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KAVI RAJ & OTHERS

v.

STATE OF J&K & ORS.

(Civil Appeal No. 162 of 2013)

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JANUARY 9, 2013

[D.K. JAIN AND JAGDISH SINGH KHEHAR, JJ.]

Service Law – Posting (or transfer) beyond the cadre (or parent department) – Appellants selected and appointed as Assistant Surgeons – But posted against vacant posts of Senior/Junior House Officers, at the Government Medical College pursuant to a Government order issued by the Department of Health and Medical Education pertaining to posting of Assistant Surgeons – Subsequent order by Principal of the Medical College reverting the appellants to their parent Department, the Directorate of Health Service – Assailed by appellants – Single Judge of High Court set aside the order on ground that the appointment of appellants at the College was not by way of deputation and accordingly there was no question of their reversion to their parent department – Decision overturned by Division Bench of High Court – On appeal, held: Though the posts of Assistant Surgeons were created by the Health and Medical Education Department of the State Government, the said department comprised of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education – Evidently, on facts, the appellants were substantively appointed to the Directorate of Health Services, and not in the Directorate of Medical Education – Their posting at the Government Medical College was most certainly beyond their parent cadre, and therefore, by way of deputation – Mere fact that consent of the appellants was not sought before their posting at the Government Medical College did not have any determinative effect – Reversion/repatriation of the appellants

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to their parent department, i.e., the Directorate of Health Services, accordingly affirmed. A

Service Law – Posting (or transfer) beyond the cadre (or parent department) – Consent of employee – Relevance and determination of – Held: Broadly, an employee can only be posted (or transferred) to a post against which he is selected – An employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible – But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought and can be implied – In the instant case, the appellants were issued posting orders by the Principal, Government Medical College – They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, despite their selection and appointment as Assistant Surgeons – No doubt about their willingness/readiness to serve with the borrowing Directorate – Consent of the appellants was tacit and unquestionable. B C D

Constitution of India, 1950 – Article 141 – Determination made by Supreme Court on merits – Proposition upheld as legal extended to other similarly situated parties since they were also heard by the Supreme Court. E

The appellants were selected and appointed as Assistant Surgeons. A Government Order pertaining to the posting of Assistant Surgeons was issued by the Department of Health and Medical Education on 17.7.1997. In consonance with the Government Order dated 17.7.1997, the Principal, Government Medical College, Jammu, by an Office Order dated 30.12.1997, posted all the appellants against the vacant posts of Senior/Junior House Officers, at the Government Medical College, Jammu (and at hospitals associated with the said college). However, by order dated 7.1.1998, the Principal, Government Medical College, Jammu, reverted the appellants to their parent Department, namely, the F G H

A Directorate of Health Service, Jammu. The order dated
7.1.1978 was assailed by the appellants before the High
Court primarily on the ground that the Secretary,
Department of Health and Medical Education being the
appointing authority of the appellants; the Principal
B Medical College, Jammu, had no jurisdiction to issue the
order dated 7.1.1998.

A Single Judge of the High Court set aside the order
dated 7.1.1998 holding that the consent of the concerned
employees, prior to their appointment on deputation was
C mandatory; and that absence of consent in the case at
hand established that the appointment of the appellants
at the Government Medical College, Jammu, (and/or at
hospitals associated therewith), was not by way of
deputation, and accordingly, there was no question of
D their reversion to their parent department. The Single
Judge also relied upon the Government Order dated
17.7.1997 in order to conclude, that the posting of the
appellants at the Government Medical College, Jammu
(and/or at hospitals associated therewith) was not
E beyond their cadre. Referring to paragraph 5(f) thereof,
the Single Judge held, that the posting of the appellants
was within the scope of the conditions of their
employment. The decision was however set aside by the
Division Bench and therefore the present appeals.

F Disposing of the appeals, the Court

HELD: 1. It cannot be said that the appointment of
the appellants was substantively made to a cadre under
the Director of Medical Education. The appointment of the
G appellants in the Directorate of Medical Education, was
clearly by way of deputation. Their posting at the
Government Medical College Jammu (and/or at the
hospitals associated therewith) was most certainly
beyond their parent cadre, and therefore, by way of
H deputation. [Para 18] [640-G-H; 641-A]

2. Even though it is clear, that the posts of Assistant Surgeons were created by the Health and Medical Education Department of the State Government, it is also clear that the aforesaid department is comprised of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education. The employees of each of the two Directorates are governed by a separate set of rules. The rules governing the conditions of service of gazetted employees of the Directorate of Medical Education, do not have the posts of Assistant Surgeons. The cadre of Assistant Surgeons is only found in the rules of recruitment applicable to gazetted employees of the Directorate of Health Service. Secondly, the assertion made by the respondents, that there were no posts of Assistant Surgeon when the appellants were selected and posted at the Government Medical College, Jammu (and/or at the hospitals associated therewith), in the Directorate of Medical Education, has not been disputed by the appellants. In the absence of any posts of Assistant Surgeon in the Directorate of Medical Education, it is impossible to infer that the appellants (who were selected against the posts of Assistant Surgeons) could have belonged to the Directorate of Medical Education. Furthermore, consequent upon the selection of the appellants by the Public Service Commission they were issued appointment orders dated 12.8.1997. A perusal of the same reveals, that such of the candidates who had been selected as Assistant Surgeons, and belonged to Jammu region, were to report to the Director, Health Services, Jammu. Whereas, those belonging to the Kashmir region, were to report to the Director, Health Services, Kashmir. The Directors of Health Services, Jammu as well as Kashmir, are admittedly incharge of the administrative chain of command, in the respective Directorates of Health Services. This by itself demonstrates, that the

