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DR. (MRS.) SANDHYA JAIN
v.
DR. SUBHASH GARG AND ANR.

OCTOBER 15, 1999

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[G.B. PATTANAİK, M. SRINIVASAN AND
N. SANTOSH HEGDE, JJ.]

Service Law :

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M.P. Medical Education (Gazetted) Service Recruitment Rules, 1987: Schedules I and IV—Promotion—From Lecturer to Reader—Dental College—Sch. I indicated 5 sanctioned posts of Reader—Sch. IV indicated Lecturers in four disciplines could be promoted as Readers but no indication regarding fifth post—But State Government decided to fill up fifth post by a Lecturer of any discipline—In the past also such a practice followed—However, despite directions from Supreme Court no record pertaining to the said Government decision produced—Affidavit said to have been filed in this regard not traced out in court record—Held: Inference drawn that fifth post of Reader being filled up in the past by a Lecturer of any discipline—Appointment of two Readers of same discipline not prohibited under Dental Council Regulations—

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Hence, Lecturers of any discipline entitled to be promoted to the fifth post of Reader on basis of seniority—Constitution of India, 1950, Arts. 16 and 309—Dental Council Regulations.

Administrative Law:

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Promotion—Statutory Rules—No provision regarding—Executive decision—Taking of—Held: Can be taken if it is not contrary to statutory rules.

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The respondent was a Lecturer in a College of Dentistry. Schedule I to the M.P. Medical Education (Gazetted) Service Recruitment Rules, 1987, framed under proviso to Article 309 of the Constitution, provided for five posts of Readers. Schedule IV to the Rules indicated as to how promotion to the post of Reader would be given in four different disciplines but there was no indication as regards the fifth post of Reader. Although there were vacancies

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in the posts of Reader, the respondent was not considered for promotion to the post of Reader by the Departmental Promotion Committee (DPC). However, one Lecturer was promoted as Reader in the same discipline as that of the respondent. Being aggrieved the respondent filed an application before the State Administrative Tribunal, which directed the State Government to consider the case of the respondent for promotion to the post of Reader along with others who were eligible. Hence this appeal.

On behalf of the appellant it was contended that under the Dental Council Regulations it was not permissible to have two Readers in the same discipline at the same time; that the fifth vacant post of Reader was already occupied by another Lecturer of the same discipline and, therefore, the respondent could not be promoted as Reader.

On behalf of the respondent it was contended that during the pendency of this appeal the State Government had conveyed its decision to the DPC that the fifth post of Reader could be given by promotion to a Lecturer in any discipline; that in the past also the same practice was followed; and that non-consideration of respondent's case infringed upon his rights under Article 16 of the Constitution.

Dismissing the appeal, the Court

HELD : 1.1. It is clear from Schedule IV of the M.P. Medical Education (Gazetted) Service Recruitment Rules, 1987 that promotion to the post of Reader has to be made from the post of Lecturer. Though there are five sanctioned posts of Reader under Schedule I but under Schedule IV only four posts of Reader could be filled up by the holders of the corresponding posts of Lecturer. It has not been indicated in Schedule IV as to how the fifth post of Reader, which is provided for in Schedule I, would be filled up. In the absence of any provision in the Recruitment Rules framed under the proviso to Article 309 of the Constitution, indicating as to how the fifth post of Reader would be filled up, the decision of the Government in this regard is significant inasmuch as the Government can issue executive instructions for the purpose, which are not contrary to the Statutory Rules. [19-B, C]

1.2. In the past also the fifth post of Reader was filled up by giving promotion to a Lecturer from any discipline based on the Government decision in this regard. Despite directions from this Court documents relating to the said decision were not produced. An affidavit said to have been filed on

A behalf of the Government is also not traced out on record. It must, therefore, be held that the fifth post of Reader was being filled up by a Lecturer belonging to any discipline, on being selected following the criteria of merit with due regard to seniority. Necessarily, therefore, non-consideration of the case of
 B his discipline tantamounts to infringement of the constitutional right of consideration under Article 16. The Tribunal, therefore, was justified in issuing the impugned directions. [19-E, F, G]

2. There is no provision in the Dental Council Regulations prohibiting appointment of two Readers in the same discipline. The respondent is,
 C therefore, entitled to be promoted to the post of Reader on the basis of his merit and seniority. [20-E]

Dr. Murali Babu, AIR (1988) SC 1048 and Dr. Preeti Srivastava v. State of M.P., (1999) 4 SCALE 579, held inapplicable.

D CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 12906-12907 of 1996 Etc.

From the Judgment and Order dated 5.9.95 and 23.11.95 of the Madhya Pradesh Administrative Tribunal, Indore in O.A. No. 213/95 and M.A. No. 174 of 1995.
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Harish N. Salve, Sushil Kumar Jain and A.P. Dhamija for the Appellants.

Anoop G. Choudhary, Ashok K. Singh and Satish K. Agnihotri for the State of M.P.

F S.K. Dholakia, S.K. Gambir, Anil K. Sharma and Awanish Sinha for the Respondent.

The Judgment of the Court was delivered by

G **PATTANAIK, J.** These appeals are directed against the Judgment dated 5.9.95 of the Madhya Pradesh Administrative Tribunal, Indore Bench in O.A. No. 213 of 1995. The appellant in each of these appeals was respondent in the original application before the Tribunal. By the impugned order the Tribunal has directed to consider the case of the applicant Dr. Subhash Garg (Respondent No. 1 in these appeals) for promotion to the post of Reader by
 H the Departmental Promotion Committee and if found eligible, to give him his

due seniority.

Dr. Subhash Garg is a lecturer in the College of Dentistry at Indore. He joined as a lecturer in Periodontia on 21.6.82. On 16.9.88, three of the Readers having been promoted as Professors on regular basis, three posts of Reader fell vacant. According to Dr. Garg, he was eligible for being considered but he was not considered notwithstanding the fact that under the Recruitment Rules, the authorities were bound to consider his case. The Principal of the college recommended the case of Dr. Garg for being considered on 6.10.89 but unfortunately, no Departmental Promotion Committee meeting was held. The said Principal made a fresh request on 24.10.91 and again on 3.5.92 and finally the Departmental Promotion Committee sat on 25.9.92 but even in that meeting, case of Dr. Garg was not considered and by order dated 2.12.92, Dr. Saxena and Dr. Dhodapkar were promoted as Readers in Oral Pathology and Periodontia respectively. On 2.12.92, one Dr. Patni was promoted as Professor of Prosthetics. Being aggrieved by non-consideration of his case, Dr. Garg approached the Administrative Tribunal, which was registered as O.A. No. 18 of 1993. That application was disposed of by the Tribunal by order dated 28.2.94 with the directions that Dr. Garg should be considered for promotion to the post of Reader along with others who are eligible and the Government shall have the discretion to determine the guidelines for selection of the candidates, keeping in view the specific teaching requirement in the College of Dentistry. This order of the Tribunal was assailed by Dr. Garg by filing Special Leave Petition No. 15892 of 1994 in this Court, which however was dismissed on 26.9.94. The Departmental Promotion Committee again sat in May, 1994 and considered and selected Dr. Desh Raj Jain, appelland in one of the appeals as Reader in Prosthetics and the case of Dr. Garg was not considered. On 29.11.94, Dr. Garg was informed that the matter of holding a Departmental Promotion Committee to consider his case is being considered by the Government. Dr. Garg filed a representation on 16.1.95. As the said representation was not disposed of, he approached the Administrative Tribunal by filing an application under Section 9 of the Administrative Tribunal Act, 1985, which was registered as O.A. No. 213 of 1995. The said application having been disposed of by the impugned order with the directions as already stated, the present appeals have been preferred. The State as well as two other private respondents before the Tribunal have preferred these appeals.

