

(2000) 07 PAT CK 0113**Patna High Court****Case No:** C.W.J.C. No. 7362 of 1997

Dr. Hem Shankar Sharma

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision: July 6, 2000**Citation:** (2000) 4 PLJR 636**Hon'ble Judges:** S.N.Jha, J**Bench:** Single Bench**Advocate:** P.K. Shahi, Rajesh Prasad Choudhary and Ajay Mukherjee, for the Appellant; Ashok Kuma Singh, Prabhat Kumar Singh for state, M/s. Rama Nand Kumar and Viveka Nand Kumar for Resp. 7, M/s. Anii Kumar Jha and Sanjay Kumar for Resp. 8, Mr. Tej Bahadur Singh for Resp. 10, M/s Sunil Kumar Singh and Ravi Ranjan for Resp. 11, 12, 15, M/s. Y.V. Giri and Dhananjay Kumar Dubey for Resp. 13, M/s. Dr. Sadanand Jha, Tej Bahadur Singh and Satyendra Kumar Jha for Resp. 16, for the Respondent**Final Decision:** Dismissed**Judgement**

S.N. Jha, J.

The dispute in this writ petition relates to appointment of Assistant Professor (Medicine) and Assistant Professor (TB & Chest diseases). The petitioner seeks quashing of the order dated 16.7.97 by which the private respondents have been appointed on the aforesaid posts.

2. The posts of Assistant Professor in different discipline in various Medical Colleges in the State including General Medicine were advertised on 19.3.95. The last date of submission of the application was 29.4.95. The petitioner applied for the post of Assistant Professor (Medicine). He was awarded thirty five and half points and placed at Sl. No. 17 in the tentative panel. Later an additional point was awarded to him as a result whereof he was placed at Sl. No. 10. On 17.12.96, one post each of Assistant Professor (TB and Chest diseases) was created in the Medical Colleges of the State. Out of 17 posts of Assistant Professor (Medicine) which were available between 1.1.95 and 31.12.95, 9 posts were thus earmarked for TB & Chest diseases.

Accordingly the first eight candidates from the aforesaid panel were appointed to the post of Assistant Professor (Medicine), while those who had additional qualification of Diploma in Chest diseases were appointed on the post of Assistant Professor (TB and Chest diseases). As the petitioner was placed at Sl. No. 10, he was not appointed as Assistant Professor (Medicine), and as he did not have the additional qualification of Diploma in Chest diseases, he was also not appointed as Assistant Professor (TB and Chest diseases). In this manner, persons placed below him in the panel were appointed against the latter post.

3. Though in the writ petition several issues have been raised, Shri P.K. Shahi learned counsel for the petitioner, put the grievance of the petitioner in a narrow compass. He submitted that in the light of the decision of this Court in [Dr. Rita Sinha and Another Vs. State of Bihar and Others](#), vacancies occurring between 1.1.95 and 31.12.95 alone could be filled up from the aforesaid panel prepared for the year 1994 and as the posts of Assistant Professor (TB and Chest diseases) were not available during that period, the concerned respondents could not be appointed against such posts. He pointed out that the fact that only vacancies occurring between 1.1.95 and 31.12.95 were to be taken into account for making appointment, had been mentioned in the advertisement itself.

4. On behalf of the respondents, it was submitted that it is not a fact that posts of Assistant Professor (TB & Chest diseases) were created on 17.12.96. The fact is that by the said order 9 posts of Assistant Professor (Medicine) were earmarked for appointment of Assistant Professor (TB & Chest diseases). This was done in order to comply with the directive of this Court and also the Medical Council of India, it was stated that if the Assistant Professors (TB & Chest diseases) were not appointed there was imminent risk of the Medical Colleges losing recognition by the Medical Council.

5. I find substance in the case of the respondents that, the order as contained in memo no. 451 dated 17.12.96 did not amount to creation of posts. By the said order the existing posts of Assistant Professor (Medicine) were simply earmarked for TB and Chest diseases which is a wing of Medicine Department. The grievance put forward by the counsel that the impugned appointments were made against the post which did not exist during the period in question, therefore, does not have any substance. This however, does not end the controversy. The moot question is whether earmarking of posts was valid, it is obvious that if the post had not been earmarked for the TB and Chest diseases wing, by virtue of seniority in the panel, the petitioner in all likelihood would have been appointed against one of the posts of Assistant Professor (Medicine). Also, by virtue of the earmarking, he was not considered for the post of Assistant Professor (TB and Chest diseases) as he did not possess the additional qualification of the Diploma in Chest diseases.

6. Counsel for the respondents were at pains to argue that earmarking of post was done pursuant to a policy decision of the State Government in public interest with

which this Court may not interfere. It was pointed out that by virtue of orders passed by this Court and directive issued by the Medical Council of India it had become imperative for the Government to appoint Assistant Professors (TB & Chest diseases). If it had not been done, there was risk of the Medical Colleges losing their recognition which would not have been in public interest. It was also submitted that non-appointment of the petitioner was not result of any mala fide. As a matter of fact, the first eight candidates from the panel were appointed on the post of Assistant Professor (Medicine) and as the petitioner was placed at Sl. No. 10, he could not be appointed. Again, on the post of Assistant Professor (TB & Chest diseases), he could not be appointed because he did not possess the requisite qualification.

7. It is true that the petitioner lost his chance of being appointed but this was because he was placed at Sl. No. 10. No doubt if appointments had been made against 17 posts of Assistant Professor (Medicine) from the panel prepared, in all likelihood he would have been appointed against one of the posts. It was only because of the earmarking of some of the posts (sic). However, it is well settled that a candidate does not have any absolute or indefeasible right of being appointed. It is also well settled that the Government is not obliged to fill all the vacancies. It is also well settled that the Government can reduce the number of vacancies or decide not to fill up the existing vacancies in public interest. The only question which thus arises for consideration is whether the earmarking was bad in law and mala fide. In the circumstances briefly set out above, it cannot be said that the Government had acted arbitrarily, much less to cause any harm to the petitioner. If earmarking is not held to be bad (because it is not under challenge), it is not open to the petitioner to disturb the appointments of the respondents possessing the additional qualification of Diploma in Chest diseases, a qualification admittedly not possessed by the petitioner.

8. Shri Shahi submitted that even if it be assumed that there was a rationale behind earmarking of posts, the State Government should have followed the same procedure as laid down in Dr. Rita Sinha's case (*supra*). The submission appears to be attractive. However, considering the fact that the 1994 panel was the last prepared by the respondents, and new Rules coming into force on 21.5.97 lay down a different procedure for making appointment to the post, the submission has merely an academic value. The ratio of Dr. Rita Sinha's case is that the Government is obliged to make yearly panel notifying the vacancies likely to occur during the next calendar year, and to fill up only such vacancies from the panel prepared pursuant to that advertisement. There is no dispute regarding the import of the decision and had the new rule not come into force and the appointments were to be made as per the old procedure, this Court would have considered issuing appropriate direction. There being no available post during the year 1995 against which the petitioner could be considered, and the procedure having changed thereafter, I find it difficult to issue any direction in favour of the petitioner.

9. In the above premises, this writ petition is dismissed, but without any order as to costs.