

(2011) 11 PAT CK 0027

In the Patna High Court

Case No : LPA No.1661 of 2011 in CWJC No. 9337 of 2002 with IA No. 7662 of 2011 in LPA No.1661 of 2011

Azazul Haque

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-11-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 5

Citation : (2012) 1 PLJR 520

Hon'ble Judges : R.M. Doshit, C.J;Birendra Pd. Verma, J

Bench : Division Bench

Advocate : T.N. Mattin, Gopal Govind Mishra, for the Appellant; Sunil Kr. Mandal, Dr. Abdur Shakoor ., for the Respondent

Final Decision : Dismissed

Judgement

Re. Interlocutory Application No. 7662 of 2011:

1. This application u/s 5 of the Limitation Act is filed by the appellant for condonation of delay of one year and eleven days occurred in filing the Letters Patent Appeal. It is the claim of the appellant that at the relevant time he was suffering from Hepatitis-B and was under medical treatment since May 2010. The averment is supported by the medical reports.
2. On the facts and in the circumstances of the case, the delay is condoned.
3. Interlocutory application stands disposed of.

Re. Letters Patent Appeal No. 1661 of 2011:

4. Feeling aggrieved by the common judgment and order dated 27th July, 2010 passed by the learned Single Judge in so far as the above CWJC No. 9337 of 2002 is dismissed, the writ petitioner has preferred this Appeal under Clause 10 of the Letters Patent.

5. Pursuant to the general direction issued by the State Government, on 6th September, 1991 the Headmaster, Government High School, Motihari, East Champaran forwarded the names of eight contingent employees for regularisation in service. Pursuant to the recommendation made by the Headmaster, under order dated 22nd May, 1993 made by the State Government, the service of the said eight contingent employees along with contingent employees of the other Government High Schools in the State was regularized. In spite of the said order dated 22nd May, 1993 the appellant and one Devanand Mishra were not paid regular salary.

6. The aforesaid Devanand Mishra filed CWJC No. 3200 of 1994 for a direction to the respondents to pay him the salary. The said petition was disposed of on 26th July, 1994. In the said judgment, this Court had observed that the District Education Officer had under the list dated 23rd January, 1991 recommended regularisation of six contingent employees whereas the Headmaster of the School made a recommendation on 6th September, 1991 for eight contingent employees. The names of the appellant and the aforesaid Devanand Mishra were evidently added to the existing list of six contingent employees. Nevertheless, being a disputed question of fact, the matter was relegated to the Director, Secondary Education, Government of Bihar.

7. It was pursuant to the said direction the above referred order dated 10th July, 1995 was made by the State Government. It was held that at the relevant time in the Government High School, Motihari six contingent employees were employed. The said six contingent employees alone were entitled to regularisation in service. The names of the appellant and the aforesaid Devanand Mishra were added to the list of six contingent employees by the Headmaster surreptitiously and illegally; although the said two persons were not employed as contingent employees in the said High School.

8. The said order dated 10th July, 1995 was challenged by the aforesaid Devanand Mishra before this Court in CWJC No. 12374 of 1995. By the judgment and order dated 15th May, 1997 passed by this Court (Coram; Shashank Kumar Singh, J.) the said writ petition was allowed. The learned Single Judge was of the opinion that in view of the earlier decision of this Court in CWJC No. 3200 of 1994 the State Government ought not to have made the order dated 10th July, 1995; it was the Director, Secondary Education who was competent to make such order. Consequently, the Court quashed the order dated 10th July, 1995 and issued direction to the Director, Secondary Education to make appropriate order.

9. It would not be out of place to mention here that pursuant to the above referred judgment dated 15th May, 1997, the Director, Secondary Education reconsidered the matter. Under order dated 31st July, 1997 made by him, the Director, Secondary Education recorded the finding that in the Government High School at Motihari six posts of contingent employees were sanctioned. Six persons were appointed on the said sanctioned posts between 9th July, 1987 to 1st October, 1990; to the list of the said six contingent employees, the then

Headmaster surreptitiously added the names of the aforesaid Devanand Mishra and the appellant at SI. Nos. 7 and 8 respectively. The factum of the appointment of the appellant and the aforesaid Devanand Mishra as contingent employees was not believed. In view of the said finding, regularisation of service of the appellant and the said Devanand Mishra under order dated 22nd May, 1993 was set aside. The order dated 22nd May, 1993 was modified accordingly.

10. The aforesaid order was challenged by the said Devanand Mishra in CWJC No. 9405 of 1997. The challenge to the aforesaid order by the said Devanand Mishra has been rejected by the learned Single Judge under the impugned judgment dated 27th July, 2010.

11. The District Education Officer, under his communication dated 23rd August 2001, informed the Deputy Director, Secondary Education, Bihar that the appellant was never appointed as a contingent, employee in the Government High School, Motihari; that regularisation of his service under order dated 22nd May, 1993 was cancelled; the appellant was, therefore, not entitled to salary. The question of payment of salary to the appellant, therefore, did not arise.

12. Feeling aggrieved by the said communication, the appellant filed above CWJC No. 9337 of 2002 under Article 226 of the Constitution. The appellant claimed that his service having been regularized, he was entitled to the salary as a regular employee. The learned Single Judge has dismissed the writ petition. Hence, the present Appeal.

13. Learned Counsel, Mr. T.N. Mattin has appeared for the appellant. He has submitted that the order dated 10th July, 1995 made by the State Government was set aside by this Court in CWJC No. 12374 of 1995. Consequently, the order dated 22nd May, 1993 stood revived. The appellant should, therefore, be treated as regularized in service under order dated 22nd May, 1993. He is, therefore, entitled to salary of a regular employee.

14. We see no substance in the submission. Although, order dated 22nd May, 1993 made in respect of the aforesaid Devanand Mishra was modified or set aside by the State Government by its order dated 10th July, 1995. The same was not challenged by the appellant. The first time the appellant raised grievance was in 2002. The appellant never challenged the action of non-payment of salary; nor did he challenge the order dated 10th July, 1995. It is not now open to the appellant to claim service benefits as late as in 2002. The claim is obviously stale and is barred by delay, laches and acquiescence.

15. In our opinion, the said order dated 10th July, 1995 has become final insofar as the appellant is concerned, The appellant in the above writ petition filed in 2002 cannot and has not challenged the said order dated 10th July, 1995, What the appellant challenged was an internal communication based on the aforesaid order dated 10th July, 1995. Such communication cannot be the subject matter of challenge in a petition filed under Article 226 of the Constitution. It is apparent that the aforesaid communication dated 23rd August, 2001 is made instrumental

to claim the benefit of the judgment of this Court passed in CWJC No. 12374 of 1995, although the appellant was not a party to that writ petition. The attempt to avail of the benefit of the order made in favour of a third party is smart and ingenious, but the Court would not fall prey to such smart moves.

16. We are of the opinion that the learned Single Judge has rightly dismissed the writ petition. No case for interference is made out. Appeal is dismissed in limine.