

(1992) 02 GAU CK 0009

Gauhati High Court

Case No: Civil Rule No. 1 of 1980

Th.Biren Singh

APPELLANT

Vs

State of Manipur and Ors.

RESPONDENT

Date of Decision: Feb. 21, 1992

Citation: (1994) 1 GLJ 132

Hon'ble Judges: W.A.Shishak, J and N.G.Das, J

Bench: Division Bench

Advocate: N.Kerani Singh, H.S.Paonam, A.Nilamani Singh , Advocates appearing for Parties

Judgement

N. G. Das, J.

The petitioner Shri (Dr) Th. Biren Singh filed this writ petition under Articles 226/227 of the Constitution of India praying for a writ of Certiorari or a writ in the nature of Certiorari or appropriate order/ direction for quashing the order of North Eastern Regional Medical College Society at Imphal. dated 6.3.75 whereby the respondent No.3 Dr.(Miss) H. Nungshi Devi was appointed as Assistant Professor of Medicine placing her above the petitioner in the seniority list. The petitioner also prayed for issuing a writ of Quo Warranto to oust the respondent No. 3 from the public office and also to issue a writ of Mandamus to compel the respondent Nos. 1 and 2 to determine the seniority of the petitioner in a legal and just manner.

2. The facts may be put in brief compass. The petitioner who obtained his Post Graduate degree of MD (Medicine) in the year 1973 was appointed as Assistant Professor (Medicine) on adhoc basis in the Regional Medical College at Imphal and he served there in that capacity from 21.8.74 to 24.2.75

Thereafter, on the recommendation of the Manipur Public Service Commission, the Governor of Manipur appointed the petitioner as Registrar (Medicine) in the said college on regular basis and in that capacity the petitioner served from 25.2.75 to 9.5.1977.

3. The respondent No 3, who also obtained her degree of MD (Medicine) in the year 1975 was, at first, appointed as General Duty Officer, Grade II of the Central Health Services and she was posted in the Regional Medical College at Manipur. While she was working as Junior Medical Officer under the Government of Manipur she was appointed as Demonstrator (Medicine) in the said college on regular basis wef 6.3.1976 as per the recommendation of the Manipur Public Service Commission.

4. In the meantime, a society was formed and registered under the Societies Registration Act, 1860 under the name of "North Eastern Regional Medical College Society" at Imphal. The membership of the society was confined to the persons nominated by the Central Government, persons nominated by the seven North Eastern States, the representatives of the North Eastern Council set up under the North Eastern Council Act, the representatives of the Gauhati University and the Members of the Regional Medical College. The Chief Minister of the Government of Manipur is the Exofficio Chairman and the Principal of the Regional Medical College is the Exofficio Secretary of the said society. After constitution of the aforesaid society the Government of Manipur transferred the Management and administration of the said college and associated hospitals at Imphal to the said society with effect from 1.8.1976 and the staff working in the said college was also transferred to the said society wef 1.8.1976 on the existing terms and conditions of employment or services.

5. But, it is alleged that the terms and conditions of the foreign service which should have been determined separately were never communicated to the petitioner and other members of the staff and that neither the consent of the petitioner nor the consent of other members of the staff was obtained. However, the petitioner was again appointed as Assistant Professor (Medicine) on ad hoc basis in the college by the said society and he rendered service in such capacity from 10.5.1977 to 5.3.1978.

6. Similarly, the respondent No.3 who had been serving as Demonstrator in the said college from 6.3.77 to 9.5.1977, was also appointed as Assistant Professor (Medicine) on ad hoc basis from 10 5.1977 to 5.3.1978. In the meantime, an advertisement dated 1.2.1978 was issued by the society inviting applications from eligible persons serving in the said college for filling up various posts including the two posts of Assistant Professors in the Department of Medicine on regular basis. In response to that advertisement the petitioner as well as respondent.No.3 appeared before the Selection Board. But, it is alleged that the Selection Board while recommending the petitioner as well as respondent No. 3 for appointing them as Assistant Professor ignored the minimum teaching experience of 3 years laid down by the Medical Council of India and also the teaching experience of petitioner and showed the respondent No.3 over the petitioner. As per this recommendation the society also appointed both the petitioner and respondent No. 3 as Assistant Professor of Medicine on regular basis in he said college placing the seniority of the respondent No. 3 over the petitioner.

7. Aggrieved by this order of appointment, the petitioner submitted two successive representations to the Chairman of North Eastern Medical College Society but those representations were not considered. So, the petitioner at last submitted representation dated 17.10.1979 to the concerned authorities of the respondent No. 2 society and the Government of Manipur by way of notice demanding justice from them. But the respondent Nos. 1 and 2 did not respond to this representation.