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A appointment of the appellants was to the Directorate of Health Services, and not in the Directorate of Medical Education. Fourthly, the order issued by the Principal, Government Medical College, Jammu dated 30.12.1997 reveals, that the appellants were being posted as Senior/
B Junior House Officers. The posts of Senior/Junior House Officer are distinct and separate from the posts of Assistant Surgeons. The posts of Senior/Junior House Officers, are included in the cadre of posts in the Directorate of Medical Education. The appellants posting as Senior/Junior House Officers also exhibits, that their
C appointment was not within the Directorate of Health Services, but was against posts outside the Directorate of Health Services. Furthermore, even the impugned order dated 7.1.1998 noted, that the appellants were being temporarily deployed "...from the Directorate of Health Services, Jammu..." to meet the exigency of shortage of doctors at the Government Medical College, Jammu. Sixthly, the endorsement at serial no.2 of the order dated 7.1.1998 (extracted in paragraph 5 above) reveals, that a request was made by the by the Director, Health Services, Jammu, that the appellants be reverted to the Directorate of Health Services, to meet the needs of the said service. Seventhly, the order of the Department of Health and Medical Education dated 20.4.1998 reveals, that the posting of the appellants at the
F Government Medical College, Jammu (and/or at hospitals associated therewith), was made by the two Directors of Health Services in violation of Government Orders, thereby, defeating the very purpose for which the appellants were selected and appointed. Lastly, is the
G unrefuted assertion by the respondents, that the salary of the appellants continued to be drawn from the Directorate of Health Services, for the entire duration during which the appellants remained posted at the Government Medical College, Jammu (and/or at the
H hospitals associated therewith). Had the appellants been

legitimately working within their own cadre, their salary would undoubtedly have been drawn from the funds of the Directorate of Medical Education. Based on the disbursement of salary to the appellants from the funds of Directorate of Health Services, the appellants must be deemed to be substantive employees of the cadre of Assistant Surgeons of the Directorate of Health Services. There is therefore no room for any doubt, that the appellants were substantively appointed to the Directorate of Health Services, and not in the Directorate of Medical Education. [Para 19] [641-B-H; 642-A-H; 643-A-C]

3. The mere fact, that the appellants consent was not sought before their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) would not have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible. But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought. It can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer. In the present controversy, the appellants were issued posting orders by the Principal, Government Medical College, Jammu,

A dated 30.12.1997. They accepted the same, and assumed
charge as Senior/Junior House Officers at the
Government Medical College, Jammu, despite their
selection and appointment as Assistant Surgeons. Even
now, they wish to continue to serve against posts, in the
B Directorate of Medical Education. There cannot be any
doubt, about their willingness/readiness to serve with the
borrowing Directorate. The consent of the appellants is
tacit and unquestionable. [Para 20] [643-E-H; 644-A-C]

C 4. In the instant case, consequent upon the decision
by the Single Judge, whereby, the impugned order of
reversion/ repatriation of the appellants to the Directorate
of Health Services dated 7.1.1998 was set aside, two
Letters Patent Appeals, were filed by the respondents
herein. In the first of the Letters Patent Appeals, 18
D Assistant Surgeons were impleaded as respondents,
whereas, in the second Letters Patent Appeal, 24
Assistant Surgeons were impleaded as respondents. The
first Letters Patent Appeal was dismissed in default and
was never restored. As such, a technical plea was
E advanced by the appellants, that the order passed by the
Single Judge relating to 18 Assistant Surgeons had
attained finality and that the binding effect in connection
with the 18 Assistant Surgeons, should be extended to
the remaining 24 Assistant Surgeons. However, insofar
F as the matter pertaining to 24 Assistant Surgeons is
concerned, the decision rendered by the Division Bench
of the High Court on 24-2-2006 has been affirmed by this
Court on merits. The decision pertaining to the 24
Assistant Surgeons (whose claim was decided by the
G impugned order dated 24.2.2006) constitutes a
declaration of law, and is binding under Articles 141 of
the Constitution of India. Such being the stature of the
determination rendered in respect of 24 Assistant
Surgeons (whose claim was adjudicated by the Letters
H Patent Bench of High Court), the same should, if

permissible, also be extended to the other 18 Assistant Surgeons. Ordinarily, in a situation when a judgment attains finality between rival parties, it is not legitimate to reopen the issue, even for correcting an error, which emerges from a subsequent adjudication. The factual position in the present controversy is, however, slightly different. The Assistant Surgeons against whom the Letters Patent Appeal was dismissed in default, are also before this Court and they have also been afforded an opportunity of hearing. Since all of them are before this Court, and have been represented through counsel, undoubtedly, the determination on merits in the instant controversy should be extended to them, as well. Since such a choice can be made in the present case, the proposition which has been upheld as legal, should be extended to the others similarly situated. It would be unthinkable to implement an order, which has been set aside after due notice and hearing. [Paras 22, 24, 25] [644-F-H; 645-A-C; 646-B-D, E-F, G-H; 647-A-B]

5. The reversion/repatiation of the appellants to their parent department, i.e., the Directorate of Health Services, Jammu, is affirmed. [Para 26] [647-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 162 of 2013.

