

(2008) 07 PAT CK 0200

In the Patna High Court

Case No : CWJC No"s. 750 of 1999 and 12493 of 2004

Kaushlendra Kumar and Others

APPELLANT

Vs

The State of Bihar and Others
 Rajesh Kumar
Srivastava Vs The Bihar School Examination Board and
Others

RESPONDENT

Date of Decision : 02-07-2008

Acts Referred:

Bihar Intermediate Education Council (Repeal) Act, 2007 — Section 3
Constitution of India, 1950 — Article 14, 16

Citation : (2008) 4 PLJR 198

Hon'ble Judges : S.K. Sinha, J;Chandramauli Kr. Prasad, J

Bench : Division Bench

Advocate : S.N. Jha, Rajendra Prasad Singh, Niranjana Kumar, Sanjeev Kumar Mishra in 750, 2472, 2959; M/s Ganesh Prasad Singh, Sanjay Kumar, Gautam Saha in 559; M/s Rajendra Prasad Singh, Niranjana Kumar in 4036; Mr. A.B. Ojha in 1522; Mr. Arun Kumar Pandey in 327; M/s Chittaranjan Sinha, Siddhartha Prasad in 696; Mr. Ranjit Kumar Singh in 2233; Mr. Amrendra Kumar Sinha in 2254; M/s Bharat Lal, Anil Kumar Singh-2 in 4131; Mr. Binod Kumar Jha in 1343; Mr. Hareram Singh in 978; Mr. S.B.K. Mangalam in 12493 and M/s Dr. K.N. Singh, Shailendra Kumar, Prem Sheela Pandey, S.N. Karn, Alok Kumar, Ajay Kumar Sharma, Md. Abu Haider, Jahan Ara, Raj Dular Sah for the Intervenor in 750, for the Appellant; Sunil Kumar Ravi for the State and M/s Lalit Kishore, Ajay Bihari Sinha, Piyush Lal, Satyabir Bharti, Girijesh Kumar, Binita Singh, Sunil Kumar Mandal, Namrata Mishra for the Bihar School Examination Board, for the Respondent

Final Decision : Dismissed

Judgement

Chandramauli Kr. Prasad & S.K. Sinha, JJ.—In all these writ applications common questions of law and facts arise and as such they have been heard together and are being disposed of by this common judgment. For the purpose of adjudication of all these writ petitions, reference basically has been made to the pleading in C.W.J.C. No. 750 of 1999. The prayer of the petitioners is for issuance of writ in the nature of mandamus commanding the respondents to make appointment to

various posts in the light of the advertisement dated 14.9.1989.

2. Although the pleadings are voluminous, but the facts necessary for the decision of these writ applications lie in a narrow compass.

3. The respondents-Bihar School Examination Board, hereinafter referred to as "the Board", issued advertisement dated 14th of September, 1989 inviting applications for appointment to various posts, including the posts of Office Assistant, Accounts Assistant, Typist, Daftari and Peon, besides Stenographer and Driver. The daily wages employees challenged the aforesaid advertisement, which led to registration of C.W.J.C. No. 3400 of 1996 (Vinod Thakur & Another vs. The Chairman, Bihar School Examination Board & Another) and C.W.J.C. No. 8440 of 1989 (Bhawesh Jha and Others vs. The State of Bihar & Others). They, inter alia, prayed for quashing the advertisement and for their regular appointment. A Division Bench of this Court by order dated 28.9.1989 disposed of the said writ application. this Court declined to quash the advertisement but directed that the Board while making regular appointment may consider the candidature of daily wage employees. this Court also directed to consider condoning the age bar, if any. The petitioners offered their candidature for various posts, including the posts of Office Assistant, Accounts Assistant and other posts. The posts of Driver and Stenographer have been filled up. A written examination was held on 14th of March, 1993 and when the result of the said examination was not published, they preferred a writ application before this Court. The said application was registered as C.W.J.C. No. 3400 of 1996 (Vinod Thakur & Another vs. The Chairman, Bihar School Examination Board & Another). this Court by order dated 29.11.1996 directed for publication of the result and while doing so, it observed as follows:-

