

Court No. - 1**Reserved**

(1) Case :- SPECIAL APPEAL No. - 254 of 2019

Appellant :- Dr. Devendra Gupta And Anr.

Respondent :- Dr. Narayan Prasad And Ors.

Counsel for Appellant :- Ishita Yadu, Utsav Mishra

Counsel for Respondent :- C.S.C., Brijesh Kumar Shukla, Indu Prakash Singh, Rajat Rajan Singh

(2) Case :- SPECIAL APPEAL No. - 255 of 2019

Appellant :- Dr. Vikas Agarwal

Respondent :- Dr. Able Lawrence And Ors.

Counsel for Appellant :- Ishita Yadu, Utsav Mishra

Counsel for Respondent :- C.S.C., Brijesh Kumar Shukla, Indu Prakash Singh, Rajat Rajan Singh

(3) Case :- SPECIAL APPEAL No. - 384 of 2023

Appellant :- Dr. Richa Mishra

Respondent :- State Of U.P. Thru. Addl. Chief/ Prin. Secy. Deptt. Of Medical Edu. U.P. Civil Sectr. Lko. And Ors.

Counsel for Appellant :- Utsav Mishra

Counsel for Respondent :- C.S.C., Indu Prakash Singh, Rajat Rajan Singh, Vinayak Saxena

Hon'ble Attau Rahman Masoodi, J.

Hon'ble Om Prakash Shukla, J.

(Per A. R. Masoodi, J.)

1. These three intra-court appeals are directed against the common judgement rendered by the writ court. Special Appeal No. 254 of 2019 has been filed by the appellants Dr Devendra Gupta and Dr Amitabh Arya, whereas, Special Appeal No. 255 of 2019 has been filed by the appellant Dr Vikas Agarwal. The appellants in both the above appeals were not a party to the writ proceedings. The intra-court Appeal No. 384 of 2023 has been filed by Dr Richa Mishra who firstly approached the writ court by means of Writ-A No. 2542 of 2023 which was dismissed on the ground of

the matter being pending before the Chancellor against the same cause. The Chancellor has also decided the issue in line with the judgement rendered by the writ court assailed in the former two appeals mentioned above.

2. After dismissal of Dr. Richa Misra's writ petition by the writ court on the aforementioned ground, the judgement so passed as a matter of fact has remained unchallenged, but feeling aggrieved against the consequential effect of the earlier judgement assailed in the former two intra-court appeals pursuant to which the Chancellor has finally set aside the order dated 9.8.2018, an intra court appeal has also been filed by Dr Richa Mishra without seeking leave to appeal.
3. It is to be noted that non parties to the writ proceedings who have instituted the two former intra court appeals as mentioned above, their prayer for leave to appeal has already been granted vide order dated 16.5.2023, hence the matter is to be dealt with on merit in the context of relevant law. The appeal filed by Dr. Richa Mishra involving the same question was also tagged.

4. The issue primarily involved in the present set of special appeals relates to the implementation of rule of reservation viz. as to whether Section 9 of the U.P. Public Services (Reservation For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as 'the Act, 1994') was rightly applied to the posts advertised vide advertisement no. 22/2003-2004, if not, the effect. The appointment and continuance of the incumbents pursuant to the above selection in the initial cadres besides their higher promotions made since the year 2004 on the higher posts/cadres remained unquestioned by any of the appellants. It is the seniority *inter se* of Professors which is relevant to be considered for appointment on administrative posts that has come to be challenged by the appellants at this stage. For example the Head of Department or Dean of Faculty in Sanjay Gandhi Institute of Medical Sciences (SGPGI) or Director, for which the inter se seniority of Professors working in all the departments becomes relevant, the conflict of interest has emerged in this arena.
5. The appellants would contend that it is only limited to the service conditions in conflict, which can be the subject matter of dispute at their instance for they

were not aggrieved against the appointments or promotions made by the SGPGI, though contrary to law.

6. On the other hand, the respondents would contend that once the advertisement and selection was duly made, their appointment made without any rider qualifies them for all the service benefits including seniority. Therefore, it is too late for the appellants to question the seniority as Professor unless their entry in service was questioned either at the level of induction or on the promoted posts till they reached to the cadre of Professor as per the qualifications and as per the criteria which was observed at par.
7. The conflict of interest between the two parties, on the one hand, drives the Court to go into the unquestioned past of more than two decades as regards violation of Section-9 of the Reservation Act, 1994 and on the other hand, the current eligibility for appointment on the administrative posts like Heads, Deans etc. is called upon to be judged without any compromise on the principle of equality embodied under Article 14 of the Constitution of India right from inception.

