
(1994) 04 PAT CK 0027

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 497 of 1984

Braj Kishore Singh and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 06-04-1994

Acts Referred:

Citation : (1994) 04 PAT CK 0027

Final Decision : Dismissed

Judgement

S.K. Chattopadhyaya, J.—Being agrieved by the order dated 8.6.83 by and under which the State Government has refused to approve the appointment of the petitioners, the petitioners have moved this Court.

2. The facts of the case lies in a narrow compass.

3. In the year 1979, the petitioners joined jagdamb College at Chapra as class III and IV grade employees. The posts were duly sanctioned by the Governing Body in the Year 1973. Petitioner Nos. 1 to 8 were appointed as Class III employees while the Ors. were appointed as Class IV employees.

4. The Vice-Chancellor of the Bihar University constituted a Selection Committee for the purpose of these appointments and the said Selection Committee after complying with all the procedures, namely, advertisement and interview selected the petitioners on different posts as stated above which posts were duly sanctioned by the Governing Body in 1973. Appointment letters have been annexed as Annexure-3 series. At the time of their appointments 21 persons were already working as Class III employees and 43 persons as Class IV employees. The Selection Committee being satisfied with the interview appointed 8 persons as Class III and 14 persons as Class IV employees One Deep Narain Singh was working in a post and as he died, petitioner No. 11 was appointed on the said sanctioned post. Out of 44 class IV employees, one died and Anr. retired from service. One Vidya Shankar Sharma, appointed earlier, had already left the college. Out of 29 Class III employees including the petitioner one Lal Babu

Singh, who was appointed as a StoreKeeper had been promoted as Demonstrator in the department of Physics. It is stated that at present working strength in Class III is 28 and 54 in Class IV. By letter No. B/5676 dated 2.3.1981 (Annexure-4), the Vice-Chancellor of the Bihar University approved the appointments of the petitioners. Previously concerned college was to pay the salary of the petitioners which were paid for a period of 8 months whereafter the Vice-Chancellor made payment for three months by several Bank Drafts. Copies of which have been annexed as Annexure-5 series.

5. Annexure-6 reveals that the college was affiliated on 1.4.75 and after such affiliation by letter No. B/30242 dated 14.9.81, the Bihar University forwarded the case of the petitioners to the Joint Secretary, Education for regular payment of salary as well as to approve their appointments. Certain queries were sought for by the Deputy Director, Higher Education by his letter dated 13.2.82. In pursuance of the aforesaid letter, the Principal of the college submitted his reply to the Deputy Registrar-I, by his letter dated 5.6.82 and copy of the same was sent to the Deputy Director (Higher Education). It appears that the State Government did not grant approval and as such the Registrar again requested the State Government by his letter dated 27.7.82 to approve the appointment of the petitioners. Ultimately, however State Government rejected the recommendation for approval of 22 non-teaching staff on the ground that they were appointed beyond the norms of the staffing, pattern.

6. Annexure-8 shows that State Government in consultation with the Bihar University Board finalised the norms of "staffing pattern" to be followed in the colleges in order to finalise the proposal of colleges for sanction of additional number of non-teaching staff. The decision of the Government dated 30.9.80 was communicated to all the members of constituent colleges as well as Principals of affiliated colleges. It is stated that according to the norms of staffing pattern, number of employees for Jagdamb College comes to 28 in Class III post and 53 in Class IV post but whereas 28 persons are working as Class III employees and 54 persons are working as Class IV employees. According to the petitioners this numbers will show that there is only one employee, who can be said to be in excess of the staffing pattern, namely, one person is in excess in Class IV grade. The petitioners have given the break-up in para-16 of the writ petition which has not been controverted by the respondents.

7. The grievance of the petitioner is that taking into consideration the staffing pattern formulated by the State Government itself, there was no justification for refusing the approval of the appointment of the petitioners. The case of the petitioners further is that all of them are working in the college for about five years continuously and that too to the satisfaction of authorities concerned.

8. Several representations were filed but without any result. The petitioners have also asserted that norms of staffing pattern being introduced after the appointment of the petitioners, the said norms cannot apply retrospectively and as such the impugned order is liable to be quashed.

