

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.932 of 2011

IN

Civil Writ Jurisdiction Case No. 7126 of 1997

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Dr. Chittaranjan Roy, son of Sri Braj Kishore Roy, at present posted as Associate Professor, Department of P.S.M. Darbhanga, Medical College & Hospital, Laheriasarai, District – Darbhanga

.... Petitioner / Appellant

Versus

1. The State of Bihar
2. Commissioner-cum-Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna,
3. Addl. Commissioner-cum-Spl. Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna,
4. Dr. Suraj Nayak, Associate Professor, at present acting as Ad hoc Professor in the Department of Preventive and Social Medicine, Darbhanga Medical College & Hospital, Darbhanga,
5. Addl. Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna,
6. Deputy Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna.

.... Respondents / Respondents.

With

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Letters Patent Appeal No. 954 of 2011

IN

Civil Writ Jurisdiction Case No. 4 of 1997

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1. Dr. Chittranjan Roy, son of Sri Braj Kishore Roy, Professor and Head of Department of P.S.M.. D.M.C.H. (at the relevant time Associate Professor), Laheriasarai, District – Darbhanga
 2. Dr. Prakash Chandra, son of Late Devy Choudhary, presently residing at A/3, P.R.D.A., Plot No. 4, Shivpuri, P.S. Gandani Bagh, District Patna, Asst. Prof. A.N. Magadh Medical College, Gaya

.... Respondent no. 6 and 9 - Appellants
Versus

1. The State of Bihar



2. The Commissioner & Secretary to Govt., Department of Health, Medical Education and Family Welfare, new Secretariat, Bihar, Patna,
3. The Addl. Commissioner & Secretary of Govt., Department of Health, Medical Education and Family Welfare, New Secretariat, Bihar, Patna,
4. Deputy Secretary to Govt. Department of Health, Medical Education and Family Welfare, New Secretariat, Bihar, Patna.
5. The Addl. Secretary (Medical Education), Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna,
6. Dr. Anil Kumar Jaiswal, son of not known Assistant Professor, P.S.M. Department, J.L.N. Medical College, Bhagalpur,
7. Dr. Binod Prasad, son of not known, Associate Professor, P.S.M. Department, J.L.N. Medical College, Bhagalpur,
8. Dr. Arun Kumar, son of not known Assistant Professor of Jwahr Lal Nehru Medical College, Bhagalpur

.... Respondents / Respondents

9. Dr. Suraj Nayak, son of Late Kumar Nayak, Superintendent (at the relevant time Professor and Head of Department P.S.M.), D.M.C.H. Laheriasarai, Darbhanga

..... Petitioner / Respondent.

With

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Letters Patent Appeal No. 955 of 2011

IN

Civil Writ Jurisdiction Case No. 10628 of 1997

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1. Dr. Chittranjan Roy Late Braj Kishore Roy, Asstt. Professor And Head Of Department Of P.S.M., D.M.C.H. (at the relevant time Associate Professor) Laherisarai, Darbhanga.
2. Dr. Prakash Chandra son of Late Devy Choudhary Presently resident of At A/3, P.R.D.A., Plot No. 4, Shivpuri, P.S. Gardanibagh, Dist. Patna, At the relevant time Asst. Prof. P.S.M., Dept., A.N. Magadh Medical College.

.... Respondents - Appellants

Versus

1. The State Of Bihar.
2. The Health Commissioner cum Secretary to Govt., Dept. Of Health, Medical Education and Family Welfare, New Secretariat, Bihar, Patna.
3. The Additional Commissioner cum Special Secretary of Govt. Dept. Of Health,



Medical Education and Family Welfare, New Secretariat, Bihar, Patna.

4. The Joint Secretary to Govt., Dept. Of Health, Medical Education and Family Welfare, New Secretariat, Bihar, Patna.

5. Dr. Anil Kumar Jaiswal, son of Not Known, Assistant Professor, P.S.M., Dept., J.L.N. Medical College, Bhagalpur.

6. Dr. Binod Prasad, son of Not Known, Assistant Professor, P.S.M. Deptt. J.L.N. Medical College Bhagalpur.

7. Dr. Arun Kumar, son of Not Known, Professor, P.S.M. Deptt., Jawahar Lal Nehru Medical College, Bhagalpur. Respondents / Respondents

8. Dr. Suraj Nayak, son of Late Kumar Nayak, Superintendent (At the relevant time Professor and Head of Department P.S.M.), D.M.C.H., Laheriasarai, Darbhanga.

.... Petitioner / Respondent

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Appearance:

(In LPA No.932 of 2011)

For the Appellant/s	:	Mr. Y.V. Giri, Sr. Advocate.
For the State:		Mr. Prabhakar Jha, GP 27.
For pvt. respondent no.4:		Mr. Ashok Kumar Singh, Sr. Advocate & Mr. Harish Kumar, Advocate.