From the Judgment & Order dated 24.02.2006 of the High Court of Jammu & Kashmir at Jammu in L.P.A. (SW) No. 88 of 2000.

WITH

C.A. No. 163 of 2013

C.A. Sundaram, Nar Hari Singh, Vikas Mehta, Madhavi Choudhary, Zafar Inayat, Rohini Musa for the Appellant.

Sunil Fernandes, Astha Sharma, Vernika Tomar, Insha Mir for the Respondent.

A The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. Consequent upon the creation of posts of Assistant Surgeons, the Health and Medical Education Department of the State of Jammu & Kashmir, addressed a requisition to the Jammu & Kashmir Public Service Commission (hereinafter referred to as "the Public Service Commission") to recruit 1255 posts of Assistant Surgeons. Based on the aforesaid requisition, the Public Service Commission issued a notification dated 31.12.1996 for inviting applications for 1255 posts of Assistant Surgeons in the pay-scale of Rs.2200-4000. Based on the aforesaid notification, an advertisement dated 2.1.1997 appeared in newspapers inviting applications for 1255 posts of Assistant Surgeons, belonging to the Health and Medical Education Department.

3. In June, 1997 the Public Service Commission after completing the process of selection, prepared a select list of successful candidates. The names of the appellants herein, appeared in the list of successful candidates. Consequent upon the selection of the appellants as Assistant Surgeons by the Public Service Commission, the Department of Health and Medical Education, issued an order dated 12.8.1997 appointing the appellants against the advertised posts of Assistant Surgeons. An extract of the aforesaid order, relevant to the present controversy, is being reproduced hereunder:

"The candidates belonging to Jammu region shall report to Director Health Services, Jammu and those belonging to Kashmir region to Director Health Services Kashmir for further postings. As regards migrant candidates they shall report to Director, Health Services Jammu for further orders."

(emphasis is ours)

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It is not a matter of dispute, that in furtherance of the order of appointment dated 12.8.1997, all the appellants reported to the Director, Health Services, Jammu as they all belonged to the Jammu region. The next step, as is evident from the extracted portion of the appointment order, was the appellants' actual posting.

4. A Government Order pertaining to the posting of Assistant Surgeons, was issued by the Department of Health and Medical Education on 17.7.1997. Paragraph 5 of the aforesaid Government Order is relevant, and is accordingly being extracted hereunder:

"5. The Doctors appointed against General category shall be posted in various Hospitals in the following orders:

- (a) Allopathic Dispensaries
- (b) Primary Health Centres and Police Hospitals;
- (c) Community Health Centres;
- (d) Sub-District Hospitals;
- (e) District Hospitals;
- (f) Hospitals of Jammu and Srinagar including Evening/Urban Clinic and after that in Medical Education and other organizations;
- (g) Surgeons shall be posted only in such Hospitals where Operation Theatres are available and the Hospitals are housed in Govt. Buildings."

Sub-paragraph (f) of paragraph 5 extracted hereinabove leaves no room for any doubt, that Assistant Surgeons could be posted in Hospitals of Jammu and Srinagar including evening/urban clinics, "...and after that...", in medical education and other organizations. In consonance with the Government Order dated 17.7.1997, the Principal, Government Medical College,

A Jammu, by an Office Order dated 30.12.1997, posted all the appellants against the vacant posts of Senior/Junior House Officers, at the Government Medical College, Jammu (and at hospitals associated with the said college).

B 5. Despite posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), on 30.12.1997; within a week thereof, by an order dated 7.1.1998, the Principal, Government Medical College, Jammu, reverted the appellants to their parent Department, namely, the Directorate of Health Service, Jammu. The instant
C order dated 7.1.1978 was first assailed by the appellants before the High Court of Jammu and Kashmir (hereinafter referred to as "the High Court"). It is now the subject matter of challenge by them, before this Court. Since the present controversy relates to the order dated 7.1.1998, whereby, the
D appellants were ordered to be reverted/repatriated to their parent department, the same is being extracted hereunder:

E "Consequent to the appointment of house surgeons in the various specialities in this institution, the Assistant Surgeons, who were temporarily deployed from the Directorate of Health Services, Jammu to meet the exigency of shortage of doctors in Govt. Medical College, Jammu, are hereby reverted to their parent department.
F The doctors listed in Annexure-I attached hereto stand relieved today the 7th January, 1998 forenoon with the direction to report for duty to the Director Health Services, Jammu."

