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**(1996) 09 PAT CK 0012**  
**In the Patna High Court**  
**Case No : C.W.J.C. No. 4097 of 1995**

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| Chandra Shekhar Prasad and Others | Vs | APPELLANT  |
| State of Bihar and Others         |    | RESPONDENT |

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**Date of Decision :** 26-09-1996

**Acts Referred:**

**Citation :** (1996) 09 PAT CK 0012

**Final Decision :** Dismissed

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## Judgement

Ashok Kumar Ganguly, J.—This writ petition has been filed by Sri Chandra Shekhar Prasad and 13 others challenging, inter alia the order by which their services have been terminated and also notification No. 5940 dated 18th June, 1993 issued by the Personnel and Administrative Reforms Department, Government of Bihar, Patna where from it appears that the respondents have decided to terminate the services of those daily wage employees who have not completed 240 days of service before 1st August, 1986.

2. The facts of the case are as follows:

The petitioner were employed in various Class IV posts of Roller Driver, Roller Attendant, Chowkidar and Driver with the respondents authorities in this Rural Development Department under the Rural Engineering Organisation which, according to the petitioner, has five Divisions at different places. The petitioner were employed at Sherghati Division in Megadh Circle. They were initially appointed in the said post on daily wage basic after advertisement on the notice board. In the writ petition, the petitioner have not stated anywhere. that they were appointed pursuant to a regular selection process and interview, on the other hand they have stated that they were appointed by the competent authority between the years 1986 and 1990. It has, however, been alleged that the posts against which the petitioner were appointed were sanctioned posts in muster roll from 1987 to 1994. For the said purpose, the petitioners have purportedly relied on a notification No. 686 dated 28th August, 1988 in order to show that the respondents authorities have decided that an employee having

more than 5 years of satisfactory service shall be absorbed by the respondents State. The petitioner have also asserted that they have worked satisfactorily on the post to which they were appointed. The petitioners have also alleged that in the year 1991-92 with the approval of the Minister, Rural Engineering Organisation Department, a high level Establishment Committee was constituted to scrutinise and examine the cases of individual employees for absorption in regular posts against which the petitioners were working. It has further been averred that the said Establishment Committee after scrutiny of the cases of the petitioners recommended their cases for absorption in the regular cadre against the sanctioned posts. In support of the aforesaid assertion, the petitioners have disclosed certain documents issued in the year 1990 under the signature of the Superintending Engineer. From those documents which are annexure-6 series it will appear that the appointment of the petitioners in the pay scale of Rs. 775-1025 was made provisionally and they were also given the benefit of Dearness Allowance and other allowances. But the respondents have disclosed in their counter affidavit in paragraph 5 that such alleged absorption of the services of the petitioners was not sanctioned by the State Government and when the said fact came to the light of the respondents, the Chief Engineer cancelled the same and asked for an explanation from the Superintending Engineer by his memo No. 283 dated 23rd November, 1990. A copy of the said memo has been referred to in paragraph 5 of the counter affidavit used in this proceeding by respondent Nos. 3 to 5. Thereafter learned Counsel for the respondents by filing a supplementary counter affidavit in this matter has disclosed the said order of the Chief Engineer dated 3rd November, 1990.

3. From a perusal of the said order dated 3rd November, 1990 issued by the Chief Engineer, it is clear that the Chief Engineer wanted an explanation from the Superintending Engineer directing him to disclose the authority under which the services of the petitioners were allegedly regularised as, according to the Chief Engineer, such appointments are illegal and ought to be terminated with immediate effect. Such explanation was to be submitted by the Superintending Engineer within seven days from the date of the issue of the said letter dated 3rd November, 1990.

4. The case of the petitioners is that thereafter also the petitioners went on continuing in service till their services were terminated with effect from the month of August, 1994. It is stated by the petitioners that some of them have been served with the individual orders of termination and the others have not been served with the order of termination but they have been asked orally not to do work and the respondents are not taking any work from then.

5. In answer to the said charge made by the petitioner that they were not served with the individual orders of termination, learned Counsel for the respondents stated that since the appointment of the petitioner was illegal and without any authority of law, all of them were not served with the order of termination rather the order of termination was pasted on the notice board and they all had the

knowledge of the same.