(In LPA No.954 of 2011)

For the Appellant/s	:	Mr. Rajesh Prasad Choudhary, Advocate.
For the State:		Mr. Niraj Kumar, AC to GA 10.
For pvt. respondent no.9:		Mr. Ashok Kumar Singh, Sr. Advocate & Mr. Harish Kumar, Advocate.

(In LPA No.955 of 2011)

For the Appellant/s	:	Mr. Rajesh Prasad Choudhary, Advocate.
For the State:		Mr. Niraj Kumar, AC to GA 10.
For pvt. respondent no. 8:		Mr. Ashok Kumar Singh, Sr. Advocate & Mr. Harish Kumar, Advocate.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

PER: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

Date: 13-03-2018

Challenge in the batch of these intra-court appeals is to the judgment dated 25.04.2011 passed by learned Writ Court in a set of



three Writ Petitions by which the learned Writ Court has been pleased to negate the claim of the writ petitioner(s) all the three Writ Petitions with certain observations and directions.

2. It appears that the set of three Writ Petitions were filed raising a dispute of inter-se seniority between Dr. Suraj Nayak on the one side and Dr. Chittaranjan Roy and another on the other side, all of them were in the Department of Preventive Social Medicine (PSM) as teachers.

BRIEF FACTS AND ISSUES

3. The learned Writ Court, keeping in view the materials available on the record, considered as to what was the entry point in service of a teaching post in Government Medical College & Hospital upto the year 1988 and came to a conclusion by discussing the several notifications issued by the State Govt. from time to time that those notifications are consistent on one thing that the entry point is 'tutor' or its equivalent which was the last rung from which, upon gaining educational qualifications like Post Graduate degree and teaching experience, one would be promoted to the post of Assistant Professor. The learned Writ Court found that there was no notification of the State Govt. which provides that the post of Assistant Professor would be filled by direct recruitment as well as by promotion from tutors.

4. The learned Writ Court found that on 12.09.1987 when



the advertisement was issued by the State Govt. for appointment of teachers in non-clinical subjects including PSM holding Post Graduate degree, the appointments made on the said post, in absence of any other specification or relaxations could have been valid only to the post of tutor. The advertisement nowhere mentioned that the appointment would be made to the post of Assistant Professor which, according to the learned Writ Court, it could not have mentioned even otherwise as per existing Rules and Resolutions. Dr. Chittaranjan Roy and others, who are appellants in the Letters Patent Appeal before us had got Post Graduate qualification, they applied pursuant to the advertisement as noted above and were appointed as Assistant Professor on 25.01.1988, even though they had not a single day as teaching experience much less teaching experience as tutors.

5. The learned single Judge took note of the fact that as per MCI Regulation of the year 1970, which had the necessary approval of the Government of India for appointment to the post of Assistant professor, teaching experience was a pre-requisite qualification. It was also noted that there were subsequent regulations of the MCI but they had for the relevant period not the approval of the Central Government.

6. As the present appellants relied upon the judgment of the Hon'ble Apex Court in the case of **Dr. R.K. Goyal Vs. State of**



U.P. & Ors., reported in AIR 1997 SC 1567, and contented that as per the Hon'ble Apex Court's judgment, appointment of Lecturer in Medical Colleges (which is equivalent to Assistant Professor) without teaching experience is legal even though MCI has prescribed teaching experience as a necessity, the learned Writ Court discussed the issues arising out of the facts in the present case and held that the proposition flowing from the judgment of the Hon'ble Apex Court would not apply to the present case. The Hon'ble Apex Court in its judgment has noticed that there were statutory rules framed by the State Government and appointments were made on the basis of the executive instructions issued from time to time and there were no instructions laying down the conditions of three years' teaching experience for appointment of Lecturers in Medical College. It further noted that the recommendations of the MCI were directory. The learned Writ Court held that in the case at hand, from the notifications it is evident that the State Government vide its notifications and resolutions provided the minimum requirement of teaching experience as tutor for being considered for appointment to the post of Assistant Professor, thus, the basic facts being totally different, the judgment of the Hon'ble Apex Court would have no application.

7. The learned Writ Court accepted the contention of the writ petitioner Dr. Suraj Nayak based on the Full Bench judgment of



this Court in the case of **Project Uchcha Vidyalaya Shikshak Sangh & Ors. Vs. The State of Bihar & Ors.**, reported in 2000(1) PLJR 287, in which the Court held that a circular cannot be applied retrospectively as it is well settled that the Government cannot and should not alter or modify any circular retrospectively which may affect and prejudice the right of the government servants. In view of the Full Bench judgment of this Court, the contention of learned counsel representing Dr. Chittaranjan Roy (appellant) that the State Government vide notification dated 17.12.1990 acquired power to relax conditions where adequate number of teachers were not available for promotion to the post of Assistant Professor was rejected by the learned single Judge. The learned single Judge found that the appointment in this case was made on 25.01.1988 and the power to relax as per the notification dated 17.12.1990 was made effective as per the said notification itself from 29.01.1990, it could not be used to validate the appointments made in 1988.

