

State Of J And K And Ors. vs Dr. Shabnam Choudhary And Ors. on 24 February, 2006

Equivalent citations: 2006(2)JKJ368

Author: J.P. Singh

Bench: J.P. Singh

JUDGMENT

B.A. Khan, C.J. (A)

1. Both these appeals arise out of a common order dated 28th May, 1998 passed by the Writ Court and are proposed to be disposed of by this common order.
2. The J&K Public Service Commission (for short, PSC) issued notification No. 30-PSC of 1996 dated 31st December, 1996 inviting applications from permanent residents of the State for the posts of Assistant Surgeon in Health and Medical Education Department in the pay scale of 2200-4000. The PSC completed the process and made selections. The selectee Assistant Surgeons were appointed vide Government Order No. 710-HME of 1997 dated 12th August, 1997 in the pay scale of 2200-4000 issued by the Health and Medical Education Department. These appointees were directed to report to Director Health Services at Jammu/Srinagar respectively for further posting, who, in turn, were required to post them in accordance with the guidelines issued vide Government Order No. 635-HME of 1997 dated 17th July, 1997.
3. Government order dated 17th July, 1997 accorded sanction to the adoption of norms while posting these newly selected Assistant Surgeons and, amongst other things, provided that Doctors appointed against general category posts be posted in various hospitals in the order mentioned therein. Sub-clause 5(f) of this order refers to the Hospitals of Jammu and Srinagar also. It is this clause which is being invoked by respondents herein in support of their claim which aspect will be dealt with later in this judgment.
4. It appears, that Director, Health Services, Jammu passed orders on various dates for placement of respondents herein in Government Medical College, Jammu. This was followed by orders passed by Principal, Government Medical College, Jammu, appointing these respondents as Senior and Junior House Officers in the College and its Associated hospitals. Later, however, the Principal Government Medical College, Jammu (appellant No. 3 herein) passed order dated 7th January, 1998 reverting respondents "to their parent department, i.e., Health Department".
5. It is this order which is at the root of the controversy. The respondents, aggrieved by this order, filed writ petitions before this Court challenging this order on several grounds, including (i) that the 3rd appellant (Principal, Government Medical College, Jammu) was not competent to send them

back to the Health Department as they were appointed by the Government; (ii) that they were appointed in the Medical College and, therefore, there was no question of their being repatriated to the Health Department; (iii) that only forty-two out of ninety-six appointed Assistant Surgeons were picked up for being sent back to the Health Department and others were retained; (iv) that 3rd appellant could not have repatriated them to the Health Department during election time when the Model Code of Conduct was in force.

6. The appellants contested the respondents' case on the plea that none of the statutory or fundamental rights of these respondents had been infringed or violated. It was submitted by them that these respondents were appointed by the Director Health Services, Jammu and were deputed/attached/deployed in the Government Medical College in November, 1997 due to paucity of House Surgeons in that college and after availability of House Surgeons in the Medical College, the 3rd appellant had in the interests of administration, exigencies of service and to protect public health, repatriated them to their parent department, i.e., Directorate of Health Services, Jammu by order dated 7th January, 1998. It was also pointed out by them that they could be repatriated by them at any time and even by the borrowing department. It was also claimed by them that the respondents stood already relieved on their postings from the Medical College.

7. The Writ Court, however, overruled the stand taken by the appellants herein and proceeded on the following factual/legal premise:

(i) that these respondents came to be appointed as Assistant Surgeons and that they were appointed in the Jammu hospitals under the orders of Commissioner./Secretary, Health and Medical Education Department by order dated 17th July, 1997;

(ii) that Director Health Services (second appellant herein) merely performed ministerial act of issuing letters of appointment in compliance to Government Order;

(iii) that these respondents came to be appointed against available vacancies and that the concept of deputation could not be attracted to their case as they had not been borrowed from any parent department (Health Department); and

(iv) finally, that they could not have been sent back during the operation of Model Code of Conduct when the election process was on.

8. The Writ Court, accordingly, allowed their writ petitions, quashed order of 3rd appellant dated 7th January, 1998 and directed the appellants to release their salary.