(emphasis is ours)

G A perusal of the order extracted hereinabove discloses the basis of the alleged repatriation of the appellants to the Directorate of Health Services, Jammu. Firstly, the appellants' parent department is described as, the Directorate of Health Services. Secondly, the appellants posting as Senior/Junior
H House Officers, was disclosed. Namely, to meet the exigency

of shortage of doctors at the Government Medical College, Jammu. And thirdly, that the aforesaid posting was depicted as a temporary deployment from the Directorate of Health Services, Jammu. Besides the main order dated 7.1.1998 extracted above, it is also relevant to reproduce the endorsement made at serial no.2 of the aforesaid order, to the Director, Health Services, Jammu. The same is therefore being extracted below:

"2. Director Health Services, Jammu. This is in reference to his verbal request for reversion of the Assistant Surgeons to the directorate to meet immediate needs in the health services."

(emphasis is ours)

A perusal of the aforesaid endorsement discloses the fourth reason for the alleged repatriation of the appellants to the Directorate of Health Services, Jammu, namely, to meet the immediate needs of the Department of Health Services.

6. So as to assail the order dated 7.1.1998 whereby the appellants were repatriated to the Directorate of Health Services, Jammu, three writ petitions came to be filed before the High Court. The details of the writ petitions are being narrated hereinbelow:

- (i) Dr.Shazia Hamid vs. State of Jammu & Kashmir (SWP no.35/98)
- (ii) Dr.Rajni Malhotra vs. State of Jammu & Kashmir (SWP no.36/98)
- (iii) Dr.Sarita vs. State of Jammu & Kashmir (SWP no.37/98)

Having entertained the aforesaid writ petitions, the High Court issued the following interim directions, on 8.1.1998:

"The grievance of the petitioners is that they have been

A deployed to the Government Medical College Jammu by the Director Health Services, Jammu and the Principal Medical College, Jammu has further posted them in Medical College, Jammu. They are being relieved by the person of the Principal Government Medical College Jammu who is having no authority to transfer them and direct them to report back to Director Health Services, Jammu.

C Issue notice to the respondents, issue notice in the CMP also.

In the meanwhile, respondents are directed not to disturb the status of the petitioners till objections are filed and considered by this Court.”

D We are informed, that in compliance with the said interim directions, all the appellants continued to discharge their duties at the Government Medical College, Jammu (and/or at hospitals associated therewith). And that eversince, upto the present juncture, despite the impugned order (passed by the Letters Patent Bench, of the High Court) having been passed against them, the appellants posting has remained unaltered. Even now, they are discharging their duties at the Government Medical College, Jammu, (and/or the hospitals associated therewith).

F 7. It is also relevant to mention herein, that the main ground on which the appellants had assailed the impugned order dated 7.1.1998 before the High Court was, that the same was not issued by the competent authority. In this behalf, it was the case of the appellants, that the Secretary, Department of Health and Medical Education being the appointing authority of the appellants; the Principal Medical College, Jammu, had no jurisdiction to issue the order dated 7.1.1998. It seems to us, that in order to get over the main ground of attack raised at the behest of the appellants, the Health, Family Welfare and Medical Education Department, issued another order on

20.4.1998, with the same effect and consequences. The
aforesaid order is also being extracted hereunder: A

"Whereas for public health care 1230 posts of Assistant
Surgeons were created vide Government Order No.129-
HD of 1996 dated 4.12.96 under special recruitment drive
programme and referred to Public Service Commission for
selection of suitable candidates. B

Whereas public service commission vide their letter
No.PSC/1/Dr/AS/5-96 dated 10.6.97 recommended a
panel of 1037 candidates for appointment of Assistant
Surgeons. C

Whereas the Health, FW and Medical Education Deptt
issued appointment orders in favour of 1097 Assistant
Surgeons and directed the two directors of Health Services
to post these doctors in rural areas and other places in
pursuance of guidelines as embodied in Government
Order no.635 HME of 1997 dated 17.7.97. D

Whereas the two directors of Health Services in violation
of standing Government Orders deputed/attached/
adjusted/detailed to work a good number of new
appointments in various health institutions and offices thus
defeating the very object of special recruitment drive. E

Now therefore in the public interest and health care the
said Assistant Surgeons are hereby detached with
immediate effect from the places where they have been
deputed/attached/adjusted or detailed to work as the case
may be and shall report to respective directors of Health
Services who shall post them strictly in accordance with
the guidelines as detailed in Government Order no.635
HME of 1997 dated 17.7.97 and report compliance to the
Administrative Department within fortnight positively." F
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(emphasis is ours)

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A The order extracted hereinabove narrates, the exact sequence of events leading to the eventual posting of the appellants, consequent upon their selection as Assistant Surgeons. It also needs to be emphasized, that the order dated 20.4.1998 highlights the fact, that the original posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), had been made by the Director of Health Services, in violation of Government Orders, and further that, their repatriation to the Directorate of Health Services, Jammu was in public interest.

