

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11734 of 2019

=====

Dr. Rakesh Kumar, Son of Late Kashi Prasad, Resident of Dighwara,
Police Station- Dighwara, District-Saran.

... .. Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Health Department having his office in Vikas Bhawan, New Secretariat, Bailey Road, Patna.
2. The Additional Secretary, Health Department having his office in Vikas Bhawan, New Secretariat, Bailey Road, Patna.
3. The Joint Secretary, Health Department having his office in Vikas Bhawan, New Secretariat, Bailey Road, Patna.
4. The Under Secretary, Health Department having his office in Vikas Bhawan, New Secretariat, Bailey Road, Patna.
5. Dr. Praveen Kumar Sahu, Associate Professor, Nalanda Medical College and Hospital, Patna.

... .. Respondents

=====

=

Appearance :

For the Petitioner	:	Mr. Rupak Kumar, Advocate
For the State	:	Mr. Mujtabaul Haque (GP12)
		Mr. Vasant Vikas, AC to GP-12

=====

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

2 20-04-2023 Heard learned counsel for the petitioner and learned
counsel for the State.

2. The petitioner in the present case is seeking a writ in the nature of writ of certiorari to quash and cancel the notification no. 311(17) dated 10.05.2019 issued under the signature of the Under Secretary, Health Department, Bihar whereby and wherunder Dr. Praveen Kumar Sahu (Respondent No. 5) was posted as Associate Professor in the Department of Orthopaedics in Nalanda Medical College and Hospital, Patna



(in short 'NMCH') contrary to merit-cum-choice principle. It is said to be against the law laid down by the Hon'ble Full Bench of this Court in the case of **Shushma Pandey Vrs. State of Bihar and Others** reported in **2006 (1) PLJR 737**.

3. Learned counsel for the petitioner submits on instruction that so far as Dr. Praveen Kumar Sahu (Respondent No. 5) is concerned, during pendency of this writ application he was unseated from the post of Associate Professor, NMCH for the reason that he failed to submit his 3 years tutor/ senior residency certificate. In this regard, Annexure 'P5 series' to the writ application has been placed before this Court. It is stated that later on Dr. Praveen Kumar Sahu has been appointed as Assistant Professor (Orthopaedics) in NMCH pursuant to the examination conducted by the Bihar Public Service Commission. His appointment is on regular basis. It is submitted, therefore, that at this stage since Dr. Praveen Kumar Sahu is not holding the post of the Associate Professor (Orthopaedics) in NMCH, there is no quarrel with him and no notice need be issued to him.

4. Learned counsel has invited the attention of this Court towards the application form filled up by the petitioner for his appointment as Associate Professor on contractual basis in



the Government Medical College. It is stated that the petitioner had applied for the post of Associate Professor in the Orthopaedics Department of the Government Medical Colleges. In the form, there is a column seeking choice of College. The candidate has been requested to give preference number of the colleges mentioned in the form. It is stated that this petitioner had given his first choice of Patna Medical College, Patna, second choice of Nalanda Medical College, Patna and likewise he had given his preferences for the other colleges. It is stated that from Annexure 'P3' which is a copy of the Advertisement No. 01/2019 inviting applications for appointment on the vacant posts of Professor/ Associate Professor on contractual basis, it would appear that in the Orthopaedics Department there were altogether eleven vacancies out of which four vacancies were meant for the extremely backward class candidates. This petitioner happened to be an extremely backward class candidate, therefore, he had applied in that category.

5. Learned counsel submits that even as the petitioner was placed at the top of the list of the selected candidates for the post of Associate Professor in Orthopedics, he was not given his choice of Nalanda Medical College. It is stated that the first choice of the petitioner was Patna Medical College but there



was no vacancy available in the Orthopaedics Department.

6. Learned counsel submits that instead of allotting the college as per his second choice, it was Dr. Praveen Kumar Sahu who was placed at serial no. 4 in the list of successful candidates, was given NMCH.

7. Learned counsel further submits that for the present two vacant posts are available in the NMCH in the Orthopaedics Department after retirement of one Dr. Sunil Kumar Mallick in January, 2020.

8. Learned counsel for the State has defended the action of the respondents. It is submitted that the appointment of the petitioner is only contractual in nature and there is no legal provision for giving preferential posting specially in the matter of contractual appointment in the Bihar Medical Education Service Cadre (Recruitment, Appointment and Promotion) Rules, 2008 (hereinafter referred to as the 'Rules of 2008') and Bihar Medical Education Service (Selection, Appointment and Promotion) (Amendment) Rules, 2013 (hereinafter referred to as the 'Rules of 2013'). It is submitted that no option had been invited by the Department to submit preferential option for choice posting and, therefore, the claim of the petitioner for choice posting is not maintainable in law.



Consideration

9. Having heard learned counsel for the petitioner and the State as also on perusal of the records, at the outset, this Court finds that the plea taken on behalf of the State in paragraph '11' of the counter affidavit that no option had been invited by the Department to submit preferential option for choice posting is not a correct statement. The application form (Annexure 'P4') clearly invites choice of college and a candidate has been called upon to give preference. In that view of the matter, the plea of the Department on this count is liable to be rejected.

10. So far as the other grounds stated in the counter affidavit are concerned, learned counsel for the petitioner has rightly invited the attention of this Court towards the judgment of the Hon'ble Full Bench in the case of **Shushma Pandey** (Supra) wherein the Hon'ble Full Bench has decided the issue as to whether there still exists merit-cum-choice principle for posting of teachers in medical colleges and whether such policy of the State continued even after coming into force of the Bihar Health Education Service Cadre and Recruitment Rules, 1997 (hereinafter referred to as the 'Rules of 1997'). The Hon'ble Full Bench has held by majority view that there always existed



policy of merit-cum-choice in matters of posting of teachers in medical colleges and the policy of merit-cum-choice never stood superseded, notwithstanding the framing of the rules.

11. This Court has in the case of **Vijay Kumar and Others Vrs. State of Bihar and Others** reported in **2015 (2) PLJR 625** dealing with the same issue of transfer on the policy of merit-cum-choice, taken note of the fact that the Rules of 1997 do not admit of any policy of merit-cum-choice in the matters of posting and transfer nonetheless the same has been followed consistently and, therefore, the State Government in its wisdom ought to frame rules to make such transfer and posting which is always a contentious issue between the doctors inter se. The Court felt that it was required to make the transfer policy transparent.

12. This Court finds that despite the judgment of the Hon'ble Full Bench which has been repeated again by this Court in the case of **Vijay Kumar** (Supra), if same and one plea is being taken by the respondents, it prima-facie amounts to be contemptuous and in an appropriate case, this Court may take a view to call upon the respondents to take a stand as to how can they come out with such pleas which are in the teeth of the judgment of the Hon'ble Full Bench of this Court. It appears



that the respondents are not at all looking into such decisions of the Court and they are not adhering to the merit-cum-choice policy.

13. In the facts and circumstances of the case as discussed hereinabove, this Court is of the considered opinion that the part of the notification as contained in Memo No. 311 (17) dated 10.05.2019 insofar as it relates to the petitioner is required to be re-examined by the respondent authorities. They are obliged to obey the merit-cum-choice policy.

14. The respondent no. 1 is hereby directed to consider the case of the petitioner for his posting in NMCH as Associate Professor in the Department of Orthopaedics as per his second choice provided in the application form.

15. Let such decision be taken within a period of two months from the date of receipt/production of a copy of this order.

16. This writ application stands allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J)

lata/-

U			
---	--	--	--

