
(2011) 05 PAT CK 0105
In the Patna High Court
Case No : CWJC No. 332 of 2009

Indra Mandal Prasad Singh	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 10-05-2011

Acts Referred:

Citation : (2011) 05 PAT CK 0105

Final Decision : Allowed

Judgement

J.N. Singh, J.—Annexure-3 is the order of the Regional Deputy Director of Education, Tirhut Division, Muzaffarpur dated 30.3.1994. By this order, Petitioner was appointed on the post of Clerk in the office of Sub-Divisional Education Officer, Bagaha in West Champaran. The order shows that Petitioner was being appointed on the basis of the decision of the Divisional Establishment Committee. However, it appears that "after little more than three years, by order dated 8.11.1997, Petitioner was terminated from service.

2. Petitioner moved this Court against the said order through C.W.J.C. No. 7608 of 1999. The said writ application was taken up on 13.9.1999 and was disposed of, vide Annexure-9, quashing the order of termination on the ground that the same was in violation of Principles of Natural Justice. However, liberty was granted to the Respondents to proceed in accordance with law after providing an opportunity of hearing to the parties. Accordingly, by order of the Director, Secondary Education dated 7.1.2000, vide Annexure-10, services of the Petitioner were restored as before and orders for payment of salary to him was issued. Later on, Respondents again terminated the services of Petitioner after affording opportunity of hearing to him by order, dated 15.7.2000, vide Annexure-12.

3. The said order was again challenged by the Petitioner before this Court through C.W.J.C. No. 7376 of 2000. The said writ application, alongwith writ applications of other similarly situated persons; was heard and judgment was passed on 9.8.2001, as contained in Annexure-13. Cases of the parties were

considered and thereafter findings of the Court in respect of the Petitioner and Ors. with regard to nature of their appointment were as follows:

From the facts enumerated in the writ application it is borne out that the Petitioners had requisite qualifications for the posts as such and posts were advertised and in some of the cases names were called for from the Employment Exchange and on the basis thereof Petitioners applied and they were interviewed and they were finally selected by the Divisional Establishment Committee and accordingly, they were appointed to the post of clerks. Prima facie, it appears that Petitioners were appointed by the Divisional Establishment Committee after following the normal procedures and their selection was made after due advertisement. From the facts enumerated in the writ applications and also in the counter affidavits, it appears that Petitioners are not alleged to have played any fraud in the matter of appointment nor it is alleged that appointments were made on extraneous consideration. However, it appears that the roster clearance etc. are not said to have been obtained and compliance of reservation rules was also not observed. However, for these, the Petitioners should not be made to suffer after several years of appointment for the fault of the authorities in not observing these formalities and in any view of the matter, it cannot be sufficient justification to terminate their services.

4. Pursuant to the said judgment of this Court, by office order of the Regional Deputy Director of Education dated 5.12.2003, as contained in Annexure-14, the present Petitioner and Ors. were re-stored in their services. However, the Respondents, in the meanwhile, had also moved in appeal before the Division Bench of this Court against the said judgment of the learned Single Judge, which was numbered as L.P.A. No. 1399 of 2001. The said L.P.A. alongwith large number of other similar cases were heard by a Division Bench of this Court and orders were passed on 11.1.2007, vide Annexure-15. The Division Bench directed the Respondents to constitute a High Level Committee of three Secretaries to consider the cases of the Petitioner and Ors. in the light of the judgment of the Constitution Bench of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, The case of the Petitioner has been since rejected by the Committee, vide Annexure-1, which is under challenge in this writ application.

5. Counter affidavit has been filed in the case by the Respondent District Superintendent of Education. In the counter affidavit, apart from noticing the facts of the case and other developments, stand of the Respondent in paragraph 10 of the counter affidavit is as follows:

10. That it is also relevant to mention here that although the Petitioner was clerk in answering Respondent office but the Respondent No. 5 i.e. the Regional Deputy Director of Education, Tirhut Division, Muzaffarpur is appropriate authority to give comprehensive reply if required at the time of hearing.

6. Thus, clearly the Respondents do not have any thing to say against the claim

of the Petitioner as the District Superintendent of Education has only thrown the burden of reply on the Regional Deputy Director of Education who has not filed any counter affidavit in the case.