8. Non-availability of eligible candidates in the reserved categories within the State of U.P. in the year of advertisement-2004 at the initial stage is an admitted position of fact and the SGPGI as well as the State has defended the appointments of outsiders so made throughout. Except the initial defect which according to the employer was unavoidable, the subsequent stages of promotion have followed as per rules strictly, therefore, the respondents claim equal right of consideration for being appointed on administrative posts.
9. The question that crops up for consideration is, if the appointments are defended by the employer as well as by the State *inter alia* on the premise that the same can be treated to have been made against the ex-cadre posts, then, why such appointments may not be recognised to have been made in accordance with the service rules as has been held by the writ court.
10. The conflict of interest between the parties while working in the cadre of Professors as stated above has brought the dispute in the lap of this Court.
11. The main ground of attack of appellants, who were not a party to the writ petition, is that since the very appointment of the respondent no. 1 herein viz. Dr

Narayan Prasad was illegal from the inception, therefore, the fruits of wrong may benefit a person individually until the other parties remain unaffected. The submission in nutshell is that the vacancies on which respondent no. 1 and seven like incumbents whose appointment was made, were actually reserved category seats. Since such appointments were not in consonance with the statute i.e. Section-9 of the Act, 1994, the service condition of *inter se* seniority as Professor relevant for appointment on administrative posts is uncomparable so long as the conditions of recruitment remain unequal. The submission put forth is attractive but the appellants have made no attempt ever since 2004 to question the initial recruitment of the respondent or his promotion made till now while working in the same institution.

12. Here it may be reiterated that the appointment of respondent no. 1 as well as seven other candidates was made in absence of any eligible candidate from the State of U.P. and the eligibility of same caste was certified in the other States and it is for this reason that the SGPGI and State have safeguarded the appointments made under the nomenclature of ex-cadre posts. It was further provided that such faculty

members whose posts were declared as ex-cadre, would not be included in the combined seniority list of Professors working in the institute. In this manner, the incumbents who stood below the aforesaid eight ex-cadre incumbents would be placed above, notwithstanding the fact that they were appointed/promoted as Professor much later. It is this decision of the State by order dated 15.10.2020 which was assailed by Dr. Narayan Prasad in Writ Petition No. 6785 (SS) of 2018 which was allowed on 9.5.2019 giving rise to Special Appeal No. 254 of 2019 and Special Appeal No. 255 of 2019 filed by the non-parties as mentioned above.

13. Defending their right of seniority relevant for appointment on administrative posts, the appellants have submitted that since they were the persons who were likely to be directly affected by any order passed in the writ petition in favour of respondent no. 1, they ought to have been made a party to the writ petition and having not done so, the writ petition was liable to be dismissed for non-joinder of necessary parties. That apart, it is also emphasized that learned Single Judge ought to have considered the mandate of Section-9 of the Act of 1994 which had a bearing on the *inter se*

seniority in the higher cadres to which all such appointees were promoted.

14. Learned counsel for the respondent, on the other hand, has submitted that the appointment of respondent no. 1, Dr Narayan Prasad (Special Appeal No. 254 of 2019) which was made as far back as on 9.7.2004 was never questioned or challenged before any court of law during all these years and at this stage when Dr Narayan Prasad has completed 19 years of service, his initial selection is being questioned and scanned so as to prejudice his right of consideration for appointment as Head of Department or Dean of faculty or Director etc. Similar plea has been raised on behalf of the respondents in other special appeals whose matter is akin to that of Dr. Narayan Prasad.
15. It may be noted here that the SGPGI does not have its own reservation rules and the appointments made in the Institute for the purposes of reservation stand governed by the State Act, namely, U.P. Public Services (Reservation For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994.

16. Sub-regulation 3 of Regulation 40 of SGPGI First Regulations, 2011 relevant in this regard provides as under:

“40(3) Reservation policy of the State Government shall be applicable.

