

(2019) 03 PAT CK 0001

In the Patna High Court

Case No : Letters Patent Appeal No. 400 Of 2018, Civil Writ Jurisdiction Case No. 8953 Of 2011

Kanti Kumari @ Kanti Devi

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 01-03-2019

Acts Referred:

Bihar Panchayati Raj Act, 2006 — Section 94(2), 146
Secretary, Bihar Gram Kutcheri (Employment, Service Conditions And Duties) Rule, 2007 — Rule 5(a)(ii)
Secretary, Bihar Gram Kutcheri (Employment, Service Conditions And Duties) Rule, 2014 — Rule 5, 5(1)
Constitution Of India, 1950 — Article 14, 16

Citation : (2019) 03 PAT CK 0001

Hon'ble Judges : Amreshwar Pratap Sahi, CJ; Anjana Mishra, J

Bench : Division Bench

Advocate : Suraj Samdarshi, Dharendra Kumar, Gyan Prakash Ojha

Final Decision : Dismissed

Judgement

1. The appellant Kanti Kumari has preferred this intra court appeal seeking to set aside the order dated 26.02.2018 passed by a learned single Judge in C.W.J.C. No. 8953 of 2011, whereby and whereunder the challenge placed before the writ petitioner to the termination of her appointment on the post of Secretary, Gram Kutcheri, was cancelled vide letter dated 20.03.2011.

2. The brief facts which led to the filing of this case is that:-

A) The petitioner having passed the Bihar Madhyama Sanskrit Shiksha Board made an application for the post of Secretary, Gram Kutcheri which is constituted by the State Government in the exercise of power under Section 94(2), read with Section 146 of the Bihar Panchayati Raj Act, 2006. The Rules for the same were framed for Gram Kutcheri Sachiv Niyojan Seva Shart Evam Kartavya Niyamavali, 2007 (hereinafter referred to as the 'Rules').

B) The petitioner's application was examined by the Block Development Officer who inquired from the District Magistrate regarding the validity of the qualification of Madhyama. The District Magistrate, in turn, inquired from the Director, Panchayati Raj as to whether the candidates who were possessing the Madhyama examination from the Sanskrit Shiksha Board could be considered as matriculate for the purpose of appointment on the post of Secretary, Gram Kutchery.

C) The Director, Panchayati Raj vide Letter No. 4808 dated 10.10.2007 clarified that Clause 5(a) of the said Rules provide that only a Matriculate can be considered for the purpose of Secretary, Gram Kutchery.

D) Thus, the candidature of the appellant/petitioner, though she was placed at serial No. 1 of the panel prepared by the Gram Panchayat for consideration to the post of Secretary, Gram Kutchery was rejected on the solitary ground that she was disqualified as she possessed the certificate of Madhyama which cannot be treated at par with matriculation.

E) This led the appellant/petitioner to file C.W.J.C. No. 15636 of 2007 which was disposed of by an order dated 10.03.2010 wherein it was noted that the issue had already been decided in C.W.J.C. No. 13905 of 2007, holding that the qualification of Madhyama was equivalent to that of Matriculation. As such, the Court disposed of the writ application with a direction to the respondents to dispose of her representation by means of a reasoned order in the light of the judgment in C.W.J.C. No. 13905 of 2007.

F) In pursuance of the orders filed by the appellant Kanti Kumari, before the competent authority the appointment of Binod Kumar Yadav, respondent No. 7 herein, was disturbed and therefore he preferred a writ application bearing C.W.J.C. No. 18123 of 2009 (Binod Kumar Yadav vs. The State of Bihar & Ors.) wherein this Court after considering the entire facts and circumstances passed orders in the following terms:-

"It appears that the issue of retrospective effect to legislative amendment by executive orders and whether it be permissible has already been considered by this Court in C.W.J.C. No. 6762 of 2009 and analogous cases in context of the very same controversy."

3. It is important to indicate here that in another writ application bearing C.W.J.C. No. 6762 of 2009, this Court had declared the law in this regard with reference to the decision in C.W.J.C. No. 13905 of 2007. The said C.W.J.C. No. 13905 of 2007 was preferred by one Santosh Kumar Pandey, similarly aggrieved by denial of appointment for the reason of his Madhyama qualification. This Court on 31.01.2008, relying upon a Government Policy Decision dated 11.01.1999, held that Madhyama was equivalent to matriculation and directed consideration of his case accordingly. Pursuant to the aforementioned pronouncement, the State Legislature made a legislative amendment to Rule 5 of the aforementioned Rules inserting the word "or equivalent" after Matriculation. The amendment was

notified on 05.01.2009 with retrospective effect from 31.01.2008. It is important to indicate here that Rule 1(3) of the Amendment Act contained a saving clause preserving appointments made prior to 31.01.2008.