C 8. A learned Single Judge of the High Court on 28.5.1998, allowed all the three writ petitions (wherein the order dated 7.1.1998 had been assailed). According to the understanding of the learned Single Judge, the concerned employees consent, prior to their appointment on deputation was mandatory. Absence of consent, according to the learned Single Judge, established that their appointment at the Government Medical College, Jammu, (and/or at hospitals associated therewith), was not by way of deputation. Since in the present case, the consent of the appellants had admittedly not been obtained prior to their posting vide order dated 30.12.1997, the learned Single Judge concluded, inter alia, that the authorities had wrongly assumed, that the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), was by way of deputation. Accordingly, the learned Single Judge held, that there was no question of the reversion of the appellants to their parent department. For, according to the learned Single Judge, the Government Medical College Jammu (and/or at hospitals associated therewith) comprised of the appellants parent department. Based thereon, the learned Single Judge felt, that the reversion/repatriation of the appellants to the Directorate of Health Services, Jammu, lacked legal sanction.

H 9. The learned Single Judge also relied upon the Government Order dated 17.7.1997 in order to conclude, that

the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith) was not beyond their cadre. Referring to paragraph 5(f) thereof, the learned Single Judge felt, that the posting of the appellants was within the scope of the conditions of their employment.

10. Besides the aforesaid, the learned Single Judge also arrived at the conclusion, that the Principal, Medical College, Jammu had no jurisdiction whatsoever to issue the impugned order dated 7.1.1998 reverting/repatriating the appellants to the Directorate of Health Services, Jammu. In this behalf, the learned Single Judge felt, that the Principal, Government Medical College, Jammu had passed the order dated 7.1.1998, in his capacity as Head of the Department, which was not in consonance with the factual/legal position.

11. The learned Single Judge summarized his conclusions as under:

"In view of the above, it is held that:

- (i) The petitioners came to be appointed as Assistant Surgeons.
- (ii) The Commissioner/Secretary in the Health and Education Department passed clear orders on 17th July, 1997 that the petitioners be appointed in Jammu Hospitals.
- (iii) That the Director Health Services merely performed ministerial act of issuing letter of appointments. He acted in compliance of the Government Orders.
- (iv) That the petitioner came to be appointed against available vacancies.
- (v) The concept of the petitioner being on deputation would not be attracted to the facts of this case. This is because this was the first appointments of the

A petitioners. The concept of parent department and department to which an employee is to be temporarily sent on deputation is missing in this case.

B (vi) The fine distinction pointed out on the basis of Rules of Business may be legally correct, but no factual foundation has been laid down for sustaining the argument as projected by the State counsel.

C (vii) That the order passed during the period when Model Code of Conduct was in operation and when election process was on, was also not in accordance with law.”

D Accordingly, the learned Single Judge set aside the impugned order dated 7.1.1998 passed by the Principal, Medical College, Jammu..

E 12. Dissatisfied with the judgment rendered by the learned Single Judge of the High Court on 28.5.1998, the State Government preferred Letters Patent Appeals. Suffice it to state, that while disposing of the Letters Patent Appeals, the common decision rendered by the learned Single Judge of the High Court, was set aside by the Division Bench on 24.2.2006. The appellants before us, have raised a challenge to the order passed by the Division Bench on 24.2.2006.

F 13. The first Civil Appeal being disposed of by the instant common order, has been filed by Dr.Kavi Raj and others, whereas the second one has been filed by Dr.Reva Gaiind and others. Leaned counsel for the appellants, at the very inception informed us, that the first Civil Appeal survives in respect of only five appellants, namely, Dr.Kanchan Anand, Dr.Arpana Sharma, Dr.Mehbooba Begum, Dr.Nidhi Sharma and Dr.Shama Parveen Bhat. As against the second Civil Appeal, it was stated to be surviving only in respect of Dr.Reva Gaiind, G Dr.Rachna Wattal, H Dr.Mala Mandla, Dr.Karuna Wazir, Dr.Ila

Gupta, Dr.Simi Kandhari, Dr.Indu Raina, Dr.Shivani Malhotra and Dr.Surekha Bhat. It is therefore apparent, that the instant two Civil Appeals are presently surviving only in respect of 14 of the appellants, fully described above.

14. In order to canvass the claim of the appellants, learned counsel invited our attention to the order of the Principal, Medical College, Jammu dated 30.12.1997, whereby, the appellants were assigned their first posting as Senior/Junior House Officers in different departments of the Government Medical College, Jammu (and/or at hospitals associated therewith). Based thereon, it was the vehement contention of the learned counsel, that the Division Bench of the High Court seriously erred in holding that the appellants were appointed by way of deputation to the Government Medical College, Jammu. To further the contention, that the appellants were not appointed to the Government Medical College, Jammu by way of deputation, it was pointed out, that the posts of Assistant Surgeons against which the appellants were appointed were created by the Health and Medical Education Department. The requisition to fill up 1255 posts of Assistant Surgeons, was also addressed by the Health and Medical Education Department, to the Public Service Commission. It was sought to be canvassed, that the Government Medical College, Jammu, was a part and parcel of the Department of Health and Medical Education, and as such, it was submitted, that the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith) cannot be deemed to be a posting by way of deputation. It was accordingly submitted, that the appellants' posting could not be deemed to be in a cadre, other than the cadre to which they were substantively appointed. Based on the aforesaid submission, learned counsel for the appellants endeavoured to suggest, that the conclusions recorded by the learned Single Judge were fully justified, and in consonance with law. Learned counsel accordingly prayed that the impugned order dated 24.2.2006 be set aside.