The case of the respondent Dr. Garg, before the Tribunal was that the recruitment and other conditions of service of the doctors in the College of Dentistry are governed by Madhya Pradesh Medical Education (Gazetted)

- A** Service Recruitment Rules, 1987 (hereinafter referred to as “the Recruitment Rules”). Under the Rules as per Schedule I, the college has one post of Principal, four posts of Professor, five posts of Reader and six posts of Lecturer. Though, there are five posts of Readers and Column 2 of Schedule IV indicates how promotion would be given to the post of Reader in four different subjects, there is no indication how the fifth post has to be manned.
- B** According to Dr. Garg, the said fifth post was usually being filled up by the senior-most lecturer available and, therefore, though he was eligible for being considered on the basis of his seniority as lecturer, he was not considered by the Departmental Promotion Committee. The further stand of Dr. Garg was that under the Rules, the Departmental Promotion Committee was required to meet at intervals ordinarily not exceeding one year but in the present case,
- C** there was no meeting of the Departmental Promotion Committee from 1988 till 1992 notwithstanding the availability of a vacancy in the post of Reader and this was purposely done only with the object of accommodating Dr. (Mrs.) Sandhya Jain and Dr. Desh Raj Jain who had not been eligible for being considered for the post of Reader till 1992 and in the process, the Constitutional
- D** Right of Dr. Garg for being considered was infringed. Dr. Garg, further asserted that notwithstanding the directions of the Tribunal in O.A. No. 18/93, the Departmental Promotion Committee did not consider his case and, therefore, appropriate directions should be given.
- E** Before the Tribunal, the State Government took the stand that the promotion to the post of Reader could be made only on the same discipline in which a person is continuing as lecturer and, therefore, since Dr. Garg was a lecturer in Periodontia, his case was not considered for promotion. The Government also took the stand that in view of the Regulations of the Dental Council of India, it was not possible to have two Readers in the discipline
- F** of Periodontia and as such the claim of Dr. Garg could not have been entertained by the Competent Authority. Dr. (Mrs.) Sandhya Jain as well as Dr. Desh Raj Jain also appeared before the Tribunal and took almost the same stand as of the State Government. The Tribunal however on consideration of the rival stand of the parties and on an analysis of the provisions of the
- G** Recruitment Rules came to the conclusion that the fifth post of Reader can be occupied by any lecturer of any discipline and there is no bar either under the Dental Council Regulations or under the Recruitment Rules to have two Readers in a particular discipline and as such non-consideration of the case of Dr. Garg for promotion to the post of Reader, even though a post was available, infringes his right under Article 16 of the Constitution of India. The
- H** Tribunal also relying upon the decision of this Court in the case of Murli

Babu Rao, further came to hold that the recommendations of the Dental Council are not binding. With these conclusions, the application filed by Dr. Garg was allowed with the directions as already stated. A

Mr. Harish N. Salve, learned Senior Counsel, appearing for both Dr. (Mrs.) Sandhya Jain and Dr. Desh Raj Jain & Mr. Anoop Choudhary, learned Senior Counsel, appearing for the State of Madhya Pradesh, assailed the decision of the Tribunal *inter alia* on the ground that the ratio in Murli Babu Rao's case is no longer a good law in view of the Constitution Bench decision of this Court in the case of *Dr. Preeti Srivastava and Anr. v. The State of Madhya Pradesh & Ors.*, (1999) 4 SCALE 579. It was further contended that even under the Recruitment Rules, it is not permissible to have two Readers in a particular discipline and, therefore, question of considering the case of Dr. Garg for the vacant post of Reader did not arise as Dr. Dhodapkar, senior to Dr. Garg in the discipline of Periodontia had been promoted as Reader and that promotion had not been assailed by Dr. Garg. Relying upon the requirements as indicated in the Regulations of Dental Council, Mr. Salve, further urged that the fifth vacant post of Reader can be occupied by other block and not by a lecturer in Periodontia as another lecturer in the said discipline had already been promoted as Reader. The conclusion of the Tribunal that the fifth post of Reader can be occupied by a lecturer of any discipline on the basis of seniority was assailed both by Mr. Choudhary, the learned Senior Counsel, appearing for the State of M.P. and Mr. Salve, appearing for the two other appellants and it was contended that it had never happened in the past. In this view of the matter, it was contended that the impugned direction cannot be sustained in law. B C D E

