

(2015) 11 PAT CK 0058

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 8406, 12443, 13769 and 14691 of 2015

Bhanu Kumar and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 06-11-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2015) 11 PAT CK 0058

Hon'ble Judges : Mihir Kumar Jha, J.

Bench : Single Bench

Advocate : Vijay Kumar Sinha, for the Appellant; Ashok Kumar Keshari, AAG11, for the Respondent

Judgement

Mihir Kumar Jha, J.—Heard learned counsel for the parties.

2. All these four writ applications having identical prayer and in fact almost having identical pleadings are being disposed of by this common judgment.

3. There is an identical prayer in all the four writ applications as would be apparent from paragraph No. 1 of the respective writ applications, one of which is quoted hereinbelow:

"That this writ application has been filed on behalf of the petitioners for issuance of an appropriate writ in the nature of Mandamus or some other appropriate writ or writs or order or direction directing the respondents to reinstate the petitioners in service when the respondent Nos. 5 to 7 have already been reinstated in the service vide letter No. 11/T-4-46/95-337(II) dated 31.8.1998 the Annexure 8 of the petition, letter No. 11/T-5-57/95-435(II) dated 26.5.1997 the Annexure 17(a) of the petition and letter No. 4/A7-23/94 839(4) dated 10.9.2001 the Annexure 22 of the petition without notification when their appointment authority was the same person."

4. The facts in brief giving rise to all these four writ applications are plain and

simple. The petitioners were appointed by famous Dr. A.A. Mallick, the then Deputy Director, Health Services (T.B.), who went to make at least more than 6000 illegal appointments in Tuberculosis Wing of the Health Department. Such illegal appointments ultimately were cancelled and the appointment of the petitioners were also cancelled in the same transaction some time in the month of April, 1993. The petitioners have thereafter remained out of service for the last 22 years but now they have filed their writ petitions seeking their reinstatement on the ground that respondents No. 5, 6 and 7 though similarly situated being appointed by the same Dr. Mallick were subsequently reinstated and as such, the petitioners would also be entitled for their reinstatement. In fact the entire pleadings in all these four writ petitions revolve round respondents No. 5, 6 and 7, inasmuch as the petitioners have not cared even to put their own order of appointment termination on record and have tried to make out a capital only on account of their plea of discrimination as against respondents No. 5, 6 and 7.

5. This Court in fact in absence of individual details of the petitioners would not be required to deal with the matter at length, inasmuch as with regard to illegality in Mallick's appointment the issue stands settled by the judgment of the Apex Court in the case of Ashwani Kumar and Others Vs. State of Bihar and Others, , wherein it was held that Dr. Mallick had gone to make more than 6000 illegal appointments while holding the post of Deputy Director, Tuberculosis Centre as against only 2250 sanctioned post. It was in this context that the Apex Court had firstly held that:

".....It becomes, therefore, clear that at least 3750 employees were drafted in the Scheme by Dr. Mallick without there being any vacancies to receive them. Under these circumstances, their initial entry must be held to be totally unauthorized, incompetent and void. It is axiomatic that when these recruitments were not supported by any budgetary grants there will be no occasion to make available finances to meet their salary expenses. Even apart from that Dr. Mallick threw all the discretion to the winds acted as monarch of what he surveyed and in a most arbitrary fashion adopting the principles of "pick and choose", recruited these 6000 employees completely violating the established norms and procedures for recruiting class III and Class IV employees as laid down by the State Government from time to time. We agree with the contention of Shri Singh, learned counsel for the respondent-State that all these recruitments made by Dr. Mallick were arbitrary, capricious and were null and void as he did violence to the established norms and procedures for recruiting such employees. Dr. Mallick was not giving appointments to these employees on his private establishment. He was recruiting them in a Government Programme which was supported by Planned Expenditure. Such recruitment to Public Services could not have been effected in such a cavalier fashion in which it was done by Dr. Mallick..... It must, therefore, be held that the appointments of 6000 employees as made by Dr. Mallick in the Tuberculosis Eradication Scheme were ex facie illegal. As they were contrary to all recognized recruitment

procedures and were highly arbitrary, they were not binding on the State of Bihar....."