8. It is, further stated that although respondent No.3 is inferior to the petitioner in all respect including qualifications, teaching experience and length of service in the said college the authority quite arbitrarily issued the aforesaid order of appointment showing the respondent No.3 as senior to the petitioner.

9. Respondent No. 3 who resisted the writ petition by filing a counter affidavit, stated, inter alia, that the Government of Manipur having transferred the management and administration of the college to the North Eastern Regional Medical College Society (hereinafter referred to as society) administration and control of the college was vested in it and the society became the supreme authority to run the administration of the college and it had also the power to appoint staff and regulate their recruitment and conditions of services in accordance with the standards laid down by the Indian Medical Council. The society in its administrative capacity appointed a Standing Committee and a Selection Board for recommending candidates for appointment to various posts. The Selection Board thus, got the authority to make the recommendation after taking the interview of the candidates. Her contention is that this Selection Board was appointed for recommending candidates to fill up a number of vacancies including two posts of Assistant Professors. At the instance of the society an advertisement was issued and in response to that advertisement issued to all the heads of department she as well as the petitioner offered themselves as candidates for the aforesaid two posts of Assistant Professors of Medicine. The Selection Board interviewed the candidates and drew up a list of candidates for various posts on overall assessment of the merits. As such, the petitioner now has no right to challenge the authority of the Selection Board.

10. Her further contention is that her length of service as well as teaching experience is longer than that of the petitioner as she gathered teaching experiences of 2 years while doing her Post Graduate course in Gauhati Medical College from May, 1973 to May, 1975 and 9 months and some days in the General Hospital at Lampheipat as she was connected with the teaching of students and 1 year 2 months 3 days as Demonstrator of Medicine and 9 months 7 days as ad hoc Assistant Professor of Medicine. Thus, altogether her teaching experiences was 4 years 8 months and 5 days whereas the petitioner had no teaching experience while doing his Post Graduate course and also his service as Assistant Professor of Dermatology from 21.8.74 to 23.2.1975 cannot be taken into consideration as a period for teaching experience. It is also contended that as per section 19A of the

Indian Medical Council Act, 1956 the teaching experience of Post Graduate students who are : (i) holding teaching appointment; or (ii) holding beds under their charge; or (iii) doing tutorial works is considered as teaching experience for the purpose of appointment of lecturer in the Medical College. So in view of this provision her teaching experience as stated above cannot be questioned. The writ petition is therefore, devoid of any merit.

11. The respondent No. 2 also filed a counter affidavit and denied all the material averments of the writ petition. It is contended that North Eastern Regional Medical College Society had the absolute authority to run the administration of the college and since no Rules were framed, the society from time to time passed resolution for management of the affairs services etc. The society by its resolution dated 7.4.1976 decided the manner of constitution of Selection Board for filling up a number of vacancies. The Selection Board, thus constituted (vide RI), interviewed the candidates for filling up a number of posts including the two posts of Assistant Professor (Medicine) and drew up a list of candidates adjudged on an overall assessment of the merits. It is stated that teaching experience and the procedure laid down under section 19A of the Indian Medical Council Act were taken in view at the time of selection of the candidates. The Selection Board considered the relative academic qualifications and experiences and after making overall assessment of merits recommended the names of the petitioner and respondent No. 3 for their appointment in order of merit. This Selection Board was duly constituted and there was no arbitrariness or discrimination in selecting the candidates.

12. It is denied that the terms and conditions of foreign service should have been determined or were never communicated to the petitioner or to the other members of the staff working in the said college or that the consent of the petitioner and other members of the staff were never obtained for transferring into society.

13. In reply to the counter affidavit the petitioner has contended that while working as Assistant Professor in the Department of Dermatology he also worked in the Department of Medicine as per the order dated 26.8.74 of the Medical Superintendent General Hospital, Imphal. It is also contended that the Selection Board was not properly constituted as one member was conspicuously absent. That apart, the Management Committee cannot redelegate its function to the Standing Appointment Committees. While admitting the contentions that teaching experience of Post Graduate students who were holding teaching appointment or holding beds under their charge or tutorial works, the petitioner denied that the experience gathered during training programme of a college etc. can be counted as a teacher of Medical College/Post Graduate Institutions. The further contention is that the document B6 was a manufactured one and as such the period of 9 months cannot be treated as a period of teaching experience. The member of the Gauhati Medical College is not an authority for treating the period of Post Graduate training of the respondent No. 3 as teaching experience. Similarly, it is averred that

certificate of the Medical Superintendent who was also the Head of the Department of Medicine in RMC is nothing but betrayal misconstruction of the recommendation of the Medical Council of India. It is further contended that Ext. B8 does not indicate that the respondent No.3 did any tutorial works while she was a Post Graduate student.

