

(2018) 05 PAT CK 0030

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 13878 of 2004

Jai Prakash Narain Singh & Anr

APPELLANT

Vs

The State of Bihar & Ors

RESPONDENT

Date of Decision : 10-05-2018

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2018) 4 PLJR 72

Hon'ble Judges : AHSANUDDIN AMANULLAH

Bench : Single Bench

Advocate : Amit Kumar Singh, Ram Kishore Singh, Shivendra Kishore, Arabind Nath Pandey, Prashant Pratap, Lala S. N. Raies

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the petitioners; State and Magadh University (hereinafter referred to as the "University"). Despite respondents no.

9 to 11 entering appearance and filing counter affidavit, nobody was present on their behalf when the case was taken up and heard.

2. The petitioners have moved the Court for the following reliefs:

Â That the present writ application is being filed to declare that since these petitioners were appointed in the year 1981 and joined on 27.7.1981 on

the post of Assistant against sanctioned and vacant post in Nalanda College, Biharsarai as such their pay be fixed on present prevailing scale since the

date of their joining and arrears of salary be paid accordingly with interest @ 12% per year and they should be declared and treated as Senior to

Respondent II and set and further by a writ of certiorari to quash the Memo No. 66/GK dated 29.4.2004 as contained in Annexure-16 by which the

Respondent II and set were illegally retransferred from Kisan College, Sohsarai to

Nalanda College, Biharsarif against the spirit of this Honâ??ble

court by order dated 8.7.02 as contained in Annexure-14 and also to quash three letters dated 8.3.2000 issued by State Government as contained in

Annexure-19 series by which the pay of Respondent IInd set were deemed to be fixed in Higher Grade and thereby they want to become senior to

the petitioners because their so called promotions, in the year 1981, were done when neither of them had completed 10 years of service in Grade

IV.â??

3. In effect, the petitioners have prayed that their services be treated from the day they joined i.e., 27.07.1981, on the post of Assistant and

accordingly all benefits of pay etc. be fixed and further that they be treated senior to the respondents no. 9 to 11.

4. Learned counsel for the petitioners submitted that in terms of the advertisement in the then daily newspaper â??Indian Nationâ? dated 31.03.1981,

they had applied for their respective posts and pursuant thereto, they were appointed under order dated 25.06.1981, issued by the Deputy Registrar of

the University. Learned counsel submitted that the same clearly reveals that the due procedure prescribed in law was followed while making such

appointment and the posts had already been created by the general body of the college prior to 16.03.1976, which was in accordance with law as the

college was managed by a private Governing Body which had the authority to create such posts. Learned counsel submitted that the chart prepared

by the Principal of the college shows that already such posts were sanctioned by the Governing Body prior to 16.03.1976, and at the relevant point of

time, even the sanctioned posts were available. In this connection, he has referred to Annexure-4 which is a typed statement on the basis of which

such submission has been made by learned counsel for the petitioners. It was further submitted that the respondents no. 9 to 11 were promoted from

Class-IV Posts to Class-III Posts but were posted to a different college and had illegally continued on the post in the college in question which

rightfully should have been filled up by the petitioners and, thus, they ought not to suffer due to the illegality committed by the University/College

authorities. Learned counsel submitted that the posts which were advertised and against which the petitioners were appointed comes under the

staffing pattern and, thus, they would be deemed to have been sanctioned in

terms of the judgment of a Full Bench of this Court in the case of Braj Kishore Singh v. State of Bihar reported as 1997(1) PLJR 509. Learned counsel submitted that the judgment clarifies the situation that posts under the staffing pattern would be deemed to be sanctioned and prior to filling up of the posts, it was not mandatorily required that there should be prior approval of the State Government, which could be obtained post facto also. Learned counsel submitted that the appointment order of the petitioners dated 25.06.1981 discloses that the petitioners, along with others, were appointed in the college on purely temporary basis in anticipation of the sanction of the post by the State Government. Learned counsel submitted that this clearly indicates that the posts were already existing in terms of the staffing pattern and only needed formal sanction by the State Government and, thus, their appointment on such posts was in accordance with law.

Learned counsel produced copy by the advertisement and submitted that the same was for temporary post for the reason that till the time they were not sanctioned, even such staffing pattern posts were temporary. Learned counsel submitted that the petitioners having continued on the post right from the year 1981, without any objection or controversy being raised, now cannot be said to be unsuited for the post as the respondents have not claimed that the petitioners were ineligible or do not possess the requisite qualification. In this regard, learned counsel has relied on a decision of a coordinate Bench of this Court in the case of Ashok Kumar v. State of Bihar reported as 2001 (1) PLJR 81, especially paragraphs 17 to 21 and 32 to 34.

