

Dr. S. K. Kacker

Vs

All India Institute of Medical Sciences and Others

Civil Appeal No. 12078 of 1996

(K. Ramaswamy, Faizanuddin JJ)

04.09.1996

ORDER

1. Leave granted.

2. While Dr S.K. Kacker, an eminent professor in Otorhinolaryngology, was working as Professor and Head of the ENT Department in the respondent-AIIMS, an advertisement had come to be made on 29-6-1990 for appointment to the post of Director of the AIIMS on regular basis. Pursuant thereto, he has applied for and was selected by the Committee for appointment as a Director. He came to be appointed by the Institute Body with the concurrence of the Government of India. He assumed the office on 11-10-1990 for a period of five years. His tenure came to an end on 15-10-1995. We are not concerned with the interlude of his tenure being not extended as an interim Director pending regular selection. The question that emerges for consideration is whether on expiry of five years' tenure as Director, he would be entitled to go back as a Professor and Head of the ENT Department till he attains his superannuation on 31-7-1998 ? When he filed writ petition in the High Court seeking one of the above reliefs, the Division Bench of the High Court in the impugned judgment made on 19-7-1996 in Writ Petition No. 3865 of 1995 has rejected his claim holding that on appointment as Director, he ceased to be a Professor and he could not revert to the ENT Department. Thus, this appeal by special leave.

3. Shri Arun Jaitley, the learned Senior Counsel appearing for the appellant, has elaborately argued the case. Shri D.D. Thakur, the learned Senior Counsel and Ms Mukta Gupta, the learned counsel for the respondents, have resisted the contentions. The question arises whether the appellant on ceasing to be a Director on and from 15-10-1995 could revert to and continue in the post of Professor of the ENT Department till he attains the superannuation ? The main emphasis laid by Shri Jaitley is that the post of Director is not a permanent post. As per Regulation 22 of the Regulations of the AIIMS, there are only two categories of posts, namely, permanent post and temporary post; the tenure post is neither a permanent post nor a temporary post and that, therefore, on completion of his tenure as Director, he is entitled to revert to the post of Professor as Head of the Department in the ENT Department. In his absence, one Dr R. Ghosh was appointed as Professor and Head of the Department while the appellant retained his post as a Professor as disclosed from the Resolution passed by the Governing Body and approved by the Institute Body. The appellant, therefore, had not ceased to be a Professor. In that behalf, he laid great emphasis on Regulation 30-A of the Regulations which envisages putting an end to the tenure post either by the Institute Body by giving notice of three months or pay in lieu thereof or on the incumbent's himself ceasing to be a Director voluntarily giving three months' notice. It would, therefore, indicate that the post of Director is not a permanent post. Thereby, the appellant had not lost his lien in the post as a Professor and Head of the ENT Department.

4. Shri Thakur, on the other hand, contended that even assuming that the appellant was permitted to continue as a Professor and Head of the ENT Department, it is only on account of the mutuality of the functioning of the two posts without there being incompatibility in the discharge of duties, that he was permitted to continue as Professor, but his primary appointment was to the post of Director of the Institute and that, therefore, he could not continue as Professor after he assumed office as Director, so as to get reverted to the post of Professor and Head of the ENT Department of the Institute on expiry of tenure in the post of Director. Mrs Gupta further contended for the respondent-AIIMS that the Fundamental Rules apply to the AIMS; no permanent government servant could continue on two permanent posts simultaneously; the advertisement itself indicated that the post of Director is a permanent post; though it is a tenure post on selection, he was appointed on probation for a period of one year and thereafter, he must be deemed to have been permanently appointed; on his appointment on permanent basis as a Director, he ceased to be a Professor and Head of the Department of the ENT Department and that, therefore, he cannot revert to the post of Professor and Head of the ENT Department. In support thereof, she places strong reliance on the observations of this Court in *L.P. Agarwal (Dr) v. Union of India* [(1992) 3 SCC 526 : 1992 SCC (L&S) 731 : (1992) 21 ATC 249] (SCC para 6).

5. In view of the respective contentions, the question for consideration is whether the view taken by the High Court is correct in law ? It is not necessary to recapitulate the admitted facts as narrated hereinbefore. The appellant, while working as Head of the Department and Professor of the ENT Department, was selected by the Selection Committee for appointment as Director of the AIIMS. It is also an admitted position that any Professor in India is entitled to apply for and seek selection to the post of Director. It is a selection post to be filled by competition in the open market. Therefore, once a Director is selected and appointed with the concurrence of the Central Government, it becomes an independent permanent appointment. It is seen that the advertisement itself clearly indicated that the incumbent would be on probation for one year. It is also an admitted position that the appointment to the post of Director is a tenure post for a period of five years. Thus, it is a permanent post.

6. The question, therefore, is whether, on completion of the period of five years, the incumbent would revert to his parent post ? It is seen that the appellant came to be selected while he was working in the post of Professor and Head of ENT Department. Take for instance, a doctor who is selected from outside the Institute from anywhere in the country; on his appointment, unless he is permitted by his appointing authority to go on tenure basis with a right to revert to the parent department, he cannot claim to retain his post in his original appointment; at the same time, he can be a permanent government servant in the Central Government with the AIIMS. In this, behalf, it is relevant to note few Fundamental Rules. Rule 9(13) defines 'lien' to mean the title of a government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively. Therefore, if a government servant is appointed substantively to a permanent post or a tenure post, he becomes a government servant for the purposes of his tenure in that post. Consequently, he is entitled to retain the lien on that post.