Mr. Dholakia, the learned Senior Counsel, appearing for Dr. Garg, on the other hand submitted that even during the pendency of this appeal when the Departmental Promotion Committee met on 14.2.97, a Government decision to the effect that the fifth post of Reader could be given by promotion to lecturer of any discipline was conveyed and in view of the aforesaid decision it is futile for the State of Madhya Pradesh to contend that the position is otherwise. According to Mr. Dholakia, a scrutiny of the provisions of the Recruitment Rules unequivocally indicate that there is nothing in the Recruitment Rules as to how the fifth post of Reader could be filled up and by promotion from which particular discipline. In the absence of any such provision in the Rules, the Government decision would supplement and, therefore, the Tribunal was fully justified in issuing the impugned directions. F G

In view of the rival stand taken by the parties, the only question that H

A arises for consideration is whether under the Rules in force governing the conditions of service, the fifth post of Reader could be filled up by a lecturer of any discipline and if answer is in the affirmative, then undoubtedly, Dr. Garg had a right to be considered when the vacancy was available and such non-consideration infringes his Constitutional Right under Article 16. The answer to the aforesaid question however would depend upon an analysis of the different provisions of the Recruitment Rules: Rule 5 of the Rules provides for the classification of the service, the number of posts included in the service and the scale of pay attached thereto and the same should be in accordance with the provisions contained in Schedule I. Schedule I provides that for the College of Dentistry, there should be one post of Principal, four posts of Professor, five posts of Reader and six posts of lecturer in Madhya Pradesh Medical Service (Class I). We are not concerned with other posts indicated in the Schedule. Rule 6 provides for methods of Recruitment and Rule 6(1)(b) provides recruitment by promotion of the member of the service. Rule 6 read with Schedule II indicates that all the posts of lecturers would be filled up by direct recruitment whereas all other posts of Reader, Professor and Principal could be filled up by promotion under Rule 6(1)(b). Rule 13 provides appointment by promotion and the procedure for such appointment has been indicated therein. In terms of the said Rules, the Departmental Promotion Committee is required to meet at intervals ordinarily not exceeding one year to consider the case of promotion in respect of the available vacancies.

E The conditions of eligibility for promotion have been provided for in Rule 14 and as per sub-rule (1) of Rule 14, a person on the first day of January of the year must have completed such number of years of service as specified in Column II of Schedule IV and he must come within the zone of consideration in accordance with sub-rule (2) of Rule 14. Under Schedule IV, it has been indicated that for being promoted as a Reader, the person concerned should have the experience as a lecturer as per the norms of the Dental Council of India. Rule 15 provides for preparation of a list of suitable officers and the selection for inclusion in such list is required to be made on merit and suitability in all respect with due regard to seniority. Under sub-rule (3) of Rule 15, the names of the officers included in the list has to be arranged in order of seniority in the specified posts as in Column II of Schedule IV at the time of preparation of such select list. The proviso however empowers the Committee to assign a junior officer, a higher place in the list if he is found to be of an exceptional merit and suitability. The select list approved by the Government under Rule 17 is the list for promotion of the members of the service from the posts shown in Column 2 of Schedule IV to the posts shown in Column 3 of Schedule IV. Necessarily, therefore, looking at Schedule IV, it