14. The contention of the petitioner is that the respondent No. 3 can never be promoted to the post of Assistant Professor or any other higher post in the college without the concurrence of the Central Government in pursuance of the instruction of the Government of India, Ministry of Finance No. F. 10 (24JE15/16, dated 4.5.1961. The respondent No. 3 cannot also be absorbed in the college as she did not resign from the central service and that the Administrative Officer of the college is not competent enough to make correct averments.

15. Learned counsel Mr. A. Nilamani Singh appearing on behalf of the petitioner has at the very outset urged that respondent No. 3 was on deputation and unless either her parent department relieved her from the service acceptance resignation or even otherwise her such appointment cannot be taken as an appointment in the eye of law. It is argued that respondent No. 3 even did not utter a word in respect of her resignation from the service of the Central Government or that she took approval of her parent department. In support of his contention learned counsel Mr. Nilamani Singh drew our attention to the provision laid down under Rule 5.1 of the Central Civil Services Rules (II Edition), which reads :

"Promotion to a person during deputation (duty) allowance. When a person already on deputation is to be promoted to another post by the borrowing authority, the borrowing authority should obtain the concurrence of the lending authority prior to the promotion so that the latter might decide as to how the pay in the higher post is to be regulated in accordance with FR 35."

16. A perusal of this provision makes it clear that as to how the pay of an employee has to be regulated in case of promotion. But it may be noted here that this is not a case of promotion. However, learned counsel Mr. A. Nilamani Singh drew our attention to Rule 9 in Appendix 31 of the Civil Service Regulation and wanted to impress that respondent No. 3 cannot be absorbed in RMC until she resigns from her previous service and the same is accepted by the Central Government. But learned counsel Mr. N. Kerani Singh, appearing on behalf of the RMC and learned counsel Mr. HS Paunam for the respondent No. 3 have submitted that if the services of respondent No. 3 is to be treated as a foreign service then there is no reason why the services of the petitioner before administration and management of the RMC was handed over to the Regional Medical College Society should not be treated alike.

17. Learned counsel Mr. N. Kerani Singh has submitted further that in response to the advertisement the petitioner and respondent No.3 both offered themselves for

the post of Assistant Professor (Medicine). The Selection Board interviewed the candidates and after making over all assessment on merits considered respondent No. 3 to be superior to the petitioner. Hence(while making recommendation they showed her over the petitioner. The advertisement will clearly show that these posts were advertised for direct recruitment and the petitioner also appeared before the Interview Board in response to that advertisement. So, now there is no scope for him to say that the Selection Board had no authority or that his ad hoc service has to be counted for the purpose of seniority. We find much force in the submission of learned counsel as on perusal of the appointment letter of respondent No. 3 (Annexure A2) we find that she was appointed as Demonstrator in the Regional Medical College, Imphal on the basis of the recommendation of the Manipur Public Service Commission. Similarly, Annexure A1 shows that the petitioner was appointed as Registrar (Medicine) in the Regional Medical College on the recommendation of the Public Service Commission.

18. It is not in dispute that the North Eastern Regional Medical College Society was established by the order of the Government of Manipur vide dated 31st July, 1976 (Annexure A3) and that this transfer took effect from 1st of August, 1976. This Ext. A3 shows that the staff working in the Ragional Medical College and Hospital shall be treated as transferred wef 1st of August, 1976 to the said society on the existing terms and conditions of employment/services. Annexure A2 whereby respondent No. 3 got her appointment as Demonstrator (Medicine) in the Regional Medical College does not show that her appointment was on deputation on foreign service for a particular period. That apart, if it is the case of the petitioner that the respondent No. 3 was still an officer of the Central Government then it is not understandable as to why the petitioner did not approach the Central Administrative Tribunal. Both the petitioner and respondent No. 3 offered themselves as candidates for this direct recruitment. We are, therefore, of the view that in the background of the facts stated above, and particularly in view of the fact the mangement of the college was handed over to the society on transferring its staff at the disposal of the society, the question of the services of respondent No. 3 on deputation does not arise and hence, promotion or resignation was not necessary. Annexure A2 clearly indicates that she was serving in the RMC under the Government of Manipur.