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A 15. In addition to the submission advanced at the hands
of the learned counsel for the appellants, as has been noticed
in the foregoing paragraph, it was also his vehement
contention, that the posting of the appellants was in consonance
with the express instructions of the State Government. In this
B behalf, learned counsel placed reliance on the Government
Order dated 17.7.1997, whereby norms for issuing posting
orders of candidates freshly selected against the post of
Assistant Surgeons, were laid down. Placing reliance on
C paragraph 5(f) of the aforesaid Government Order dated
17.7.1997 (extracted in paragraph 4 hereinabove) it was
submitted, that the posting of the appellants against the
vacancies in the Directorate of Medical Education, was clearly
within the purview of their selection to posts in the Health and
D Medical Education Department. Since the posting of the
appellants was made in consonance with the Government Order
dated 17.7.1997, it was contended, that it was natural to infer
that the same was within the cadre to which they were selected
and appointed. It was therefore submitted, that the impugned
order dated 7.1.1998 passed by the Principal, Government
E Medical College, Jammu, must be deemed to have been
issued on a misunderstanding, that the posting of the appellants
at the Government Medical College, Jammu (and/or hospital
associated therewith) was beyond the scope of their legitimate
posting. For the aforesaid reason also, it was contended that
F the impugned order dated 7.1.1998 needed to be set aside.

16. We may also place on record the submission of the
learned counsel for the appellants, on the same lines as the
determination rendered by the learned Single Judge of the High
Court. To avoid repetition, reference may be made to
G paragraph 8 above. Learned counsel, endorsed the aforesaid
factual/legal position.

17. In response to the submissions advanced at the hands
of the learned counsel for the appellants, the contentions
advanced at the hands of the learned counsel for the
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respondents, though exhaustive during hearing, are being summarised hereunder, for an overview: A

- (i) The Department of Health and Medical Education comprises of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education. The posts of Assistant Surgeons, against which the appellants were selected and appointed belonged to the cadre of posts, under the Directorate of Health Services. B
- (ii) Whereas, at the time of selection and appointment of the appellants, the Directorate of Health Services had a cadre of Assistant Surgeons, the Directorate of Medical Education, which included the Government Medical College, Jammu (and/or hospitals associated therewith), did not have any post of Assistant Surgeons. Therefore, the posting of the appellants, at the Government Medical College Jammu (and/or at hospitals associated therewith) could only have been by way of deputation. C
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- (iii) Cadres under the Directorate of Health Services, as well as, the cadres under the Directorate of Medical Education are regulated by separate rules. While the Jammu & Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979, govern the conditions of service of gazetted employees of the Directorate of Medical Education; the Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1970 regulate the recruitment of gazetted employees, in the Directorate of Health Services. Under the 1979 Rules referred to above, there was no post of Assistant Surgeons. Therefore the posts of Assistant Surgeon, were clearly not included in the cadre of posts under the Directorate of Medical Education. It was also pointed out, that F
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A the post of Assistant Surgeon figure in the 1970
Rules referred to above, and as such, the posts of
Assistant Surgeon, find a definite place in the cadre
of posts, under the Directorate of Health Services.
It was sought to be inferred from the above factual/
B legal position, that the appointment of the appellants
was in the Directorate of Health Services, and their
posting at the Government Medical College,
Jammu (and/or at the hospitals associated
therewith) was by way of deputation.

C (iv) Referring to the impugned order passed by the
Division Bench dated 24.2.2006, it was pointed out,
that the appellants before this Court had not
disputed a vital factual position recorded therein,
D namely, that the salary of the appellants continued
to be drawn from the Directorate of Health
Services, for the entire duration during which the
appellants had been rendering service at the
Government Medical College, Jammu (and/or at the
E hospitals associated therein). It was submitted, that
this factual position is sufficient to establish, that the
appointment of the appellants was to the
Directorate of Health Services, and not in the
Directorate of Medical Education.

F 18. Having given our thoughtful consideration, to the
submissions advanced at the hands of the learned counsel for
the rival parties, we are of the view, that the submissions
advanced on behalf of the respondents, as have been
summarized above are unexceptionable. It is therefore, not
G possible for us to accept that the appointment of the appellants
was substantively made to a cadre under the Director of
Medical Education. We are also of the view, that the
appointment of the appellants in the Directorate of Medical
Education, was clearly by way of deputation. Their posting at
H the Government Medical College Jammu (and/or at the

hospitals associated therewith) was most certainly beyond their parent cadre, and therefore, by way of deputation. The reasons for our aforesaid conclusions, are being recorded in the following paragraphs. A

