

State of Bihar and Another

Vs

Ramesh Chandra and Another

Civil Appeals Nos. 11240 and 11241 of 1995

(S. C. Agarwal, G. T. Nanavati JJ)

20.03.1997

JUDGMENT

NANAVATI, J. –

1. These two appeals arise out of the judgment and order passed by the High Court of Patna, in Civil Writ Jurisdiction Case No. 12274 of 1992. Civil Appeal No. 11240 of 1995 is filed by the State of Bihar and Civil Appeal No. 11241 of 1995 is filed by Dr. Choudhary, who was Respondent 3 in the writ petition. The writ petition was filed by Dr. Ramesh Chandra, Respondent 1 in these appeals and hereafter referred to as "the respondent".

2. The respondent after obtaining MBBS degree joined the Price of Wales Medical College, Patna as a demonstrator in the Department of Anatomy. He did MS in General Surgery and thereafter MCh in Neurosurgery in 1967. He then joined the Christian Medical College, Vellore for some time and then went to a foreign country for further studies. He returned to India in 1973. By that time the Prince of Wales Medical College, Patna, was taken over by the State Government. As leave for two years which he had obtained while working as a demonstrator in the Price of Wales Medical College had expired and he had not reported for duty his name was not included in the list of employees submitted to the Government when the said Medical College was taken over by it. Finding that his name was not included in the list, he joined Kurji Holy Family Hospital in March 1973. His services were terminated by that hospital in December 1978. Earlier, on 18-1-1947, he had submitted a joining report to the officer in charge of the Patna Medical College who had forwarded it to the Government. On 29-6-1981, he was permitted to join and was absorbed in the Bihar Health Services as a tutor in the Department of Anatomy with effect from 29-5-1971 i.e. from the date the college was taken over by the Government. The Government then sought an opinion of the Medical Council of India as regards his eligibility for appointment on a teaching post in Neurosurgery. After receiving the concurrence of the Medical Council the Government created a post of Associate Professor in the Department of Neurosurgery and on 27-4-1983 appointed him on that post on ad hoc basis in anticipation of the concurrence of the Bihar Public Service Commission.

3. The appointment of the respondent as a tutor with retrospective effect and his further appointment as an Associate Professor was challenged by one Dr. Sinha and by Dr. Choudhary who were then working as Assistant Professors, by filing a petition (CWJC No. 1815 of 1983) in the Patna High Court. It was disposed of on 31-5-1983 as infructuous, as the State Government made a statement before the Court that promotion of both the writ petitioners as Associate Professors on ad hoc basis was approved by it but a notification to that effect could not be issued because of the stay order. The High Court, while dismissing the writ petition had observed that it would be open to the Government to issue the notification. Accordingly, on 3-6-1983, the Government issued a

notification cancelling its earlier Notification dated 27-4-1983 (whereby the respondent was appointed as an Associate Professor) and appointing all the three doctors as Associate Professors on ad hoc basis. The order passed by the High Court was challenged by the respondent by filing an appeal in this Court. During the pendency of that appeal (Civil Appeal No. 4023 of 1991) the State Government, on 24-1-1991, issued a notification regularising the ad hoc appointments of all the three doctors. Dr. Sinha's name was mentioned at Serial No. 1 followed by the name of Dr. Choudhary at Serial No. 2 and the respondent's name appeared at Serial No. 3. On 22-9-1991, this Court disposed of the appeal by passing the following order :

"After hearing the learned counsel for the parties and having regard to the subsequent events resulting into the appointment of the appellant and Respondents 4 and 5, we find that the dispute which requires determination relates to seniority only. It appears that the State Government had by its notification dated 24-1-1991 determined the inter se seniority of the appellant and respondents 4 and 5. We are of the opinion that the question relating to seniority should be decided by the High Court. We, accordingly, allow the appeal, set aside the order of the High Court and remand the matter to the High Court for determining the question seniority of the appellant and Respondents 4 and 5. ..."

