
(2014) 06 PAT CK 0049
In the Patna High Court
Case No : CWJC No. 7767 of 2013

Hasin Akhtar and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 18-06-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Citation : (2015) 1 PLJR 859

Hon'ble Judges : Ajay Kumar Tripathi, J

Bench : Single Bench

Advocate : Akashdeep and Shyameshwar Kr. Singh, Advocates for the Appellant; K.B. Singh, Advocates for the Respondent

Judgement

Ajay Kumar Tripathi, J.—There are 205 petitioners, who have filed the writ application for regularization of their services against sanctioned vacant posts of Trade Instructors in their respective trades and different Industrial Training Institutes or ITIs, situated across the State. They also want a refrain order against the Staff Selection Commission from making fresh appointments to fill up the posts on a regular basis. There are more than 600 vacant posts of Trade Instructors. There is no reason why these petitioners cannot be considered and regularized looking at their past service and experience even though the engagement was a contractual one initially. Petitioners no doubt are working as Trade Instructors in different trades in ITIs for the last three years. Despite availability of vacancies, the State Government has taken recourse to contractual engagements instead of making regular appointments but since these petitioners had never had any bargaining position in matter of engagement or appointment under the State, they did opt for contractual appointments and have been appointed by following the same kind of procedure, which is sought to be adopted by the respondent authorities for filling up the posts a second time over. The advertisement contained in Annexure-2 would show that all the trappings of regular appointment was adopted. The only difference was that the engagement was made on contractual basis, which is violative of Articles 14 and 16 of the

Constitution of India. Petitioners came to be appointed in terms of Annexure-5 dated 22.4.2010. All this process was gone through and then the appointment letter Annexure-5 was issued. Later on, the State Government has now decided to fill up the posts on regular basis but have decided to ignore the claim of the present petitioners or their status and have in fact created prejudice against them especially such persons, who have become overage while working under the respondent State on contractual basis.

2. Learned senior counsel for the petitioners submits that a bare perusal of Annexure-5, which is order No. 1836 dated 22.4.2010 and Annexure-B, which is order No. 1835 also dated 22.4.2010 would show that all the terms and conditions are identical. In one case the process for appointment on contractual basis was taken i.e. Annexure-5 where as for regular appointment Annexure-B is the decision. Both these orders and notifications have been issued one after the other and on the same date. A few facts also points out towards the manner in which the State functionaries have been taking decision in such vital matters. The so-called process for regular appointment was initiated on 4.8.2007 but still an advertisement was issued on 12.8.2009 for filling up the posts on contractual basis till regular appointments were to be made. No appointment on regular basis was made till 2009, therefore, on 12.8.2009, the modality of contractual engagement was adopted. The process even for regular appointments was initiated side by side and recommendation for regular appointment was received on 26.2.2010, which is Annexure-C. If that was the position then there was no occasion for respondent authorities to go ahead and make selection and appointment on contractual basis because these appointments or selection was to subsist till permanent appointments was made. However, the State went ahead and made appointments on contract basis, extended their engagement from time to time and are now denying them opportunity in the name of regular appointments and selection. A few of these petitioners are left in the lurch because they are overage and they cannot even seek employment otherwise anywhere else. Similarly, the appointment and the engagement of the petitioners vis-a-vis so-called permanent appointees are identical in nature including the pay scale. They had similar kind of duties and functions and still a welfare State adopts a discriminatory position by first exploiting the petitioners and then dumping them in favour of so-called duly selected persons for permanent engagements.

3. While the dispute was going on in this regard the Department of Labour Resources, Government of Bihar issued Notification No. 2263 dated 19.7.2013. By virtue of this notification in exercise of power contained in Article 309 of the Constitution of India a set of rules known as Bihar Industrial Training Instructor Cadre Rules, 2013 was notified. It came into play immediately. This notification was supposed to take care of such persons, who were duly appointed in the it is (sic--ITTs?), functional in the State of Bihar.

4. Learned senior counsel submits that the stand of the State that the whole

thing is to be now regulated by the same said rules and these petitioners have no independent status is being seriously disputed on a plain reading of Rule 3 sub-rule (2). Rule 3 talks in terms of cadre and categories of Bihar Industrial Training Instructor and sub-rule (2) states as under:--

"(2) The persons appointed and working in different category of cadre, shall be deemed to be automatically included in this cadre."

5. According to learned senior counsel, the petitioners belong to such category of "persons appointed and working". The said sub-rule does not talk in terms of appointment on a substantive basis or contractual engagement. Engagement even on contract basis does create a right as would be evident from the set of principles enunciated by the Hon"ble Apex Court in the case of Union Public Service Commission Vs. Dr. Jamuna Kurup and Others, . Paragraph 14 of the said decision reads as under:--

"14. The term "employee" is not defined in the Delhi Municipal Corporation Act, 1957, nor is it defined in the advertisement of UPSC. The ordinary meaning of "employee" is any person employed on salary or wage by an employer. When there is a contract of employment, the person employed is the employee and the person employing is the employer. In the absence of any restrictive definition, the word "employee" would include permanent or temporary, regular or short term, contractual or ad hoc. Therefore, all persons employed by MCD, whether permanent or contractual will be "employees of MCD"."