9. The appellants are aggrieved of the Writ Court judgment. Their case is that the Writ Court had failed to consider the subsequent orders passed by the Government (Government Order No. 312-HME of 1998 dated 29th April, 1998 and No. 343-HME of 1998 dated 24th April, 1998) - the first order directing the detachment of the respondents from the places where they were deputed/adjusted and for their fresh posting in the Health Department and the second order

permitting continuance of these respondents under the orders passed by the Writ Court. It was not a case of repatriation ordered by the 3rd appellant which could be held to be incompetent. It is also submitted by them that the Writ Court had failed to appreciate that these respondents were adjusted because of the paucity of House Surgeons in the Medical College and its Associated Hospitals. It is further submitted that the writ petitioners were appointed to the J&K Health (Gazetted) Service and not to the J&K Medical Education (Gazetted) Service so much so that their salary was also drawn from the Health Department and not from the Medical Education Department.

10. Learned Counsel for the respondents argued the case and has also filed written submissions. He submitted that these respondents were initially appointed as Assistant Surgeons by the Government and vide order dated 17th July, 1997 directions were issued by the Commissioner/Secretary, Health and Medical Education Department to Director Health Services for their placement in the department of Health and Medical Education Department which was one department at that point of time. A reference to the directions so given shows that Government had directed the placement of these respondents not only in Health Department but also in the hospitals in Jammu and Srinagar. It is further contended that the J&K Medical Education (Gazetted) Service Recruitment Rules, 1979 which govern the Service in Medical Education Department though did not carry any post of Assistant Surgeon but subsequently, after 1979 and before 1996, when the advertisement notification No. 30-PSC of 1996 dated 31st December, 1996 was issued, a number of posts were permanently created in the Government Medical College at Jammu and at Srinagar which posts can be referred to as "extra cadre" posts under the J&K Medical Education (Gazetted) Service Rules of 1979. These posts are admitted by the Government to be the sanctioned posts of Assistant Surgeons in the Government Medical Colleges.

11. It is also pointed out that even on the date of issue of the advertisement notification, i.e., 31st December, 1996 the Health Service was a distinct Service than the Medical Education Service and yet the advertisement notification to which the respondents responded invited applications for both Health and Medical Education Services which also brought out the Government's intention to make appointments of respondents in the Medical Education Service and not Health Service. It is also asserted that these respondents were appointed by the Principal Government Medical College and not Director, Health Services, and therefore, there was no occasion to repatriate them to the Health Department.

12. Looking at the matter in its correct perspective it appears to us that the whole matter had been messed up which needs to be put straight by ' proper understanding of the events and legal position in terms of the statutory rules which governed the service conditions of the respondents-writ petitioners.

13. The record shows that a special recruitment drive was launched for the newly created posts of Assistant Surgeons, numbering 230. Consequently, notification No. 30-PSC of 1996 dated 31st December, 1996 was issued by the Public Service Commission inviting applications for the posts of Assistant Surgeon in the Health and Medical Education Department. After the selection was made, Government issued order No. 710-HME of 1997 dated . 12th August, 1997 appointing the selected candidates to the post of Assistant Surgeons. It, at the same time, issued Government Order No.

635-HMV of 1997 dated 17th July, 1997 providing guidelines for their posting and placement. This order provided the mode of posting and placement for reserved as also the general category posts. Clause 5 of this order provides that the Doctors appointed against general category posts shall be posted in various hospitals of Jammu and Kashmir also. It seems that pursuant to this order the Director, Health Services, Jammu issued order placing these respondents in Government Medical College, Jammu. His orders were followed by the orders issued by Principal, Government Medical College, Jammu (3rd appellant) "appointing these respondents as Senior and Junior House Surgeons" in the College and Associated Hospitals and not against the post of Assistant Surgeons because, admittedly, there was no post of Assistant Surgeon available either in the Medical College or its Associated Hospitals. This deployment/adjustment at Jammu is said to have been made to meet the shortage of House Surgeons in the Medical College, Jammu. However, according to the appellants when the requisite House Surgeons became available in the College, this arrangement was terminated and Government Order No. 312-HME of 1998 dated 20th April, 1998 was issued detaching these respondents and directing their placement in the Health Services.