17. Now coming to the special appeal filed by Dr Richa Mishra, we find that the same is directed against the order dated 7.4.2023 passed in the writ petition filed by her viz. Writ-A No. 2542 of 2023 whereby the challenge made by her to the appointment of respondent no. 6 Dr Rungmei SK Marak as Head of Department of Microbiology in SGPGI and her claim to be appointed as such, has been negated by the Court and the writ petition has been dismissed, subject to the decision in the Special Appeal No. 254 of 2019, mentioned above. The Court while dismissing the writ petition filed by the appellant has observed that the appellant was aware of the situation and her placement from the date she joined the department of Microbiology but she did not raise any grievance and it is only when the proceedings for appointment of Head of Microbiology department were in the offing, she stood up to raise her claim whereas she had full

opportunity to do so right from her appointment in the said department in 2013.

18. In the case of Dr Richa Mishra also, the very initial appointment of respondent no. 6 has been questioned on the ground that the respondent no. 6 belonged to Scheduled Tribe category in the State of Manipur who not being a domicile of the State of U.P. was not eligible for appointment against the reserved category posts contrary to the mandate of Section-9 of the Act of 1994. Section 9 of the Reservation Act, 1994 is reproduced hereunder:

9. Caste certificate. - For the purposes of reservation provided under this Act, caste certificate shall be issued by such authority or officer in such manner and form as the State Government may, by order, provide.

19. On the matter being agitated, the Director, SGPGI and other authorities vide letter dated 4.4.2005 came forward with a defence that the candidates belonging to the States other than the State of U.P. were appointed in some super speciality departments of the SGPGI against the reserved category seats due to non-availability of eligible reserved category candidates within the State. However, the allegation regarding the appointments being illegally made was evaded looking

to the larger interest of medical service, research and education.

20. It is also borne out of the record that a letter dated 2.11.2007 was written by the Principal Secretary, Department of Medical Education to the then Director of the Institute whereby advice sought by the Personnel Department and the Law Department of the State of U.P. with respect to the appointments made on the posts belonging to reserved category candidates against the reservation policy applicable in the State of U.P. was communicated to the Institute for taking necessary action. It is mentioned in the said communication that the persons belonging to other State cannot be given the benefit of reservation policy in the State of Uttar Pradesh and in case any such candidate belonging to a State other than the State of U.P. has been wrongfully extended the benefit of reservation, **clean-up** or '**parimarjan**' of such posts is required.
21. In the meantime, a complaint dated 16.10.2007 was filed by Dr Narayan Kumar before the U.P. State Commission for Backward Classes, Lucknow whereby the issue relating to appointment of two candidates,

namely, Dr Sushma Agarwal and Dr Maria Das belonging to the State of Bihar and Tamil Nadu respectively against the posts reserved for OBCs belonging to State of U.P. in the Department of Radiotherapy in violation of the reservation policy was raised.

22. The Commission after hearing the matter and considering the rival submissions, held that the Institute had clearly violated the reservation policy in the past while making appointments of the aforesaid two faculty members. Therefore, in case timely action is not taken by the institute for rectifying the anomaly created by aforesaid illegal appointments on reserved category posts, the Commission shall send a request for punitive action as per the provisions contained in the Act, 1994 against all the responsible officers.
23. The Commission further opined that the Institute should rectify the aforesaid anomaly and fill up eight such posts from candidates belonging to reserved category having domicile of State of U.P. and submit its report before it within a specified period.
24. The Institute accordingly vide its letter dated 26.6.2008 annexing all the relevant documents requested the

State Government for guidance regarding the manner and procedure to be undertaken for ‘parimarjan’ of eight posts which had been filled up in violation of the reservation policy so that the directions passed by the Court as well as Backward Classes Commission may be complied with.

25. In response to the aforesaid letter, the Special Secretary, Department of Medical Education, State of U.P. wrote a letter dated 29.5.2009 to the Director of the Institute stating that the matter at hand was considered in the meeting held on 3.3.2009 under the Chairmanship of the **Chief Secretary, State of U.P.** in presence of representatives of the law department and personnel department wherein *inter alia* a decision was made that the posts which have been filled in violation of the reservation policy be declared as **ex-cadre posts**.

26. It is in this manner that after due deliberations Government Order dated 15.10.2010 came to be issued in compliance whereof following decisions were taken by the Institute vide office order dated 15.9.2016:

“i. The posts occupied by candidates belonging to outside the State of U.P. and appointed on the reserved category posts, be declared as ex-cadre posts and the faculty members appointed on such posts be henceforth considered as appointed on ex-cadre posts.

ii. The faculty members whose posts are declared as ex-cadre, shall not be included in the seniority list of faculty members of the Institute.

iii. The faculty members whose posts are declared as ex-cadre in the respective departments wherein they are appointed, shall not be eligible for holding post of Head of the Department, any administrative posts or responsibilities, which are generally given on the basis of seniority.”

