

O F I N D I A
RECORD OF PROCEEDINGS

C.A. No. 7444-7445/1997

Satyajyoti Dutta & Anr. ... Appellant (s)

VERSUS

State of Assam & Ors. ... Respondent (s)

Date : 08/11/2001 These matters were called on for hearing today.

CORAM:

HON'BLE MR. JUSTICE G.B. PATTANAİK
HON'BLE MR. JUSTICE DORAISWAMY RAJU

For the appellant: Mr. P.K. Goswami, Sr. Adv.
Mr. Rajiv Mehta, Adv.
Mr. R. Rahim, Adv.

For respondent(s): Ms. Sumita Hazarika, Adv.
Mr. V. Hazarika, Adv.
for Mr. S.M. Jadhav, Adv.

Ms. Asha G. Nair, Adv.
for M/s Corporate Law Group, Adv.

UPON hearing counsel the Court made the following
O R D E R

L.....L.....I.....T.....T.....T.....T.....T.....T.....T.....J
.SP2

The appeals are dismissed.

.SP1

(Ganga Thakur) (Suneet Bala Sharma)
P.S.to Registrar Court Master

Signed order is placed on the file.

.PA
.PL55

IN THE SUPREME COURT OF INDIA@@
AAAAAAA AA
CIVIL APPELLATE JURISDICTION@@
AA

CIVIL APPEAL NOS. 7444-45 OF 1997@@
AAAAAAAAAAAAAAAAAAAAAAAAEE

Satyajyoti Dutta & Anr. Appellants

State of Assam & Ors.

..... Respondents

O R D E R@@
CCCCCCCCCC

L.....L.....I.....T.....T.....T.....T.....T.....T.....J
.SP2

These appeals are directed against the judgment of the Gauhati High Court in the matter of determination of inter se seniority in the rank of Assistant Professor in the Medical College. The recruitment to the post of Assistant Professor in the Medical College is not governed by any statutory rule. The feeder cadre for promotion is the post of Registrar. In accordance with the regulation of Indian Medical Council, a persons can be appointed as Assistant Professor provided he/she has 3 years' experience and out of those 3 years, one year must be after acquiring the qualification of the post graduate degree. In the case in hand, we are concerned with the Department of E.N.T. The respondent No.6 was initially a Registrar in the Department of Anatomy but later on was

.PA

:2:

transferred to the Department of E.N.T. which appears to be a practice followed in the State of Assam. The said respondent No.6 acquired the post graduate qualification on 26.1.1989. On 15.2.1989 an advertisement had been issued for filling of the post of Assistant Professor E.N.T by direct recruitment. Appellant No.2 applied for the said post and on being selected, was promoted to the post of Assistant Professor with effect from 27.11.1990. Appellant no.1 was also appointed by way of promotion to the post of Assistant Professor in the E.N.T. Department with effect from 27.11.1990. Respondent No.6 had been initially appointed as Assistant Professor on 4.2.1993. On representation being made by her to appropriate Selection Committee, the Government came to the conclusion that she was entitled to be considered for being appointed as an Assistant Professor with effect from 26.1.1990, the date on which she must be held to have acquired one year experience subsequent to obtaining the post-graduate degree. She was also adjudged suitable for being appointed as Assistant Professor with effect from that date and ultimately by order dated 22.9.1993, she was appointed by the State Government as an Assistant Professor with effect from 26.1.1990. Since the post in question was a gazetted post, no appointment could be

.PA

:3:

made without consultation with the Public Service Commission in accordance with Article 32 of the Constitution. Such appointment of the respondent No.6 with retrospective effect, that is, 26.1.1990 was also approved by the Assam Public Service Commission. Thus Public Service Commission itself adjudged her suitable for being promoted to the post of Assistant Professor with effect from 26.1.1990. Necessarily, therefore, taking in to account the date of appointment as Assistant Professor for reckoning the seniority, the said respondent No.6 would be held senior to the two

appellants.

The two appellants, however, filed writ petition before the Gauhati High Court assailing the orders of the Government inter alia on the ground that the transfer of respondent No.6 from the Department of Anatomy to the Department of E.N.T. could not have conferred her seniority in the cadre of Registrar by taking into account of the past service rendered in the Department of Anatomy. It was also the contention that even assuming past services of the respondent No.6 could have been taken into account for the determination inter se seniority in the rank of Registrar, she could not have been retrospectively promoted to the post of Assistant

.PA

:4:

Professor overlooking the claim of these two appellants and therefore the Order dated 26.2.1993, granting retrospective promotion to the respondent No.6 as an Assistant Professor must be held to be illegal. Consequently, she will be held to be junior to these two appellants who were promoted and directly recruited on 27.11.1990. The learned Single Judge as well as the Division Bench appears to have decided the question of legality of transfer of the employee concerned from the Department of Anatomy to the Department of E.N.T. and the consequences thereof and concurrently came to the conclusion that there is no illegality in such transfer of the employee from one department to the other and in the event of such a transfer the concerned employee would be entitled to reckon his past service in the former department for the purposes of seniority in the transferred department. The writ petition as well as the writ appeal have been dismissed. The present two appeals have been preferred by grant of special leave. Mr. Goswami, learned senior counsel appearing for the appellants contended with vehemence that though the legality of retrospective promotion of the respondent No.6 with effect from 26.1.1990 had been specifically