Learned counsel submitted that even with regard to there being dispute relating to salary paid to the petitioners, the matter had come to the High Court and finally in terms of the orders passed by the Court, the petitioners and other similarly situated persons had been paid their salary etc.

5. Learned counsel for the State submitted that once the matter has been brought to the notice of the State Government, they are entitled to go into the aspect of legality and validity of the appointment of the petitioners, moreso for the reason that the emoluments paid are 100% reimbursed by the State Government and the money coming from public exchequer needs to be spent on the rightful claimant, especially on persons who have been appointed in accordance with law. With regard to the budgetary allocation, it was submitted that without approving the allocation on an individual basis, from time

to time, amounts are sanctioned and given to the Universities for being paid strictly to those persons, both working and retired, who have been

appointed in accordance with law on duly sanctioned posts and only if the petitioners are able to demonstrate and show that they fall under such

category, they shall be entitled to such payment in law and further their case has not been verified and approved by the Audit Team of the State

Government and whatever payment they may have received is without prejudice to the stand of the State in this regard. It was further submitted that

even with regard to the petitioners being appointed on temporary basis by order dated 25.06.1981, and retained against sanctioned posts in terms of

order dated 25.01.1985, proposal to the State Government on 22.11.1999, was sent only in terms of the meeting of the Syndicate held in the year 1999

and further it has been mentioned that persons who were appointed prior to 16.08.1976 on the basis of interview by the Selection Committee and

approval within one year thereafter by the Vice Chancellor, would be deemed to be appointed on approved posts. It was further submitted that the

letter further requests that the posts be created. Learned counsel submitted that in view thereof, the present transaction, when the petitioners were

appointed in the year 1981, the University not sending, even post facto, for approval of the posts on which they were appointed, to the State

Government, any claim of the post being under the staffing pattern, the deemed to be sanctioned principle would clearly not be applicable in the case

of the petitioners. It was submitted that in any view of the matter, the selection and the appointment of the petitioners was in violation of the settled

legal provisions including the constitutional mandate.

6. Having considered the matter, in view of the limited relief with regard to the petitioners' claim, the Court has not been persuaded to intervene in

the matter. From the materials on records and the copy of the advertisement produced by learned counsel for the petitioners, which reads as under:

Application are invited for the following temporary post so as to reach the undersigned latest by 07.04.81 persons having requisite qualifications

only need. Apply Laboratory-in-Charge in Science subject including Psychology, Store-keeper, Assistant, Steno-typist, typist, Machanic in workshop

PTI, Sorter, Library Assistant and Junior Engineer (Civil).

it is obvious that the advertisement was for temporary posts. Once the

advertisement was for a temporary post, as has been rightly submitted by learned counsel for the State, it cannot be said to be satisfying the requirement of Article 14 of the Constitution of India, as other persons who would have been eligible, at the relevant point of time, were not made aware that such posts were not temporary but rather they were existing, subject to sanction/approval by the State Government. Thus, the requirement to disclose with regard to the post, its nature, duration and the eligibility is sine-qua-non to any valid advertisement which can satisfy the requirement of Article 14 of the Constitution of India in such public employment. Moreover, the appointment order dated 25.06.1981 states that such appointment was on temporary basis, which is a departure from the advertisement which stated that the posts were temporary whereas the appointment letter states that the employment was on temporary basis in anticipation of sanction of the post by the State Government. Thus, there is inherent contradiction inasmuch as, in the advertisement the posts are said to be temporary whereas, in the appointment letter, the appointment is said to be temporary in anticipation of sanction of the post by the State Government, which means that effectively the employment/appointment was to continue as the posts were anticipated to be sanctioned by the State Government. Thus, clearly the appointment order reflects permanency of the post which was not at all reflected in the advertisement. Coming to the document at Annexure- 4, which has been referred to and relied upon by learned counsel for the petitioners, to indicate that the posts on which they were appointed were sanctioned prior to 16.03.1976 by the Governing Body, the said document is only a typed document without disclosing either the date or the authority or the signatory of such document. Moreover, if the posts were already sanctioned by the Governing Body prior to 16.03.1976, then, as far as the college /University is concerned, they could not have been said to be temporary posts and rather it should have been disclosed that the posts stand created and subject only to sanction by the State Government, as has been stated in the appointment order dated 25.06.1981. Moreover, the notification dated 25.01.1985, retaining the petitioners against the sanctioned posts which had fallen vacant, also indicates that the appointment of the petitioners was not against any sanctioned or deemed sanctioned post, for the reason that had the appointment been on a deemed sanctioned post, the

same was not required to be adjusted against any sanctioned post as, in terms of the appointment order itself, it was in anticipation of sanction of the posts by the State Government.