14. Viewed in this scenario, the Writ Court appears to have proceeded on a wrong premise altogether. Because it was a case of deployment/adjustment - pure and simple - And not a case of deputation as was erroneously projected in the stand taken by appellants against respondents' writ petition and on which the Writ Court had also proceeded overlooking the terms of Government Order No. 312-HME of 1998 dated 20th April, 1998 which had terminated the arrangement by which respondents had come to be deployed/adjusted in the Medical College. Therefore, there was hardly any need of examining the concept of deputation by the Writ Court and to allow the respondents' writ petitions holding that the respondents were not on deputation and thus could not be repatriated. Learned Single Judge has misconstrued the orders issued by the appellants from time to time to treat the respondents as members of the Education Gazetted Service.

15. One may agree that the order dated 7th January, 1998 issued by 3rd appellant was neither here nor there and was rather incompetent but it cannot be ignored that appellant State had passed Government Order No. 312 of 1998 dated 20th April, 1998 to set the records straight. It is this order that would clinch the issue rendering the action of 3rd appellant (Principal, Government Medical College, Jammu) as inconsequential. In fact, his order dated 7th January, 1998 seems to have been passed in ignorance of the fact situation that he had deployed the respondents as House Surgeons and was drawing their salary from the Directorate of Health Services, Jammu and was not paying them from the Medical College or Associated Hospitals' budget.

16. The Writ Court has fallen in error in holding that these respondents were appointed against the available vacancies of Assistant Surgeons in the Medical College, Jammu when admittedly no such posts or vacancies existed in the Medical College. On the contrary these respondents were appointed as Senior and Junior House Officers by the orders of 3rd appellant dated 30th December, 1997. Had they been appointed against any available post of Assistant Surgeon in the Medical College, the question of drawal of their salary from the budget of Directorate, Health Services, Jammu would not have arisen. Moreover, these respondents on their appointment had to belong to a particular service, for they cannot be seen wandering in the no man's land. They must either belong to the Gazetted Health Service or to the Gazetted Medical Education Service which are, admittedly, two

different services.

17. It is nobody's case that the post of Assistant Surgeon is borne on the cadre of J&K Medical Education Gazetted Service. If that be so, which it is, then they cannot claim to be belonging to the Medical Education Gazetted Service. Nor can their deployment/placement in the Medical College or its Associated Hospitals temporarily for meeting the shortage of House Officers/Surgeons confer any right on them to become the members of that Service. As against this the post of Assistant Surgeon is admittedly created in the Health Service and their selection and appointment to the post would make them belong to that Service alone.

18. We are also not impressed by the submission made by the learned Counsel for respondents, Mr. Sunil Sethi, claiming that the Government had the intention of appointing these respondents to the Medical Education Gazetted Service. The question of intention is foreign to the service jurisprudence. There is nothing on records to show that either the post of Assistant Surgeon was borne on the cadre of J&K Medical Education (Gazetted) Service or was available in Medical College, Jammu or that respondents were appointed to the post in the College or its Associated Hospitals.

19. Mr. Sethi's claim that they were appointed by the 3rd appellant, Principal, Government Medical College, Jammu to the post of House Surgeon is wholly wrong. This is negated by this appellant's order dated 30th December, 1997 which adjusts them only as "Senior and Junior House Officers" in the College. This order does not appoint them to the post of Assistant Surgeon for which they were selected and appointed. The issue of 3rd appellant's order dated 7th January, 1998 having been issued during Model Code of Conduct is irrelevant for our purposes now that much water has flown down the river.

20. All issues raised in support of the writ petitions having failed, these appeals are allowed and the impugned Writ Court judgment dated 28th May, 1998 set-aside. Respondents' writ petitions are dismissed leaving appellants free to pass appropriate orders for their placement/deployment back home in the interests of administration to the J&K Medical Gazetted Service.

21. While parting, we are constrained to observe that appellants cannot resort to pick and choose and treat the similarly situated differently. They must apply the same yardstick to all those who are equally circumstanced with the respondents. Though appellants' administrative exigency may demand retention of some doctors at the College but this would again create an impression of selective and subjective action, which cannot be countenanced, and which would generate further litigation. The State appellant should, therefore, be well advised to adopt a uniform policy of sending back similarly situated or placed Assistant Surgeons to the field in the Health Service Department and pass appropriate orders in accordance with these directions to avoid any more misgivings on the subject.