

Dr. Umakant Saran vs State Of Bihar And Ors. on 13 October, 1972

Equivalent citations: AIR1973SC964, (1972)ILLJ580SC, (1973)1SCC485, 1973(1)SLJ14(SC), 1973(5)UJ410(SC), AIR 1973 SUPREME COURT 964, 1973 (1) SCC 485, 1973 LAB. I. C. 229, 1973 (1) SCWR 313, 1973 2 LBLJ 580, 1973 SERV L J 14, (1973) 1 SERV L R 204, 1973 (1) SERVLR 201, (1972) 2 LAB L J 580

Bench: A.N. Ray, D.G. Palekar, M.H. Beg, S.N. Dwivedi

JUDGMENT

Palekar, J.

1. These appeals by special leave have been filed by Dr. Saran from the Order of the Patna High Court dated 3-1-1967 dismissing two Writ Petitions filed by him, being G.W.J.C. 984 and 1235 of 1965-The Petitions deal with the same subject matter. The first one was filed by Dr. Saran and others but the other petitioners withdrew and thereupon Dr. Saran filed the second Writ Petition in order to avoid a possible technical defect. The two petitions were heard together and disposed of by a common judgment by the High Court. Dr Saran complained that respondent No. 5 Dr. Mahendra Pratap Sinha and respondent No. 6 Dr. Hari Narain Verma, who were both junior to him in service and also without teaching qualifications had been illegally appointed lecturers in Surgery at Rajendra Medical College, Ranchi in disregard of his own claim to the post. He, therefore, prayed for the issue of a mandamus for setting aside these appointments.

2. Dr. Saran had been appointed a Civil Assistant Surgeon in Bihar State Medical Service in 1954. He was confirmed in that post in 1957 and was appointed in that Post in 1957 and was appointed a Tutor in 1957 in Surgery at Rajendra Medical College, Ranchi on 17-7-1962. He held that post till he filed the petitions.

3. Respondent No. 5 was appointed as a Civil Assistant Surgeon in the Bihar State Medical Service in 1956 and was confirmed in that post in 1961. He worked as a Casualty Officer in the Darbhanga Medical College Hospital from 23-9-1959 to 5-8-1963 and thereafter on 23-9-1963 he joined the Patna Medical College Hospital as the Assistant Surgical Officer which post he held till he was appointed lecturer in Surgery at Rajendra Medical College, Ranchi on 19-8-1965.

4. Respondent No. 6 was initially appointed to a Gazetted post as Anti Malaria Officer on 16-4-1953 and was subsequently absorbed in the cadre of the State Medical Service with effect from May 1, 1957. On a representation made by him regarding his previous service, an order was passed by the

Government on April 19, 1963 (Annexure VI) declaring that he would be treated as the Junior most temporary direct recruit of 1953 in the cadre of the State Medical Service for the purpose of determining his seniority. By this order, therefore, he was to be regarded as appointed in 1953 and accordingly, he was senior both to Dr. Saran who was appointed in 1954 and Dr. Sinha who was appointed in 1956. It appears that by some mistake he was later in 1967 confirmed with effect from a date prior to that of Dr. Saran. From 30-12-1959 to 2-7-1963 and again from 4-11-1963 to 9-1-1964 he held a supernumerary post of Civil Assistant Surgeon, at the Patna Medical College Hospital and from 9-1-1964 he was appointed ad hoc surgical Registrar which post he held till he was appointed lecturer in the Rajendra Medical College Ranchi on 19-8-1965 along with respondent no 5 Dr. Sinha.

5. It will thus be seen that Dr. Saran the appellant, and Dr. Sinha and Dr. Verma, respondents 5 and 6, belonged to the same service at the time when respondents 5 and 6 were deputed as lecturers in Surgery to the Rajendra Medical College on 19-8-1965. Dr. Saran was already in that College working as a Tutor from 16-7-1962. His chief contention was that not only was he the Senior in service but had also that necessary qualification of teaching experience of three years which the other two did not have and, hence, their appointment to the higher post of lecturer in disregard of his own claim was illegal and unconstitutional.

6. It must be mentioned at this stage that shortly before these appointments were made there had been a reorganisation of the medical service. The State Government had two separate cadres known as the Medical cadre and the public Health cadre in Bihar. Both these cadres were merged into one cadre known as the Health Service by Government Resolution dated July 17, 1965 published in the Bihar Gazette Extraordinary on July 22, 1965. This amalgamated cadre consisted of (i) Duty posts on the Administrative side and (ii) teaching posts. All posts in the New Health Service were borne on the administrative side and the teaching posts were filled on an officiating basis from amongst those who were borne on the administrative side after having due regard to their experience. The permanent posts on the administrative side were divided into four classes (i) Civil Assistant Surgeons and equivalent posts including some selection grade posts in that class (ii) senior posts including posts of Civil Surgeons, (iii) super-times posts of Deputy Directors and equivalent posts and (iv) Directors of Health Services. On the teaching side also, there were four classes (i) junior teachers (ii) lecturers, (iii) Professors and (iv) Principals. Junior teachers were of the same grade as the Civil Assistant Surgeons in the non-practising scale of Rs. 415/- to Rs. 925/-. The lecturers were analogous to the selection grade posts in the scale of pay as those who are included in classes (ii) and (iii) on the administrative side, while the principals held a position slightly inferior to that of the Director of Health Services. It will be thus seen that the several posts on both sides ran almost on parallel lines and it is the case of the State Government that the teaching posts are filled on an officiating basis by deputation of officers borne on the administrative side. As the teachers are always regarded as on deputation, they could be withdrawn to the administrative side. The salary of those who were deputed to the teaching side was protected by the application of the "next below rule".