6. Having held so that these appointments were void ab initio it was further held that the so called regularization or confirmation of such 6000 employees by Dr. Mallick also did not confer any right to them and in this regard it was held as follows:

"13. In this connection it is pertinent to note that question of regularisation in any service including any Government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the concerned incumbents have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the concerned employees can give their best by being assured security of tenure. But this would require one pre-condition that the initial entry of such an employees must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the concerned incumbent. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant would ever survive for consideration, however competent the recruiting agency may be. The appellants fall in this latter class of cases. They had no case for regularisation and whatever purported regularisation was effected in their favour remained an exercise in futility. Learned counsel for the appellants, therefore, could not justifiably fall back upon the orders of regularisation passed in their favour by Dr. Mallick. Even otherwise for regularising such employees will established procedure had to be followed. In the present case it was totally by-passed....."

7. The Apex Court thereafter had also gone to the plea of violation of the principles of natural justice and had held that in the given set of facts and circumstances where the Committee was constituted by the State Government and notices were issued to the illegal appointees of Dr. Mallick the principles of natural justice also had stood complied. In this regard the Apex Court had held as follows:

"16.....The data which they had to submit was duly received and it was thereafter that the Review committee was entrusted with the task of going through the data submitted by these employees along with their replies and their say during the personal hearing. Therefore, the said review Committee was only to scrutinize the data collected during the personal hearing by the Director-in-Chief, Health Services and on that basis the Committee decided the question of legality and validity of their appointments. Thus the basic principles of natural justice cannot be said to have been violated by the Committee which ultimately took decision on the basis of the personal hearing given to the concerned employees and after considering what they had to say regarding their appointments. Whatever was submitted by the concerned employees was taken into consideration and then the committee came to a firm decision to the effect that all these appointments made by Dr. Mallick were vitiated from the inception and were required to be set aside and that is how the impugned termination orders were passed against the appellants. On the facts of these cases, therefore, it cannot be said that principles of natural justice were violated or full opportunity was not given to the concerned employees to have their say in the matter before their appointments were recalled and terminated."

8. Having held so and in fact having also approved the entire termination of 6000 appointments of Dr. Mallick the Apex Court had issued certain directions as with regard to taking steps for filling up the post by following the mandate of Articles 14 and 16 of the Constitution of India in the following terms:

"18.....When that is the need of the day, it would be appropriate to direct the State to undertake that exercise at the earliest and while doing so after following the due procedure of recruitment and the rules governing the same, given an opportunity to these 6000 unfortunate creatures of Dr. Mallick to compete for the said posts in the future recruitment that may be undertaken by the State and in the process because of the experience which they have gathered in their past service under the Tuberculosis Programme and the training which they might have received pursuant to the Government Order dated 31.1.1987, due weight age also be given to them while considering their eligibility for being recruited in service as and when such future exercise is undertaken. Consequently we deem it fit to issue the following directions to the respondent State of Bihar in this connection:

1. Respondent-State of Bihar may start at the earliest a fresh exercise for recruiting Class III and Class IV employees in the Tuberculosis Eradication Programme undertaken by the State as a part of 20-Point Programme on the

available 2250 vacancies or even more vacancies, as the case may be, preferably within three months from the receipt of a copy of this order.

2. Towards the said exercise the State will publish a notice in all the newspapers having circulation in the State inviting applications for direct recruitment to Class III and Class IV posts for filling up these vacancies in the said Programme.

3. Similarly names may also be called for from the concerned Employment Exchange for such recruitment.

4. If no statutory body composed of high-ranked officials for recruitment to Class III and Class IV employees is in vogue, the State is directed to constitute a committee consisting of three members, viz., (a) a member of the Public Service Commission; (b) a senior IAS officer, i.e., the Additional or Joint Secretary of the Health Department; and (c) a senior officer, i.e., the Director or Additional Director of Health Services, to select the candidates. The Additional or Joint Secretary of Health Department shall be the Chairman of the Committee.

5. The respondent-State will constitute such a committee preferably within three months of the receipt of this order.

6. It would be open to all the appellants or those appointed by Dr. Mallick who might not have challenged their termination orders before any competent court up till now, to apply for selection to the concerned Class III and Class IV posts. The committee would in their cases as first step, verify and satisfy itself of the credentials of such candidates whether they were appointed by Dr. Mallick and had worked at least for three years continuously. The committee would also satisfy itself that such candidate or candidates honestly and meritoriously discharged their duties as Class III and Class IV appointees, at least for the said period.

