

(2010) 10 PAT CK 0002
In the Patna High Court
Case No : CWJC No. 12150 of 2002

Braj Kishore Tiwary

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 07-10-2010

Acts Referred:

Citation : (2010) 10 PAT CK 0002

Final Decision : Allowed

Judgement

Mihir Kr. Jha, J.—Having heard Mr. Mahesh Narain Parbat, learned Counsel for the Petitioner, Mr. Harendra Prasad Singh, learned Counsel for Kameshwar Singh Sanskrit University, Darbhanga and Mr. Raj Kamal, A.C. to S.C. 20, for the State, as with regard to the following relief:

(i) To issue a writ of certiorari for quashing Memo No. 535 Patna dated 25.5.99 issued by Respondent No. 2 through which the claim of the Petitioner for his absorption on the post of Assistant Librarian of Pandit Bharat Mishra Sanskrit College, Chapra and for payment of his salary of the said post has been rejected.

(ii) To issue a writ of mandamus commanding the Respondents to extent the benefits of a Full Bench decision of this Hon"ble Court passed in L.P.A. No. 36/94 Ed.- 1995 (1) PLJR 509. (Braj Kishore Singh and Ors. v. The State of Bihar and Ors.) to the Petitioner and to regularise his service on the post of Assistant Librarian on his post he is working continuously since 1.9.79.

(iii) To issue a further writ of mandamus commanding the Respondents to discharge their legal obligation to follow the Full Bench decision of this Hon"ble Court and to make payment of salary of the Petitioner alongwith arrears admissible in law for the said post to the Petitioner in terms of abovesaid decision of this Hon"ble Court.

(iv) To issue a further writ of mandamus commanding the Respondents to not to disturb the peaceful working of Petitioner on the said post in any way till regularisation of his service on the said post.

(v) To issue a writ of mandamus commanding the Respondent to make payment of interest @ 18% per annum on the entire dues amount of salary and emoluments of the Petitioner which have not been paid to him without any rhyme or reason.

this Court is of the considered opinion that the impugned order dated 25.5.1999 (Annexure-15) passed by the Secretary to the State Government in the Department of Higher Education does not decide the real issue in question and in fact is a slipshod effort of the Secretary of the Department to dispose of the matter only in order to report compliance of a direction of this Court in the order dated 8.8.1998 in C.W.J.C. No. 4812 of 1998.

2. The issue is quite simple, inasmuch as the College of the Petitioner, namely, Pandit Bharat Mishra Sanskrit Mahavidyalaya, Salempur, Chapra was an affiliated College of Kameshwar Singh Sanskrit University right from the inception the University came into existence some time in the year 1965-66. It is the case of the Petitioner that the College was given temporary affiliation in the year 1967 and permanent affiliation in the year 1972. The appointment of the Petitioner was made by the governing body of the affiliated College on the post of Library Assistant, a post which was also covered by the staffing pattern for Sanskrit Colleges as would be borne out from the communication of the University dated 30.3.1979 making it as a condition precedent for continuation of the affiliated College by providing 13 posts of teachers and 10 posts of non-teaching employees including that of Library Assistant. As a matter of fact when the College was already selected for its take over by University for its being made a constituent unit of the University with effect from 24th-25th March, 1982 as would appear from the University's letter dated 2nd March, 1982 (Annexure-5), the Registrar of the University had also given provisional approval to the appointment of the Petitioner on the post of Library Assistant with effect from 1.9.1979, the date on which he was appointed on the said post in the College.