6. The challenge of the petitioners in this writ petition has been that the order of termination of the petitioner is based on the notification of the government dated 18th June, 1993 to the effect that the persons who have been appointed on daily wage basis after 1st August, 1985 should not be regularised. Learned Counsel for the petitioners has submitted that making the order effective with retrospective effect is bad in law and the further submission is that the choice of the said date, namely, 1st August, 1985 is also un-reasonable and arbitrary. The other submission which the learned Counsel for the petitioners made before this Court is that after serving the concerned department for a number of years, the petitioner have acquired a right of being absorbed in the services of the respondents and the said right of theirs cannot be taken away. It has further been alleged by the petitioners that their termination is in the nature of retrenchment which is in violation of the provisions contained in Section 25F of the Industrial Disputes Act inasmuch as they have worked for more than 240 days continuously in a year.

7. Learned Counsel appearing for the respondents has submitted that the petitioners were engaged on daily wage basis after 1st August, 1985 and the Government has taken a decision to terminate the services of all such daily wage earners who have been engaged after 1st August, 1985. It has further been stated by the learned Counsel for the respondents that the petitioners have been engaged without inviting any application from the public at large and without observing any procedure for such appointment and hence the engagement of the petitioners was bad from the very inception. There was a ban imposed on the appointment of daily wage earners after 1st August, 1985 by the Government and the petitioners were engaged as daily wage earners ignoring the said ban. The said ban was imposed by the State Government by a policy decision. Learned Counsel for the respondents further submitted that the petitioners were employed against the work charge establishments and the project against which the petitioners were so appointed on daily wage basis has been shelved as result of financial crunch and there is now no necessity of daily wage earners in connection with the project against which the petitioners were appointed. In that view of the matter, the petitioners cannot be continued in the department. Learned Counsel for the respondents further submitted that the Chief Engineer, Rural Engineering Organisation Patna in compliance with the Government resolution, as stated above, directed the Executive Engineer to terminate the service of such daily wage earners under his letter bearing No. 874 dated 28th April, 1994 and in compliance with the said direction of the Chief Engineer, the Executive Engineer has terminated the services of the daily wage earners vide his order bearing Memo No. 21 dated 26th August, 1994 and the said order was passed on the notice board by the Assistant Engineer. Thus the services of the petitioners were terminated.

8. Learned Counsel for the petitioners has, however, said that before the

termination of the services of the petitioners they were not heard and were not given any opportunity of hearing. The said submission of the learned Counsel for the petitioners was not controverted factually by the learned Counsel for the respondents, on the other hand the learned Counsel submitted that the appointment of the petitioners not being in accordance with law and not having been made in compliance with the provisions of Articles 14 and 16 of the Constitution of India, they have not acquired any right and such appointees are not entitled to be heard.

9. Considering the aforesaid rival contention, this Court is of the view that the initially appointments of the petitioners are not through any legitimate selection process. On their own showing, the petitioners have admitted that they were appointed on the basis of the alleged advertisement on the notice board. An advertisement on the notice board is no advertisement at all. In fact the petitioners were appointed to posts under the State in a manner which is not consistent with the concept of equality guaranteed under Article 14 of the Constitution of India and further elaborated under Article 16 of the Constitution of India. The Government decision to stop such ad hoc appointment with effect from 1.8.1985 has been taken in public interest. This Court can take judicial notice of the fact that in this State series of appointments are made by various Officers who have no authority to make such appointments and such appointments are made without properly observing the proper legal procedure which must be observed when a person is appointed to the government service. It is, however, true that Court, at times, considering the plight of an appointee who has been appointed in the above fashion and has been working against such posts for a number of years has acted more out of compassion than out of reason by interfering with any subsequent steps taken for termination of such appointments. In doing so, the Court has sometime held that the persons working for five years, persons working for three years or the persons working for some such length of time, however illegal may be the initial appointment, cannot be subsequently terminated but the unhealthy trend "0 such illegal appointment has thus received, if this Court may say so, some encouragement as a result of such judicial pronouncements. Therefore, the Court including the Apex Court on a re-thinking of the entire problem have come out with the pronouncements which do not interfere with the subsequent termination of such initially illegal appointment.