8. The learned Writ Court found yet another reason to accept the submissions of Dr. Suraj Nayak (respondent) that there can be promotion only step-by-step and as per the situation obtaining at the relevant time there was no scope for direct appointment to the post of Assistant Professor. In this case, the earlier judgments of this Court in the case of **Dr. Hari Ram Singh Vs. State of Bihar & Ors.**,



reported in 1995(1) PLJR 462, and the judgment rendered in the case of **Dr. Shashi Bhushan Pandey Vs. The State of Bihar & Ors.**, reported in 1993 (1) PLJR 446, were relied upon as the learned single Judge found that in those judgments which were decided in the year 1979 and 1992 respectively this Court deprecated the practice of the State in promoting or sanctifying “level jumping”. It was held in the case of Dr. Hari Ram Singh (Supra) that promotion had to go step-by-step.

9. As the learned Writ Court found that the State Government took a decision to appoint Dr. Chittaranjan Roy and others directly as Assistant Professor, no notification was issued or resolution taken much less brought on record before the advertisement or before their appointment on 25.01.1988 altering the situation to enable the State Government to make such an appointment. The appointments, as held by the learned Writ Court, were thus irregular which was only sought to be regularized subsequently vide notification dated 05.06.1991 and the said notification was issued after 1990 when the gradation list was finally published. The State Government considered Dr. Chittaranjan Roy and others junior to Dr. Suraj Nayak which, according to the learned Writ Court, was rightly shown but this position was sought to be altered in the year 1996 by fresh notifications.



10. The learned Writ Court ultimately upheld the seniority list as published in the year 1990. However, as regards individual promotions, the learned Writ Court was of the view that the position would be slightly different. The reason being that for promotion to the post of Associate Professor, avoiding “level jumping”, a person had to have three years’ minimum teaching experience as an Assistant Professor. Dr. Suraj Nayak was promoted as Associate Professor on 02.08.1991 when he had not completed three years as Assistant Professor, which post he had occupied since 01.11.1988, therefore, his date of promotion to the post of Associate Professor had accordingly shifted.

11. So far as Dr. Chittaranjan Roy and others are concerned, learned Writ Court found that their appointments were made irregularly as Assistant Professor on the excuse of emergent situation arising out of impending MCI inspection but, in law, it would be that they were appointed as ‘tutors’, though designated and entitled to financial benefits of Assistant Professors because it was not possible under the existing government notifications to appoint a person as an Assistant Professor directly without minimum three years teaching experience as tutor. Thus, regarding Dr. Chittaranjan Roy and others, the learned Writ Court held that on completion of three years’ from 25.01.1988, they would deem to be confirmed as



Assistant Professor and they would be entitled to be considered for promotion to the post of Associate Professor and hence forth.

CHALLENGE TO THE JUDGMENT OF THE WRIT COURT

12. While assailing the impugned order of the learned Writ Court Mr. Y.V. Giri, learned Senior Advocate, contended that the learned Writ Court has committed an error inasmuch as the court could not appreciate that there was no rule governing appointment on the post of Assistant Professor in the year 1988 when Dr. Chittaranjan Roy was directly appointed on the post of Assistant Professor. Learned Senior Advocate further submits that the employer has power to advertise the post and make appointment on the post of Assistant Professor and get direct recruits through such advertisement. Learned Senior Counsel further submitted that the learned Writ Court again committed error in assuming that there was a gradation list of the year 1990 whereas, in fact, there was no such gradation list. Reliance has once again been placed on the judgment of the Hon'ble Apex Court rendered in the case of **Dr. R.K. Goyal** (Supra).

13. *Per contra* Sri Ashok Kumar Singh, learned Senior Counsel representing Dr. Suraj Nayak (private respondent) submits that the learned Writ Court has examined each and every aspect of the matter at length and only after going through the materials available on the record, the learned Writ Court found that there was a



notification dated 23.11.1976 by which the State Government had resolved and notified its decision to re-designate the teaching posts. Since the notification was issued in the name of the Governor, in absence of any other rules on the subject, it would be deemed to be rules within the meaning of Article 309 of the Constitution. The learned Writ Court, therefore, rightly took a view that such notifications have got force of law. In the rules in so far as it concerns the present litigation it was, inter alia, provided that the first teaching post would be re-designated as teacher whose basic qualification was to be MBBS. It further provided that a tutor, who had Post Graduate degree and teaching experience as tutor of not less than three years, would be eligible for promotion to the post of Assistant Professor. It further provided that a person, who was as Assistant Professor and had teaching experience of five years, would be considered for promotion to the post of Associate Professor.