9. Several supplementary affidavits have been filed during pendency of this application annexing some documents. The first supplementary affidavit reveals that an agreement was entered into on 6.8.84 by and between the Non-Teaching Association and the University In accordance with the agreement aforesaid, the Vice-Chancellor by his order dated 15.1.85 directed for payment of salary in the scale of pay prescribed for them to some employees of Dr. Ram Manohar Lohia College, Muzaffarpur, B.P.S. College Bhore and S.R.A.P. College, Barachakia. By subsequent order dated 23.1.85, Vice-Chancellor directed for payment of salary to the employees of Ram Sakal Singh Science College, Sitamarhi with effect from 1.1.85.

A representation was filed on 25.2.85 by the petitioners with a request for payment of their salaries in accordance, with the agreement as aforesaid. It is further alleged that service of employees of those four colleges have been approved by the University in the year 1985 whereas petitioners' service were approved by the University in the year 1981 itself. The case of discrimination has been made out by the petitioners by ascertaining that employees of those four colleges were appointed after the appointment of the petitioners and University never paid salaries to those persons prior to passing of the order dated 15.1.85 and 23.1.85 respectively, whereas the petitioners were being paid their salaries by the University itself from much earlier daily

10. Second supplementary affidavit show that by its order dated 30.9.1980 (Annexure 12) the State Government admitted that before 16.8.76, the Governing Body of an affiliated college was competent to create posts for class III and class IV employees and Governing Body was also competent to make appointment of class III employees whereas the Principal was competent to appoint Class IV employees, of course subject to certain conditions. This letter further indicates that in view of section 35 of the Bihar State Universities Ordinance, 1976 which was promulgated on 16.8.1976, no other college than the colleges managed and maintained by the State Government and the colleges established by the minority community could create posts of teaching or non-teaching staff and make any new appointments to posts either existing from Before 16.8.76 or after 15.8.76, without obtaining permission of the State Government to sanction additional posts of non-teaching staff for making further appointments in the colleges

It appears that as there was no yard stick to measure the need of a particular college as such by this letter, the Principals of the concerned colleges were requested to examine the (sic)ecds of the college on the basis of norms of staffing pattern finalised by the State Government. They were also requested to submit their proposals for sanction of additional posts and appointments thereto for obtaining the sanction of the State Government. It was made clear in the said letter that neither the University nor the State Government is bound to bear any financial liability for the payment of those employees in respect of which posts were created by the Governing Body and appointments were made after 16.8.76

without permission/sanction of the State Government.

11. Copies of order dated 15.1.85 and (sic).1.85 have been annexed as Annexure-15 and 16 respectively in the third supplementary affidavit to show that after the aforesaid agreement dated 6.8.84, the University had issued the orders for payment of salary to those non-teaching employees, who were appointed and working on the basis of staffing pattern. Further referring to Annexure-10 (a copy of the agreement), it was directed that non-teaching staff working after 15.8.76 will not be removed and would get their salary regularly. It is asserted that non-teaching staff as are mentioned in Annexures-15 and 16 in this affidavit, though were not being paid prior to issuance of these two orders, are being regularly paid with effect from 1.1.85. Another document has been annexed and marked as Annexure-17 which is a Government resolution dated 10.5.91 to show that para-2 of Annexure-17 will reveal that after consideration, the State Government has decided that on the basis of "Staffing Pattern", previously issued, the posts should be created. Para-4 further indicates that absorption be made against sanctioned posts on the basis of "staffing pattern" and benefit of absorption would be given to the employees who have been appointed till 10.5.86. Referring to para-6 of the resolution, it is submitted that even if posts are not available on the basis of staffing pattern the employee who are working from before 10.5.86 will be retained in service and they will be absorbed against vacant posts which would occur in future.

12. Subsequently, annexing a letter dated 15.12.87 (Annexure-19) it is stated that the Principal of the college concerned in compliance of letter dated 16.11.87 (Annexure-18) sent the required information regarding teaching and non-teaching staff required against prescribed post in consonance with the approved "staffing pattern". According to letter dated 15.12.87, it is apparent that as per the approved "staffing pattern" the total- post of Class III employees are 46 and that of Class IV are 78 in Jagdamb College, out of which only 24 persons including 2 (two) Laboratory Incharge in Class III and 43 employees in Class IV are working in the College. Annexing letter dated 17.8.79 (Annexure-22) issued by the Education Department of the State Government it is stated that, State Government approved one of Laboratory Incharge in the Science Faculty on the strength of 32 students reading in I.Sc. and B.Sc. upto Hon''s in the college.