4. Meanwhile, the post of Professor of Neurosurgery had fallen vacant on 1-5-1990. Dr. Sinha had also retired by that time. At that stage, the respondent again filed a petition in the Patna High Court for a writ of mandamus directing the State of Bihar not to appoint Dr. Choudhary as Professor or allow him to assume the office of the Head of Neurosurgery Department. The respondent also filed one more petition (CWJC No. 5965 of 1991) for getting quashed the recommendation of the Departmental Promotion Committee to appoint Dr. Choudhary as Professor and Head of the Department and also for a writ of mandamus directing the Government to appoint him as Professor and Head of the Neurosurgery Department in the Patna Medical College. The latter writ petition was disposed of on 6-12-1991 as premature.

5. On 22-4-1992, a writ petition was filed by Dr. Sinha and Dr. Choudhary in 1983 and the decision which was challenged before this Court by the respondent and which was remanded to the High Court for determining the question of seniority was withdrawn at the instance of the writ petitioners. On 1-8-1992, the Government promoted Dr. Choudhary to the post of Professor with effect from 1-5-1990, the date on which the post had fallen vacant. The respondent challenged that appointment by amending his earlier writ petition viz. CWJC No. 3596 of 1990 which was still pending. It was allowed by the High Court on 19-8-1992 as the impugned Notification dated 1-8-1992 was issued upon an erroneous assumption that CWJC No. 5965 of 1991 was still pending. The High Court remanded the matter to the State Government and directed it to take a fresh decision. Accordingly the Government, on 18-11-1992, decided that all the three doctors were eligible for appointment/promotion as Associate Professors; Dr. Sinha acquired eligibility on 29-9-1981 and became entitled to the said post on 8-1-1983; Dr. Choudhary acquired eligibility on 5-2-1983 and became eligible for promotion from 8-1-1983 as the vacancy was already existing on that date; and, Dr. Ramesh Chandra, the respondent, who was appointed on the post created on 10-3-1983, was not entitled to get it with retrospective effect as prior to 27-4-1983, he was working as a tutor in another department, namely, Anatomy and was, therefore, not having any teaching experience during 10-3-1983 to 26-4-1983. In view of this decision Dr. Sinha and Dr. Choudhary were given promotion to the post of Associate Professor and their teaching experience was treated as having started from 3-6-1983. The respondent was treated as appointed on 27-4-1983 and his teaching experience was to count from that date. The appointments of the three doctors were, however, termed as ad hoc.

6. The respondent, therefore, challenged the said decision of the Government and the appointments of Dr. Sinha and Dr. Choudhary by filing a petition out of which these two appeals arise. The High Court held that it was not open to the State Government to describe the promotions/appointments as ad hoc as it had already made their ad hoc promotions/appointments regular and fixed their seniority. As this fact was noticed by this Court and as in the Order dated 27-9-1991, it was observed that "the dispute which requires determination relates to the seniority only", the High Court held that there was no justification for the State Government to convert their appointment/promotion into an ad hoc one. As the challenge to the appointment and seniority of Dr. Choudhary as Associate Professor was given up in view of the order passed by this Court in Civil Appeal No. 4023 of 1991, the only controversy which the High Court was called upon to decide was whether Dr. Choudhary was eligible for appointment as Professor. It was contended that even though the appointment of Dr. Choudhary as Associate Professor is now to be regarded as valid and qualifications for the posts of Associate Professor and Professor are the same, his eligibility for the post of Professor was required to be considered afresh while appointing him on that post. The High Court held that the regulations framed by the Indian Medical Council in 1971 were the only regulations having statutory force, they having received the approval of the Central Government. As the regulations made by the Medical Council in 1982 and 1989 have not so far been approved by the Central Government they are to be regarded as recommendatory only. Therefore, the question of eligibility for appointment as Professor in Neurosurgery was to be determined according to the qualifications recommended in the 1971 Regulations. In the 1971 Regulations the Medical Council had recommended the following qualification for the post of Professor/Associate Professor in Neurosurgery :

##(a) Professor/Associate MCh in speciality (a) As Reader, Asst. Professor concerned after Prof., in MS/FRCS. respective subjects for 5 years in a medical college after requisite postgraduate qualification. or MS/FRCS or equivalent surgery with two years' special training in the speciality concerned or Speciality Board (USA) in the speciality concerned.###