7. In its brief reply to the petition the State Government relied upon the counter-affidavits filed on behalf of respondents 5 and 6 so far as the factual statements were concerned, and averred as follows in para 6 :

The charges of arbitrariness and malafide made in the Writ applications are erroneous and unjustified. There being no statutory rules directly governing the matters under consideration, the State Government acted in the best of its judgment in selecting for appointment the persons most suited to the job by reason of their capability and experience.

8. The brief nature of the above affidavit drew an energy counter-affidavit for Dr. Saran who charged the State Government that it had not disclosed the principles upon which the impugned appointments had been made and that it had withheld from the court all information regarding the principles adopted in regulating the appointment of lecturers in Bihar Health Services. Thereafter the State Government filed a more detailed affidavit on 29-9-1966 in which it stated as follows as para 5 :

In the matter of appointment to superior teaching post, although there are no statutory rules in taking its decisions, the State Government has undoubtedly always kept in mind the appropriate factors namely merit and experience. As evidence of merit, the State Government has always kept in mind the academic qualifications of a candidate under consideration in accordance with the recommendation of the Indian Medical Council, namely, whether the candidate possessed a post graduate degree of M.S., whether he possessed F.R.C.S. or equivalent qualification in Surgery. With reference to the question of experience likewise the State Government has always taken into consideration whether the candidate has worked as Registrar or any equivalent post of Surgery or in allied Clinical Department, for at least a period of 3 years in a teaching institution. It is only after a full consideration of these factors that decision is taken in the matter of appointment as Lecturer in Surgery. With reference to the particular facts of the cases under consideration, all the appointed persons did possess the necessary academic qualification and in addition to those qualifications had a long experience either in the post of a Registrar or some other equivalent post better than the petitioner Dr. Uma Kant Saran. Indeed, so far as the petitioner Dr. Uma Kant Saran is concerned, the position is that he was appointed as tutor in Surgery on 17-7-1962 and consequently on the 31st March, 1965 when the panel of eligible candidates were drawn up for consideration, he had a teaching experience of only two years 8 months and 15 days, which is even less than the very minimum length of experience to qualify, for consideration in accordance with the recommendation of the Indian Medical Council.

9. It is clear from the above that according to the State Government Dr. Saran was not eligible for appointment at the time the decision was taken i.e. on March 31, 1965. Respondents 5 and 6 were so eligible and therefore, Dr. Saran, it was submitted, had no right to ask for a mandamus.

10. This court has pointed out in *Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College* 1962 (2) Suppl. S.C.R. 144 that in order that mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty and the aggrieved party had a legal right under the Statute to enforce its performance. It is contended on behalf of the State that

apart from the fact that respondents 5 and 6 had been validly appointed in accordance with the practice followed by the Government, Dr. Saran, who was not eligible for consideration for appointment at the time, had no right to question the appointments since he was not aggrieved.

11. The lowest grade amongst the teachers is that of Junior teachers. They are generally designated as Demonstrators or Tutor or Residents or Registrars or Junior Surgeons or Junior physicians or Junior Venereologist or Junior Anaesthetist. All these persons get teaching experience when they are appointed to these posts. Respondents 5 and 6 had not been initially appointed specifically to these posts. Respondent No. 5 though attached to the Medical College Hospital was described as a Casualty Officer and respondent No. 6 was described as a Supernumerary Assistant Surgeon. Their case is that they were required to do teaching work and, in fact, on representations made by them and others they were specifically designated as holding the posts with teaching experience with the concurrence of the Indian Medical Council. A lot of correspondence had been produced in this case. We have been taken through the same and we are satisfied that the State Government finally accepted the posts held by respondents 5 and 6 teaching posts. The trouble started with the letter written by the Secretary of the Indian Medical Council to the Government on December 3rd, 1959. In this letter the Secretary informed the Government that the Executive Committee of the Medical Council Officers (OPD) Resident Officers etc., in the subjects such as Medicine, Surgery etc. be accepted as equivalent to the teaching done by Registrars for the purpose of appointment to the posts of Lecturers. Respondent No. 5 was a Casualty Officer at the time and felt that he was left out. So in December 1960 he wrote to the Government that though he was doing teaching post. His case was taken up by the Professor of Surgery and the Principal of the College, and in due course the Vice Chancellor accepted the proposal that the post of Casualty Officer should be recognised as a teaching post. On 12-6-1963 the State Government wrote to the Secretary, Indian Medical Council that the post of Casualty Officer must also be recognised as a teaching post. In its letter dated 4-11-1963 the State Government informed the Secretary, Medical Council that Dr. Mahendra Pratap Sinha, M.S. (That is respondent No. 5) was one of the 8 Casualty Officers and had teaching experience from 23-9-1959 to 5-8-1963. In reply to that letter the Secretary on 6-2-1964 informed the Government that though they were not very much in favour of Casualty Officers being recognised as holding teaching posts the Executive Committee had decided that the teaching done by the 8 Doctors as Casualty Officers shall be counted, as a special case, as teaching done by the Registrar for the purposes of appointment to the higher posts. It will be seen that this decision had been taken quite a long time before the Writ Petition had been filed. Respondent No. 5, therefore, found a place in the same class as Registrars, Tutors etc.