13. It is further case of the petitioners that petitioner No. 7 who was initially appointed in 1979 as Store-Keeper was subsequently appointed to the post of Laboratory Incharge by the Vice-Chancellor. Similarly, petitioner No. 8 was initially appointed to the post of Solution man in the department of Chemistry in the said College in March, 1979 and was later on appointed on the sanctioned and approved post of Laboratory Incharge Chemistry department by the Vice-Chancellor by his order dated 13.2.1981.

14. The grievance of the petitioners is that inspite of the fact that by reason of Annexure-17, while State Government has decided to give benefit of absorption to the employees who were appointed till 10.5.86 and admittedly when the

petitioners were appointed as far back as in 1979 and are still continuing in service, they are not being paid their salary. Annexing Government letter dated 1st May, 1989 as Annexure-25, Anr. supplementary affidavit has been filed to show that on the basis of an agreement entered into between State Government and Bihar State University and College Employees Federation on 26.4.89, the State Government has agreed to regularise the services of the non-teaching staffs working in the University/Colleges as per the staffing pattern.

15. When the writ application was filed, the Chancellor and vice-Chancellor of the Bihar University were made respondent Nos. 3 and 4 respectively. On 23.8.93, when the case was taken up for hearing Mr. Indu Shekhar Pd. Singh, learned senior counsel for the respondent No. 4 informed the court that the college in question is now under the Jai Prakash Narayan University (J.P. University) which has been carved out from erstwhile Bihar University during the pendency of the writ application. The prayer was made that notice should be issued to J.P. University was also informed that Bihar University has been renamed as Baba Saheb Bhim Rao Ambedkar Bihar University. On such information being given the learned counsel for the petitioner sought permission to add J.P. University through its Registrar as respondents No. 5 and the prayer was allowed. By the salary order, liberty was given to the petitioner it serve a copy of the writ petition on the Registrar J.P. University (Respondent No.5) and to obtain a receipt from, himself authorised agent and to file the same.

16. Mr. Mukesh Kumar Sinha appeared on behalf of the respondent No. 5 by filed Vakalatnama. A counter affidavit has been filed on behalf of the respondent No. 5. the stand of the respondent No. 5 namely, the J.P. University is to the effect that as it petitioners were not appointed on regular posts on regular pay scale rather they were working against unsanctioned posts even after the college became constituent, no relief cannot be granted to the petitioners. It is stated that the petitioner's appointments were not excpted by the erstwhile University i.e. Bihar University which is known as Baba Saheb Bhim Rao Ambedkar Bihar University at present (Respondent No-4). The Respondent No. 4 has stopped releasing the fund the petitioners and as such their claim salary is without any basis. Further stated "Respondent No. 5 is that details with (sic) to the petitioners are not available with(sic) as the petitioners were not appointed is accordance with law, they are not entitled to their salary. .

17. Mr. Rajendra Prasad Singh, learned senior counsel appearing for the petitioner has submitted that apart from the (sic) troverted facts of the present case, this(sic) under similar circumstances in the case of Kiran Prakash Gupta and Ors. v. State of Bihar and Ors. C.W.J.C. No. 3730/86 heard along with Shashi Ranjan Kumar Shukhla v. the State of Bihar and Ors. C.W.J.C. No. 5647/90 by its judgment dated 22nd May, 1992 has directed the State Government to consider the recommendation of the University for sanctioning the post of non-teaching staff and also directed the University to scrutinise the case of the petitioners of that case. It is submitted by the learned counsel that the present case is fully

covered by the aforesaid decision and the grievance of the petitioners will be redressed if similar direction is given in this case also.

18. Mr. Singh has also drawn my attention to the order of the Supreme Court dated 25-9-91 passed in Writ Petition No. 409/91 and has submitted that under similar circumstances the apex court has directed the Ranchi University to take immediate steps to determine the staffing pattern and other details in accordance with the agreement and forward the list within two months to the State Government. The State Government, it is further directed, will consider the same and issue orders within one month thereafter.

19. Mr. Indu Shekhar Prasad Singh, learned senior counsel appearing on behalf of Respondent Nos. 3 and 4 has submitted that the directions, as aforesaid, are given in this case also, he cannot have any objection.