7. Admittedly, Dr. Choudhary did not have the degree of MCh and, therefore, the only question required to be considered was whether he possessed the alternative qualification of MS with two years' special training in the speciality concerned. Interpreting the eligibility requirement the High Court held that the person concerned should possess both qualification of special training as well as the requisite teaching/research experience when he claims to be covered by the alternative qualification. It further held that the two expressions "special training" and "teaching experience" cannot be read as having the same meaning. Therefore, the teaching experience of Dr. Choudhary as Assistant Professor or Resident Surgical Officer could not be regarded as "special training". It also held that the material on record did not clearly disclose the nature of work done by Dr. Choudhary. Thus the claim of Dr. Choudhary that he had received "special training" for more than two years was negated and it was held that he did not possess the requisite qualification for appointment as Professor. In taking this view the High Court followed the decisions of this Court in Arun Kumar Agrawal (Dr.) v. State of Bihar [1991 Supp (1) SCC 287 : 1991 SCC (L&S) 1060 : (1991) 16 ATC 931] and Ganga Prasad Verma (Dr.) v. State of Bihar [1995 Supp (1) SCC 192 : 1995 SCC (L&S) 383 : (1995) 29 ATC 154] and distinguished the decision of this Court in the case of Govt. of A.P. v. Dr. R. Murali Babu Rao [(1988) 2 SCC 386 : 1988 SCC (L&S) 610 : (1988) 7 ATC 316 : (1988) 3 SCR 173]. It also held that though the qualifications for the posts of Associate Professor and Professor are the same and the appointment of Dr. Choudhary on the post of Associate Professor was not under challenge, the respondent was entitled to challenge the eligibility of Dr. Choudhary for the post of Professor. The High Court distinguished the decision of this Court

in *A. N. Shashtri v. State of Punjab* [1988 Supp SCC 127 : 1988 SCC (L&S) 536 : (1988) 7 ATC 290 : (1988) 2 SCR 363] on the ground that the facts in that case were different. Finally, the High Court quashed the impugned decision of the Government dated 18-11-1992 insofar as it treated the appointments of the respondent and Dr. Choudhary as Associate Professor as ad hoc only. It also quashed the decision to appoint Dr. Choudhary as Professor in Neurosurgery and directed the State Government to consider the matter of promotion to the post of Professor in Neurosurgery afresh.

8. The same contentions which were urged before the High Court have been raised before us. We will first deal with the contention whether, in view of the order passed by this Court on 22-9-1991 in Civil Appeal No. 4023 of 1991 and the concession made before the High Court by the respondent that the appointment of Dr. Choudhary as Associate Professor was now not challenged, it was open to the respondent to contend that Dr. Choudhary does not possess the requisite qualification for appointment as Professor, when the qualifications for both the posts are the same. Once it is conceded that the appointment of Dr. Choudhary as Associate Professor was valid it would be implied that apart from the required teaching experience he also possessed "special training" of two years in the speciality of Neurosurgery after obtaining the degree of MS. It is, therefore, difficult to appreciate how it was open to the respondent thereafter to challenge that Dr. Choudhary did not have the special training requisite for appointment as Professor. It is also difficult to appreciate the reason given by the High Court for distinguishing and not applying the decision of this Court in *A. N. Shashtri* case [1988 Supp SCC 127 : 1988 SCC (L&S) 536 : (1988) 7 ATC 290 : (1988) 2 SCR 363] and upholding the contention raised on behalf of the respondent. In *A. N. Shashtri* case [1988 Supp SCC 127 : 1988 SCC (L&S) 536 : (1988) 7 ATC 290 : (1988) 2 SCR 363] the facts were that Shashtri was first appointed as Professor and then as Deputy Director. Subsequently, he was promoted as Director. His appointment as Director on promotion was challenged on the plea that he did not possess the prescribed qualification. This Court noticed that there was no difference in the qualifications prescribed for the posts of Professor and that of Director. It, therefore, held that while giving appointment to him as Professor the Government must have been satisfied that he had the requisite qualification. It was further held that he did possess that requisite qualification for appointment as Director. The High Court has distinguished the decision in *A. N. Shashtri* case [1988 Supp SCC 127 : 1988 SCC (L&S) 536 : (1988) 7 ATC 290 : (1988) 2 SCR 363] only on the ground that his appointment as Professor and Deputy Director was not challenged and, therefore, it was not open to question his appointment as Director, the qualifications for those appointments being the same. In view of the order passed by this Court in Civil Appeal No. 4023 of 1991 and the concession made by the respondent before the High Court, it ought to have proceeded on the ground that appointment of Dr. Choudhary as Associate Professor was not in dispute, and ought not to have allowed itself to be influenced by the fact that earlier his appointment as Associate Professor was challenged. In our opinion, the High Court was not right in not following the ratio of that case that when the prescribed qualifications for the two posts are the same it has to be assumed that the appointing authority was satisfied that the person who was already appointed on one of those posts did possess the requisite qualification for appointment on the other post. It was not shown that the Government was not so satisfied when it had appointed Dr. Choudhary as Professor. The High Court wrongly placed the burden on Dr. Choudhary to show that he had received the requisite "special training" for two years and erroneously held that he had failed to establish that he possessed the said qualification. The decision of this court in *A. N. Shashtri* case [1988 Supp SCC 127 : 1988 SCC (L&S) 536 : (1988) 7 ATC 290 : (1988) 2 SCR 363] squarely applied to the facts of this case and, therefore, the challenge to the appointment of Dr. Choudhary as Professor should have been rejected.