Besides, there is nothing on the record to show that any enquiry was made with regard to the complaint with regard to use of unfair means nor any complaint has been annexed with the counter-affidavit, although in the writ petition it has categorically been stated that no report of use or unfair means was made by the Centre Superintendents. Thus, it is manifest that reason assigned for cancelling the examination and re-advertising the post is not at all tenable. Learned Counsel for the respondents was also allowed time to produce file to show that any enquiry was made with regard to the complaint. The file was brought by Learned Counsel for the respondents and he made statement that the file available with him does not show that any enquiry was made. In the circumstances, it is pertinent to mention here in that Without any enquiry with regard to the complaint/respondents are not justified in cancelling the examination or taking decision as mentioned in Annexure-A to the counter affidavit.

4. In the light of the aforesaid direction, the respondent-Board published the result and it is the assertion of the petitioners that they have been declared successful in the said examination.

5. It is worth mentioning here that the matter of appointment was considered by the Board in its meeting held on 25th of February, 1994 in which a decision was taken to prepare separate list of daily wages employees, who have been declared successful in the examination.

6. However, when no appointment was made, several writ applications were filed before this Court viz., C.W.J.C. No. 5482 of 1999 (Nagendra Kumar Bhagat vs. The State of Bihar & Others), C.W.J.C. No. 8704 of 1999 (Raj Kumar Pandit vs. The State of Bihar & Others), C.W.J.C. No. 987 of 2000 (Pradeep Kumar Gupta vs. The State of Bihar & Others) and C.W.J.C. No. 3029 of 2000 (Arun Kumar Verma and Another vs. The State of Bihar & Others). All these writ applications have been dismissed by orders dated 4th April, 2000 (A.K. Ganguly, J., as he then was), 18th April, 2000 (A.K. Ganguly, J., as he then was), 5th of October, 2001 (R.N. Prasad, J., as he then was) and 4th February, 2003 (C.K. Prasad, J.) respectively.

7. C.W.J.C. No. 750 of 1999 was taken up for consideration by a learned Single Judge of this Court on 28.4.2005 and taking into account the importance of the matter, he has placed this case for consideration before a Division Bench. While referring the matter to the Division Bench, the learned Single Judge had observed as follows:-

The results were also published. Thereafter no appointments have been made in pursuance of the list prepared on one ground or the other. That action of the Board was challenged before this Court and some of the Hon''ble Judges seeing the long period have not interfered with the matter.

Counsel appearing for the petitioners submitted that this is an arbitrary exercise of the power by the Board and once the selection has been made then the authorities cannot go back specially taking the work from the daily rated employees. These aspects appear to have not been taken into consideration by the other Hon''ble Judges.

8. This is how the matter has been listed before us.

9. It is relevant to state that in the counter affidavit the Board had taken a stand that on account of decrease of the work load, there is no requirement of further appointment of Class-III and Class-IV employees. In this connection, the plea of the respondent-Board in paragraphs 9, 10 and 11 of the counter affidavit deserves to be noted. The same read as follows:-

9. That it is pertinent to state here that earlier the Board was holding the examination of Elementary and Higher Secondary Standards but now these examinations are not conducted by the Board. Further, the Primary Teachers'' Training Examination is also being not held since 1994 and as such the work load of the Board has considerably diminished resulting into financial hardships in maintaining the Board. The Board is managed by the Registration and Examination fees collected from the students and there is no financial aid

available to the Board from the Government and, therefore, with the decrease of the work load as stated above, there is no requirement of further appointment of Class-III and Class-IV employees.

10. That it may also be stated here that the Board did not require so much of the appointments as was advertised rather the staff available in the Board are sufficient to properly manage the Board as the Board is now not holding Elementary, Higher Secondary and Primary Teachers' Training Examination resulting into considerable decrease in work load and consequentially financial hardship.