4. In another writ application bearing C.W.J.C. No. 1791 of 2010, vide order dated 30.08.2010, this court categorically held as under:-

"It is a settled law that a legislative amendment cannot be given further retrospective effect by any executive orders. If the Legislature in its wisdom thought it fit to fix a cut-off date as 31.1.2008 and which this Court considers extremely reasonable based on the date of pronouncement by the Court, no executive order can make "Madhyama" an acceptable qualification for appointment on the post of Secretary prior to 31.1.2008. Any direction to consider for appointment persons who applied on basis of "Madhyama" qualification prior to 31.1.2008 by invoking the legislative amendment is completely contrary to law.

In view of the saving clause contained in the amendment notified on 5.1.2009, the appointment of the petitioners in C.W.J.C. No.5274/10 and 594/10 having been made much prior to 31.1.2008 stands saved by the amendment itself. Insofar as the appointment of the petitioner in C.W.J.C. No.1791/10 is concerned, the appointment letter having been issued on 29.1.2008 and she having joined within time granted for such appointment, the same dates back to 29.1.2008 and any joining on 31.1.2008 by her is clearly fortuitous and does not put her in a category different from the other two petitioners. This Court therefore holds that the ouster of the petitioners to accommodate the private respondents cannot be sustained in law. The legislative amendment has to be given its true and legal effect only from 31.1.2008. There can be no deemed retrospective effect to a legislative

5. For a clearer perspective, it would be appropriate to take quick glance through the notification dated 05.01.2009 by which the Rules Bihar Panchayat Raj Act, 2006 was amended as the Secretary, Bihar Gram Kutchery (Employment, Service Conditions and Duties) Rule, 2007 dated 05.01.2009 which is extracted hereinbelow:-

"The 5th January 2009 No. 2P/V6-102/2007/PR/28-In exercise of powers conferred by Section-146 read with Section - 94(1) of the Bihar Panchayat Raj Act, 2006 (Bihar Act 6, 2006), the Governor of Bihar amends the Secretary, Bihar Gram Kutchahry (Employment, Service Conditions and Duties) Rule, 2007 as under:-

1. Short title, extent and commencement.- (1) These rules may be called the Secretary, Bihar Gram Kutchahry (Employment, Service Conditions and Duties) (Amendment) Rule, 2008.

(2) It shall extend to the whole of Bihar State.

(3) It shall come into force w.e.f. 31.01.2008. The appointments made prior to

this date under the Secretary, Bihar Gram Kutchahry (Employment, Service Conditions and Duties) Rule, 2007 shall not have any effect of this amendment.

2. In sub-rule 5(a)(ii) after the words "Secondary (Matriculate) "the words" or the certificate declared equivalent to the aforesaid certificate by the State Government from time to time" shall be inserted.

By order of the Governor of Bihar,

Sd/-Illegible,

Principal Secretary to the Government"

6. It appears that a challenge was placed to the amendments made in Rule 5(a) (ii) of the Secretary, Bihar Gram Kutchery (Employment, Service Conditions and Duties) Rule, 2007 dated 05.01.2009, which was heard by a Division Bench in C.W.J.C. No. 1996 of 2010 (Kiran Kumari & Ors. Vs. the State of Bihar & Ors.) wherein the aforesaid Rules were held to be intra vires Article 14 and 16 of the Constitution of India. The Court held in the following terms:-

"We see no substance in the argument advanced by Mr. Pandey. As we have noted earlier the extant Rule 5(ka) (2) did not envisage any qualification other than matriculation; not even an equivalent qualification. The impugned Notification dated 5th January 2009 amends the said Rule effective from 31st January 2008, i.e. effective from 31st January 2008, not only the matriculates but also candidates possessing equivalent qualification have been made eligible for appointment as the Secretary of the Gram Kutchery. What should be the date from which the Rule should be made effective is a matter of policy. This Court exercising power of judicial review will not interfere with the policy decision of the State.