10. Therefore, this Court finds that there is a perceptible change in the climate of the judicial opinion while dealing with cases of such appointment.

11. Associated with the aforesaid question is the ethics of making such appointment in government service without giving other equally eligible candidates any chance to offer their candidature. Under the secrecy of office such appointments are offered by those in power to those who are favoured and obviously there is no public advertisement, no recommendation of names from employment exchange, total non-observance of the reservation principles

coupled with the complete absence of any rational selection process. All these taken together make it abundantly clear that such appointments are, as the Supreme Court coined it, "backdoor appointments" and an example of extension of patronage by those who are in power. This aspect of the matter has also disturbed the judicial conscience of Supreme Court and High Court and accounts for the shift in recent times in the attitude of Courts where persons so appointed, after working for some time approach the Court with a prayer for regularisation of their appointment. The Hon"ble Supreme Court observed about such appointees that persons appointed through backdoor must go out through the backdoor.

12. Learned Counsel for the petitioners relied on a series of judgment in support of this contentions that the petitioners cannot be terminated and their services must be regularied. Thus reliance was placed on the decision of the Supreme Court in the case of The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc., .

13. In that decision, the Hon"ble Supreme Court on the scheme submitted by the State of Karnataka to regularise the services of about 50 thousand daily rated workers suggested certain alternations to the said scheme after striking a balance between the rights of the employees to get equal pay for equal work and the State's financial constraints. In that decision, Supreme Court was guided by the principles of giving equal pay for equal work to the employees who were working on daily wages for the last 15 to 20 years. In that case the Supreme Court did not have to consider the question of validity of initial appointment as in the case here. So the ratio of the decision in the case of Dharwad District (supra) has no application to the present case.

14. Reliance was also placed by the learned Counsel for the petitioners on the decision rendered on the case of Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, . In that decision in Jacob's case, while directing regularisation the Supreme Court directed the Kerala Public Service Commission to consider the question of regularisation of the services of workers who possess the requisite qualification. The importance of requisite qualification and the requirement of regular selection process was emphasised in the case of Jacob (supra).But here admittedly the petitioners were appointed without any regard to a regular selection process. So this decision is hardly of any assistance to the petition.

15. The decision of the Supreme Court in the case of H.C. Puttaswamy and others Vs. The Hon"ble Chief Justice of Karnataka High Court, Bangalore and others, is about appointments made by the Chief Justice of Karnataka High Court. In that case the Chief Justice made "the appointments disregarding the authority of the Public Service Commission and by passed the power of the District Judge to make the appointments. On those facts, the Apex Court came to the conclusion that "the methodology" adopted by the Chief Justice was "manifestly" wrong and in deviation from the legal procedure. Those

appointments were, therefore, irregular. The Hon"ble Supreme Court regularised those appointments by taking a "humanitarian approach" in the facts of that case and by taking into consideration the concession made by the Advocate General of the State to the extent that the Chief Justice was willing to appoint those persons in High Court, even if necessary by creating "additional posts".

16. But the appointments in the case with made ignoring ban by the Superintending Engineer who had no authority to make the appointments and the Chief Engineer has called for an explanation from the Superintending Engineer asking him to explain how such appointments can be made and asking to terminate such appointment. The work charge establishment to which they were appointed was shelved. These facts are not present in the case of Puttaswamy (supra) and so that decision cannot govern the facts of this case. Apart from that it appears that the decision in the case of Puttaswamy (supra) must be understood as confined to the facts of that case.

17. The decision of the Supreme Court in the case of Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, is also distinguishable on facts. In that case, the teachers were not appointed by an authority who had no power to appoint ignoring a policy ban against a work charged establishment which has subsequently been shelved.

18. In that decision of K.S.P. College (Supra), the Hon"ble Supreme Court made a distinction between two classes of ad hoc appointments. In the first category falls appointment which have given by the authority as a favour to accomodate certain employees. The Court has categorised such appointment as "abuse of power" and "un-pardonable". In the other category falls ad hoc appointments which are permissible by rules. Here the appointment of the petitioners falls in the first category and as such, on the ratio of the said judgment cannot be approved.