19. The next contention of learned counsel Mr. A. Nilamani Singh is that the Selection Board committed an error of law in not counting the period of service rendered by the petitioner on ad hoc basis as Assistant Professor. Learned counsel has quite emphatically submitted that the period of service rendered by the petitioner from 21.8.74 to 24.2.1975 ought to have been taken in view at the time of determining their order of seniority. In support of his submission learned counsel has referred to the case of the Direct Recruited Class II Engineering Officer's Association vs. State of Maharastra reported in AIR 1990 SC 1607. But on perusal of the judgment we find that the facts of this case are quite distinguishable. In this

case, the controversy related to the rivalry of seniority in service between the direct recruit and the promotees. Learned counsel for the petitioner has, however, drew our attention to paragraph 44 (B) where it has been observed that :

"if the initial appointment is not made by following the procedure laid down by the rules but the appointees continue in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

But under paragraph 44 (A) their Lordships have also observed that if the initial appointment was only ad hoc and not according to the rules and made as a stop gap arrangement, the officiating in such post cannot be taken into account for consideration of the seniority. In the present case, it will be very much apparent from the letter of ad hoc appointment of the petitioner that his appointment as Assistant Professor (Demonstrator) was nothing but a stop gap arrangement and was purely on ad hoc basis. However, the learned counsel for the petitioner also referred to the case of *Rajbir Singh & others vs. Union of India & others*, reported in AIR 1991 SC 518. On perusal of the judgment we also find that the facts of this case are distinguishable and not applicable to the present case. In this case the appellants were appointed in the year 1971 in Class IV posts and they were promoted in the Grade of Rs. 192232 in 1975 and they were further promoted to Class III post after holding selection tests and finding them suitable for promotion to the posts.

20. It is an admitted fact that the petitioner was appointed as Assistant Professor (Dermatology) on purely temporary and ad hoc basis for a period of 6 months. Ext. B1 which is the appointment letter shows that this appointment was made purely on temporary and on ad hoc basis for a period of 6 months from the date he assumes charge of the post until the post is filled up on regular basis by nominee of the Manipur Public Service Commission whichever is earlier. It is therefore, very clear from this letter of appointment that the appointment of the petitioner was made on, purely ad hoc basis, i. e. by way of stop gap arrangement without considering the claims of all eligible persons and without following the rules of appointment. So, it is apparent that the case of the petitioner is not a case of ad hoc appointment followed by regularisation. It has been held in the case of *Delhi Water Supply and Sewage Disposal Committee & others vs. RK Kashyap & others*, reported in Alt 1989 SC 278, as follows :

"If ad hoc appointment or temporary appointment is made without considering the claims of seniors in the cadre, the service rendered in such appointment should not be counted for seniority in the cadre. The length of service in ad hoc appointment or stop gap arrangement made in the exigencies of service without considering the claims of all the eligible and suitable persons in the cadre ought not be reckoned for the purpose of determining the seniority in the promotional cadre. To give the benefit of such service to a favoured few would be contrary to the equality of

opportunity enshrined in Articles 14 and 16 of the Constitution." Similarly, it has also been held in the case of Keshav Chandra Joshi & others vs. Union of India & others, reported in AIR 1991 SC 284, as follows :

"Where the initial appointment is only ad hoc and not according to rules and is made as a stop gap arrangement the period of affiliation in such post cannot be taken into account for reckoning seniority."

21. In the instant case, it is abundantly clear from our discussion made above that the appointment of the petitioner as Assistant Professor (Dermatology) was purely on ad hoc basis and it was nothing but a stop gap arrangement. It is not a case of promotion from the post, of Registrar to the post of Assistant Professor. In the present case the petitioner competed at an oral interview for direct recruitment to the post of Assistant Professor and Selection Board did not consider him suitable to be over the respondent No. 3 in order of merit.

22. In reply to the argument of learned counsel for the respondent, learned counsel Mr. A. Nilamani Singh at last argued that the same Board acted as DPC as well as Selection Board. We, however, do not find much substance in this submission.

23. We have carefully perused the documents filed by the respondent No. 3 and also the relevant provision in the Indian Medical Council Act, 1956 about the qualification for Assistant Professor and we find that the respondent No. 3 got requisite qualification for appointment as Assistant Professor (Medicine). The authority of Selection Board cannot be challenged at this stage on the simple ground that the petitioner was not shown senior to the respondent No. 3

24. No other point has been argued by the learned counsel for the petitioner in this case.

25. In the circumstances and for the reasons recorded above, we find no merit in the writ petition and it is accordingly dismissed. The parties are to bear their respective costs.