
(2011) 09 PAT CK 0132

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2930 of 2009

Binay Kumar Singh and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-09-2011

Acts Referred:

Citation : (2011) 09 PAT CK 0132

Final Decision : Allowed

Judgement

Navin Sinha, J.—Heard learned Counsel for the Petitioners and the State.

2. The Petitioners are aggrieved by the orders dated 15.4.2008 and 16.4.2008 passed by the three man committee declining to regularize their services, holding upon consideration that their appointments were illegal.

3. It is submitted that the Petitioners were appointed on 29.12.1993 and 14.9.1993 as Clerks by the Regional Deputy Director of Education, Tirhut Division at Muzaffarpur, and who was statutorily competent to make the appointment as the appointing authority. Their services were terminated on 12.6.2000 and 26.11.1999 respectively leading to institution of C.W.J.C. No. 8325 of 2000 and C.W.J.C. No. 9089 of 2000. By separate orders dated 6.9.2001 and 9.7.2001 the writ applications were allowed. Petitioner No. 1 was held to have been appointed by the Divisional Establishment Committee after following procedure. The liability for not following reservation roster could not be fastened at the door of the Petitioner. The termination of Petitioner No. 2 was likewise held to be bad holding that the appointment was made by the Divisional Establishment Committee after advertisement. In a span of six years his appointment has been verified more than once. Even if some wrong appointments has been made in Tirhut Division the allegation against him across the Board without identification of individual facts was not justified. While the termination orders stated that it was without advertisement, the show cause notice did not mention that ground. The non compliance of reservation roster could not be attributed to the Petitioner. It was further noticed that similar other applications had been allowed and affirmed in

L.P.A.

4. The Respondents preferred L.P.A. No. 580 of 2002 and L.P.A. No. 1500 of 2001 respectively against both the Petitioners. They were heard with a batch of analogous applications led by L.P.A. No. 798 of 2005 and disposed on 11.1.2007. The Division Bench did not go into the facts of each case but noticed the allegations that some of the appointments were not legal and some were irregular. The matter was referred to a committee to be constituted by the State Government for examination of individual claims leading to the present impugned order.

5. Learned Counsel for the Petitioners submits that the order dated 15.4.2008 in respect of Petitioner No. 1 arrives at the conclusion that because he had not produced a copy of the advertisement in pursuance of which he came to be appointed it would lead to a presumption for absence of any vacant sanctioned post. He relies upon an order of this Court in C.W.J.C. No. 592 of 2009 which in turn notices another order in C.W.J.C. No. 17887 of 2008 that where the allegations are for non publication of an advertisement and the defence is for an appointment in pursuance of an advertisement, before holding that No. advertisement was issued making the appointment illegal, it was incumbent upon the Respondents to come with a positive stand based on documentary evidence that in fact No. advertisement whatsoever had been published and the matter cannot proceed on assumptions and presumptions. The order next states that the Regional Deputy Director was the appointing authority of the Petitioner. The appointment was to be made by a committee to be headed by the District Magistrate. The appointment letter in No. uncertain terms talks of appointment by the committee under the signature of the Regional Deputy Director. So long as the committee was constituted and the Regional Deputy Director was present and signed the appointment letter, the absence of the District Magistrate in the committee was at best an irregularity and not an illegality. This Court in the earlier round of litigation had already held that roster clearance was the responsibility of the Respondents and not of the Petitioner.

6. In respect of Petitioner No. 2, the impugned order dated 16.4.2008 itself notices that he produced a copy of the advertisement. Likewise, he was appointed by a committee under the pen of the Regional Deputy Director and the District Magistrate who were both present. His was a valid appointment terminated without any procedure. Co-employees similarly situated Ravindra Kumar Tiwary and Anil Jha were likewise terminated and their appointment were upheld up to the Supreme Court. Again it was reiterated that the roster clearance was not the responsibility of the Respondents.

