th November, 1992 refused to accept the recommendation for promotion in the post of Lecturer in Prosthetics Department holding that after completion of PG Degree Course he did not have three years' teaching experience (Annexure-R-5/10). The said

decision was challenged by Dr. D.K. Singh respondent No. 5 as well as by Dr. (Mrs.) Mridula Verma in CWJC Nos. 12418 of 1992 and 844 of 1993 the court considered the case and rejected the claim of Dr. D.K. Singh, respondent No. 5 to be appointed on the post of Lecturer on the ground that he does not possess requisite teaching experience of three years and, accordingly, the writ petitions were dismissed.

10. Being aggrieved by the said order, Dr. Dharmendra Kumar Singh, Respondent No. 5 and Dr. (Mrs.) Mridula Verma challenged the common order passed in both the writ petitions in LPA Nos. 59 of 1994 and 61 of 1994, this Court has arrived to a conclusion in Para-10 that Dr. D.K. Singh has got experience while working as Tutor Dentistry for more than three years. For arriving to a conclusion, the Court has taken into consideration that Respondent No. 5 discharged the duty of Tutor Dentistry with effect from 1st August, 1981 till the same was set aside by this Court in CWJC No. 762 of 1987 and, accordingly, the appeal was allowed and the common order of the Single Judge was set aside and direction was given to the respondents to consider the case of Dr. D.K. Singh and Dr. (Mrs.) Mridula Verma to the post of Lecturer, Prosthetics, if they were otherwise qualified. In the meantime, Dr. D.K. Singh, respondent No. 5 and Dr. (Mrs.) Mridula Verma were given time bound promotion on completion of ten years of service, the name of respondent No. 5 stands at Sl. No. 4(Annexure-R-5/11).

11. After the direction of the Division Bench passed in LPA Nos. 59 of 1994 and 61 of 1994, the DPC in its meeting dated 19th August, 1987 recommended the name of Dr. D.K. Singh, respondent No. 5 to the post of Lecturer in the Prosthetics Department of the College with effect from 12th August, 1991 (Annexure-R-5/12). In pursuance of the recommendation, the Deputy Secretary, Government of Bihar vide its notification No. 171(17) dated 11th April, 1998, promoted Dr. D.K. Singh on the post of Lecturer, Prosthetics Department, Patna Dental College, Patna with effect from 12th August, 1991 at notional basis. The aforesaid notification was challenged by Dr. (Mrs.) Mridula Verma and Dr. Jyoti Prasad, as alleged in CWJC Nos. 8106 of 1997 and 9321 of 1997 and both the writ petitions were allowed and the Court has arrived to a conclusion that appointment of Dr. D.K. Singh as Lecturer, Prosthetics Department is not in accordance with law and remanded back the matter to the Government to consider his case afresh, if it is found that Dr. D.K. Singh and Dr. (Mrs.) Mridula Verma were having requisite qualification upto the relevant date, the appointment has to be made in accordance with law in case it is found that none has requisite qualification upto the relevant date, then the cases of other eligible Doctors having requisite qualification and experience would be considered for promotion to the post of Lecturer. The order of the Single Judge was tested in LPA No. 930 of 1998 and the Division Bench vide order dated 1st February, 1998 stayed the operation of the order of the Single Judge passed in the aforesaid writ petition. Later on, vide order dated 3rd November, 1998, the stay order was made absolute.

12. The Division Bench in LPA Nos. 930 of 1998 and 931 of 1998 found the order of the Single Judge passed in CWJC Nos. 8106 of 1997 and 9321 of 1997 to be bad in law, accordingly set aside the same and directed for fresh consideration. There the Court has held that till the seniority in between Dr. Verma vis-a-vis Dr. D.K. Singh, respondent No. 5 is decided Dr. D.K. Singh will not function on the said post and, accordingly, in pursuance thereof letter No. 171(17) dated 11th April, 1998 (Annexure-R-5/13) was set aside vide Government Notification No. 911(17) dated 4th October, 2005 (Annexure-R-5/21) and that order was modified vide letter No. 17/Court/41-205-113(17) dated 13th December, 2005 (Annexure-R-5/22) whereby he would not perform the duty of Lecturer till the decision of seniority in between Dr. D.K. Singh and Dr. (Mrs.) Mridula Verma is decided.

13. In pursuance of order passed in LPA No. 930 of 1998, the DPC considered the case of Dr. D.K. Singh, respondent No. 5 vis-a-vis Dr. (Mrs.) Mridula Verma and arrived to a conclusion that Dr. D.K. Singh is more suitable for promotion to the post of Lecturer with effect from 12th August, 2001 (Annexure-R-5/23).