7. The committee may fix total number of marks to be obtained by the candidates for being treated to have passed the selection test. Any relaxation in the minimum eligibility marks to be obtained by the Scheduled Casts, Scheduled Tribes and Other Backward Classes candidates as found necessary may also be decided by the committee. The committee if satisfied about the credentials and other particulars of the appellants or those appointed by Dr. Mallick as mentioned in paragraph (6) above, may allot additional marks to them for each of the three years and more for which they might have worked, at the rate of 2 marks for each completed year of continuous working, upto the maximum of 6 marks, for each candidate. Candidates appointed by Dr. Mallick who are found to have undertaken training pursuant to the Government direction dated 31.1.1987 may be awarded 2 additional marks for the training so received. Those 2 marks will be in addition to the 6 marks which are to be awarded on completion of meritorious and honest service by the concerned employees as mentioned above.

8. If the concerned candidates who were earlier appointed by Dr. Mallick are found by the committee to be otherwise eligible for being appointed to Class III

and Class IV posts as per the relevant rules and regulations and if on the basis of the marks allotted to them as aforesaid they become eligible to be appointed besides other competing candidates, then if they are found to have become age barred the condition of age for recruitment of such candidates should be relaxed appropriately so as to entitle such candidates to be considered for selection.

9. The State Government shall arrange sittings of the Selection Committee preferably within two months from the last date prescribed for submitting the applications and for completion of the preliminary scrutiny of such applications. The committee shall select all candidates on merits following the prescribed procedure in the appropriate circulars and rules and shall also follow the rules of reservation as in vogue and prepare the merit list and should submit it to the Government. While doing so the eligible candidates who were earlier appointed by Dr. Mallick and who received the marks for their past meritorious service and training as aforesaid will be considered for selection qua the other candidates in the light of the weight age of the marks as aforesaid and in that light the committee will select all the candidates on merits and will prepare the select list of candidates found fit to be appointed to the concerned posts.

10. The committee will complete the process of selection preferably within three months from the date of its sittings for selection.

11. An appropriate authority or the government, as the case may be, will appoint preferably within three months from the date of the receipt of the merit list from the committee, the selected candidates as per roster and the merit list, on available vacancies, after due identification of the credentials of the candidates concerned as per its legally permissible procedure.

12. In the event of selection and appointment of erstwhile daily-rated employee or employees, who were inducted by Dr. Mallick, the entire proved period during which they had worked as daily wage and/or confirmed employees will be computed for the purpose of pensionary and other retirement benefits but they will not be entitled to claim any inter se higher seniority in the selection made by the committee or for any promotion on the basis of their previous service."

9. Let it be kept in mind that the curtains were drawn on the appointments of Dr. Mallick way back on 16.12.1996 in view of the aforesaid judgment of the Apex Court in the case of Ashwani Kumar (supra). The petitioners also in view of the aforesaid judgment of the Apex Court have remained out of service from 1993 onwards but now they want to be reinstated on the ground that subsequently respondents No. 5 to 7 were reinstated on 26.5.1997, 31.1.1998 and 10.9.2001 respectively. As noted above, though such events of reinstatement of respondents No. 5, 6 and 7 had also taken place some 14 to 18 year back. This Court, therefore, on account of abnormal delay in the reinstatement of respondents No. 5, 6 and 7 is not prepared to even examine that issue in view of the following observations of the Apex Court in the case of State of Bihar Vs. Upendra Narayan Singh and Others, , as with regard the concept of right to

equality under Article 14 of the Constitution in the matter of public employment especially with regard to giving similar benefit as to some others retained. The Apex Court in this regard had held as follows:

"65. In view of the above discussion, we hold that the initial appointments of the respondents were made in gross violation of the doctrine of equality enshrined in Articles 14 and 16 and the provisions of the 1959 Act and the learned Single Judge gravely erred by directing their reinstatement with consequential benefits.

67. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order - Chandigarh Administration and another Vs. Jagjit Singh and another, , Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and Others, , Union of India (Railway Board) and others Vs. J.V. Subhaiah and others etc. etc., , Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, , Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and Others, , M/s. Faridabad Ct. Scan center Vs. D.G. Health Services and others, , M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another, and State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, , Union of India (UOI) and Another Vs. International Trading Co. and Another, and Directorate of Film Festivals and Others Vs. Gaurav Ashwin Jain and Others, ."

