

(2010) 04 PAT CK 0218
In the Patna High Court

Ajay Kumar Sharma

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 19-04-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2010) 04 PAT CK 0218

Hon'ble Judges : J.N. Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

J.N. Singh, J.—Heard learned Counsel for the petitioner and learned Counsel for the State.

2. Petitioner has filed this writ application for quashing of office order No. 88/06 dated 27.5.2006, as contained in Annexure-2, by which services of a large number of employees have been absorbed by the University with effect from 5.6.2003, to the extent that while absorbing the services of the petitioner, his past services in the College with effect from 1.12.1980 have not been taken into account. A further prayer has been made in the writ application for grant of revised pay scale to the petitioner with effect from 1.1.1996 which has been allegedly reduced with effect from 5.6.2003, without any opportunity of show cause or hearing to the petitioner. A further prayer has also been made to pay difference of salary of the period 1.4.1997 to 31.3.2001.

3. Case of the petitioner is that he was initially appointed in S.M. College (the College for short) on daily wages in 1979. Subsequently, there was an advertisement issued by the Principal of the College on 21.3.1980 which was pasted on the notice board and a copy of the said advertisement was sent to some other institutions also, for being pasted on their respective Notice Board also. Pursuant to the said advertisement, petitioner submitted his application, interview was held and he was appointed by the Principal on the post of Hostel

Clerk-cum-Accountant in the pay scale of Rs. 260-40.8 by order dated 25.2.1981 vide Annexure-26/5. He continued as such. Subsequently, vide Annexure-2 8, he was granted pay scale of Rs. 348-570 by the University and he drew his salary in the said pay scale.

4. However, it appears that on the orders of the Chancellor, an exercise was undertaken by the University for regularization of the services of the persons working on daily wages or on temporary basis in the University on Class III and Class IV posts. University issued an advertisement for such employees inviting them to submit their application for consideration for absorption of their services. A Selection Committee was constituted which held interview, examined the documents, and prepared a list of such candidates who were found eligible for absorption. Petitioner was found fit for absorption, therefore, his name was included in the list. Earlier, University took a decision to absorb the services of all the selected candidates with effect from the dates of their initial appointment. However, some anomalies were found in the said decision and the matter was referred to the State Government also, and finally, with the approval of the State Government, impugned office order by the Registrar of the University, as contained in Annexure-2, was issued by which services of the selected employees were absorbed with effect from 5.6.2003.

5. Learned Counsel for the petitioner submits that the petitioner was appointed on the basis of advertisement issued by the Principal and on recommendation of the Selection Committee. He submits that it is not that the advertisement was pasted on the Notice Board of the College concerned only, rather, to give it a wide publicity, it was sent to other institutions also for being pasted on their Notice Board. Thus, he submits that there was a selection process held pursuant to which petitioner was appointed. He also submits that the earlier Principals of the Colleges had been delegated with the power to make appointments of Class III and Class IV employees and in exercise of such power the Principal had undertaken such exercise to make appointments. Hence, his initial appointment itself being valid, respondents should have absorbed the services of the petitioner with effect from the initial date of his appointment itself, and not from the date indicated in Annexure-2.

6. Referring to the Office order dated 9.11.2009 of the office of the Registrar, as contained in Annexure-G to the counter affidavit of respondent No. 5, learned Counsel for the petitioner submits that the respondents have discriminated the petitioner in the matter of fixation of pay and his absorption inasmuch as eight non-teaching employees of the University have been absorbed in service from initial ; date of their appointment by said Annexure-G, whereas petitioner has been absorbed only from 5.6.2 003 and not from before. He submits that the said eight persons out of fourteen persons named in Annexure-G were also selected in the same process and they were absorbed by Annexure-2 from the same date earlier i.e. 5.6.2003. However, by this office order, their dates have now been shifted back.

7. Learned Counsel for the petitioner lastly submitted that pursuant to his initial appointment and fixation of his pay scale and revision thereof, petitioner has been paid his salary without any misrepresentation or fraud played by the petitioner in the matter. He submits that in Annexure-2, which has been issued with the approval of the State Government, there is no mention that any earlier salary paid to the incumbents shall be recovered from them. However, after this writ application was filed, respondents have issued orders holding his earlier appointment to be illegal the cancelling his appointment with retrospective effect. He submits that this order (Annexure-12) was out and out a malafide order and the consequential orders for recovery of his salary etc. paid to him earlier, as contained in Annexures-16 and 17, are also bad. He submits that in any case, even if the date of absorption of the services of the petitioner is accepted as 5.6.2003, no recovery of salary etc. paid to him prior to that can be made as the petitioner has actually served the University on appointment made by the Principal of the College, who had powers at that point of time to make appointments against Class III and Class IV posts and there was no allegation of fraud or misrepresentation practiced by the petitioner.