14. Ultimately, in pursuance of order passed in LPA Nos. 930 of 1998 and 931 of 1998, on the recommendation of the DPC, Dr. D.K. Singh, respondent No. 5 was made Lecturer in Prosthetics Department of the College with effect from 12th August, 1991 (Annexure-1 to the writ petition) whereby Dr. (Mrs.) Mridula Verma was declared to be junior to Dr. D.K. Singh and preference was given to him and he was given appointment as aforesaid.

15. While LPA No. 930 of 1998 was pending, Dr. D.K. Singh was made Professor, Prosthetics (Dentistry) (Annexure-R-5/18) in his own pay scale and later on vide notification No. 781(17) dated 13th October 2004, he was given additional charge of Principal and was made Drawing & Disbursing Officer and later on vide Letter No. 682(17) dated 26th May, 2008 (Annexure-R-5/24) Dr. D.K. Singh, respondent No. 5 was appointed on the post of Professor in working arrangement Prosthetic (Dentistry) Department in the pay scale of Rs. 14,300-18,300/- on regular basis.

16. Dr. N.K. Singh, the petitioner was not satisfied with the manner Dr. D.K. Singh was given promotion to the post of Lecturer with effect from 12th August 1991, filed CWJC No. 6642 of 2003 before this Court and this Court in order to arrive to a right conclusion remanded back the matter to the Principal Secretary, Health Department with a direction to examine not only the case of Dr. N.K. Singh, the petitioner and Dr. D.K. Singh, respondent No. 5 but also of all other eligible persons and to appoint the person who will emerge as the seniormost as the Principal of the College and direction was also given for publication of a tentative gradation list inviting persons to give their representation and special privilege of personal hearing was given to the petitioner as seniority of teachers have direct bearing in the appointment for the post of Principal. Till such exercise is not completed by the Principal Secretary, neither petitioner nor respondent No. 5 will be eligible for the post of Principal of Patna Dental College and during the

pendency consideration, the Principal of Patna Medical College shall look after the work of Principal of Patna Dental College & Hospital.

17. The said order was challenged in LPA Court in LPA No. 79 of 2011 (Annexure-R-5/27) and this Court has refused to interfere with the matter and directed to consider the seniority of all teachers and while deciding the seniority, letter vide Memo No. 899(17) dated 25th October, 2010, contained in Annexure-1 will not be taken into account and thereafter seniority was decided vide Notification No. 773(17) dated 27th July, 2011, Annexure-29 to the writ petition and the same was stayed by this Court vide order dated 5th August, 2011 through I.A. No. 5183 of 2011 and later on after hearing the parties, the Principal Secretary vide order dated 1st August, 2011 (Annexure-32) found Dr. D.K. Singh to be senior to the petitioner.

18. In this case seniority of Dr. Nawal Kishore Singh, petitioner and Dr. D.K. Singh, respondent No. 5 is to be examined as the Principal Secretary, Department of Health, Government of Bihar - vide Annexure-32 has declared Dr. D.K. Singh, respondent No. 5 to be senior to Dr. N.K. Singh, the petitioner.

19. Some facts are admitted, Dr. D.K. Singh, the petitioner was appointed in the year 1977 on the recommendation of Bihar Public Service Commission as Dental Surgeon, a non-teaching post and subsequently posted as Tutor, Dentistry Oral Surgery, basic teaching post vide Notification No. 560 dated 7th November, 1992 of the Health Department (Annexure-4 to the writ petition), whereas Dr. D.K. Singh, respondent No. 5 was appointed as Tutor, Dental Hygienist on ad hoc basis on 20th December, 1979 (Annexure-R-5/3). The ad hoc appointment was extended from time to time and ultimately on 14th May, 1980 vide Annexure-R-5/4 he was appointed as Dental Surgeon, on temporary basis on the recommendation of Bihar Public Service Commission and was posted at Naugachia, vide letter dated 11th August, 1980 (Annexure-R-5/5) the Principal Secretary, Health Department, Government of Bihar directed not to relieve Dr. D.K. Singh from the post of Tutor, Dental Hygienist. Dr. D.K. Singh, respondent No. 5 got permission for doing MDS Course on 17th December, 1980, vide Annexure-R-5/7 and completed his studies of MDS Course on 1st February, 1984.

