

State Of Bihar And Another vs Ramesh Chandra And Another on 20 March, 1997

Equivalent citations: AIR 1998 SUPREME COURT 2384, 1997 (4) SCC 43, 1998 AIR SCW 2372, (1997) 3 SCR 115 (SC), (1997) 2 SERV LJ 170, (1997) 4 JT 329 (SC), 1997 (3) SCALE 245, 1997 (3) ADSC 770, 1997 (4) JT 329, 1997 (2) BLJR 1112, 1997 BLJR 2 1112, (1997) 2 ESC 1050, (1997) 2 LAB LJ 685, (1997) 1 PAT LJ 131, (1997) 2 SCT 373, (1997) 2 SCJ 222, (1997) 3 SUPREME 482, (1997) 3 SCALE 245, (1997) 1 BLJ 1189, (1997) 4 LAB LN 536, 1997 SCC (L&S) 1287

Bench: S.C. Agrawal, G.T. Nanavati

PETITIONER:

STATE OF BIHAR AND ANOTHER

Vs.

RESPONDENT:

RAMESH CHANDRA AND ANOTHER

DATE OF JUDGMENT: 20/03/1997

BENCH:

S.C. AGRAWAL, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T THE 20TH DAY OF MARCH, 1997 Present:

Hon'ble Mr. Justice S.C. Agrawal Hon'ble Mr. Justice G.T. Nanavati Dr. Shankar Ghosh, Sr. Adv. Ratan Kumar Choudhry and Anil Kumar Jha, Advs. with him for the appellant/in C.A. No. 11240/95 and Respondent in C.A. No. 11241/95 Braj K. Mishra and G.B. Sathe, <Advs. for the appellant. in C.A. No. 11241/95. and Respondent in C.A. No. 11240/95 The following Judgment of the Court was delivered:

NANAVATI, J.

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. 11240/95 is filed by the State of Bihar and Civil Appeal No. 11241/95 is filed by Dr. Choudhary, who was respondent No.3 in the writ petition. The writ petition was filed by Dr. Ramesh Chandra, respondent no.1 in these appeals and hereafter referred to as 'the respondent'.

The respondent after obtaining MBBS degree joined the Prince of Wales Medical College, Patna as a demonstrator in the department of Anatomy. He did M.S. in General Surgery and thereafter M.Ch. in Neuro Surgery 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 Prince 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 January 18, 1974, he had submitted a joining report to the officer incharge of the Patna Medical College who had forwarded it to the Government. On June 29, 1987, he was permitted to join and was absorbed in the Bihar Health Services as a tutor in the department of Anatomy with effect from May 29, 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 Neuro Surgery. After receiving concurrence of the Medical Council the Government Created a post of Associate Professor in the department of Neuro Surgery and on April 27, 1983 appointed him on that post on ad hoc basis in anticipation of the concurrence of the Bihar Public Service Commission.

The appointment of respondent as a tutor with retrospective effect and his further appointment as an Associate Professor was challenged by one Dr. Sinha and by Dr. Chaudhary who were then working as Assistant Professors, by filing a petition (C.W.J.C. 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 June 3, 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 January 24, 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. Chaudhary 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 learned counsel for the parties and having regard to the subsequent events resulting into the appointment of the appellant and respondent Nos. 4 and 5, we find that the dispute which requires determination relates to seniority only. It appears that the State government has by its notification dated 24th January, 1991 determined the inter seniority of the appellant and respondent Nos. 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 of seniority of the appellant and respondent Nos. 4 and 5".

Meanwhile, the post of Professor of Neuro Surgery had fallen vacant on May 1, 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. Chaudhary as Professor or allow him to assume the office of the Head of Neuro Surgery Department. The respondent also filed one more petition (CWJC 5956 of 1991) for getting quashed the recommendation of Departmental Promotion Committee to appoint Dr. Chaudhary as Professor and Head of the Department to appoint him as Professor and Head of the Neuro Surgery Department in the Patna Medical College. The latter writ petition was disposed of on December 6, 1991 as premature.

On April 22, 1992, the writ petition filed by Dr. Sinha and Dr. Chaudhary in 1983 and the decision in 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 August 1, 1992, the Government promoted Dr. Chaudhary to the post of Professor with effect from May 1, 1990, the date on which the post had fallen vacant. The respondent challenged that appointment by amending his earlier writ petition viz. C.W.U.C. No. 3596 of 1990 which was still pending. It was allowed by the High Court on August 19, 1992 as the impugned notification dated August 1, 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 November 18, 1992, decided that all the three Doctors were eligible for appointment/promotion as Associate Professors; Dr. Sinha acquired eligibility on September 29, 1981 and became entitled to the said post on January 8, 1983; Dr. Chaudhary acquired eligibility on February 5, 1983 and became

eligible for promotion from January 8, 1983 as the vacancy was already existing on that date; and , Dr . Ramesh Chandra, the respondent, who was appointed on post created on March 10, 1983, was not entitled to get it with retrospective effect as prior to April 27, 1983, he was working as a tutor in another department, namely, Anatomy and was, therefore, not having any teaching experience during March 10, 1983 to April 26, 1983. In view of this decision Dr. Sinha and Dr. Chaudhary were given promotion to the post of Associate Professor and their teaching experience was treated as having started from June 3, 1983. The respondent was treated as appointed on April 27, 1983 and his teaching experience was to count from that date. termed as ad hoc.