11. That since the Board was being not managed properly, it is superseded by the Government vide its Notification No. 534 dated 4.9.96 and since then the Board is being managed by a duly appointed Administrator in accordance with the provisions of the Bihar School Examination Board Act, 1952. After the Board was superseded, the matter relating to further appointments in the Board was considered by the Administrator and at present the Board do not require any further appointment of Class-III and Class-IV employees for the reasons stated above.

10. Taking into account the plea of the Board that it does not require filling up the posts of Class-III and Class-IV employees, this Court by order dated 15.3.1999 directed the State Government "to constitute a Committee headed by the Secretary, Education Department to examine the viability for appointment of the candidates included in the list after following the selection process and submit the report within two months". this Court further directed "that during the pendency of the writ application, if the situation so demands and the Board so considers to engage on daily wages, the Board shall do so only from amongst the candidates, whose names find place in the select list...." In the light of the aforesaid direction of this Court, a Committee was constituted. The Committee consisted of the Secretary to the Government of Bihar in the Human Resources Department, Director, Secondary Education and Special Director, Secondary Education. The Committee examined the records of the Board and opined as follows:-

Keeping in view the modern level and the recent decision of the Board the Committee has come to the conclusion that it will not be viable to appoint any further staff of Assistant, Accounts Assistant, Typist from the list published by the Bihar School Examination Board.

11. It is worth mentioning here that while coming to the aforesaid conclusion, the Committee had taken note of the fact that the Board had ceased to conduct the Middle Level Examination. It had also observed that earlier several steps, which used to be handled manually, have now been gradually replaced by advanced methods of scientific working such as despatch of question papers from the source of printing itself and not through the employees of the Examination Board as used to be done previously and computerized printing of results and

mark-sheets. It concluded that as a result many mandays are being wasted and there is not enough work for the existing staff and the Board is forced to meet heavy expenditure by way of payment of salary etc. to such employees.

12. It is the stand of the petitioners that although they have been declared successful in the examination, but they have not been appointed, instead work is being taken from the daily wages employees. This action of the respondent-Board, in the opinion of the petitioners, is arbitrary.

13. It is worth mentioning here that when the matter was taken up on 21.5.2008, this Court directed the Board to file affidavit stating the number of posts which are available. In the light of the aforesaid order, the Board had filed affidavit and in paragraph 6 thereof it has stated about the existing vacancy. The same reads as follows:-

6. That on 27.6.2008 the existing vacancy in the office of the respondent-Bihar School Examination Board against the abovementioned posts are as follows:-

Posts

Strength

Existing Vacancy

a. Assistant

185

105

b. Stenographer/ Typist

15

08

c. Routine Clerk

61

07

d. Peon

97

Nil

14. It has also been pleaded that no post of Accounts Assistant exists and it has also been explained as to why the existing vacancies are not being filled. It has been averred that with a view to restructure Intermediate Level Education, the Bihar Intermediate Education Council, which used to conduct the said examination, has ceased to exist in view of the Bihar Intermediate Education Council (Repeal) Act, 2007. It has also been averred that the assets and

liabilities of the Bihar Intermediate Education Council stand transferred to and vested in the Board and in view of Section 3 of the said Act, the adjustment of the employees of the said Bihar Intermediate Education Council in the Board is also in process. Besides the aforesaid plea, it has also been averred that 50% of the vacancies of the posts of Office Assistants are to be filled by the Routine Clerks, which is under consideration. Thus, in sum and substance, the plea of the respondent-Board is that on account of decrease of the work load and, further, on account of adjustment of the employees of the Bihar Intermediate Education Council as also promotion of the Routine Clerks, there is no requirement of further appointment of Class-III and Class-IV employees.

15. We have heard Dr. S.N. Jha, Mr. Rajendra Prasad Singh, Mr. Ganesh Prasad Singh, Mr. Chittaranjan Sinha, Mr. A.B. Ojha, Mr. Arun Kumar Pandey, Mr. Gautam Saha, Mr. Bharat Lal and Mr. Hareram Singh, Learned Counsel on behalf of the petitioners and the State, which is represented by Mr. Lalit Kishore, Senior Advocate. We have also heard Mr. Ganesh Prasad Singh and Dr. K.N. Singh on behalf of the intervenors.