3. It is true that the said order of the University dated 9.2.1982 could not have made the State Government also liable for payment of salary, inasmuch as it was clarified that the provisional approval of the services of the Petitioner would entail the consequence of payment of salary only after the Government would release funds for payment of salary but then the appointment and continuance of the Petitioner in the said college on the post of Library Assistant till it became a constituent unit of the University is an admitted fact. The University therefore was under obligation to take a decision as with regard to absorption of the Petitioner in terms of Section 4(1)(14) of the Bihar State Universities Act but when such a decision was not taken by the University in the case of the Petitioner he had moved this Court in C.W.J.C. No. 4812/1998 for his absorption and payment of salary against the post of Library Assistant which was disposed of on 8.8.1998 wherein this Court had clearly observed in favour of the Petitioner in following terms:

8. In this background before asking the Government to consider the claim of the

Petitioner in the light of the recommendation of the Respondent University, it would be relevant to mention that from a bare reference to Annexure-1 it would appear that only one post of Assistant Librarian was created in this college. It is the admitted case of the parties that against this post Petitioner got appointment with effect from 1.9.1979 by the erstwhile Managing Committee and there was no other claimant for the said post. This also cannot be denial that in the affiliated colleges a post of librarian is must. Therefore, on this ground also the Respondent authorities cannot ignore the request of the Respondent authority to accord approval. But the only objection of the State appears that prior approval for such appointment as required u/s 35 of the Act was not obtained. In my view, having regard to the ratio laid down by the Full Bench, once staffing pattern is prescribed/laid down, it would be unreasonable to insist on the prior approval of the State Government in the matter of creation of posts within the frame work of the staffing pattern. The Government can scrutinize the eligibility or suitability of the candidates appointed even prior to take over. Therefore, prior approval u/s 35 of the Act can also be read as post facto approval, because the moment staffing pattern is accepted it amounts creation of post. Thereafter, if it is found that appointments were made against these posts i.e. within the sanctioned strength, there cannot be any scope to urge that such appointments were in violation of Section 35 of the Act.

9. Therefore, taking into consideration entire facts noticed above, I direct the State Government to examine the claim of the Petitioner for regularization and approval in the light of the ratio laid down by the Full Bench, preferably within three months from the date of receipt of a copy of this order, so that Petitioner can get his due salary etc. in accordance with law.

4. It has to be however regretfully noted that the impugned order as contained in Annexure-15 which has been passed by the Secretary, Higher Education Department does not take into account even remotely any of the aforesaid observations made by this Court in an intra-party order nor there is any conscious effort on the part of the said authority to examine the law on the subject settled in the judgment of Full Bench of this Court in the case of *Braj Kishore Singh and Ors. v. State of Bihar and Ors.* reported in 1995 (1) PLJR 509 before rejecting the claim of payment of salary mechanically by taking the ground of violation of Section 35 of the Act. It is unfortunate that while doing so the Secretary of the Department even did not address himself to the scope of Section 35 of the Act as clarified in the Full Bench judgment of this Court in the case of *Braj Kishore Singh (supra)*, wherein the issue with regard to applicability of Section 35 of the Act in an affiliated College was clearly explained in the following terms:

21. The point for consideration then is whether appointments made by the College/University authorities against sanctioned posts, that is, posts within the staffing pattern are to be accepted as final. As noticed above, Section 35 of the Universities Act provides for prior approval both in the matter of creation of posts

as also in the matter of appointment. Creation of pdst is the earlier stage, actual appointment comes next. As noticed above, there cannot be a College without the teachers and without teachers the College cannot be granted affiliation. The relevant part of Section 35 requiring prior approval in the matter of appointment has to be read down to include "post facto" approval otherwise the provision may become unworkable and lead to anomalous or absurd situations. One of the objects underlying Section 35 is that appointments are made of persons possessing necessary eligibility and qualification and in accordance with law. This object can be achieved even without insistence on "prior approval" in each and every case. In appropriate cases, appointment can be made subject to "post facto" approval of the State Government after such scrutiny of the qualification and the recruitment process as may be necessary and appropriate. Such appointments, made by the college/university authorities, should not be treated as final, they shall have legal effect and sanctity only after approval of the State Government.