6. Another decision which learned senior counsel places for consideration is the case of The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, . What is of relevance according to learned senior counsel is paragraphs 26 and 28 of the said decision, which are reproduced hereinbelow:--

"26. The expression "as if" is used to make one applicable in respect of the other. The words "as if" create a legal fiction. By it, when a person is "deemed to be" something, the only meaning possible is that, while in reality he is not that something, but for the purposes of the Act of legislature he is required to be treated that something, and not otherwise. It is a well-settled rule of interpretation that, in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on the basis of which alone such fiction can operate. The words "as if" in fact show the distinction between two things and, such words must be used only for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created."

28. In Industrial Supplies (P) Ltd. vs. Union of India this Court observed as follows:--

"25. It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what purpose the fiction is created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be

carried to its logical conclusion. The court has to assume all the facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. The legal effect of the words "as if he were" in the definition of "owner" in Section 3(n) of the Nationalization Act read with Section 2(1) of the Mines Act is that although the petitioners were not the owners, they being the contractors for the working of the mine in question, were to be treated as such though, in fact, they were not so."

7. The reason for relying on the above proposition is that as an alternative argument, the 2013 Rules also envisages the likes of the petitioners to be also part and parcel of a category of persons, who were appointed and working in different category of cadre on the date of the notification, which is 19.7.2013.

8. The writ application was previously heard by different benches and some orders have come to be passed from time to time. Since petitioners had taken a plea that the respondent State authorities are using different yardstick for similarly situated persons of other departments, there is no reason why these petitioners also cannot be given an opportunity for sitting in a limited examination as was done in the case of Health Department. If necessary they can be given age relaxation in matters of regular appointment taking into consideration the fact that after all they were rendering service may be on a contract basis but still under the State. The above position is evident by reading of order dated 25.6.2013. Matter was further considered on 25.7.2013 where the court was not satisfied with the respond of the State with regard to three queries which were put up earlier. It is also of significance that indulgence was given to persons who were willing to apply and participate in the exercise for regular appointments even to such persons, who have crossed the age barrier. Exercise thereafter has been done though it is the plea of the counsel that the respondent Bihar Staff Selection Commission has refused to entertain applications to participate in case of some.

9. The response of the State is that clause 5 of the appointment letter is unambiguous. Petitioners would be bound by the terms of the appointment and they have no special right to be appointed on a substantive basis or regularization more so when the advertisement for 600 posts was an independent step taken by the respondents for which exercise has already been carried.

10. Having taken into consideration the rival stand as well as factual and legal position, the Court cannot ignore the basic fact that these petitioners were appointed on contractual basis with a limited object and purpose. It was a stop gap arrangement made by the State in absence of filling up the vacant posts on permanent basis. That step was taken by issuance of advertisement No. 2 of 2013.

11. The above mentioned advertisement was a subject matter of challenge in CWJC No. 7890 of 2013 and analogous case and considering the various aspects

placed before the Court in the said writ applications, the Court quashed the said advertisement vide order passed on 17.6.2014 and directed initiation of a fresh exercise of filling up the vacant posts in the ITIs in terms of the qualification laid down by NCVT as well as the Cadre Rules, 2013 which was notified in the Gazette by the State on 25th of July, 2013.

12. If this is what has emerged in a related writ application then there cannot be any occasion for this Court to give any relief to these petitioners by giving a direction upon the respondent State to continue with their engagement or confer permanency upon them.

13. However, the Court will not have any objection, if the State as a matter of policy decides to give some indulgence and relaxation in matter of age to all such candidates, who may have become overage during the protracted delay in filling up posts over a period of time as well as allowing these candidates as well to participate in the fresh exercise for recruitment in terms of the terms and conditions, which will form part and parcel of the advertisement and the direction issued by the Court in CWJC No. 7890 of 2013.

14. The basic prayer, therefore, of regularization and continuance of these petitioners on the respective posts of Trade Instructors on the basis of initial contract of engagement cannot be ordered in the factual and legal background.

15. This writ application, therefore, cannot be allowed in isolation as no clear and categorical right in favour of these petitioners emerge looking at the background under which they came to be engaged. The appointment of these petitioners was contract for service and not of service and the State cannot be restrained from bringing the contract to an end by terminating the contract if they decide not to extend the period of their engagement. However, since a fresh exercise would be required to be carried out by the respondents to fill up the posts, it is left open to the State to consider the efficacy of continuance of these petitioners on the posts since the interest of the students already pursuing their studies cannot be allowed to suffer.

The writ application, however, is dismissed as being devoid of merit.