19. Reliance was also placed by the learned Counsel for the petitioners on a Single Bench decision of this Court in the case of Saryu Singh and Anr. v. State of Bihar and Ors. reported in 1995 (2) BLJR 735. In that case the Court found that the services of persons who were working without any interruption for five years were terminated even though there was no adverse report against the working of the persons concerned. The said decision of the Court was passed on the mere principle that a person working in government service for more that five years without there being any interruption and without any complaint should be given the benefit of regularisation. In that case the question which is agitated here, namely, the nature of initial appointment of the persons concerned, was not examined. From a perusal of the judgment in the said case it does not appear whether the persons concerned, who were seeking for regularisation of their services, were actually appointed pursuant to some process of selection or in accordance with the regular procedure. This aspect of the matter was not at all considered in the said case. But this aspect of the matter is very much relevant in the facts and circumstances of the case where the categorical case of the

respondents is that the petitioners were not appointed pursuant to any valid selection process. It is also the case of the respondents that the petitioners were appointed in the work charge establishment and those establishments has been shelved in view of the financial crunch and the Chief Engineer has categorically stated that the appointment of the petitioners had been made ignoring the ban of the Government and also by the Superintending Engineer without the approval of the Chief Engineer. Apart from that the said decision in Saryu Singh (Supra) was delivered without consideration of any precedent on the subject. Therefore, the said decision cannot be treated as a valid procedure and does not bind a subsequent Bench.

20. The other decision which has been cited by the petitioners is in the case of Baleshwar Mandat and Ors. v. State of Bihar and Ors. reported in 1995 (2) BLJR 718. In that case termination of service was not involved. There the question came up whether the persons by performing similar nature of work are entitled to the same scale of pay. The Court held the persons working in Darbhanga Medical College and Hospital on being paid a meagre sum of Rs. 104/- per month ought to be placed in the same scale of pay given to the employees working in the Patna Medical College and Hospital. The said direction was given by the learned Single Judge following the similar direction given by the Division Bench of this Court in another case. In the facts of this case, the said decision has no application inasmuch as here the question of setting aside the order of termination of the petitioners' appointment is involved and it is not merely a question of giving equal pay for equal work.

21. Learned Counsel for the petitioners has also relied on another Division Bench decision of this Court in the case of Ashok Kumar and Ors. v. State of Bihar and Ors. reported in 1994 (2) BLJR 499. The facts of the case in Ashok Kumar (supra) are that the services of the petitioners were regularised by an agreement dated 24th September, 1981 and on the basis of the said regularisation of the appointment of the petitioners by an agreement dated 24th September, 1981, the judgment was delivered in C.W.J.C. No. 2460 of 1992 on the basis of the said agreement. In the background of these facts, the Judges of the Division Bench came to the conclusion that when the initial appointment of the petitioners was regularised by an agreement dated 24th September, 1981 and the same has been acted upon, in that case the question of initial appointment of the petitioners cannot be re-opened after 12 years, but in the instant case there is nothing on the record to show that the services of the petitioners were regularised. The documents an annexure-6 series read with the order of the Chief Engineer dated 3.11.90 show that the appointment of the petitioners was not approved by the Chief Engineer and the Superintending Engineer was asked to show cause how could the Superintending Engineer pass such order when he has no authority to pass the same.

22. Learned Counsel for the respondents, on the other hand, placed reliance on a series of judgment in support of the contention that the services of the

petitioners cannot be regularised. Reliance was first placed on a judgment of the Supreme Court in the case of R.N. Nanjudappa Vs. T. Thimmiah and Another, . In para 26 of the said judgment it has been held that the regularisation cannot be said to be a form of appointment. It has been held in the said judgment that if the appointment itself is in infraction of the rules or if it is in violation of the Constitution such illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some noncompliance with procedure but when the act of appointment itself is illegal, the regularisation cannot be said to be a mode of recruitment.