14. Learned Senior Counsel has further drawn our attention towards the finding as recorded by the learned Writ Court that the gradation list was prepared at the end of 1990 in respect of Assistant Professor in PSM department. In this gradation list, Dr. Suraj Nayak was positioned at Sl. No. 3 whereas Dr. Chittaranjan Roy was placed at Sl. No. 10 along with others who were directly appointed as Assistant Professor just above Dr. Chittaranjan Roy, but,



admittedly, below Dr. Suraj Nayak. In the said gradation list it was pointed out that Dr. Suraj Nayak had joined the post of tutor on 07.09.1983 and having acquired P.G. degree was designated as Assistant Professor on 02.11.1988. So far as Dr. Chittaranjan Roy and others are concerned, they had no previous teaching experience and were directly appointed as Assistant Professor on various dates in 1988 with Dr. Chittaranjan Roy having been appointed on 18.03.1988. The said gradation list of 1990 was challenged by Dr. Chittaranjan Roy in CWJC No. 7041 of 1996 in which Dr. Suraj Nayak was a respondent which was dismissed as withdrawn on 04.12.1996, upon prayer of Dr. Chittaranjan Roy to withdraw the writ petition but without any liberty.

15. Learned senior counsel has further referred the finding of the learned Writ Court as regards the fact that MCI Regulation of the year 1970 had necessary approval of the Government of India for appointment to the post of Assistant Professor, teaching experience was a pre-requisite qualification.

16. Once again, the learned Senior Counsel representing the private respondent has relied upon the judgments of the Hon'ble Full Bench of this Court in the case of Project Uchcha Vidyalaya Shikshak Sangh & Ors. (Supra) and Dr. Hari Ram Singh (Supra) as well as Dr. Shashi Bhushan Pandey (Supra).



CONSIDERATION

17. We have heard learned senior counsel for both the parties at length and perused the records.

18. The submission of Sri Y.V. Giri, learned Senior Counsel, that in the year 1987 when the advertisement was issued for appointment, there was no rule in existence and, as such, appointment on the post of Assistant Professor has to be accepted as it is because such appointments were within the domain of the employer and as the facts revealed such appointments were made in emergent situations are to be rejected at the outset.

19. We find from the records and as contended on behalf of private respondent that the learned Writ Court has rightly come to a conclusion that on 23.11.1976 there was a resolution of the State Government which was notified in the name of the Governor and, therefore, such notifications are to be taken as rules within the meaning of Article 309 of the Constitution and, as such, the notifications have got force of law. Mr. Giri, learned Senior Counsel has not challenged the existence of the resolution dated 23.11.1976 and notification thereof in the name of the Governor.

20. The next contention of Sri Y.V. Giri, learned Senior Counsel is that there was no gradation list of 1990 and the learned Writ Court has committed an error by recording that there was a



gradation list of 1990 is also fit to be rejected for the reasons apparent on the face of the records. There is no denial of the fact that Dr. Chittaranjan Roy had himself challenged the final gradation list of 1990 in CWJC No. 7041/1986 and in the said gradation list he was shown at Sl. No. 10 whereas Dr. Suraj Nayak was positioned at Sl. No. 3.

21. Reliance placed by the learned Senior Counsel on the judgment of the Hon'ble Supreme Court in the case of Dr. R.K. Goyal (Supra) has to be rejected for the reasons already recorded by the learned Writ Court in the impugned judgment. We find that the learned Writ Court has rightly concluded that the facts of the present case are totally different and distinguishable from that of the case of Dr. R.K. Goyal (Supra). In the present case, from the notifications of the State Government it is crystal clear that there were resolutions and notifications laying down the minimum requirement of teaching experience as tutor for being considered for appointment to the post of Assistant Professor.

22. We also find from the records that there is no denial of the fact that the advertisement, by virtue of which Dr. Chittaranjan Roy and others were appointed directly on the post of Assistant Professor, did not mention that the appointment was to be made to the post of Assistant Professor and the learned Writ Court has rightly held



that it could not have been mentioned even otherwise as per existing rules and regulations.

23. Contention of the appellant(s) once again that the State Government vide the notification dated 17.12.1990 acquired power to relax conditions where adequate number of tutors were not available for promotion to the post of Assistant Professor is also of no help to the appellant(s) inasmuch as we agree with the views of the learned Writ Court that the power to relax as per the circular dated 17.12.1990 was made effective as per the said circular from 29.01.1990 and it could not be used to validate the appointments made in the year 1988.

24. We are of the considered opinion that the appellant(s) are unable to make out a case for interference with the impugned judgment of the learned Writ Court.

25. These appeals have no merit and are accordingly dismissed.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Dilip, AR

AFR/NAFR	AFR
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