19. Even though it is clear, that the posts of Assistant Surgeons were created by the Health and Medical Education Department of the State Government, it is also clear that the aforesaid department is comprised of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education. The employees of each of the two Directorates are governed by a separate set of rules. The rules governing the conditions of service of gazetted employees of the Directorate of Medical Education, do not have the posts of Assistant Surgeons. The cadre of Assistant Surgeons is only found in the rules of recruitment applicable to gazetted employees of the Directorate of Health Service. Secondly, the assertion made at the hands of the learned counsel for the respondents, that there were no posts of Assistant Surgeon when the appellants were selected and posted at the Government Medical College, Jammu (and/or at the hospitals associated therewith), in the Directorate of Medical Education, has not been disputed by the learned counsel for the appellants. In the absence of any posts of Assistant Surgeon in the Directorate of Medical Education, it is impossible to infer that the appellants (who were selected against the posts of Assistant Surgeons) could have belonged to the Directorate of Medical Education. Furthermore, consequent upon the selection of the appellants by the Public Service Commission they were issued appointment orders dated 12.8.1997. A relevant extract of the aforesaid appointment order, has been reproduced above. A perusal of the same reveals, that such of the candidates who had been selected as Assistant Surgeons, and belonged to Jammu region, were to report to the Director, Health Services, Jammu. Whereas, those belonging to the Kashmir region, were to report to the Director, Health Services, Kashmir. The Directors of Health Services, Jammu as well as B
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A Kashmir, are admittedly incharge of the administrative chain of
command, in the respective Directorates of Health Services.
This by itself demonstrates, that the appointment of the
appellants was to the Directorate of Health Services, and not
in the Directorate of Medical Education. Fourthly, the order
B issued by the Principal, Government Medical College, Jammu
dated 30.12.1997 reveals, that the appellants were being
posted as Senior/Junior House Officers. The posts of Senior/
Junior House Officer are distinct and separate from the posts
of Assistant Surgeons. The posts of Senior/Junior House
C Officers, are included in the cadre of posts in the Directorate
of Medical Education. The appellants posting as Senior/Junior
House Officers also exhibits, that their appointment was not
within the Directorate of Health Services, but was against posts
outside the Directorate of Health Services. Furthermore, even
D the impugned order dated 7.1.1998 noted, that the appellants
were being temporarily deployed "...from the Directorate of
Health Services, Jammu..." to meet the exigency of shortage
of doctors at the Government Medical College, Jammu. Sixthly,
the endorsement at serial no.2 of the order dated 7.1.1998
E (extracted in paragraph 5 above) reveals, that a request was
made by the by the Director, Health Services, Jammu, that the
appellants be reverted to the Directorate of Health Services,
to meet the needs of the said service. Seventhly, the order of
the Department of Health and Medical Education dated
20.4.1998 reveals, that the posting of the appellants at the
F Government Medical College, Jammu (and/or at hospitals
associated therewith), was made by the two Directors of Health
Services in violation of Government Orders, thereby, defeating
the very purpose for which the appellants were selected and
appointed. Lastly, is the unrefuted assertion at the hands of the
G learned counsel for the respondents, that the salary of the
appellants continued to be drawn from the Directorate of Health
Services, for the entire duration during which the appellants
remained posted at the Government Medical College, Jammu
(and/or at the hospitals associated therewith). Had the
H appellants been legitimately working within their own cadre, their

salary would undoubtedly have been drawn from the funds of the Directorate of Medical Education. This factual position puts a final seal on the matter, as it does not leave any room for any further imagination. Based on the disbursement of salary to the appellants from the funds of Directorate of Health Services, the appellants must be deemed to be substantive employees of the cadre of Assistant Surgeons of the Directorate of Health Services. There is therefore no room for any doubt, that the appellants were substantively appointed to the Directorate of Health Services, and not in the Directorate of Medical Education.

20. Before concluding, it is essential to deal with certain inferences drawn by the learned Single Judge of the High Court. According to the learned Single Judge, prior consent of an employee is imperative, binding, preemptory and mandatory, before he is posted on deputation outside his parent department. No statutory rule has been brought to our notice, requiring prior consent of an employee, before his deployment against a post beyond his parent cadre. The mere fact, that the appellants consent was not sought before their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) would not, in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible. But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought. It can be implied. It need not be in the nature of a written consent. Consent of

A posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer. In the present controversy, the appellants were issued posting orders by the Principal, Government Medical College, Jammu, dated 30.12.1997. They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, Jammu, despite their selection and appointment as Assistant Surgeons. Even now, they wish to continue to serve against posts, in the Directorate of Medical Education. There cannot be any doubt, about their willingness/readiness to serve with the borrowing Directorate. The consent of the appellants is tacit and unquestionable. We are therefore of the view, that the learned Single Judge of the High Court, clearly erred on the instant aspect of the matter.

D 21. For the reasons expressed hereinabove, we are satisfied, that the impugned order passed by the Letters Patent Bench of the High Court on 24.2.2006, does not suffer from any factual or legal infirmity. The same is therefore, affirmed.