20. Mr. Ram Balak Mahto, learned senior counsel appearing on behalf of Respondent No. 5, on the other hand, has strongly (sic)posed the contention raised on behalf of the petitioners as well as Respondent. Nos. 3 and 4. He has submitted that the decision rendered by this Court in the case of Kiran Prakash Gupta (Supra) is not applicable for the simple reason that the Jagdamb College became constituent from 1-4-1975 which will reveal from Annexure-13 itself. It is further submitted that appointment letters of the petitioners are some times of the year 1979. In such connection, he has drawn my attention to the different appointment letters, as contained in Annexure-3 series. Advancing his argument, Mr. Mahto has submitted that when the college became a constituent unit from 1-4-1975 and the petitioners were appointed in 1979 i.e. much after the college became constituent, section 35 and 10(6) of the Bihar State Universities Act, 1976 (hereinafter referred to as the "Act") will come into play. It is further urged that the terms of appointment of the petitioners clearly indicate that the posts they claim were not sanctioned and the Governing Body was not authorised to appoint them in view of the aforesaid provisions of the Act.

21. Referring to Paragraph "7" of the writ petition, Mr. Mahto has submitted that at the time of appointment of the petitioners in 1979, 21 persons were already working in Class-III Grade and 43 persons in Class-IV Grade, petitioners claim to be regularised against posts created by the Governing Body in 1973 when admittedly the college was affiliated. The petitioners claim that they were selected in 1977 and joined in 1979 which goes to show that at their time of joining in 1979, the Act had held the field and as such the Principal of the college was not competent to appoint any person without prior approval of the State Government in view of section 35 of the Act. Advancing his argument, Mr. Mahto has strongly, submitted that the appointment of the petitioners against unsanctioned posts by a person not competent to appoint, is no appointment in the eye of law and as such they have no right to be regularised. In such view of the matter, the State Government as well as the University can ignore the appointments of the petitioners. In support of his contention, learned counsel refers several decisions of this Court as well as the Supreme Court.

22. In the backdrops of these facts, it is to be seen as to whether the case of the petitioners are covered by the decision of this Court rendered in the case of Kiran Prakash Gupta. (Supra). In the said case, the petitioners were appointed at a time when the said college was neither affiliated nor was a constituent one and as such outside the purview of the Act. The Vidya Bhawan Mahila Mahavidyalaya, Siwan became constituent with effect from 1st March, 1991 and the Managing Committee appointed certain teaching staff and created some posts of Class-III and Class-IV non-teaching staff by its proceeding dated 21st March, 1979. By subsequent proceeding dated 12th May, 1980, the Managing Committee of the said college further created certain other posts of Class-III and Class-IV posts of non-teaching staff.

23. From the above facts, it is clear that the petitioners of the said case were appointed some times in 1979. In the aforesaid case, Mr. Indu Shekhar Prasad Sinha appeared on behalf of the University and conceded fairly that if the college was not affiliated, no provision of the Act would be applicable. It was also submitted that the agreement (Annexure-4 of that case) postulate that the employees will be bound by section 35 of the Act if the college is affiliated. In the present case, on the other hand, uncontroverted position is that the Jagdamb College became a constituent college on 1-4-1975 whereas the petitioners claim to have been appointed in 1979 i.e. much after the college became constituent.

24. Section 35 of the Act reads, as follows:

No post for appointment shall be created without the prior sanction of the State Government.-- Notwithstanding anything contained in this Act, no University or any college affiliated to such a University, except such college. --.

(a) as is established, maintained or governed by the State Government; or

(b) as is established by a religious or linguistic minority;

(i) after the commencement of this Act no teaching or non-teaching post involving financial liabilities shall be created without the prior approval of the State Government.

(ii) shall either increase the pay or allowance attached to any post, or sanction any new allowance;

Provided that the State Government may, by an order, revise the pay scale attached to such post or sanction any new allowance.

(iii) shall sanction any special pay or allowance or other remuneration on any kind including ex-gratia payment or any other benefit having financial implication to any person holding a teaching or non-teaching post;

(iv) shall incur expenditure of any kind on any development schemes without the prior approval of the State Government.

(2) Notwithstanding anything contained in this Act, no College other than one

mentioned in clauses (a) and (b) of sub-section (1), shall, after the commencement of this Act, appoint any person on any post without the prior approval of the State Government: "

Provided that the approval of the State Government shall not be necessary for finding up a sanctioned post of a teacher for period not exceeding six months, by a candidate possessing the prescribed qualificaion.