7. At this stage, the Court would pause and take note of the fact that even as per the appointment letter dated 25.06.1981, when the same states that

the appointment was on purely temporary basis in anticipation of the sanction of the post by the State Government, the obvious next step should have

been for the University/college to send the proposal to the State Government for sanctioning of the said posts. From the records, it transpires that no

such proposal was ever sent to the State Government, either by the college or the University and even the proposal sent under letter dated 22.11.1999,

clearly did not include the posts on which the petitioners were appointed, as in the letter itself, it has been indicated that the said proposal was in terms

of the meeting of the Syndicate

held in the year 1999 only, and moreover, the proposal to treat persons appointed only till 15.08.1976, on the basis of interview held by a Selection

Committee and approved by the Vice Chancellor, also indicates that the petitioners were excluded from such proposal to the State Government for

being accepted as being appointed under the staffing pattern and deemed sanctioned principle. The reliance of the petitioners on the decision of the

Full Bench in the case of Braj Kishore Singh (supra) does not help the case of the petitioners for the reason that in paragraph no. 22, it has been held

as under: 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 cases 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.â??

8. From the aforesaid, it is clear that the Court had also held that though the college/University authorities are competent to make appointment of eligible and suitable persons against such posts, without seeking prior approval of the State Government, but only in exceptional cases, in exigency of service or situation, such provisional appointment can be made subject to approval of the State Government within the stipulated time frame. It was further held that it was 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. Thus, the Court has approved that ordinarily, after prior approval only such post should be filled up but an exception has been carved out only when there is exigency of service or situation. In the present case, if it is accepted that the posts were created prior to 16.03.1976, then the appointments made in the year 1981 i.e., after almost five years, clearly shows that there was no exigency of service or situation, as the delay from creation of such posts and appointment, does not reflect any exigency of service or situation. Had the appointment been made in close proximity of the creation of the posts, it could have indicated exigency of service or situation but the appointment coming after almost five years cannot in any way be said to be either in the exigency of service or situation. Coming to the decision relied upon in the case of Ashok Kumar (supra), the Court would only indicate that all such decisions with regard to the issue relating to public employment, of absorption, regularization, permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees appointed/recruited and continued for long in public employment de hors the scheme of public employment, after the judgment of the Constitution Bench of the Honâ??ble Supreme Court in the case of Secretary, State of Karnataka v. Uma Devi (3) reported as (2006) 4 SCC 1, running contrary to the principle laid down in the aforesaid judgment shall stand denuded of their status as precedents in terms of paragraph 54, which reads as under:

â??54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what

we have held herein, will stand denuded of their status as precedents.â??

9. The law on this point has also been clarified by a Full Bench of this Court in the case of Ram Sevak Yadav vs. State of Bihar reported as 2013(1)

PLJR 964, where considering various decisions on the issue including Secretary, State of Karnataka v. Uma Devi (3) (supra) as well as The State of

Karnataka vs. M. L. Kesari reported as (2010) 9 SCC 247 and various other decisions, the Court has summed up its conclusion in paragraph no. 43,

which

reads as under:

Â â??43. We therefore sum up our conclusions and answer the reference as follows:-

(A) Uma Devi (supra) prohibits regularization of daily wage, casual, ad-hoc and temporary appointments, the period of service being irrelevant;

(B) An illegal appointment void abinitio made contrary to the mandate of Article 14 without open competitive selection cannot be regularized under

any circumstances.

(C) Irregular appointments can be regularized if the appointment was made by an authority competent to do so, it was made on a vacant sanctioned

post, in accordance with Article 14 of the Constitution with equal opportunity for participation to others eligible by competitive selection and the

candidate possessed the eligibility qualifications for a regular appointment to the post.

(D) The appointment must not have been an individual favour doled out to the appointee alone and the person must have continued in service for over

ten years without intervention of any court orders.â??

10. The same has also been approving noticed by the Honâ??ble Supreme Court in the recent judgment dated 23.02.2018 in Civil Appeal No. 2356 of

2018 in the case of Upendra Singh vs. State of Bihar & Ors.

11. Thus, from the discussions made hereinabove, once the Court is unable to uphold the legality/validity of the very induction into the service of the

petitioners, the relief prayed by them for considering their period of service from the day they joined i.e., 27.07.1981, and accordingly to grant them

seniority over respondents no. 9 to11, cannot be allowed.

12. Accordingly, the writ petition stands dismissed.

13. However, the Court would clarify that the present order is limited to the claim of the petitioners in the present writ application, which the Court has found to be not tenable.