12. Similar is the case of respondent No. 6. He held a supernumerary post of a Civil Assistant Surgeon attached to the Patna Medical College Hospital from 30-12-1959 and while in that post had to teach under-graduate and post-graduate students. On 22-10-1962 Govt. issued a notification that 8 Doctors including respondent No. 6 were permitted to count certain periods of their service towards teaching experience. Respondent No. 6 was permitted to count his service from 30-12-1959 towards teaching experience. Later, on 20-4-1963 Government seems to have gone back on this decision. But on representations being made, Government on 21-9-1964 directed that these Medical Officers may be permitted to count certain be permitted to count certain periods when they were on supernumerary duty towards teaching experience. One of the Medical Officers was respondent No. 6

and the period which was allowed to be counted was from 30-12-1959 to 2-7-1963 and again from 4-11-1963 to 9-1-1964. On the latter date respondent No. 6 was appointed Registrar, Department of Surgery, Patna Medical College Hospital on a temporary basis. He held that position till he was appointed a lecturer on 19-8-1965.

13. It is not disputed that respondents 5 and 6 had the necessary academic medical qualifications for appointment, and if they also had the necessary teaching experience, as held by the Govt., they would be eligible for appointment as lecturers in Surgery. The Medical Council had recommended that a lecturer in Surgery should be a Registrar or should have held an equivalent post in Surgery or like Clinical Deptt. for at least 3 years in a teaching institution. It is clear from what has been already stated about respondents 5 and 6 that they were holding a post equivalent to the Registrar or Resident Medical Officer for much more than 3 years in the Medical College Hospital and hence they were eligible for appointment as lecturers.

14. Even so Dr. Saran complained that he was senior to respondents 5 and 6 and since they were all in the same class of teachers, his seniority could not be ignored. There can be no doubt that he was senior to respondent No. 5 but the same cannot be said with regard to respondent No. 6 it is true that respondent No. 6 was absorbed in the Medical Service for the first time in 1957 and in that sense he was junior to Dr. Saran who joined in 1954. But as already pointed out, respondent No. 6 had been working as Assistant Malaria Officer from 1953 in a grade equivalent to that of Civil Assistant Surgeon and that on his absorption in 1957 as a Civil Assistant Surgeon, his seniority was counted in the cadre as from the date he was appointed as the Malaria Officer i.e. 1953. He cannot, therefore, be regarded as junior to Dr. Saran. Therefore, the latter cannot question the appointment of respondent No. 6 either on the ground that he was junior to him or on the ground that respondent No. 6 did not have teaching experience for 3 years.

15. As between Dr. Saran and respondent No. 5 it is true that respondent No. 5 was his junior in service. But he had the requisite minimum teaching experience which the petitioner did not have. It is not necessary for us to consider in this case whether the lecturer's posts which were in class I service were filled by promotion, as contended for the appellant, or by deputation, as contended on behalf of the State. Assuming that the appellant's contention is correct that the lecturer's posts were filled by promotion, then it will have to be shown that the appellant, though he had the requisite qualification for his promotion, had been disregarded in favour of a junior. The answer made by the State Government is that they had taken the decision to fill the posts on March 31, 1965 and on that day the appellant had not even completed the minimum period of teaching experience while the other two had done so. In other word the case is that the appellant was ineligible for appointment when the decision was taken. It is true that the appointment was actually notified on 19-8-1965 when the appellant had also completed his 3 years of experience. But obviously that is irrelevant. Decisions have to be taken first before appointments are notified. The usual administrative process takes some time. The appellant sought to controvert the statement of the Govt. that the decision had been taken to make the appointment on March 31, 1965. But we do not think there is any substance in that contention. It would, thus, follow that while respondents 5 and 6 were eligible for appointment as lecturers on 31-3-1965 the appellant was not and, therefore, he cannot be regarded as aggrieved for the purpose of the relief claimed by him.

The appeals, therefore, fail and are dismissed. No order as to costs.