8. Since Annexures-12, 16 and 17 were issued by the respondents during the pendency of this writ application, petitioner earlier filed I.A. No. 7535 of 2009 for liberty to challenge the said orders of the University. The said I. A. was allowed by this Court by order dated 30.11.2009. Petitioner's other I.A. No. 7536 of 2009 filed for stay of operation of the said orders was also disposed of in the light of the fact that the petitioner had submitted a representation before the Vice Chancellor for recall of the said orders, as contained in Annexures-12, 16 and 17, and it was directed that the representation of the petitioner should be considered by the Vice Chancellor within two months and till fresh orders are passed, there should be no recovery from his monthly salary. Pursuant to the said order, the Vice Chancellor of the University has passed orders, as contained in Annexure-22, by which his representation has been rejected and it has been held that the petitioner has been correctly regularized with effect from 5.6.2003 and his earlier appointment by the Principal was not valid. The Vice Chancellor also justified the orders of recovery of salary of the petitioner paid to him earlier.

9. Petitioner has challenged the said order of the Vice Chancellor also through I.A. No. 1672 of 2010. The said I.A. is allowed.

10. University has filed counter affidavit in the case. Learned senior counsel for the University submits that the chronology of documents annexed by the petitioner in support of his appointment by the Principal itself shows that his appointment was not valid. Referring to the documents annexed by the petitioner as Annexure-2 6 series, he submits that it is apparent that the petitioner was initially appointed on daily wages by the Principal on 1.6.1979 as Office Assistant in Accounts Section for one month. Subsequently, said appointment of the petitioner on daily wages was extended by subsequent order dated 15.6.1979 upto 30.6.1979. He submits that the advertisement which has been relied upon

by learned Counsel for the petitioner, as contained in Annexure-26/3 shows that the said advertisement dated 20.3.1980 on Notice Board was for Accountant-cum-Typist for Sundarvati Mahila Mahavidyalaya Hostel, Bhagalpur. Subsequent advertisement dated 12.5.1980, as contained in Annexure-26/4, also mentions the same post. However, appointment of the petitioner vide Annexure-26/5 dated 25.2.1981 was made on the post of Hostel Clerk-cum-Accountant. He points out certain peculiar features in this office order, i.e. although this office order was issued on 25.2.1981, pay scale on which petitioner was appointed was made admissible to him with effect from 1.12.1980 itself; the appointment was on the recommendation of Hostel Advisory Committee which had no power to recommend for regular appointment in the College. In this connection, he refers" to the resolution of the Hostel Advisory Committee dated 7.10.1980, as contained in Annexure-J/1, which shows that the Committee, after considering the application of the petitioner, resolved that until the post is re-advertised, petitioner will continue on daily wages. Learned senior counsel for the respondents submits that there is nothing on record to show that, after the said resolution of the Hostel Advisory Committee dated 7.10.1980-, any fresh advertisement was made. Therefore, this resolution of the Committee could not be taken by the Principal as recommendation in favour of petitioner to appoint him on the post by the said order dated 25.2.1981. He also points out anomaly in the joining report of the petitioner, as contained in Annexure-K, in which petitioner has put date below his signature as 1.12.1980 but in the body of the said joining letter, it is mentioned that he joined the post as per order dated 25.2.1981. In the backdrop of these anomalies, learned senior counsel for the respondents submits that there is no continuity in the process of selection of the petitioner as claimed by him and the documents do not show that in a valid process of selection petitioner was appointed. He also submits that there was no sanctioned post of Hostel Clerk-cum-Accountant in the College and therefore, appointment of the petitioner was on unsanctioned and non-existent post. With regard to the date of regularization as mentioned in Annexure-2, he admits that initially the University had recommended to regularize the services of all the eligible candidates from the dates of their initial appointment. However, the said recommendation of the University was not approved by the Government and finally the Government gave its approval for regularization with effect from 5.6.2003, i.e. the first date of decision taken by the Committee constituted for the purpose under the orders of the Chancellor. Hence, from this date, petitioner and a large number of other employees have been regularized. So far as order of recovery is concerned, learned senior counsel for the respondents submits that since initial appointment of the petitioner was not found to be valid, order was rightly passed for recovery of his salary paid to him prior to his regularization in terms of the orders issued by the State Government.