25. In this connection, it will be useful refer the provisions as laid down in section 10(6) of the Act, which reads thus:

The Vicc-Chancellor shall subjected the provisions of this Act, the Statutes the Ordinances have power to make pointment to posts within the sanction grades and scales of pay and within(sic) sanctioned strength of the ministerial state and other servants of the University (sic) being teachers and officers of the University and have control and lull disciplinspowers over such staff and servants.

26. From bare reading of the provisions, aforesaid, of the Act, it is clear that as soon is a college becomes constituent, no post for appointment can be created without prior sanction of the State Government. In the intant case, nowhere it has been stated by the petitioners that after the college became conttuent in 1979, the Government sanctioned or creation of posts.

27. In the case of Birendra Singh v. the state of Bihar and Ors. reported in 1993 (1) PLJR 460, a Division Bench of this Court after discussing the provisions of Bihar Non-Government Secondary Schools (Taking Over service Management and Controls) Act, 1981 and Bihar Secondary Education (Conditions of service) Rules, 1983, has observed that a person who has been appointed on "a tenure post and that too on wholly irrelevant and extancous consideration has no right to hold he post as his appointment is itself a nullity sancing violative of the mandatory provisions of the Recruitment Rules as also Article 16 of the Constitution of India. It was also held that regularisation cannot be a mode of recruitment in derogation to the provisions of the statutory Rules as also Article 309 of the Constitution of India.

28. Similarly in a recent decision in the case of Sitaram Thakur v. The State of Bihar and Ors. reported in 1994 (1) PLJR 8, the Division Bench of this Court, while holding the order of termination of the petitioner as valid, has observed that when appointment itself was illegal being contrary to the procedure laid down under Rule, the appointed persons cannot derive any right to continue in the said post.

29. It cannot be disputed that the petitioners were appointed without prior sanction of the post by the State Government at a time when the college became constituent one. only because the petitioners claim to have been selected in 1977 though appointed in 1979, in my opinion, cannot be a ground for regularisation of the petitioners.

30. In the case of Sukh Sagar Prasad and Others Vs. The State of Bihar and

Others , a Division Bench of this Court by its judgment dated 23-3-94, after elaborate discussion of scope of section 35 of the Act has observed that:

We, are further of the opinion that this Court cannot direct the State of Bihar to accord sanction. We, are however, of the view that the State of Bihar as also the concerned Universities would implement its own policy decision and thus it is not necessary to issue a specific writ in this regard. As and when posts are sanctioned on the basis of staffing pattern or otherwise the appointments should be made strictly in accordance with the provisions of Bihar State Universities Act and the Statutes framed thereunder by the respondent-University as also upon compliance of the provisions of Articles 14 and 16 of the Constitution of India

31. In a recent judgment in the case of J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., , the apex court had held that:

Existence of the statutory Rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil posts and fill them up according to executive instructions consistent with Arts. 14 and 16 of the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplement the law, but would only supplant the law.

It was further observed by their lordship that :

A little leeway to make ad hoc appointment due to emergent exigencies, does not clothe the executive government with power to relax the recruitment or to regularise such appointment nor to claim such appointments to be regular or in accordance with rules. Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The later are the product of order and regularity.

32. Similarly on the question of direction given by the High Court to regularise the services of the respondent of that case, the Supreme Court observed that it is true that the ad hoc appointments have been continuing from 1986 onwards but their appointments are de hors the Rules. The direction of the High Court, held the apex court, is a negation of Articles 14 and 16 and in violation of the statutory rules. Referring to various decisions, Supreme Court has observed that the direction of the Supreme Court to regularise the services of ad hoc appointees were a direction under Article 142 of the Constitution on the peculiar facts and circumstances there and the High Court was not right in placing reliance on the judgment as a ratio to give the direction to the PSC to consider the cases of the respondents.

33. On the basis of this authoritative pronouncement of the apex court, I am of the opinion that the order dated 25-9-91 (Supra) relied by Mr. Singh for the

petitioners is a direction under Article 142 of the Constitution of India and this Court has no such power to give direction for regularisation of the petitioners when admittedly they were appointed without prior approval of the State Government, as contemplated u/s 35 of the Act and after the college became a constituent one.

34. In these view of the matters, in my considered opinion, the petitioners have right to get any relief from this Court, in much as, it is a settled law that once statutor rules have been made, the appointments shall be made only in accordance with the rules

35. In the result, this writ application no merit and as such it is dismissed. However in the facts and circumstances of the ca(sic) there will be no order, as to costs.