20. On 30th July, 1981, as per the claim of petitioner, he was asked to work as Tutor, Dentistry in Prosthetics Department. On 19th February, 1987 vide Notification No. 68(17) dated 19th February, 1987, respondent No. 5 was posted absorbed to the post of Tutor, Dentistry from Tutor, Dental Hygienist. This was challenged by the petitioner before this Court in CWJC No. 762 of 1987. The ground of challenge was that Dr. D.K. Singh, respondent No. 5 entered into Patna Dental College in the Ex-cadre post of Tutor, Dental Hygienist the absorption of Dr. D.K. Singh, respondent No. 5 violates the provisions of Articles 14 & 16(1) of the Constitution of India and made a prayer to declare that the absorption-cum-appointment of Dr. D.K. Singh, respondent No. 5 with effect from 1st August, 1981 is bad in law The plea of the petitioner was accepted and declared absorption of Dr. D.K. Singh, respondent No. 5 as Tutor, Dentistry to be bad in

law (Annexure-3/1) It will be relevant to quote the following:--

"Para-15. There can be some exigency of a service which may warrant a departure from the general rule of recruitment. But if such a departure is needed, it is to be clearly spelled out and made in such a manner that Articles 14 and 16 of the Constitution are not violated. If there were any such exigencies for appointment to the post of Tutor, as above, it was open to the respondent-State to come out clearly and categorically as to who may qualify for such appointment and accordingly consider cases of every eligible candidate. The respondent-State has in the instant case shown as if it was no constraint of law to observe. The petitioners who had the lurking hope of being considered for appointment to a teaching post and were applicants for inclusion of their names in the panel had to suffer the worst disillusion to give their weightage not only that the respondents 3 and 4 were given appointments as Tutor on 19th August, 1998, they were almost eligible for Higher appointments by recognizing their services from 1st August, 1981 as Tutor and thus a clear advantage over the petitioners for appointment to the post of Associate Professor/Professor. Such a retrospective appointment therefore, has to be struck out for that reason atone."

21. The said judgment attained its finality on account of the fact that LPA filed by Dr. D.K. Singh, respondent No. 5 in LPA No. 30 of 1989 was not pressed, accordingly, it was dismissed and he was reverted back to the post of Tutor, Dental Hygienist Tutor, Dental Hygienist is not a teaching post but the post of Tutor, Dentistry, is a teaching post.

22. The DPG was constituted and for the purpose of promotion to the post of Lecturer against the single vacant post in the Department of Prosthetics Dentistry, vide Annexure-R-5/9, recommendation was made in favour of Dr. D.K. Singh, respondent No. 5 to the post of Lecturer in the Prosthetics Department. The same was not accepted by the Government and the Government vide Notification dated 24th November, 1992, vide Annexure R-5/10 refused to accept the recommendation on the ground that Dr. D.K. Singh, respondent No. 5 does not possess teaching experience. That was challenged in CWJC No. 12418 of 1992, could not succeed there, ultimately filed LPA No. 59 of 1994. The Court held in Para-10 of the said judgment that Dr. D.K. Singh, respondent No. 5 got teaching experience while working as Tutor, Dentistry for more than three years and remanded back the matter for fresh consideration.

23. Again the DPC sat on 19th August 1987 and found Dr. D.K. Singh, respondent No. 6 to be competent for pro-motion to the post of Lecturer with effect from 12th August, 1991 (Annexure-R-5/12). Accordingly, he was promoted as Lecturer in Prosthetics Department of the College with effect from 12th August, 1991 vide Notification No. 171(17) (Annexure-R5/13). But the same was challenged by one Dr. Mridula Verma and Jyoti Prasad in CWJC No. 8106 of 1997 and CWJG No. 9321 of 1997. The Single Judge of this Court relied on the judgment passed in CWJC No. 762 of 1987 whereby declared adjustment of Dr. D.K. Singh as Tutor, Dentistry was not sustainable in the eye of law and on that

basis the Court held that he cannot claim any benefit acquiring teaching experience as Tutor, Dentistry by virtue of order dated 12th February 1987 with effect from 1st August, 1981 as the absorption of Dr. D.K. Singh, respondent No. 5 was quashed on 26th September, 1988 and further held that the order dated 12th February, 1987 shall be treated to have never been passed and as such, any experience gained on the basis of said order cannot be treated to be valid experience in the eye of law. The Court is of the view that after setting aside the illegal order/the party cannot be allowed to reap the benefit of illegal order. The Court has rejected the plea of experience of Tutor, Dentistry on 31st August, 1981 claiming to have performed the duty of Tutor, Dentistry in addition to the duty of Tutor, Dental Hygienist and held that the appointment as Lecturer of Dr. D.K. Singh, respondent No. 5 is not in accordance with law.