23. This Court is in respectful agreement with the aforesaid proposition laid down in the said case of Nanjudappa (supra). The said decision has also been followed by this Court in several other judgments subsequently. In a Division Bench Judgment of this Court in the case of Lalan Kumar Singh and Others Vs. The State of Bihar and Others this Court has held that the method of advertisement on the notice board of the office is not legal. In the instant case the admitted case of the respondents is that before the appointment of the petitioners the alleged advertisement was made only on the notice board of the office and not in any news paper or in any media. In that case of Lalan Kumar Singh (Supra) it was held where appointment itself was illegal and without following any statutory rules, the out right termination of services of such appointees cannot be questioned either on ground of violation of principles of natural justice or lack of compliance of statutory provisions. In the said Division Bench Judgment of this Court in Lalan Kumar Singh (Supra) it was also stated that the regularisation of services of the employees on equitable and humane consideration, which were made illegally, can be directed only by the Supreme Court under Article 142 of the Constitution and the High court exercising its power under Article 226 of the Constitution cannot do so. To the similar effect, there is another Division Bench Judgment of this Court in the case of Bimal Kishore Rai Vs. The State of Bihar and Others . In that case the learned Judges of the Division Bench of this Court relied on a decision of the Supreme Court in the case of Nanjudappa (Supra) and held that where appointment, itself was illegal, the appointee would be presumed to be "in pari delicto" and cannot claim any sympathy by claiming to be blameless.

24. Reliance was also placed by the learned Counsel for the respondents in the case of B.N. Nagarajan and Others Vs. State of Karnataka and Others, . In the said decision in the case of B.N. Nagarajan (Supra) the three Judges Bench of the Supreme Court relied on the ratio of the judgment of the Supreme Court in the case of Nanjudappa (Supra) and came to the conclusion that regularisation does not mean prescience. By regularisation is meant the condonation of the procedural irregularities and to cure only such defects as are attributable to the methodology followed in making the appointments. Regularisation cannot be construed to mean permanence (sic) can such regularisation be a mode of appointment. The ratio of the judgment in Nanjudappa (supra) has also been

subsequently followed by the Supreme Court in the case of State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, wherein in paragraph 7 the learned Judges of the Supreme Court came to the conclusion that regularisation of services of irregular appointees who have worked for long years on compassionate ground cannot constitute "Public Interest".

25. To the said effect is another judgment of the Supreme Court in the case of State of Haryana and others Vs. Piara Singh and others etc. etc., . In that case word of caution has been sounded by the Supreme Court to the effect that while giving direction for regularisation of services the court must act with due care and caution and a practical and pragmatic view has to be taken. The Supreme Court in that said judgment in the State of Haryana (Supra) sat aside the direction for regularisation of the services. As has already been observed, the present case of the petitioners does not fail within the purview of regularisation as explained by the Supreme Court in its various judgments.

26. Here the initial appointment of the petitioners having been made totally in disregard to the rules, the petitioner cannot claim for the regularisation of their services. The case of the petitioners is squarely covered by the later decision of the Supreme Court in the case of State of Himachal Pradesh v. Suresh Kumar Verma and Anr. reported in AIR 1996 SC 1365 where the Supreme Court observed that the project in which the employees are engaged has come to an end and, therefore, their service have necessarily been terminated for want of work and in that situation the Court cannot give any direction to re-engage them in any other work or appoint them on any post. The Court has made it clear that if such direction is given it will virtually amount to recruitment through a judicial process which is not permissible.

27. Considering the rival contentions urged in this case and considering the various judgments of the Supreme Court as well as of this Court, as stated above, this Court is of the view that in the facts and circumstances of the case it cannot give any direction for setting aside the order of termination of the petitioners and also for the regularisation of their services. This Court is also of the opinion that the governmental policy of not appointing any employee on daily wage basis after 1st August, 1985 is based on some reason, and grounds of public policy. Such appointment on daily wage basis, without following the legal selection procedure was actually operative in a series of illegal and unauthorised appointments at the cost, of the State exchequer and in most of the cases such appointments used to be done by the persons concerned even though the persons concerned lack the authority under the law to make such appointment and such appointments are held on a pick and choose basis on a principle of extension of patronage. The Government by stopping the said mode of appointment has not acted against the public interest nor such action of the Government is opposed to the principles enunciated under Article 14 of the Constitution of India.

28. This Court, therefore, holds that the initial appointment of the petitioners

being illegal and being opposed to the provisions of Articles 14 and 16 of the Constitution of India, no relief can be granted to them to this writ petition. This writ petition is accordingly dismissed. There will be no order as to cost.