is crystal clear that the promotion to the post of Reader has to be made from the post of lecturer. A bare look at Schedule IV indicates that a lecturer in Prosthetics can be promoted as Reader in Prosthetics; a lecturer in Periodontia can be promoted as Reader in Periodontia; a lecturer in Oral Diagnosis can be promoted as Reader in Oral Diagnosis; a lecturer in Pedodontia can be promoted as Reader in Pedodontia. Thus though under Schedule I, the college has the sanctioned strength of six posts of lecturer and five posts of Reader but under Schedule IV, only four posts of Reader could be filled up by the holders of the corresponding posts of lecturer. It has not been indicated in Schedule IV as to how the fifth post of Reader which is provided for in Schedule I would be filled up. In the absence of any provision in the Recruitment Rules framed under the proviso to Article 309 of the Constitution, indicating as to how the fifth post of Reader would be filled up, the decision of the Government in this regard assumes significance inasmuch as the Government can issue executive instructions for the purpose, which is not contrary to the Statutory Rules. It is in this context the assertion of Dr. Garg that in the past the Government has been following the practice of filling up the fifth post from amongst the lecturers of any discipline, assumes much significance. It may be noticed that even in the minutes of the D.P.C. held in the office of the Public Service Commission on 14.2.97, a reference has been made to a Government decision indicating that the Government has taken the decision to promote lecturer of any subject on the post under question and this was placed before us in course of hearing on 13.3.98. We had accordingly called upon the counsel appearing for the State to produce the relevant decision of the State Government but unfortunately the same has not been produced and even though in course of hearing it was contended by Mr. Choudhary, appearing for the State that an affidavit has been filed but no such affidavit could be traced out on record. In this view of the matter, we are inclined to hold that the fifth post of Reader was being filled up by lecturer belonging to any discipline, on being selected following the criteria of merit with due regard to seniority. Necessarily, therefore, non-consideration of the case of Dr. Garg solely on the ground that there was no available vacancy in the discipline of Periodontia tantamounts to infringement of the constitutional right of consideration under Article 16. The Tribunal, therefore, was justified in issuing the impugned directions while disposing of the original application filed by Dr. Garg.

The next question which comes up for consideration is whether the Regulations framed by the Dental Council contains any prohibition for appointing two Readers from one discipline which would stand on the way

- A of the Tribunal to issue the directions for consideration of the case of Dr. Garg. According to Mr. Salve as well as Mr. Choudhary, the Tribunal relied upon the decision of this Court in the case of *Dr. Murli Babu*, AIR (1988) SC 1048. In the aforesaid case this Court had observed that the recommendations made by the Medical Council of India or the Regulations framed by it are only recommendatory and not mandatory and right to be considered for promotion is a condition of service and it can only be regulated
- B by a rule framed under the proviso to Article 309 and the recommendation of Medical Council could not over-ride a rule framed under Article 309. In the Constitution Bench decision on which the counsels appearing for the appellants strongly relied, the question for consideration was whether it is possible for the State Government to prescribe different admission criteria, in the sense of prescribing different minimum qualifying marks for special category candidates, seeking admission under the reserved category. It is in that context the Court had observed that by permitting the State Government to lay down the minimum qualifying marks for the post-graduate classes would entail sacrificing the merit altogether and, therefore, the same is not permissible.
- C We fail to understand how the aforesaid decision will be of any assistance in deciding the question whether a direction can be issued to consider the case of Dr. Garg in respect of the fifth vacancy which could be filled up by a lecturer of any discipline. That apart, no provisions of the Dental Council's Regulation was placed before us to indicate that there is an embargo for appointing two Readers from the same discipline in a particular Dental College. If there is no provision in the Dental Council Regulations, prohibiting appointment of two Readers in a particular discipline in a Dental College and the Recruitment Rules framed under Article 309 of the Constitution being also silent inasmuch as it does not indicate as to how the fifth post of Reader will be filled up, then the same can be filled up by administrative decision of the
- D Government and such a decision cannot be held to be repugnant to the provisions of the Dental Council Regulations. As we have stated earlier, there is no repugnancy and that being the position and in view of our conclusion that the fifth post of Reader could be filled up by a lecturer of any discipline and in fact was being filled up by the State Government, we see no illegality in the impugned direction of the Tribunal, calling upon the State to consider the case of Dr. Garg when a vacancy was available and he had become eligible for being considered. It has been brought to our notice that said Dr. Garg has in the meantime been promoted as Reader but still his right to be considered at an earlier point of time when he was not considered erroneously, cannot be said to have been wiped of by the subsequent promotion. In the aforesaid
- E premises, we are of the considered opinion that the Tribunal rightly issued
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the impugned directions. We see no error in the same, so as to be interfered with by this Court. A

All these appeals accordingly fail and are dismissed but in the circumstances there will be no order as to costs.

V.S.S.

Appeals dismissed.