7. An extract of the order passed in C.W.J.C. No. 6762 of 2009 is quoted hereinunder:-

"A person who possessed the qualification of "Madhyama" appears to have come to this Court in C.W.J.C. No.13905 of 2007 claiming that it was equivalent to "Matriculation" under a government decision dated 11.1.1999, aggrieved by his non-consideration for lack of eligibility which was allowed on 31.1.2008. In pursuance thereof, the State Government in the Department of Panchayat Raj under the pen of the Governor amended the Gram Kachahary Rules on 5.1.2009 with effect from 31.1.2008 accepting Madhyama as an equivalent qualification to Matriculation for appointment as Gram Kachahary Secretary. Pursuant to the Amendment of the Rules on 5.1.2009 with effect from 31.1.2008 consequent to certain orders of this Court, the Secretary, Department of Panchayat Raj issued orders on 6.1.2009 by giving directions for cancellation of all appointments even prior to 31.1.2008 and directing fresh appointment after redrawing the merit list with consideration of those holding Madhyama qualification also. In pursuance thereof has followed the termination orders of the petitioners dated 20.6.2009.

The Respondents have chosen not to file a counter affidavit. This Court is not persuaded to hold up the proceeding for that reason in view of the nature of the order to be passed hereinafter.

The issue in C.W.J.C.No. 13905 of 2007 did not concern appointments already made and the Court made no pronouncements in respect of the same.

Prima facie this Court finds substance in the submission on behalf of the petitioners that the termination of their services by an executive fiat contrary to statutory rules is not sustainable. If the statutory Rules make the effective date fixed 31.1.2008, it cannot be shifted by any executive orders. This Court, therefore, directs that the impugned orders of termination shall be kept in abeyance till determination in the manner hereinafter directed.

Since the writ applications are being disposed without a counter affidavit, in fairness to the Respondents, this Court directs the Principal Secretary, Department of Panchayat Raj to re-decide the issue of termination of the petitioners in light of the aforesaid discussion that executive orders cannot override statutory rules and pass a reasoned and speaking order in accordance with law within a maximum period of three weeks from the date of receipt/production of a copy of this order.

The order of termination shall abide by such final orders to be passed by the Principal Secretary, Department of Panchayat Raj.

The writ application stands disposed."

8. In the light of the aforementioned pronouncements which includes judgments both prior and post amendment, the contention of the State was clear that this Hon'ble Court had settled the law inasmuch as it had been made clear that any appointment made on the basis of Madhyama qualification prior to 31.01.2008, if any, is not valid and legal in view of the provisions of the Secretary, Bihar Gram Kutchery (Employment, Service Conditions and Duties) (Amendment) Rule, 2008.

9. The respondent-State of Bihar has filed a counter affidavit contesting and opposing the appellant's claim. It has been submitted that so far as the appellant Kanti Kumari is concerned, the respondent has contended that the Appellant was a Madhyama qualified and had challenged the order of appointment of the respondent No. 7 before this Court which pertained to his appointment done prior to 31.01.2008, on which date, matriculation was the sole qualification. The case of the respondent vis-a-vis the appellant stood settled in view of the judgment delivered in C.W.J.C. No. 6762 of 2009 (Mahabir Choudhary Vs. State of Bihar) and also the Division Bench vide order dated 05.04.2011 passed in C.W.J.C. No. 1996 of 2010 (Kiran Kumari and Ors. vs. The State of Bihar). It was also contended by the respondent-State that the current scenario has changed and the Rules, 2007 has been repealed and replaced by the Secretary, Bihar Gram Kutchery (Employment, Service Conditions and Duties) Rule, 2014, with effect from date of its Notification i.e. 05.01.2015. In the said Rules, the

minimum educational eligibility qualification under Rule 5(1) of the Rules, 2014 has been written as Intermediate(10+2) or equivalent qualification by the State Government and thus the appellant's claim is devoid of any merit.