27. However, the Visitor, SGPGIMS on a reference being filed against the order dated 15.9.2016 by Dr Narayan Prasad, respondent in Special Appeal No. 254 of 2019 (writ petitioner) under Section 36 of the SGPGIMS Act, 1983, held that the appointment of Dr Narayan Prasad was not in accordance with law and while rejecting the contention raised by Dr Narayan Prasad, set aside the order dated 15.9.2016 passed by the Director. The Visitor further directed that the matter be placed before the appointing authority i.e. the Chief Secretary, State of U.P. being the President of the Institute for testing the legality of the Government Order dated 15.10.2010. The matter thus was placed before the Chief Secretary, Government of U.P. who in a meeting held under his Chairmanship, took a decision to declare the post occupied by the Dr Narayan Prasad (and consequently the other like appointees) be declared as ex-cadre post and thus the Government Order dated 15.10.2010 stood revived.

28. The aforesaid two orders, namely, Government Order dated 15.10.2010 and the order dated 9.8.2018 came to be challenged in several writ petitions and the learned Single Judge court after considering the entire aspects of the matter has quashed both the orders giving rise to the present special appeals.

29. It is pertinent to mention here that in none of the writ petitions, the appointments made in the year 2004 against the reservation policy was specifically under challenge, but it is the inclusion of such incumbents in the combined seniority of Professors consequent upon the quashing of the orders dated 15.10.2010 and 9.8.2018 which has caused a grievance and resentment to other incumbents.

30. In the aforesaid conspectus, the questions which crop up for adjudication by this Court may be culled out as under:

(i) Whether the eligibility based on the caste certificates submitted by the candidates in the selection held as far back as in the year 2004 can be tested at this stage or whether the process of selection can be questioned after a period of more than 12 years;

(ii) Even if the aggrieved persons at this stage do not opt to challenge the appointments made on the basis of the caste certificate submitted by the candidates in the year 2004, whether the placement of such selectees in the

combined seniority list pursuant to the order passed by the writ court can be questioned after having acquiesced to the appointments so made.

(iii) Whether any fault can be attributed to the selected candidates if some illegality was committed by the selection committee moreso when their applications treated to be in line with the advertisement issued and the same were duly scrutinized and verified whereafter they joined the services having been duly selected. The appointment order of the selectees also does not mention the category under which they were appointed.

31. Learned counsel for the respondents have categorically submitted that the respondents were selected by a Selection Committee constituted under the SGPGIMS Act, 1983 read with the regulations framed thereunder and thereafter they were issued appointment order in pursuance whereof, they have joined and continued to discharge their duties without any complaint from any quarter. They were also granted promotion as and when the same fell due and are presently holding the post of Professor.

32. It is further submitted that the impugned order dated 15.10.2020 affecting the right of the respondents for further promotion treating the posts occupied by them to be belonging to outside the State of U.P., was based on incorrect facts and against the principles of natural justice. The respondents having continued in service in

regular line and having been granted promotion from time to time, there was no justification in keeping them in an 'ex-cadre'. The writ court has rightly set aside the impugned orders keeping in view same came to be passed merely on the resentment expressed by the employees who are admittedly junior to the respondents that too at a stage when the proceedings for their promotion as Head of Department came into being.

33. In nutshell submission is that once there was no prohibition to apply for the initial post and their candidature having been accepted and the selection proceedings having been held in accordance with the Act and the regulations framed thereunder, the respondents (petitioners before the writ court) are entitled to be placed in the seniority list as per their length of service and to hold the administrative post of Head of Department. Their placement in the ex-cadre was unjustified, discriminatory and against the relevant provisions of the Act.