9. Even otherwise we find that Dr. Choudhary had received more than two years' training in

Neurosurgery after obtaining the degree of MS and the High Court was, therefore, wrong in holding otherwise. May be, because all the supporting material which has been placed before us by the Government and Dr. Choudhary in their respective appeals was not placed before the High Court and, therefore, the High Court held that the material placed before it was not sufficient to establish that Dr. Choudhary had received two years' special training in Neurosurgery. Apart from the assertions made earlier by Dr. Choudhary and the Government in that behalf, the material on record discloses that Neurosurgical Unit was established in Patna Medical College Hospital in May 1975. One Dr. Verma was appointed as the Head of that unit and Dr. Choudhary was appointed as Resident Surgical Officer in that unit in December 1976. The certificate issued by Dr. Verma further discloses that Dr. Choudhary had received intensive theoretical and practical training during his tenure of three years as Resident Surgical Officer and that during that period he had independently dealt with Neurosurgical investigations and performed operations. The material also discloses that the Neurosurgical Unit had an independent Neuro Out-Patient Department, routine and emergency operation theatres and wards with facilities for critical cases. The operation register for the year 1976 of the Neurosurgical Unit shows that during that year as many as 67 major and 4 minor operations had been performed. The post of Resident Surgical Officer is a teaching post and Dr. Choudhary had continued on that post in that unit till his appointment as Assistant Professor on 5-2-1980. It is, therefore, not correct to say that the training which Dr. Choudhary received as Resident Surgical Officer between 1976 and 1980 cannot be regarded as "special training" in Neurosurgery. The High Court was not right in taking the view that Neurosurgical Department did not exist in Patna Medical College Hospital during that period and that it came into existence only after 1980. What the High Court has failed to appreciate is that though the Neurosurgical Department was not an independent department prior to 1982 it was an independent unit having all the facilities for dealing with neurosurgical cases. Therefore, in view of the certificate issued by Dr. Verma, the Head of the Neurosurgical Unit and the other material on record we hold that Dr. Choudhary did have "special training" in Neurosurgery for two years.

