

A

STATE OF ORISSA

v.

DR. SIVASANKER LAL BAJORIA AND ANR.

SEPTEMBER 6, 1994

B

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

Service Law :

C

Appointment—Assistant Professor of Cardiology in a Medical College—Challenged by another person—High Court directed State to consider his claim—Only one post available—High Court's direction unworkable and hence set aside.

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The appellant State created a post of Assistant Professor in Cardiology in S.C.B Medical College, Cuttack and appointed one 'U' to the post on transfer. Respondent challenged the validity of the appointment by filing a Writ Petition before the High Court. However, the petition was dismissed since the Government withdrew the said appointment. Subsequently, one 'S' was appointed to the said post and the respondent challenged the same before the High Court, which directed the appellant to consider the claim of the respondent.

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Allowing the appeal, this Court

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HELD : 1. In the absence of a declaration that the appointment of 'S' as on February 3, 1983 was illegal and when the High Court had specifically declined to go into that question, there is no vacant post existing for consideration of the claim of the respondent as per the directions given by the High Court. This situation makes the order of the High Court unworkable. [191-D]

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2. This Court's direction to state whether there is more than one post of Asstt. Professor of Cardiology available for consideration of the claim of the respondent has failed to evoke the needed response. The affidavits filed make it to evoke the needed response. The affidavits filed make it clear that the existing post of Assistant Professor of Cardiology for which the respondent's claim for appointment is to be considered is the one already occupied by 'S'. The fact that the High Court has specifically declined to go

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into the validity of the appointment of 'S', who is still holding that post, makes unavailable a vacant post for which the claim of the respondent as per the directions of the High Court could be considered. It cannot be said that in view of the declaration given by the High Court that the respondent was eligible for consideration for the post in the year 1979 when 'S' was not eligible to be considered, his subsequent appointment should not stand in the way of consideration of the respondent's case for appointment to a vacancy which existed in the year 1979. [190-F-G-H; 191-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4456 of 1986.

From the Judgment and Order dated 28.2.86 of the Orissa High Court in O.J.C. No. 428 of 1983.

Rajinder Sachher, A.K. Panda, N.K. Sharma and Sanjeev Das for the Appellant.

Soli J. Sorabjee, P.N. Misra and A.C. Pradhan for the Respondent in No. 1.

Janaranjan Das for the Respondent No. 2.

Gagrat & Co. (N.P.) and K.K. Gupta (NP) for the Respondent in No. 3.

The following Order of the Court was delivered :

This appeal by special leave arises from the Judgment of the Division Bench of the High Court of Orissa at Cuttack in OJC No. 428 of 1983, dated February 28, 1986.

The State Government in G.S. No. 15882-H, dated April 19, 1979 created a post of Asstt. Professor in Cardiology in S.C.B. Medial College Hospital at Cuttack. Dr. Urmila Kumari Swain, who was an Assistant Professor in Paediatrics, was appointed by tranfer as Assistant Professor of Cardiology by Order dated November 9, 1979. Dr. S.L. Bajoria challenged the validity of the said appointment by a separate Writ Petition filed in that regard. However, the Government since withdrew the said appointment itself, the Writ Petition came to be dismissed. Subsequently, when Dr. Mruthyunjaya Satpathy was appointed as Assistant Professor, Cardiol-

A ogy on February 3, 1983, that appointment also came to be challenged by Dr. Bajoria in the Writ Petition out of which the present appeal has arisen. Dr. Bajoria impleaded therein Dr. Satpathy as respondent No. 2 and the State as respondent No.1. The relief sought in that Writ Petition was for quashing the appointment of Dr. Mruthyunjaya Satpathy and for issuing a direction to the State Government to consider him as eligible for appointment in that post from the year 1979. The High Court in the Judgment held that under 1970 Regulations Dr. Bajoria was eligible to be considered for promotion in the post of Asst. Professor in which Dr. U.K. Swain had been appointed and non-consideration of his case for appointment was unjustified. It also held that in the year 1979 Dr. M. Satpathy was not eligible for appointment as Asstt. Professor in Cardiology though he was eligible for such appointment in the year 1983. It also held that it was unnecessary to go into the appointment of Dr. Satpathy as an Asstt. Professor. Accordingly, direction was given as under:

D "In the result, we would direct opposite party No. 1 the State to re-consider the question of promotion of the petitioner to the post of Assistant Professor of Cardiology with retrospective effect from 9.11,1979 and to allow all service benefits to him in case he is found fit for promotion to such post, expeditiously."

E This order came to be challenged in this appeal by the State.

Though arguments are sought to be addressed to support the order under appeal, no need arises to consider them, for the simple reason that this Court's direction to state whether there is more than one post of Asstt. Professor of Cardiology available for consideration of the claim of the appellant has failed to evoke the needed response. The affidavits filed make it clear that the existing post of Assistant Professor of Cardiology for which the appellant's claim for appointment is to be considered is the one already occupied by Dr. Satpathy. The fact that the High Court has specifically declined to go into the validity of the appointment of Dr. Satpathy, who is still holding that post, makes unavailable a vacant post for which the claim of Dr. Bajoria as per the directions of the High Court could be considered. However, it is sought to be contended by Shri Soli J. Sorabjee, the learned senior counsel for Dr. Bajoria that in view of the declaration given by the High Court that Dr. Bajoria was eligible for consideration for the post in the year 1979 when Dr. U.K. Swain was

appointed and when Dr. Satpathy was not eligible to be considered, his subsequent appointment should not stand in the way of consideration of Dr. Bajoria's case for appointment to a vacancy which existed in the year 1979. We find no force in the contention.

It is rightly contended by the learned counsel for Dr. Satpathy that had his appointment been quashed, it would have been open to him to contend that on the date when he was appointed, he had the necessary qualifications while as on that date Dr. Bajoria was not having such qualification and therefore, his appointment would not be illegal and remained unassailable. When the appointment of Dr. Satpathy was not quashed, he could have no grievance and that, therefore, is no vacancy existing in the post of Assistant Professor, Cardiology in the said college for which appellant's claim for appointment could be considered as directed by the High Court.

Hence, in the absence of a declaration that the appointment of Dr. Satpathy as on February 3, 1983 was illegal and when the High Court has specially declined to go into that question, there is no vacant post existing for consideration of the claim of Dr. Bajoria as per the directions given by the High Court. This situation makes the order of the High Court unworkable. Accordingly, no need arises to consider the argument made in support of the order under appeal.

The appeal is accordingly allowed. The direction given in the order of the High Court to consider the claim of Respondent No.1 (Dr. Bajoria) is set aside. No costs.

G.N.

Appeal allowed.