11. It is not disputed that the petitioner stands regularized with effect from 5.6.2003. Question is as to whether the date of his regularization can be shifted back to the date of his initial appointment or not and even if the same cannot be

shifted, whether the respondents are legally entitled to recover the salary paid to him during the period prior to his regularization. For establishing the case for regularization of services from initial date of appointment, petitioner had to establish, to the satisfaction of this Court, that his initial appointment was regular. So far as Annexure-26 series are concerned, it is apparent that there was no advertisement in the newspapers. Learned Counsel for the petitioner has referred to Annexure-26/2 to show that the Principal of the College had sent copies of advertisement to some other institutions for being pasted on their Notice Board also to give it a wide publicity. Names of the institutions are written on the document by hand. Even if the document is accepted as valid and genuine, it appears that the advertisement was sent to only four institutions by the Principal and none else. Therefore, it can hardly be accepted that the advertisement was given a wide publicity. This document also does not show that any intimation was sent to the University with regard to this process of appointment being initiated. Advertisements dated 20th March, 1980 and 12th May, 1980 mention about, post of Accountant-cum-Typist in the Hostel whereas petitioner's appointment was on the post of Hostel Clerk-cum-Accountant. The last advertisement is dated 12th May, 1980. subsequent to that, there is a resolution of the Hostel Advisory Committee dated 7.10.1980, as contained in Annexure-J/1, which resolved that till the post is advertised afresh, petitioner will continue on daily wages. There is no advertisement subsequent to this date. Therefore, mention of recommendation of Hostel Advisory Committee in the appointment letter of the petitioner does not stand corroborated by any document. The joining letter of the petitioner also shows that he submitted his joining before the Hostel Superintendent on 25.2.1981 but put the date below his signature as 1.12.1980. These are some anomalies in the documents that do not inspire confidence of this Court to hold that the appointment of the petitioner was regular and valid. The correlation between the documents is not established to the satisfaction of this Court. It may also be pointed out that the petitioner, though was appointed as Hostel Clerk-cum-Accountant, in Annexure-28 his designation has been mentioned as Office Assistant-cum-Accountant and his pay scale has been shown as Rs. 348-570, although his initial appointment by Annexure-26/5 was in the pay scale of Rs. 260-408. In the circumstances, it is not possible for this Court to hold that the petitioner's initial appointment was valid and legal and therefore, he is entitled for regularization from that date.

12. However, since the petitioner stands regularized with effect from 5.6.2003, this Court is of the view that it is not open to the respondents to go behind that date, examine his initial appointment and hold it illegal so as to recover the salary paid to him during the period. This is not disputed that under the orders of the Chancellor respondents had issued advertisement, held scrutiny and interview for absorption of the employees working in the University against Class III and Class IV posts on daily wages/ad hoc basis/temporary. Petitioner at least was working on daily wages, even if he claimed that his services were regularized from that very date. On that ground, case of the petitioner was

considered, he was found eligible and he has been regularized. Therefore, respondents are restrained from questioning his initial appointment itself, hold it illegal and order for recovery of salary paid to him earlier.

13. At this stage, learned Counsel for the petitioner has referred to an order of the Chancellor in the case of one Saista Ahmad of the same College. From the order of the Chancellor it appears that the said Saista Ahmad did not respond to the interview and did not participate in the selection process, still on the basis of submissions made on behalf of said Saista Ahmad that the Principal had power to make appointment, Chancellor has passed orders for her regularization, pursuant to which University has also issued notification. The order itself shows that the University lawyer did not appear before the Chancellor, although reports submitted by the University was considered by the Chancellor, but it is apparent that it could not be pointed out to the Chancellor that even if Principal had power to make appointment on Class III and Class IV posts, the appointment had to be in accordance with law complying with the requirements of Article 14 and 16 of the Constitution of India and not otherwise. However, since the order is of the Chancellor, learned Counsel for the University submits that it has been complied with and the University has issued notification in favour of the said incumbent. However, that order of the Chancellor cannot be taken as a binding precedence to hold the same in favour of the petitioner also.

14. Learned Counsel for the petitioner lastly submitted that the petitioner was appointed in 1981 and after lapse of almost 30 years, question of validity of his appointment cannot be opened. In this context, he has relied upon judgment of this Court in the case of Baidyanath Singh v. State of Bihar reported in 2010 (1) PLJR 246.

15. Learned senior counsel for the University submits that against the said judgment, University has preferred an L.P.A. before a Division Bench of this Court which is pending.

16. In view of the opinion of this Court as indicated earlier, it is not necessary to consider this submission of learned Counsel for the petitioner, as this Court has indicated that after absorption of services of the petitioner on the basis of his past services in the University, it is not open to the University to consider the validity of his initial appointment, hold it illegal and order for recovery of salary paid to him during the period.

17. In the circumstances, this writ application is allowed in part. Order canceling his appointment from initial date and orders of recovery of salary of the petitioner paid earlier, as contained in Annexures-12, 16 and 17 are quashed. The order of the Vice Chancellor, as contained in Annexure-22 to that extent is also quashed and the respondents are restrained from recovering any amount from the salary of the petitioner paid to him subsequent to his alleged appointment in 1981 till the date of his absorption, and any amount already recovered shall be paid back to him. However, this Court does not find any error

in Annexure-2, regularizing the services of the petitioner from 5.6.2003, and to that extent, this writ application is dismissed. However, if the petitioner is in a position to show that the date of absorption of other incumbents, whose services have been regularized by Annexure-2, have been shifted back on some consideration which may be squarely applicable to the petitioner also, the petitioner will be at liberty to claim that.