22. The above discussion may be summed up in these words. By reason of the approval of the staffing pattern proposed by the Bihar Inter University Board, non-teaching classes-III and IV posts will be deemed to have been created with the prior approval of the State Government i.e. sanctioned. Appointments can be made against these posts in accordance with the staffing pattern without seeking further approval regarding post(s). Merely on the ground that prior approval of the State Government was not obtained, the appointment cannot be said to be illegal. The College/University authorities are competent to make appointment of eligible and suitable persons against such posts. Ordinarily, this should be done with the prior approval of the State Government. In exceptional cases, in exigency of service or situation, provisional appointment can be made subject to approval of the State Government within the stipulated time frame. It is open to the State Government to examine the eligibility and suitability of even those who have already been appointed against the sanctioned posts as per the staffing pattern.

23. The view that I have taken above is somewhat tangent with the express provisions of Section 35 of the Universities Act. But as I have pointed out above, if the provisions are literally construed, it may result into an absurd situation and may also make the provisions unworkable rendering them vulnerable to challenge on the ground, of arbitrariness. No guidelines have been laid down and absolute discretion has been conferred on the State Government. As rightly contended at the Bar when power is conferred on an authority to do certain thing, the authority is obliged to exercise that power one way or the other. Conferment of power is coupled with obligation to exercise the power. In order to sustain the provisions, so that the objects underlying the same are achieved, it becomes necessary to interpret the provisions in the manner indicated above by reading them down. Reading down of the provisions of the Act is a settled principle of interpretation to sustain its validity, as well as for effectuation of the purpose of the statute. The Courts though have no power to amend the law by

process of interpretation, they do have the power to amend it so as to be in conformity with the intendment of legislature. As has been observed in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, the doctrine of reading down or of recasting the statute can be applied for saving a statute from being struck down on account of any unconstitutionally or on the ground of vagueness or ambiguity where it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made.

30. In view of my interpretation of Section 35 of the Act and conclusion that the staffing pattern has already been laid down which amounts to creation of posts, the abovesaid decisions cannot be said to be correct in law. The Supreme Court rejected the S.L.Ps. summarily and these orders cannot be understood as upholding the judgments/orders on merit. If the appointments are made against posts as per the staffing pattern i.e. within the sanctioned strength, they cannot be said to be violative of Section 35 of the Act and illegal on the ground that the posts have not been sanctioned by the State Government provided, of course, the candidates possess the eligibility and suitability and the selection/appointment process was in conformity with Articles 14 and 16 of the Constitution.

5. The said judgment having been already rendered before passing of the impugned order the following portion of the impugned order

apparently seems to be in the teeth of the aforementioned law laid down in the case of Braj Kishore Singh (supra).

6. Additionally, this Court would also note with profit that the same issue was also considered subsequently by the Division Bench of this Court in the case of Bihar Sanskrit Mahavidyalaya Pradhyapak Karamchari Mahasangh and Others Vs. The State of Bihar and Others and noticing the concept of provisional approval on 10 posts of non-teaching employees in Sanskrit Colleges, this Court had once again reiterated not only the law laid down in the case of Braj Kishore Singh (supra) but had also held that individual scrutiny of such cases has also to be made by the University and the State Government and to that extent the following extract of the Division Bench judgment in Karamchari Mahasangh case (supra) would by itself be sufficient to indicate that the issue of Section 35 of the Act vis-a-vis a sanctioned post in an affiliated college had to be examined in the individual case of the Petitioner:

7. In view of the authentic pronouncement of the Full Bench it is needless to embark upon de novo adjudication of the point at issue. The Government has already fixed staffing pattern and appointments have to be made in conformity with it. It has also issued guidelines, and it goes without saying that scrutiny of individual cases has to be made in accordance with the guidelines dated 10.5.91 and other guidelines provided that they are not inconsistent with Articles 14 and 16 of the Constitution. We may however, observe that while making scrutiny of

the individual cases the authorities would be well advised to keep in mind the question as to whether the person concerned possessing the requisite qualification for the post on which they were appointed and seek regularisation. Secondly, whether the sanctioned post/recommended posts within the staffing pattern are available against which their cases can be considered. The Government would also be at liberty to take into consideration the quality of performance of the persons concerned. Merely because they hold appointment on sanctioned post would not confer any right to regularisation if their conduct has not been found to be satisfactory. The Government would further be at liberty to consider whether they have been actually working on the post in question. Those who worked for few months, did not continue thereafter and remained out of job for years together, may not be considered, for regularisation. In other words those who have not been in continuous employment may not be regularised. We are conscious of the fact that possibility of each and every claimant taking the plea of continuous employment throughout cannot be ruled out. This however, is a matter which can be sorted out by verification of the records.

8. We are of the view that the concerned Universities which are involved in these cases should submit particulars with respect to different Petitioners within two months of receipt of a copy of this order to the State Government in the Higher Education Department, whereafter the State Government would make its own scrutiny and take final decision within four months. It would be open to the State Government to send for the records of the concerned colleges/Universities before failing final decision in the matter. The observations made hereinabove should not be construed as direction to regularise the services of the Petitioners. That is for the State Government to decide though on the basis of records. We direct accordingly.

7. This Court in fact has been informed at the bar that pursuant to the aforementioned judgment in the case of Karamchari Mahasangh (supra) the State Government had also found justification in absorption and payment of salary of the Petitioners of those cases by holding that there were ten existing sanctioned post of non-teaching employees including that of the post of Library Assistant in a constituent College of the University.

8. In the opinion of this Court once a decision has already been taken in the light of the aforementioned judgment by the State Government in respect of similarly situated persons of Sanskrit University and its colleges not only the case of the Petitioner would require reconsideration but it would also now be the duty of the State Government to consider the direction given by the Division Bench on a general scale for other similarly situated persons working in constituent and affiliated colleges of Sanskrit University where the liability of payment of salary is being fully shared by the State Government.

9. This Court would even otherwise fail to understand the logic on over insistence of the authorities of the State Government that in a Sanskrit College there would

be only sanctioned strength of 4 non-teaching employees as is sought to be canvassed on the basis of the department's letter No. 714 dated 14.7.1999 mentioning only 2 posts of Class-III and 2 posts of Class-IV employees. If a constituent college like the college of the Petitioner has to be funded salary by the Government it must meet same parameter which has been approved by the State Government by staffing pattern for all other constituent colleges as was recommended by Mukhopadhyaya Committee on 16.8.1981 and was also accepted in toto by the State Government for all constituent and affiliated colleges. There cannot be a discriminatory treatment in the matter of sanction of non-teaching post or release of fund for the constituent colleges of Sanskrit University wherein again the decision for creation and sanction of post as per Mukhopadhyaya Committee's report has to be made strictly on the basis of strength of students in an academic session.

10. All these aspects however having been not addressed to in the impugned order and the same having been passed only in a routine mechanical manner, this Court would not be in a position to sustain the correctness of the same and accordingly, the impugned order, as contained in Annexure-15 is hereby quashed and the matter is remitted back to the Principal Secretary of Human Resources Department to reconsider the issue of absorption and payment of salary of the Petitioner in the light of the observations made above within a period of 6 months from the date of receipt/production of a copy of this order.

11. It is also made clear that the amount of Rs. 93,183/- which under the order of Apex Court dated 25.1.1996 in S.L.P.(C) No. 10430-30A of 1992 has been invested by the Registry of this Court in the State Bank of India, Secretariat Branch, Patna on 22.9.1997 shall continue to remain invested till a final decision is taken by the State Government in the manner as indicated above whereafter necessary orders would be passed by this Court for withdrawal of the amount.

12. With the aforesaid observation and direction this writ application, to the extent indicated above is allowed. There would be, however, no order as to costs.