7. The common submission therefore was that their's was not a case for regularization but a wrong termination of vaild appointment. Counter affidavit has been filed on behalf of the Respondents. It cannot and does not endeavour to go beyond the materials mentioned in the impugned order but seeks to raise fresh issues with regard to fraudulent appointment letters and appointment

beyond the sanctioned strength.

8. Once the Respondents have passed a reasoned and speaking order in pursuance of the directions of this Court their actions have to be scrutinized in judicial review on basis of what is recited in the order. They cannot be permitted to improve upon that order by additional materials supplemented in the counter affidavit beyond the grounds mentioned in the speaking order. An administrative order is not like old wine which matures with passage of time.

9. The Court considers it proper to commence the discussion from the order of this Court in C.W.J.C. No. 8325 of 2000 and C.W.J.C. No. 9089 of 2000. The Respondents had also filed counter affidavits. After considering the respective cases the Court arrived at a positive finding of No. illegality in the appointment for specified reasons. The judgments were carried in Appeal and merged with the order of the Appellate Court. The appellate order did not set aside the findings of the writ Court while referring the issue to the three man committee. Therefore applying the doctrine of merger the entire issue including the findings of the writ Court were referred to the Committee. The Division Bench again gave an opportunity to the committee to record its findings based on reasons and documentary evidence why the findings recorded by the writ Court may not have been correct. The impugned orders do not cross the findings of the writ Court in the two writ petitions.

10. What the term merger shall mean in a case shall largely depend on the nature of the orders passed as held in State of Madras Vs. Madurai Mills Co., Ltd., at Paragraph-6 as follows:

6. But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

11. A similar view has been expressed in M.R.F. Ltd. Vs. Manohar Parrikar and Others, at Paragraph-38 as follows:

38...The merger is essentially of the operative part of the order and the principle of merger of the order of the subordinate court with the order of the superior court cannot be applied when there is No. order made by the superior court on merits and the controversy between the parties has not been looked into by the superior court.

12. Both the Petitioners are in possession of appointment letters. They were removed from service earlier. Findings were returned of the legality of the

appointment. Those findings remain undisturbed by the report of the three man committee which appeared to have proceeded to also scrutinize their appointments. The scrutiny reveals that No. finding has been arrived at by the committee that the appointments were made without following procedures by advertisement. In both cases the Petitioners have specifically alleged issuance of an advertisement. Petitioner No. 2 in fact did produce a copy of the same. In neither case the Respondent took the stand that they had never published an advertisement. Their appointment letters have not been doubted in the impugned orders. The counter affidavit suggests to the contrary that it was fraud. Fraud is a question of fact for which Petitioners had to be put on notice. No. such procedure has been followed. If they had produced appointment letters there is a presumption that all Government work was done in normal course of duties u/s 114(e) of the Indian Evidence Act. This presumption gets further fortified when the Respondents acknowledge that the appointing authority was the Regional Deputy Director. If that be so, it is not in controversy that both the Petitioners have been appointed by him. In both the cases the contention of the Respondents is that the constitution of the committee was incomplete. It is not their case that the committee did not make the appointment. The absence of any committee member may at best be an irregularity and shall not make the deliberations of the selection committee illegal. The finding that roster clearance was the responsibility of the Respondents has not been dealt with at all.

13. In C.W.J.C. No. 592 of 2009 similar view has been taken that any infirmity in the Constitution of the committee may at best make it an irregular appointment and not an illegal appointment.

14. The impugned order dated 16.4.2008 completely misdirects itself when it concludes that since termination was done in a period of six years and the Petitioner had not completed 10 years he was not entitled for regularization. As discussed the issue before the committee was the legality of the appointment and not regularization.

15. The impugned orders dated 15.4.2008 and 16.4.2008 are accordingly set aside.

16. The Petitioners are held entitled to reinstatement in service from the date of termination with continuity of service for all purposes including pension and seniority except salary.

17. The writ application is allowed.