34. Alternatively, it is argued that even if some discrepancy was detected in the process of selection at some later point of time, the respondents cannot be

held responsible for the same as they fulfilled the eligibility criteria as required and at no point of time they were ever informed about any shortcoming in their eligibility or any document submitted by him. Reliance has been placed upon supreme court judgements reported in **(2011) 3 SCC 436 (State of Orrisa Vs. Mamta Mohanty; (1998) 3 SCC 381 (Upen Chandra Gogoi Vs State of Assam); and (2005) 3 SCC 422 (Mangal Prasad Tamoli Vs. Narvadeshwar Mishra).**

35. In the case of **State of Orrisa Vs. Mamta Mohanty** (supra), the apex court while dealing with the delay in filing the appeal, has observed as under:

33. Needless to say that Limitation Act 1963 does not apply in writ jurisdiction. However, the doctrine of limitation being based on public policy, the principles enshrined therein are applicable and writ petitions are dismissed at initial stage on the ground of delay and laches. In a case like at hand, getting a particular pay scale may give rise to a recurring cause of action. In such an eventuality, the petition may be dismissed on the ground of delay and laches and the court may refuse to grant relief for the initial period in case of an unexplained and inordinate delay. In the instant case, the respondent claimed the relief from 1.1.1986 by filing a petition on 11.11.2005 but the High Court for some unexplained reason granted the relief w.e.f. 1.6.1984, though even the Notification dated 6.10.1989 makes it applicable w.e.f. 1.1.1986.

34. This Court has consistently rejected the contention that a petition should be considered ignoring the delay and laches in case the petitioner approaches the Court after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. A litigant cannot wake up from deep slumber and claim impetus from the judgment in

cases where some diligent person had approached the Court within a reasonable time. (See: *M/s Rup Diamonds & Ors., v. Union of India & Ors.*, AIR 1989 SC 674; *State of Karnataka & Ors. v. S.M. Kotrayya & Ors.*, (1996) 6 SCC 267; and *Jagdish Lal & Ors. v. State of Haryana & Ors.*, AIR 1997 SC 2366).

Likewise, in the case of **Mangal Prasad Tamoli Vs. Narvadeshwar Mishra**, the apex court has categorically observed as under:

“To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied.....”

36. It is also pointed out that Section 9 though stipulates that for the purposes of reservations, caste certificate shall be issued by such authority or officer in such manner and form as the State Government may, by order, provide, however, the advertisement did not debar any candidate who is not domicile of State of

Uttar Pradesh from applying against the vacancies advertised. Therefore, no restriction could be placed by the authorities in discharge of their duties by placing their posts in 'ex cadre' nor they could be deprived of holding an administrative post as per the rules of service which were uniformly applicable to all the incumbents working in the institution.

37. The next ground of attack is that before passing the impugned orders having adverse effect to the service avenues including promotion of the respondents and debarring them to hold the administrative post, to which they were otherwise entitled, an opportunity ought to have been afforded to them. The orders impugned in the writ petition are thus passed in violation of the service jurisprudence and principles of natural justice.

38. We find substance in the arguments raised by the respondents. The appellants at no point of time challenged the appointments of the respondents nor it could be established that the selection was held in violation of the conditions enumerated in the advertisement. It is also not the case of the appellants that since the respondents belong to a State other than

the State of U.P., they were not entitled to the benefit of reservation. That being so, the very appointment of the respondents being free from any objection and no fault being attributable to them in the process of selection, they cannot be denied the benefits available to them as per their seniority fixed by the institution.

39. Besides, the decision to place the respondents in 'ex-cadre' appears to have been taken baselessly as the authorities failed to follow the very basic rule of 'reasonable opportunity' before taking a decision which tends to obstruct the service benefits available to the respondents and virtually amounts to their supersession.
40. Learned counsel for the appellants has cited certain case laws but in the absence of any challenge to the appointment of the respondents and consequently their continuance till the passing of the impugned order, we find that the same do not have any bearing on the peculiar facts and circumstances of the case at hand and for the sake of brevity, we refrain from discussing the same in this judgement.
41. It is trite to mention that any illegality crept in the process of selection due to the default committed by

the departmental authorities cannot be attributed to the appointees and they cannot be made to suffer for no fault on their part. The selection committee is expected to be vigilant and cautious while making a selection and deciding the fate of the job aspirants and we expect that the institute shall chalk out appropriate guidelines and amend the bye-laws if necessary to avoid any error in the future selection process.

42. Thus, having an overall view of the matter and after going through the observations made by the writ court, we find no illegality in the order dated 9.5.2019 which may warrant interference by this Court in exercise of appellate jurisdiction.

43. The judgement we have rendered is in exceptional circumstances and **shall not form a precedent.**

44. In view of aforesaid facts and observations, all the special appeals lack merit and are accordingly **dismissed.**

Order Date :- Jan. 5, 2024

Fahim/-