7. It is not on record that after the Petitioner was reinstated by Annexure-14 dated 5.12.2003, he was again terminated. However, finally in terms of the order of the Division Bench passed in the said L.P.A. and other cases, case of the Petitioner has been considered by the three member committee and has been found not fit for absorption, vide Annexure-1 dated 27.5.2008 as his appointment has been found illegal. The grounds mentioned in Annexure-1 for not finding the case of the Petitioner fit for absorption are;

(i) before appointment, roster clearance was not: obtained by the concerned officers in respect of vacancies available;

(ii) Petitioner had claimed that the post was advertised by the office of the Regional Deputy Director of Education, but in support of the advertisement he has not produced any evidence which shows that the appointment has been made without sanction and without any vacancy; and

(iii) Petitioner "was appointed on 30.3.1994 and at that time notification of the Personnel and Administrative Reforms Department No. 5939 dated 18.6.1993 was in force, which, had laid down detailed procedure for preparation of merit list for appointment on Class-III posts in the regional offices under the Government. For appointment in the regional offices in the divisional cadre, as per notification No. 3435 dated 13.8.1974, a Committee headed by the Regional Deputy Director of Education was to take steps. Appointment of the Petitioner was made in the teeth of the said notification by the Regional Deputy Director of Education, who was not the competent authority, without obtaining merit list from the Committee headed by the Collector of the District.

8. The three grounds relied upon by the Committee of the Secretaries for rejecting the case of the Petitioner do not appear to be good grounds for rejecting his claim, for the appointment letter of the Petitioner, as contained in Annexure-3, which is not doubted by the Respondents in the counter affidavit, shows that the appointment of the Petitioner was on the basis of the decision of the Divisional Establishment Committee. Therefore, his appointment was not by the Regional Deputy Director of Education from his own level and the order was issued on the basis of the decision of the Divisional Establishment Committee which was admittedly empowered to make appointments on Class-III posts in the regional offices. Secondly, it was the case of the Petitioner from before, as noticed by this Court in the earlier orders, that the names were called for from the Employment Exchange, panel was prepared, interview was held and then Petitioner was appointed.

9. This positive stand of the Petitioner, if it was establishment from the records, was enough to hold that the appointment of the Petitioner was not illegal. Since entire procedure, as claimed by the Petitioner, was gone through by the

Respondents themselves in their offices, Petitioner was not expected to produce proof of the same in support of his claim that the posts were advertised, names were called for from the Employment Exchange, interview was held and then selection was made. Hence, in absence of any proof being produced by the Petitioner in support of his this claim, the Committee was not correct in coming to a finding that the appointment of the Petitioner was without any advertisement or without any procedure adopted. In view of the findings of this Court earlier and the claim of the Petitioner from before, onus lay on the Respondents to establish, on the basis of records of their offices, that either there was no decision of the Divisional Establishment Committee as referred to in the order of appointment of the Petitioner is-sued by the Regional Deputy Director or the Establishment Committee had not taken into, consideration any panel of names or had not adopted any procedure before recommending the Petitioner for his appointment. Once that presumption, arising from the wordings of the appointment letter, is not rebutted by the Respondents, benefit has to go to the Petitioner. In the circumstances, if it is presumed that the Petitioner was appointed pursuant to an advertisement, after calling names from the Employment Exchange, interview and selection, non-clearance of roster and failure to comply with the reservation rules will only be an irregularity committed by the officers of the State Government in their offices for which, as rightly held by this Court in the earlier writ application of the Petitioner, Petitioner cannot be penalized.

10. In the circumstances, this Court finds that the Petitioner fulfils the tests as laid down by the Constitution Bench of the Apex Court in paragraph 53 of the said judgment as noticed in the impugned order itself. That being the position, this Court holds that the Petitioner is fit to be regularized in service. However, it is made clear that though the Petitioner may get continuity of service for the purpose of pay fixation etc., he shall not be entitled to monetary benefits of the period during which he has actually not worked and shall not be entitled for seniority over others who are not before this Court.

11. The writ application is allowed with the aforesaid observations and directions.