10. Learned counsel for the petitioners has, however, submitted that two writ applications, C.W.J.C. No. 12433/2013 and C.W.J.C. No. 16459/2013 are also pending before this Court on exactly same issue in which notices have been issued to respondents No. 5 to 7 as well as the Government was asked to explain the reason for their being retained in service.

11. Since both the above writ applications are not listed before this Court and in fact the subject matter and the roster of those writ applications is entirely different, this Court is not inclined not make any comment about them but then if this is all what the petitioners of those cases have to contend that after their termination of service in 1993 they want to be reinstated on the ground of reinstatement of respondents No. 5 to 7, this Court following the ratio in the case of Upendra Narayan Singh (supra) must hold that such illegality cannot be perpetuated by the Writ Court. As noted above, the Apex Court had clarified that the right to equality is a positive right and cannot be enforced in a negative manner.

12. This view has also been again reiterated by the Apex Court in the case of State of Orissa and Another Vs. Mamata Mohanty, , wherein it was held as follows:

56. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Administration and another Vs. Jagjit Singh and another, ; Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others, ; Anand Buttons Ltd. Vs. State of Haryana and Others, ; K.K. Bhalla Vs. State of M.P. and Others, ; Maharaj Krishan Bhatt and Another Vs. State of Jammu & Kashmir and Others, ; Upendra Narayan Singh (supra); and Union of India (UOI) and Another Vs. Kartick Chandra Mondal and Another, .

57. This principle also applies to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same. While dealing with a similar issue, this Court in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., observed as under. (SCC p. 551, para 12).

"12....."2.....To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in *Pierce v. Delameter* (A.M.Y. at page 18:"

"a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors".

(See also In Re: Sanjiv Datta and Others, ; Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Another, ; and Mayuram Subramanian Srinivasan Vs. C.B.I., ."

13. Thus, having regard to overall scenario in all these four cases where the petitioners only after being continued in service for a period of 4 to 5 years were removed way back in the year 1993 they cannot be now reinstated in service, especially when they have kept complete silence/withheld information as to whether they had appeared in the fresh selection process as per the direction of the Apex Court in the case of Ashwani Kumar (supra). As a matter of fact it would transpire that pursuant to the directions of the Apex Court in the case of Ashwani Kumar (supra) the Bihar Public Service Commission had undertaken the exercise by issuance of fresh advertisement and a number of appointments by giving preference to the appointees of Dr. Mallick by way of relaxation of age as also giving certain weightage for their earlier experience etc. and that exercise also came to an end way back in the year 2000. Thus, if either the petitioners did not participate in that selection process to avail the benefit of the directions given in the case of Ashwani Kumar (supra) or having participated have failed, they cannot now claim reinstatement in service which is invariably a concept in Service Jurisprudence, wherein the termination order having been held to be

bad, the consequential relief is only by way of reinstatement. In the present case the appointment of the petitioners have been held to be void ab initio and they were terminated from service in 1993 and such decision of the State Government was also reaffirmed by the Apex Court in the case of Ashwani Kumar (supra).

14. Thus, for all these reasons this Court does not find any merit in these writ applications and they are accordingly dismissed.

15. This Court, however, must make it clear that dismissal of these four writ petitions will not mean that the reinstatement of respondents No. 5, 6 and 7 in service has been approved by this Court.

16. In fact it will be also open to the respondents No. 1 to 4 to examine on their own as to whether the decision of the authorities of Health Department of reinstatement of respondents No. 5 to 7 back in service after their termination from service in 1993 on the ground of their being also appointees of Dr. Mallick was/is in accordance with law and in keeping with the directions of the Apex Court in the case of Ashwani Kumar (supra) and/or if the petitioners also file a representation for this purpose, an appropriate decision will be taken by the Principal Secretary of the Health Department within a period of six months but only after giving notice and/or opportunity of hearing to respondents No. 5 to 7.

17. This Court would also make it clear that such decision of Principal Secretary of the Health Department shall remain confined only to alleged illegality in reinstatement of respondents No. 5 to 7 and nothing more.

18. Let a copy of this order be sent not only to the Principal Secretary of the Health Department but also tagged with the records of C.W.J.C. No. 12433/2013 and C.W.J.C. No. 16459/2013 for its being taken into consideration while disposing of the aforesaid two pending writ applications.