.PA

:5:

raised and urged before the High Court but the High Court does not appear to have deal with the same and as such the Order of the learned Single Judge and that of the Division Bench must be held to be erroneous. The learned counsel further urged that the appellant No.2 having been applied for the post of Assistant Professor pursuant to the advertisement issued on 15.2.1989 qua the date on which respondent No.6 was not found eligible to make an application inasmuch as she did not have one year experience subsequent to the acquisition of the qualification of the post-graduate degree, she could not have been given retrospective promotion and could not have been granted seniority in the cadre of Assistant Professor. Mr. Goswami also lastly urged that if respondent No.6 was considered and promoted with effect from the date she acquired one year experience subsequent to acquiring the post-graduate degree, the same principle should have been applied to the case of two appellants who had admittedly acquired the post-graduate degree much earlier and therefore nonconsideration of their case for being promoted with effect from any retrospective date vitiates the so-called appointment of respondent No.6 and that must be struck down.

.PA

:6:

It is no doubt true from the impugned judgment, we find that the question of legality of appointment with retrospective effect in favour of respondent No.6 has not been considered by the Single Judge or by the Division Bench. It would therefore reasonable for us to held that this contention had not been raised in the court below. But having regard to the fact that though the appellants have urged the ground in the appeal memo, we are persuaded to permit the learned counsel to urge this question in this regard also and consider ourselves the legality of an order of promotion with retrospective effect in favour of respondent No.6. Once it is held that the said promotion of respondent No.6 with retrospective effect from 26.1.1990 is legal and permissible then necessarily her seniority in the cadre of Assistant Professor has to be reckoned with effect from the date of such appointment which is earlier than the date of appointment in favour of appellants 1 and 2, by promotion of appellant No.1 and by direct recruitment of appellant No.2. Admittedly there is no statutory rule framed by the Governor under proviso under Article 309 of the Constitution governing the conditions of the services of these employees of the Medical College. The

.PA

:7:

appointment therefore is being made through the prevalent practice under the basis of administrative order which appears to be governing the field.

Medical Council of India has prescribed the minimum qualification for being appointed as an Assistant Professor. When an appointment of a particular person is assailed to the post of Assistant Professor what is required to be adjudicated upon is whether that person possesses the qualification required and whether the selection of such person is vitiated on account of any infirmity in the matter of selection or that the if the post is gazetted post whether the Public Service Commission has been duly consulted. In the case in hand if we examine the appointment of respondent no.6 with retrospective effect from 26.1.1990, we find that on that particular date the said respondent no.6 did possesses the qualification for being considered for appointment as Assistant Professor, provided she is adjudged suitable for the post in question. Mr. Goswami also does not dispute her eligibility for being considered for the post on 26.1.1990. So far as the suitability is concerned, the Selection Committee which was constituted by the Government adjudged her suitable for promotion with

.PA

:8:

effect form 26.1.1990. It is true that on 2.9.1993 the date on which the appointment was made, the Public Services Commission had not been consulted and in fact by then she had already been appointed after consultation with the Public Services Commission on 4.2.1993. But her suitability to be promoted with effect from 26.1.1990 as reflected in the recommendation of the Selection Committee has also been approved by the Public Service Commission and the Public Services Commission later on approved the Government order and the suitability, adjudged by the Selection Committee, appointing respondent No.6 as Assistant Professor with retrospective effect from 26.1.1990. In the absence of any statutory

rule, we see no infirmity with the subsequent ratification of Public Service Commission to an appointment made by the Selection Committee and further it is well known that promotions can be given also with effect from a date retrospectively. In this view of the matter we see no Constitutional or legal infirmity with the order of promotion dated 22.9.1993 giving retrospective promotion to respondent No.6 with effect from 26.1.1990. That being the position the said respondent no.6 will have to be considered senior to the

.PA

:9:

two appellants who were promoted to the post of Assistant Professor and appointed to the post of Assistant Professor on 27.11.90. We are therefore unable to accept the submission of Mr. Goswami that there has been any infringement of rights of the two appellants in the matter of determination of their inter se seniority vis a vis respondent no.6 in the cadre of Assistant Professor, nor there has been any illegality in the order of the Government dated 22.9.93 giving retrospective promotion to respondent No.6 with effect from 26.1.1990. So far as the other question is concerned, namely, whether the parent service including the services rendered in the Department of Anatomy can be reckoned for the purposes of seniority in the cadre of Registrar. We see no justification to interfere with the conclusion arrived by the Single Judge which has been affirmed by the Division Bench.

In the aforesaid premises we see no merit in these appeal which are accordingly dismissed.

.SP1

.....J.
(G.B. Pattanaik)

New Delhi,
November 8, 2001.

.....J.
(Doraiswamy Raju)