The respondent, therefore, challenged the said decision of the Government and the appointments of Dr. Sinha and D. Chaudhary 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 fixed their seniority. As this fact was noticed by this Court and as in the order dated September 27, 1991, it was observed that "the dispute which requires determination relates of the seniority only", the High Court held that there was no justification for the State Government to convert their appointment/promotion into and ad hoc one. As the challenge to the appointment and seniority of Dr. Chaudhary 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. Chaudhary was eligible for appointment as Professor. It was contended that even though the that even though the appointment of Dr. Chaudhary 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 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/ M.Ch. in Speciality (a) As Reader, Associate concerned after Asst. Prof., Professor M.S./F.R.C.S. in respective subjects for M.S./F.R.C.S. or 5 years in a equivalent Surgery with medical college two years special after requisite training in the post-graduate speciality concerned qualification.

or speciality Board (USA) in the speciality concerned."

Admittedly, Dr. Chaudhary did not have the degree of M.Ch. and, therefore, the only question required to be considered was whether he possessed alternative qualification of M.S. with two years special training in the speciality concerned. Interpreting the eligibility requirement the High Court held that the person concerned should possess both, the 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 two expressions 'special training' and 'teaching experience' cannot be read as having the same meaning. Therefore, the teaching experience of Dr. Chaudhary as Assistant Professor of 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. Chaudhary. Thus the claim of Dr. Chaudhary 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 *Dr. A.K. Agrawal vs. State of Bihar* 1991 Supp (1) SCC 287 and *Dr. Ganga Prasad Verma vs. State of Bihar* 1995 Supp. (1) SCC 192 and distinguished the decision of this Court in the case of *State of Andhra Pradesh vs. Dr. R. Murali Babu Rao* 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. Chaudhary on the post of Associate Professor was not under challenge, the respondent was entitled to challenge the eligibility of Dr. Chaudhary for the post of Professor. The High Court distinguished the decision of this Court in *A.N. Shastri vs. State of Punjab* 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 November 18, 1992 in so far as it treated the appointments of the respondent and Dr. Chaudhary as Associate Professor as ad hoc only. It also quashed the decision to appoint Dr. Chaudhary as Professor in Neurosurgery and directed the State Government to consider the matter of promotion to the post of Professor in Neurosurgery afresh.

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. Chaudhary as Associate Professor was now not challenged, it was open to the respondent to contend that Dr. Chaudhary 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. Chaudhary 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. Chaudhary 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. Shastri's case* (supra) and upholding the contention raised on behalf of the respondent. In *A.N. Shastri's case* the facts were that Shastri was first appointed as Professor and then as Deputy Director. His appointment as Director of 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 the requisite qualification for

appointment as Director, The High Court had distinguished the decision in A.N. Shastri's case (supra) only on the ground that 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. Chaudhary 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. Chaudhary as Professor. The High Court wrongly placed the burden on Dr. Chaudhary 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. Shastri's case (supra) squarely applied to the facts of this case and, therefore, the challenge to the appointment of Dr. Chaudhary as Professor should have been rejected.

Even other wise also we find that Dr. Chaudhary had received more than two years' training in Neurosurgery after obtaining the degree of M.S. 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. Chaudhary 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. Chaudhary had received two years, special training in Neurosurgery. Apart from the assertions made earlier by Dr. Chaudhary 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. Chaudhary was appointed as Resident Surgical Officer in that Unit in December, 1976. The certificate issued by Dr. Verma further discloses that Dr. Chaudhary 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. Chaudhary 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. Chaudhary 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 existence only after 1980. What the High Court had 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. Chaudhary did have 'special training' in Neurosurgery for two years.

Relying upon the decision of this Court in Dr. Ganga Prasad Verma's case (supra) 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 M.Ch. in the speciality concerned after M.S./F.R.C.S. 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 of this Court in Arun Kumar Agarwal (Dr.) vs. State of Bihar, 1991 Supp. (1) SCC 287. The question 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 M.Ch. 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 M.Ch. 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 25 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 'M.S./F.R.C.S. or M.S. or F.R.C.S. or a qualification equivalent in Surgery with two years' special training in the speciality concerned', is an alternative academic qualification, was not specifically raised, though such an interpretation was suggested on behalf of Dr. Verma. Therefor, this Court considered only the first qualification, namely, M.Ch. in speciality concerned after M.S./F.R.C.S.' and held that promotion to the post of Professor or Associate Professor, the qualification of M.Ch. in speciality concerned after M.S./F.R.C.S. 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 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 M.Ch. in speciality concerned after M.S./F.R.C.S. is a must before a person can be appointed as Professor or Associate that would make the latter part of the prescribed academic qualification redundant. M.Ch. is no doubt a higher degree than M.S. and, therefore, in respect of a person who is not M.Ch. and has only the M.S. degree it is further necessary that he should have two years' special training in the concerned speciality 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 as it had not become necessary to decide whether M.S. with two years' 'special training' in the speciality concerned was an alternative qualification or not.

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 referred to those recommendations as they have not till now received the approval of the Central Government and, therefore, have not become regulations under the Indian Medical Council Act. As decided by 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 bases 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 in a better manner. Both under the 1982 and 1989 recommendation the academic qualification suggested for the post of Professor in Neurosurgery is M.Ch. in Neurosurgery. However the Medical Council made it clear in both those recommendations that teachers holding posts of the rank of Associate Professors/Readers and above possessing qualifications and experience as prescribed can continue in their posts and also be eligible for promotion to higher posts. Therefore, even if we judge the eligibility for appointment as Professor on the basis of the subsequent recommendations the appointment of Dr. Chaudhary 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 14.7.95 and 24.11.95 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.