16. It has been contended on behalf of the petitioners that in one hand the respondent-Board is appointing persons on daily wages, but the petitioners, who have been declared successful in the examination, are not being appointed. This act, according to the petitioners, is absolutely arbitrary. The arguments advanced, prima facie, looks very attractive, but on examining the facts of the present cases, the same is devoid of any substance. There is no specific pleading that persons have been appointed on daily wages, excepting that few appointments of the retired employees on daily wages have been made. According to the petitioners, the proceeding of the Board dated 25th of February, 1994 itself suggests that 128 persons have been regularised. In our opinion, this is total misreading of the resolution of the Board. The Board, while taking the resolution dated 25th of February, 1994, had observed that in the merit list names of 128 daily wages employees find place and for that a separate list be prepared. From the aforesaid resolution it cannot be inferred that, in fact, the Board in order to defeat the claim of the petitioners is making appointments on daily wages. In our opinion, even if few persons have been appointed on daily wages, that shall not entitle the petitioners for writ in the nature of mandamus for their appointment. In view of the plea of the Board in the counter affidavit as also the report of the Committee that the Board does not need to make appointment on Class-III and Class-IV posts, we are not inclined to accept the submission of the Learned Counsellor the petitioners that the decision is arbitrary.

17. It has also been contended by the petitioners that earlier less number of students used to appear than the present one and, therefore, the Board needs further employees and hence the plea of the Board that they do not require further employee is fit to be rejected. Existence of large number of posts in the year 1988 has also been emphasized to drive home the point that the Board needs to employ many persons. We are of the opinion that how many employees

the employer need is to be primarily decided by the employer and this Court in exercise of its writ jurisdiction will not substitute its opinion, except in case when it is found that the decision is arbitrary or fanciful. The Board and the Committee taking into account the relevant materials into consideration had come to the conclusion that the Board does not need to fill up those posts. Existence of certain number of posts in the year 1988 shall also not clothe the petitioner any right.

18. It is well settled that empanelment of a candidate in the select list does not confer on him an indefeasible right to be appointed. In our opinion, a candidate selected for appointment can be denied appointment on legitimate grounds. Here, the respondent-Board had taken a plea on consideration of the relevant materials that it does not need to fill up the posts. In our opinion, the plea taken by the respondent-Board is legitimate. Once it is held so, the mandamus sought for appointment is not fit to be granted. The view, which we have taken finds support from the judgment of the Constitution Bench of the Supreme Court in the case of *Shankarsan Dash Vs. Union of India*, Paragraph 7 of the judgment, which is relevant for the decision reads as follows:-

It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *The State of Haryana Vs. Subash Chander Marwaha and Others*, *Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others*, or *Jatinder Kumar and Others Vs. State of Punjab and Others*,

19. In fairness to the Counsel for the petitioners, they contend that although the petitioners have no right to be appointed but right of consideration and the employers having not considered their cases for appointment, its action is in violation of Articles 14 and 16 of the Constitution of India. We do not have the slightest hesitation in rejecting the submissions of the Learned Counsel for the petitioners. In view of the settled legal position, the petitioners are not saying that they have the right of appointment but the purport of the sub-mission is that they are seeking mandamus for appointment. Question of consideration will arise only when the Board decides to make appointment. It is not the case of the petitioners that any person below them in the merit list have been appointed.

Here in the present case, on consideration of the relevant facts, the employer had taken a decision not to fill up the posts. We have found that the decision taken by the Board not to fill up the posts does not suffer from any arbitrariness and, in fact, taken bona fide for appropriate reasons. In that view of the matter, the complaint of the petitioners of violation of Articles 14 and 16 of the Constitution of India is absolutely misconceived.