24. The said order was challenged in LPA No. 930 of 1998 read with LPA No. 931 of 1998 and the Division Bench set aside the order and held that even though his appointment as Tutor, Dentistry vide letter dated 19th February, 1987 giving effect to 1981 to be bad in law but the duty performed as a Tutor, Dentistry with effect from 1st August, 1981 cannot be stripped out and it will be treated that Dr. D.K. Singh has acquired teaching experience and has relied on the judgment of the Hon'ble Supreme Court in the case of Dr. Asim Kumar Bose Vs. Union of India (UOI) and Others, . In that case, the Hon'ble Supreme Court found that Dr. Ghosh was holding the post of Radiologist-cum-Professor of Radiology who was asked to perform the duty of teaching in addition to his duty as Radiologist. It was found that he had actually taught students. The Hon'ble Supreme Court has said that there is hardly any difference so far as teaching experience is concerned whether it was acquired on regular appointment or as specialist in a teaching hospital with the Ex-officio capacity. Accordingly, the Court has set aside the order of Single Judge but directed Dr. Singh not to function in the said post till the seniority in between Dr. Singh, respondent No. 5 and Dr. Verma is decided on merit.

25. In this case, the Court while deciding the issue held that it is true that no one can take advantage of any wrong order and it is also true that an order quashed by the Court in a proceeding initiated under Article 226 of the Constitution of India should be treated to have never been in existence. It cannot be said that a person who had worked on the basis of such an order do not earn experience. The Court has further held that before the earlier Division Bench, the issue of gaining experience was considered and had been settled but question of seniority was not under consideration. It will be apt to quote Paras-9 and 10 of the judgment:--

"Para-9 From the portion of the judgment of the Division Bench as quoted above, it is clear that there is a direct and clear pronouncement of the Division Bench rendered on 20th September, 1996 that Dr. Singh undisputedly has got experience as tutor Dentistry for more than three years. The passage of the Division Bench judgment dated 20th December, 1996 referred by the learned

Single Judge makes it abundantly clear that the Division Bench did not go into the question as to grant of the benefit of teaching experience to Dr. Singh with effect from 1st August, 1981 which may offend the seniority of Dr. Prasad, as was claimed by him, inasmuch as the question before the Division Bench was not of seniority and the scope of appeal was only to consider as to whether Dr. Singh and Dr. Verma were qualified to be considered for the said post and that too only in regard to three years' teaching experience and in no uncertain terms directed consideration of the cases of Dr. Singh and Dr. Verma for the said post. The Division Bench, accordingly, held that Dr. Singh had requisite teaching experience which was the bone of contention between the parties in the said appeals. The said finding given by the Division Bench which has been permitted to reach finality, cannot be said to be *res integra*, or has not attained finality.

Para-10. It is true that no one can take advantage of a wrong order. It is also true that an order quashed by the court in a proceeding initiated under Article 226 of the Constitution of India should be treated to have never been in existence. However, it cannot be said that a person who had worked on the basis of such an order do not earn experience. In the case of Dr. Asim Kumar Bose Vs. Union of India (UOI) and Others, , on the fact is it was found that Dr. Prashun Kumar Ghosh while holding the post of Radiologist-cum-Professor of Radiology was asked to teach in addition to his duty as Radiologist. It was found that Dr. Ghosh actually taught students. It was also found that Dr. Ghosh was not drawing teaching allowance for such allowance was attached to the regular teaching post. The experience thus gained by Dr. Ghosh was not taken into account as the required teaching experience. This dispute was sorted out by the Supreme Court. The Supreme Court looked at the rules and found that there is no provision made in the Rules that the teaching experience must be gained on a regular appointment and unless the same is so gained, it would not count towards teaching experience. The Supreme Court observed that there is hardly any difference so far as teaching experience is concerned whether it is acquired on regular appointment or as specialist in a teaching hospital with the Ex-officio capacity. The court, thus, held that Dr. Ghosh was entitled to be considered for he had the actual teaching experience. In the instant case not only Dr. Singh had actual teaching experience but his such experience has been taken note of and upheld by a Division Bench of this Court, which has reached its finality and is binding upon the parties before us. In such situation it was not permissible for the learned Single Judge to hold that the impugned appointment of Dr. Singh to the question was not in accordance with law for he did not have the requisite teaching experience, as is the view of the learned Single Judge expressed in the impugned judgment and order."