10. In the counter affidavit filed by the respondent No. 7 who was a candidate for the same set of advertisement as the appellant, it was contended that while respondent No. 7 was having a requisite qualification of Matriculation, he applied on 09.08.2007 and counselling was done on 25.09.2007. After exhausting all processes in the meeting dated 16.01.2008 held by the Employment Committee, one Nand Kishore was selected and granted ten days time to join, but the said Nand Kishore submitted his written refusal for joining on 21.01.2008 and as a consequence thereof the respondent No.7, being the next applicant from the merit-list was informed about the appointment on 28.01.2008. On the said date, i.e. 28.01.2008 he got his appointment letter which finds place at Annexure-C of the counter affidavit. Respondent No.7 further alleged that the appellant got the recital made in the proceeding book dated 28.01.2008 manipulated and in the last line of the date "28.01.2008", the letter '2' of '28' had been made '0' whereas the month '1' had been converted into '2'. It is important to mention that the signature of the Sarpanch however, remains to be "28.01.2008" in the proceeding book as appended at Annexure-4 of the writ petition. The manipulated version of the aforementioned proceeding book has been brought on record as Annexure-A and A/1 of the counter affidavit. The aforementioned annexures have been brought on record after obtaining them under the Right to Information Act, 2005. The fact that the petitioner was appointed on 28.01.2008, is also explicit from Annexure-E which is memo No. 5 dated 31.08.2012 written by the then Sarpanch, Gram Kutchery Mahmada, District-Saran by which it had been reported to the Block Development Officer, Garkha, Saran that the petitioner was appointed on 28.01.2008. An extract of the letter from the office of the Gram Kutchery Mahmada, (Garkha) contained in memo No. 5 dated 31.08.2012 is extracted hereinbelow:-

"कार्यालय ग्राम कचहरी, महमदा (गड़खा) पत्रांक 5 दिनांक 31.08.12 प्रेषक: सरपंच,

ग्राम कचहरी महमदा सेवा में, प्रखण्ड विकास पदाधिकारी गड़खा सारण। विषय : सि० डब्लू जे० सी० नं०. 8953/11 के आलोक में। विनोद कुमार यादव के नियोजन सम्बन्धी प्रतिवेदन। प्रसंग : भवदीय पत्रांक 359 दिनांक - 09/04/12

महाशय,

उपर्युक्त विषयक निवेदन पूर्वक कहना है कि श्री विनोद कुमार यादव, पिता- श्री बनवारी राय, ग्राम- लाढ़पुर, पों०- गुरूकुल मेहिया, थाना- गड़खा, जिला- सारण का नियोजन दिनांक - 28/01/08 को हुआ था। नियोजन सम्बन्धी नियुक्ति कार्यवाही की प्रति इस पत्र के साथ संलग्न है।

विश्वासभाजन

ह०/-

सरपंच

ग्राम कचहरी महमदा।

ज्ञापांक 5 दिनांक 31.08.12

प्रतिलिपि :- जिला पंचायत राज पदाधिकारी, सारण को सूचनार्थ प्रेषित। प्रतिलिपि :- जिला पदाधिकारी सारण को सूचनार्थ प्रेषित।

ह0/-

सरपंच

ग्राम कचहरी महमदा।

गड़खा सारण।"

11. Learned counsel for respondent No. 7 further pointed out that the question of want of qualification was never the case of anybody and vide order dated 03.11.2009 passed in C.W.J.C. No. 13839 of 2009 and C.W.J.C. No. 1791 of 2010, vide order dated 30.08.2010, it had been specifically clarified that those appointed prior to the cut-off date fixed in Notification dated 05.01.2009 were not to be disturbed but the order was categorically clear with regard to those possessing Madhyama qualification. The fact of the same is reproduced hereunder:-

"Any direction to consider appointment for persons who applied on the basis of "Madhyama" qualification prior to 31.01.2008 by invoking the legislative amendment is completely contrary to law."

12. It was thus submitted by the respondent No. 7, that the termination of respondent no.7 had been kept in abeyance by virtue of the order passed in C.W.J.C. No. 18123 of 2009 (Binod Kumar Yadav vs. The State of Bihar & Ors.) which was disposed of on 15.03.2010 to take a decision in his matter in accordance with the directions of C.W.J.C. No. 6762 of 2009 and other analogous cases. The termination of respondent no.7 was to be kept in abeyance which would merge in the final order to be passed by the Principal Secretary, Department of Panchayati Raj, Bihar. However, no orders were passed pursuant to the direction dated 15.03.2010 which led the respondent No. 7 to file M.J.C. No. 805 of 2011 and ultimately vide memo no.3210 dated 27.04.2011 issued under the signature of the Principal Secretary, Department of Panchayati Raj, Bihar, the District Magistrate, Saran, was directed to take action in respect of his case. Thereafter, on 09.10.2010 vide Annexure-H, contained in memo No. 1421 the Block Development Officer, Garkha informed the Sarpanch, Gram Kutcheri, Mahmada, that in compliance of the order passed by this Court, the appointment of Shri Binod Kumar Yadav was being affirmed and also directed that his appointment be kept untouched and appropriate instructions be issued accordingly. As such the Sarpanch convened a meeting dated 20.03.2011, in which the appointment of the petitioner was approved unanimously (Annexure-I). It was thus urged by the respondent no.7 that the issue must now be laid to