7. Rule 9(30-A) defines "tenure post", to mean a permanent post which an individual government servant may not hold for more than a limited period. Government of India's Order (2) under Rule 13 prescribes the procedure of retention of lien in the parent Department in the case of government servants getting employed in other Departments. Clause 2(2) thereof reads that "in the case of permanent government servants, their lien may be retained in the parent Department/Office for a period of two years. They should either revert to the parent Department/Office within that period or

resign from the parent Department/Office at the end of that period. An undertaking to abide by these conditions may be taken from them at the time of forwarding the applications to other Departments/Offices."

8. Rule 14-A(a) which was heavily relied on by Shri Jaitley read as under :

"Except as provided in clauses (c) and (d) of this rule and Rule 97, a government servant's lien on a post may, in no circumstances, be terminated, even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post."

9. The contention of Shri Jaitley is that since the appointment to the post of Director is on temporary basis, the appellant cannot be allowed to leave his lien in the permanent post held as Professor and Head of the ENT Department. We do not find that his contention is justified. Here is a case where, when the government servant is either on deputation or on leave or on any other assignment, during the absence of his service on the post, he cannot be allowed to leave without lien upon the permanent post. On his appointment as Director which is a permanent post and a tenure post, he cannot continue to hold his parent post, namely, he cannot hold two posts, viz. of Director as well as of Professor and Head of the ENT Department, simultaneously. In this behalf, clause (d) of FR 14-A is relevant; it reads as under :

"A government servant's lien on a post shall stand terminated on his acquiring a lien on a permanent post (whether under the Central Government or a State Government) outside the cadre on which he is borne."

10. It would indicate that on appointment to a permanent post, be it under the Central Government or the State Government, outside the cadre on which he is borne, his lien on the previous permanent post stands terminated on his acquiring a lien in a permanent post. The post of Director is not in the same cadre as the post of Professor in the AIIMS. The post of Director is the Head of the AIIMS and it is independent of all the Departments. The Director is enjoined to supervise not only the administrative work of the AIIMS, but also its management for and on behalf of the Institute Body. Therefore, on his appointment to the permanent post as a Director, he lost his lien on the post as a Professor and Head of the ENT Department. Resultantly, when the tenure of the appellant had expired on/by efflux of time or in case any of the eventualities mentioned in Regulation 30-A had happened, he cannot revert to the post of Professor and Head of the Department.

11. Dr L.P. Agarwal case [(1992) 3 SCC 526 : 1992 SCC (L&S) 731 : (1992) 21 ATC 249], it is seen from the facts that Dr Agarwal came to be appointed as a Professor of Ophthalmology and the director of the Institute. It was a composite appointment. Thereafter, when he was compulsorily retired as a Professor, the question arose whether his tenure post as a Director had also automatically come to a terminus ? In that behalf, this Court had considered the question and had held in para 16 thus : "Even an outsider (not an existing employee of AIIMS) can be selected and appointed to the post of Director. Can such person be retired prematurely curtailing his tenure of five years ? Obviously not." It would thus be clear that an incumbent appointed to the post of Director is governed by the Fundamental Rules and he is independent of the tenure which he holds in any other post either on permanent or temporary basis. Accordingly, on his ceasing to be a Director, he does not have the right to fall back upon the previous permanent post held by him as Professor and Head of the ENT Department.

12. Shri Jaitley placed strong reliance on the resolutions passed by the Governing Council permitting the appellant to continue as Professor and Head of the Department and approval thereof by the Institute Body. That was also reflected in the counter-affidavit filed by the Union of India indicating that his superannuation as Professor is on 31-7-1998. That would mean that he was allowed to continue as a Professor and that, therefore, he is entitled to revert as Professor and Head of the Department. It is true that such resolutions came to be passed. The question, however, is whether such resolutions have statutory basis ? They are by their very nature administrative resolutions passed by the authorities. When, admittedly, Dr Kacker is a permanent government servant governed by the Fundamental Rules, he cannot hold two substantive posts at the same time, namely, the post of Professor and Head of the Department and also the post of Director. In view of the findings recorded hereinbefore, the appellant lost his lien in the post of Professor and Head of the ENT Department on his substantive appointment to the post of Director. Therefore, such resolutions which are inconsistent with the statutory rules have no role to play nor do they have any legal efficacy. The administrative instructions would only supplement the yawning gaps in the statutes but cannot supplant the law. The resolution is, therefore, a self-serving one without legal back-up.

13. Thus considered, we are of the view, though for different reasons, that the High Court was right in holding that the appellant cannot revert as Professor and Head of the ENT Department, on his ceasing to be the Director of AIIMS.

14. Shri Jaitley has stated that consequent upon the disposal of this case, the appellant is required to vacate the bungalow in his occupation which continues to be in his possession pursuant to the interim direction granted by the High Court. He states that the appellant has already requested his tenant to give vacant possession of his personal house and the tenant has written that he would vacate by 31-10-1996. Therefore, he requests that a direction may be given to AIIMS to allow him to continue to be in possession of the bungalow till 31-10-1996. Shri Thakur has, however, stated that on the instructions obtained from the Government, he had persuaded the Department to allow the appellant to continue but he has already overstayed in the premises. Since a new incumbent is appointed, he has to take possession of the office-cum-residence for the discharge of his duties as Director. Therefore, it would be difficult to allow him to retain premises in his occupation, but he would try to persuade the AIIMS to provide alternative accommodation, if available. We hope and trust that AIIMS would consider in all earnestness the request of the appellant to give him any other accommodation in the premises till 31-10-1996 on which date he has undertaken to vacate even that alternative accommodation.

15. The appeal is accordingly dismissed, but, in the circumstances, without costs.