10. Relying upon the decision of this Court in Dr. Ganga Prasad Verma case [1995 Supp (1) SCC 192 : 1995 SCC (L&S) 383 : (1995) 29 ATC 154] it was contended by Mr. Ranjeet Kumar, learned counsel for the respondent, that for promotion on the post of Professor or Associate Professor the qualification of MCh in the speciality concerned after MS/FRCS is a must. In that case Dr. Ganga Prasad Verma, an Assistant Professor, was promoted as Associate Professor in Neurosurgery on 17-9-1993. Prior to that date Dr. Basant Kumar Singh had filed a writ petition claiming that he was entitled for promotion as Associate Professor in Neurosurgery. As Dr. Verma was appointed as Professor during the pendency of the petition, it was amended and the promotion of Dr. Verma was also challenged. The High Court allowed the writ petition, set aside the promotion of Dr. Verma and directed the Government to consider the matter afresh in the light of the decision of this Court in Arun Kumar Agrawal (Dr.) v. State of Bihar [1991 Supp (1) SCC 287 : 1991 SCC (L&S) 1060 : (1991) 16 ATC 931]. The question which arose for consideration was whether the High Court was right in giving which arose for consideration was whether the High Court was right in giving the said direction. As Dr. Verma did not possess the degree of MCh this Court held that the High Court was right in giving such a direction. It was contended on behalf of Dr. Verma that the qualification of MCh was not a condition precedent for promotion to the post of Associate Professor from the post of Assistant Professor and as he had put in more than 15 years' experience as Assistant Professor in the speciality concerned, he was entitled to be considered for promotion as Associate Professor. It appears that the point that "MS/FRCS or MS or FRCS or a qualification equivalent in surgery with two years' special training in the speciality concerned or Speciality Board (USA) in the speciality concerned", is an alternative academic qualification, was not specifically raised, though

such an interpretation was suggested on behalf of Dr. Verma. Therefore, this Court considered only the first qualification, namely, "MCh in speciality concerned after MS/FRCs" and held that for promotion to the post of Professor or Associate professor, the qualification of MCh in speciality concerned after MS/FRCs is a must. We are of the opinion that if that qualification was considered as a must for appointment as Professor or Associate Professor then the relevant regulation would not have contained the qualification of "MS/FRCs or equivalent qualification in surgery with two years' special training in the speciality concerned" as qualification for the post of Professor or Associate Professor also. A plain reading of the regulation indicates that it is an alternative qualification for being appointed as Professor or Associate Professor. For such appointment the person should have either of these qualifications. If the said regulation is interpreted otherwise and it is held that MCh in speciality concerned after MS/FRCs is a must before a person can be appointed as Professor or Associate Professor that would make the latter part of the prescribed academic qualification redundant. MCh is no doubt a higher degree than MS and, therefore, in respect of a person who is not MCh, and has the MS degree it is further necessary that he should have two years' special training in the speciality concerned to make him eligible for appointment as Professor or Associate Professor. These aspects were not gone into by this Court while deciding the case of Dr. Ganga Prasad Verma [1995 Supp (1) SCC (1) 192 : 1995 SCC (L&S) 383 : (1995) 29 ATC 154] as it had not become necessary to decide whether MS with two years' "special training" in the speciality concerned was an alternative qualification or not.

11. Our attention was also drawn by the learned counsel to the subsequent recommendations made by the Medical Council of India in 1982 and 1989. The High Court has not recommendations as they have not received the approval of the Central Government till now and, therefore, have not become regulations under the Indian Medical Council Act. As decided by this Court the recommendations of the Medical Council even after they become regulations framed under Section 33 of the Indian Medical Council Act are only recommendatory in nature. The High Court was, therefore, not right in proceeding on the basis that the 1971 Regulations have statutory force by reason of the approval granted by the Central Government and other regulations of 1982 and 1989 are only recommendatory in nature. Whereas the regulations are expected to be followed while making appointments on teaching posts in the Medical Colleges, it would be open to the appointing authority either to follow or not to follow the recommendations which have not received the approval of the Central Government and have thus not become regulations. But it would not be improper on the part of the appointing authority to follow such recommendations if they are found to be acceptable and the appointments made on the basis of such recommendations would be able to stand the challenge of arbitrariness in a better manner. Both under the 1982 and 1989 recommendations the academic qualification suggested for the post of Professor in Neurosurgery is MCh in Neurosurgery. However the Medical Council made it clear in both those recommendations that teachers holding posts of the rank of Associate Professor/Readers and above possessing qualifications and experience as prescribed can continue in their posts and also be eligible for promotion of higher posts. Therefore, even if we judge the eligibility for appointment as Professor on the basis of the subsequent recommendations the appointment of Dr. Choudhary as Professor cannot be regarded as arbitrary or illegal. In the result, the appeal is allowed, the judgment and order passed by the High Court are set aside and the writ petition filed by the respondent stands dismissed. However, in view of the interim relief granted by this Court on 14-7-1995 and 24-11-1995 the State Government is directed to consider the case of the respondent for appointment as Professor on the post which had fallen vacant. There shall be no order as to costs.