20. It has also been contended that the advertisement, which led to the petitioners' selection, also contained the posts of Stenographer and Driver and the Stenographer and Driver have been appointed, but the petitioner, who are candidates for appointment to the posts of Office Assistant and Accounts Assistants have been left out. They contend that there does not exist any reason to make discrimination between the case of Stenographer and Driver to that of the petitioners, who are candidates for appointment to the posts of Office Assistant and Accounts Assistant etc. We do not find any substance in the submission. Stenographer and Driver constitute a different class altogether than that of the Office Assistant and Accounts Assistant and other posts, for which the petitioners are the applicants. Once it is held that the Stenographer and Driver constitute a different class, the complaint of discrimination is absolutely misconceived.

21. It has further been contended by the Learned Counsel for the petitioners that the Board having once decided to make appointment, it cannot turn its head later on, and say that the appointment shall not be made. In this connection, our attention has been drawn to the resolution of the Board dated 25th of February, 1994, wherein it has been decided to prepare a separate merit list of successful daily wage candidates. The decision to prepare a separate merit list of daily wages employees cannot be construed to mean that the Board had taken decision to appoint. In any view of the matter, nothing prevents the Board to come to a decision later, not to make appointment if it finds that the appointment is not required to be made or is not viable.

22. To put the record straight, it may be pointed out here that the this decision of the Board has been termed as statutory in nature by one of the Counsel, but how, has not been explained at all and fall out of this submission to the ultimate prayer made by the petitioners. As observed earlier, the aforesaid decision of the Board is not to make appointment but to prepare separate merit list for daily wages candidates, which the Board later on changed on consideration of the relevant facts. We do not find any substance in the submission of the Learned Counsel.

23. It has also been contended that once the Board had published the advertisement, the same has to be taken to its logical end; meaning thereby that it must culminate in appointment. In support of the aforesaid decision, reliance has been placed on a Bench decision of this Court in the case of *Rajendra Sharma Vs. Bihar State Electricity Board and Another*, and our attention has been drawn to paragraph 6 of the judgment, which reads as follows:-

6. Once an employment notice has been published, the same should be pursued unless the same had been issued erroneously or in violation of any rule governing the same. If the notice is responded by one, there is no just reason not to proceed with the selection pursuant to the notice, unless it is held that the others have been prevented from responding to the notice. Because others did not have the qualification fixed in the notice that is no ground for cancellation of the notice.

24. We do not find any substance in this submission and the decision relied on has no application in the facts of the present case. Here in the present case, after the advertisement was made, respondent-Board proceeded with the selection process. Advertisement to fill up the post is an invitation to qualified persons to apply for recruitment. Board later on for bona fide and appropriate reasons decided not to fill up the posts. It is well settled that an employer on valid grounds can refuse to make appointment, even if the vacancy exists. Here, the reasons assigned by the respondents for not filling up the posts have been found to be bona fide and Hence refusal to appoint the petitioners cannot be said to be illegal.

25. It has lastly been contended that when this Court directed to publish the result of the candidates, who have appeared in the examination, it would mean that this Court intended to direct the respondent-Board to make appointment. We cannot read in the order of this Court what has not been stated while disposing of the writ application. It is relevant to state here that this Court directed the respondent-Board to publish the result of the test as the Board instead of publishing the result has come out with a fresh advertisement. Issuance of fresh advertisement implies that the Board needed to fill up the posts. In the background of the fact that there was no complaint in regard to the conduct of the examination and further in the face of fresh advertisement having been published to fill up the vacancies, this Court directed the respondent-Board to publish the result. The direction to publish the result, in our opinion, would not mean that they have to be appointed. Accordingly, we reject this contention of the petitioners.

26. To put the record straight, it is worth mentioning here that many of the daily wages employees of the Board, who have been declared successful in the examination, have filed writ applications separately and also intervened in some of the writ applications, inter alia, contending that they have the first preference in the appointment. As we have declined to issue mandamus for appointment, we do not consider it expedient to adjudicate this inter se dispute between the daily wages employees and the petitioners, who have been selected for appointment. The result of the aforesaid discussion leads us to conclude that all these writ petitions have no merit and they deserve to be dismissed and are dismissed accordingly, but without any order as to costs.