rest as the appeal is wholly devoid of any merit and the points of law formulated by the appellant are contrary to the settled principal of law and also no relief can be granted in the prevailing facts and circumstances of the case.

13. We have heard learned counsel for the parties and perused the materials available on records. The law with regard to the appointment to the appellant vis-a-vis that of the respondent No. 7 need not be gone into in view of the various judicial pronouncements which have been brought to the fore. The law laid down in the case of Kiran Kumari (supra) goes to settle and negate the claim of the appellant and we are not persuaded to consider otherwise.

14. It being apparent that the matter now stands concluded by the Division Bench judgment decided on 5th April, 2011 in C.W.J.C. No.1996 of 2010 (Kiran Kumari and Ors. vs. The State of Bihar), the only issue which needs to be resolved which has been raised by the appellant as a last bid effort to salvage her case, is that the appellant has contended that the appointment of respondent No.7 was made on 8th February, 2008 and not 28.01.2008, which is beyond the cut-off date of 31.01.2008. It was in view of such a contention raised by the appellants that we deemed it necessary to issue notices to the respondent No. 7 who has appeared and filed counter affidavit.

15. We have considered in detail the series of events which led to the appointment of Respondent No. 7 and the documents appended to the writ application filed by the Respondent No. 7. There appears to be a clear interpolation in the Proceeding Book. In this context, court this would have not gone into the disputed questions of facts but for the availability of other corroborating documents/evidence appended to the counter affidavit in the shape of the letters issued prior to the date of contest in this regard. It is clear from the letter/proceeding (Annexure-A) written by the Sarpanch that one Nand Kishore was given an appointment and granted ten days time to join and if he does not give his consent, the offer would be made to the second candidate in the letter Annexure- A. It is stated in the aforementioned letter that the said Nand Kishore had not given his consent rather, on 21.01.2008, he had expressed his inability to join and thereafter respondent-petitioner Vinod Kumar Yadav was given an offer to join within next ten days. This letter is dated 28.01.2008 (Annexure A/1). However, there appears to be a cutting in the opening sentence of the Proceeding Book and thus that the appellant is claiming that the appointment was made on 08.02.2008 and not on 28.01.2008. A document dated 28.01.2008 which is marked Annexure 'C' and 'D' is the joining letter of the respondent No. 7 on the same date duly received by the Sarpanch of Gram Kutcheri, Mahmada, Garkha, Saran, has also been brought on record to demonstrate that the petitioner's claim is far-fetched.

16. We have also considered Annexure-E dated 31.08.2012 duly signed by the Sarpanch of the Mahmada. In the said letter the date of appointment of the respondent No. 7 was stated to be 28.01.2008. Thus any allegation with regard to interpolation in the date of appointment does not stand substantiated and the

benefit thereof would accrue in favour of respondent No. 7.

17. The learned Single has thus rightly held that the writ petitioner was not eligible for being appointed on the date of the application and subsequently by amendment of the Rule, she could not be affected as the amendment of Rule 5 came into play only after it was notified on 05.01.2009. The said amendment made it abundantly clear that it would have retrospective effect from 31.01.2008, meaning thereby that the appointment made prior to 31.01.2008 were saved from being disturbed.

18. Furthermore, in our considered view, the appointment of respondent No. 7, who was possessing the requisite qualifications of Matriculation at the time of the selection which began in 2007 cannot be upset by the appellant as it was made on 28.01.2008 i.e., prior to the cut-off date fixed by the Amendment. Thus, even on facts, the appellant has no case in her favour.

19. For the aforementioned reasons and considering all aspects of the matter which includes the proposition of law with reference to the particular facts and circumstance, we find that the appeal is shorn of any merit and fit to be dismissed.

20. We direct accordingly. Consigned.