26. LPA No. 59 of 1994 and LPA No. 930 of 1998 Dr. N.K. Singh, the petitioner was not a party and any finding recorded therein cannot have a binding effect on the petitioner. Ultimately, petitioner has challenged the order before this Court in CWJC No. 6642 of 2006 (sic--2003?) where his appointment as Lecturer vide Notification dated 11th April 1998 and subsequent promotion as Professor and

Principal was also under challenge. The matter was remanded back. The said order was affirmed by the Division Bench in LPA No. 79 of 2011 (Annexure-27). There the Court has directed that while deciding seniority, Letter No. 899(17) dated 25th October, 2010, Annexure-18 to LPA No. 79 of 2011 will not be taken into account.

27. It is well settled principle of law that in absence of any Rule, length of officiation to a particular post is the basis for deciding the issue of seniority but the post should not be on ad hoc basis or officiation on the post based on fortuitous circumstances. Here one thing is clear, in LPA No. 59 of 1994 and LPA No. 930 of 1998, seniority was not the issue for decision. Only the issue was raised about gaining experience as Tutor, Dentistry and in that circumstance, the Court has held that actually Dr. D.K. Singh has performed the duty of Tutor, Dentistry in addition to his original duty of Tutor Dental (Hygienist), thereby he was given experience of teaching for more than three years.

28. It will be proper to rely on the following judgments:--

(1) Sanjay K. Sinha-II and Others Vs. State of Bihar and Others,

"It is clear from the admissions made on behalf of the respondents by way of affidavits filed in judicial proceedings that sanctioned number of posts were not available in the year 1987 when the respondents were promoted as ACFs, rather the promotions were made against non-existing posts, Can such promotions, confer any right on the officers concerned particularly over and above the other duly appointed officers in the service like the appellants. In this connection we have to note that Rule 35 of the Bihar Forest Service Rules provides that seniority of officers appointed to the service is to be determined with reference to the date of their substantive appointment in order to become a member of the service the person concerned has to satisfy at least two conditions first, appointment must be in substantive capacity, and second, the appointment has to be to the post in the service according to the Rules and within the quota to a substantive vacancy. In the present case neither of the two conditions is satisfied. The posts to which substantive appointments were to be made were not available, therefore, there could be no appointment to the service. When there is no appointment to the service, much less substantive appointment to the service, the promotees could not be given seniority with effect from the purported date, of their promotion."

(2) State of Rajasthan and Others Vs. Jagdish Narain Chaturvedi,

"The only question that has remained to be decided is as to whether because of the retrospective nature of the amendment, the amendment itself could be invalidated to the extent of retrospectivity. In our opinion the answer is negative."

(3) Keshav Chandra Joshi and others etc. Vs. Union of India and others,

"Employees appointed purely on ad hoc or officiating basis due to administrative exigencies. even though continued for a long spell do not be-come the members

of the service unless the Governor appoints them in accordance with the rules and so they are not entitled to count the entire length of their continuous officiating or fortuitous service towards their seniority."

29. The Division Bench in LPA No. 930 of 1998 has taken cognizance of the fact that the issue of seniority was not under consideration rather the issue of gaining experience was the issue before the Division Bench. It is one thing to say that a person has acquired experience on the basis of actually he has worked but it is another thing to say whether the experience will be the basis for deciding seniority between the Parties. though he has performed the duty of Tutor, Dentistry in addition to his Tutor Dental (hygienist) but the question is whether the period he has performed as tutor Dentistry in view of the judgment passed in CWJC No. 762 of 1987 will be taken into consideration for the purpose of deciding seniority.

30. In this case thing is also very important that after the judgment passed in LPA No. 930 of 998 and LPA No. 931 of 1998 the DPC considered the case of Dr. D.K. Singh and recommended his promotion to the post of Lecturer w.e.f. 12th August, 2001 but the Government without disclosing the reason and disagreement with the view of DPG, vide Memo No. 899(17) dated 25th October, 2010 (Annexure-1) promoted Dr. D.K. Singh, respondent No. 5 With effect from 12th August, 1991.

31. Though, the petitioner and respondent No. 5 are teachers in different and distinct departments as the petitioner is in the Department of Oral Surgery whereas respondent No. 5 is in Prosthetics Department, Directly, there is no clash between them as both of them have re (sic) separate channel of promotion to higher post without any dash but seniority plays vital role while deciding who would head to the institution as Principal, Patna Dental College & Hospital.