E 22. Despite having recorded our conclusions on the merits of the controversy, it is also essential for us to take into consideration a technical plea advanced at the hands of the learned counsel for the appellants. It was submitted on behalf of the appellants, that consequent upon the decision by the learned Single Judge (dated 28.5.1998), whereby, the impugned order of reversion/repatriation of the appellants to the Directorate of Health Services dated 7.1.1998 was set aside, two Letters Patent Appeals, i.e., LPA (SW) no.88 of 2000, and LPA (SW) no.89 of 2000 were filed by the respondents herein (to impugn the common order dated 28.5.1998, passed by the learned Single Judge). In the first of the aforesaid Letters Patent Appeals, 18 Assistant Surgeons were impleaded as respondents, whereas, in the second Letters Patent Appeal 24 Assistant Surgeons were impleaded as respondents. It was pointed out, that the Letters Patent Appeal (SW) no.88 of 2000

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was dismissed in default.. The said Letters Patent Appeal was never restored. As such, it was submitted, that the order passed by the learned Single Judge on 28.5.1998, relating to 18 Assistant Surgeons, (impleaded as respondents therein), attained finality. Based on the aforesaid uncontroverted position, it was submitted, that it is imperative for the State Government, now to give effect to the order of the learned Single Judge dated 28.5.1998, pertaining to the aforesaid 18 Assistant Surgeons, (impleaded as respondents in LPA(SW) no.88 of 2000). In the aforesaid view of the matter, it was further submitted, that the binding effect in connection with the 18 Assistant Surgeons, should be extended to the remaining 24 Assistant Surgeons (who had been arrayed as respondents in LPA (SW) no.89 of 2000. This, according to the learned counsel for the appellants, would also meet the ends of justice, inasmuch as, all similarly situated individuals, must be placed similarly. According to learned counsel, if this position is not accepted, the appellants would be deprived of their right to equality before the law and to equal protection of the laws, guaranteed under Article 14 of the Constitution of India.

23. We have given our thoughtful consideration to the aforesaid technical plea advanced at the hands of the learned counsel for the appellants. It is not a matter of dispute, that LPA (SW) no.89 of 2000 was adjudicated upon by the Division Bench on merits. In terms of the instant order passed by us, we have affirmed the correctness of the order passed by the Letters Patent Bench of the High Court on 24.2.2006. Thus viewed, it is clear that the controversy was justly adjudicated upon by the Division Bench, in respect of 24 Assistant Surgeons. The only question to be decided, while dealing with the technical plea advanced at the hands of the learned counsel for the appellants is, whether the judgment rendered in LPA (SW) no.88 of 2000 should be extended to LPA(SW) no.89 of 2000. Or vice-a-versa, whether the order of the learned Single Judge, which has attained finality in respect of 18 Assistant

A Surgeons, should be extended to the other 24 Assistant Surgeons.

B 24. In so far as the matter pertaining to 24 Assistant Surgeons is concerned, the decision rendered by the High Court on 24.2.2006 has been affirmed by us on merits. It is therefore legitimate to infer, that the matter has been wrongfully determined by the learned Single Judge. We are of the view, that the decision of the controversy by this Court, pertaining to the 24 Assistant Surgeons (whose claim was decided by the impugned order dated 24.2.2006) constitutes a declaration of law, and is binding under Articles 141 of the Constitution of India. Such being the stature of the determination rendered in respect of 24 Assistant Surgeons (whose claim was adjudicated by the Letters Patent Bench of High Court), we are of the view that the same should, if permissible, also be extended to the other 18 Assistant Surgeons. Ordinarily, in a situation when a judgment attains finality between rival parties, it is not legitimate to reopen the issue, even for correcting an error, which emerges from a subsequent adjudication.

E 25. The factual position in the present controversy is slightly different. Before this Court two Special Leave Petitions were filed. The Assistant Surgeons against whom the Letters Patent Appeal was dismissed in default, are also before this Court. They have also been afforded an opportunity of hearing. This Court has expressed the opinion that the order passed by the Letters Patent Bench of the High Court on 24.2.2006 deserves to be upheld. If the Assistant Surgeons whose Letters Patent Appeal was dismissed in default, had not been before this Court, it may not have been possible for us to re-adjudicate upon their claim. Since all of them are before us, and have been represented through counsel, we have no doubt in our mind, that the determination on merits in the instant controversy should be extended to them, as well. Since such a choice can be made in the present case, we are of the view, that the proposition which has been upheld as legal, should be extended

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to the others similarly situated. The converse proposition, does not commend itself for acceptance. It would be unthinkable to implement an order, which has been set aside after due notice and hearing. We therefore, find no merit in the technical plea advanced at the hands of the learned counsel for the appellants. A

26. The reversion/repatriation of the appellants to their parent department, i.e., the Directorate of Health Services, Jammu, is affirmed. The appellants who have continued to discharge their duties ever since their induction into service at the Government Medical College, Jammu (and/or at hospitals associated therewith), will be repatriated/reverted to the Directorate of Health Services, Jammu. Now, that the matter has attained finality, they must be relieved from their postings in the Directorate of Medical Education. So as to enable them to accept the reality of the situation, and to acclimatize them with the position emerging from our order, we consider it just and appropriate to direct, that the appellants be allowed to be continued at their present place of posting till 31.3.2013. They shall be relieved from their posting in the Directorate of Medical Education under all circumstances on the afternoon of 31.3.2013, for onward posting against a cadre post in the Directorate of Health Services. B
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Disposed of in the aforesaid terms.

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Appeals disposed of. F