32. On perusal of the order passed by the Principal Secretary Health Department, Government of Bihar, this Court finds that there, are some serious errors have been committed toy him as he has held that Dr. N.K. Singh joined as Tutor Dentistry vide notification dated, 7th November, 1992 whereas Dr. D.K. Singh as Tutor, Dentistry with effect from 1981 Dr. N.K. Singh was promoted to the post of Tutor, Oral Surgery and then to the post of Lecturer, Oral Surgery vide Notification dated 2nd August 1996 from the date he assumed the charge, whereas Dr. D.K. Singh was promoted notionally from the post of Tutor, Dentistry to the post of Lecturer Prosthetics with retrospective effect from 12th August 1991. The Principal Secretary has misdirected himself in holding that Dr. D.K. Singh was appointed as Dentistry with effect from 1981 which is completely an error of record and wrong in view of the fact that appointment of Dr. D.K. Singh as Tutor, Dentistry with effect from 1981 was challenged and was set aside by this Court in CWJC No. 762 of 1981 after quashing the order and now it will be deemed that the said order was not in existence and he cannot claim to have been appointed as Tutor, Dentistry with effect from 1st August, 1981, though he can claim teaching experience on the basis of his actual performance. As it is well

settled, no one can take advantage of the wrong order and the order quashed of by the Court in a proceeding under Article 226 of the Constitution should be treated to have never been in existence.

33. Another error, has been committed by the Principal Secretary while recording:--

"The Dental Council of India in its meeting held on 17th and 18th April, 1984 took a decision that duties of a doctor as Dental Hygienist be taken into account as teaching experience of Tutor, Dentistry. On 30th May, 1984, the Central Government approved the proposal of the Dental Council of India to treat the post of Tutor, Dental Technician as a teaching post. On 19th February, 1987, the State Government issued a Notification and thereby appointed Dr. D.K. Singh as tutor, Dentistry with retrospective effect."

34. There is an error in assessing to finding, in fact, the Dental Council of India in its meeting dated 17/18th April, 1984 decided that duty of doctors as Dental Hygienist be taken into account as teaching in tutor, Dentistry but as per Section 20 of the sub-clause (i) of Dental Council of India Regulation it was required to be approved by the Central Government.

35. There is an error, in fact, Dental Council of India in its meeting dated 17/18th April, 1984 decided that the duties of Dental Hygienist be taken into account as teaching experience for Tutor, Dentistry but as per Section 20(i) of the Dental Council of India Regulation, it was required to obtain the approval of the Government and no such approval was granted and, as such, his working as Tutor, Dentistry Hygienist will not be treated as performing the duty of teaching so much so that the appointment as a Tutor, Dentistry vide order dated 12th February, 1987 was quashed in CWJC No. 762 of 1987. It is wrong to say that the absorption of Dr. D.K. Singh as Tutor Dentistry with effect from 1st August, 1981 which was quashed has no substance and his absorption was confirmed since 1st August, 1981 which is completely an error. When his appointment as Tutor, Dentistry was quashed, the finding recorded by the Principal Secretary, Health Department is completely an error of record misdirected, misconceived, illegal and not sustainable in law.

36. Though it is a fact that on the subsequent occasion, respondent No. 5 was promoted to the post of Lecturer and Professor earlier to the petitioner but all those appointments were under challenge in CWJC No. 6642 of 2003. So while deciding the issue of seniority the primary consideration would be the date of entry of the petitioner vis-a-vis respondent No. 5 to the teaching post and experience of teaching, this Court is of the view that, cannot be the basis for deciding the seniority in between the parties as the seniority is one thing and gaining experience in teaching is another thing. In both the LPAs, as stated above, the issue of seniority was not under consideration. In this view of the matter, this writ petition is allowed and the order dated 25th October, 2010 (Annexure-1) and the Notification No. 773(17) dated 27th July, 2011

(Annexure-29) with respect to only petitioner and Dr. D.K. Singh deciding seniority between them and the order dated 1st December, 2011 (Annexure-32) are hereby quashed and the Principal Secretary, Department of Health, Government of Bihar is directed to take fresh decision while deciding the issue of seniority would consider the recommendation made by the DPC dated 3rd March, 2006 (Annexure-1/1). Till such decision, neither the petitioner nor the respondent No. 5 would hold the post of Principal of Patna Dental College and during the intervening period, the Principal, Patna Medical College in addition his own duties, shall perform as the Principal of Patna Dental College, Patna.