
(2013) 04 PAT CK 0042
In the Patna High Court
Case No : CWJC No. 2842 of 2012

Malti Kumari

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-04-2013

Acts Referred:

Limitation Act, 1908 — Article 102

Citation : (2013) 138 FLR 75 : (2013) 2 PLJR 677 : (2013) 4 SCT 601

Hon'ble Judges : Vijayendra Nath, J; Samarendra Pratap Singh, J; Navin Sinha, J

Bench : Full Bench

Advocate : Banwari Sharma and Pramod Kumar Smha, for the Appellant;
Harendra Pd. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Navin Sinha, J.—The reference to us is occasioned by the difference of opinion by a Learned single Judge with an order passed by a coordinate Bench, opining that the direction for payment of back wages in the latter was contrary to the express prohibition ordered by another Learned single Judge in the earlier litigation. The petitioner was appointed as an Auxiliary Nurse Midwife on 18.2.1980. Her services were terminated on 27.6.2003 on the ground that her registration in the Nursing Council was subsequent to the date of appointment. CWJC No. 9066 of 2003 preferred by her was allowed on 8.9.2003 by a Learned single Judge along with a batch of similar cases led by CWJC No. 4702 of 2003, Sitendra Kumar Singh Vs. State of Bihar and Others . The Court did not examine the order of termination on merits. It was held that termination after such long period of time was not equitably justified even if the appointment was not strictly in accordance with law. It was however directed that no salary shall be payable for the period not actually worked. LPA No. 492 of 2005 was preferred by the State. It was heard and disposed on 26.6.2006 along with a batch of analogous Appeals led by LPA No. 946 of 2003. The correctness of the appointments and termination was referred for reconsideration and possible regularisation to a five man committee

in accordance with Secretary, State of Karnataka and Others Vs. Umadevi and Others, . Upon reconsideration, the respondents regularised the services of the petitioner by order dated 20.9.2007 from the date of joining. Salary was denied from the date of termination to the date of joining on the principle of "No work no pay", but the period was to count for purposes of pension only.

2. Learned Counsel for the petitioner submitted that claim shall lie for salary from 8.9.2003, when the termination was set aside by the Learned single Judge till date of regularisation and joining on 20.9.2007. The termination having been set aside, the Division Bench in Appeal did not set aside that order but only referred the matter to the State Government, subsequently reinstatement has been ordered, the period is being counted for pension, the reinstatement is from the date of termination by fiction. The same period cannot be valid for certain purposes and invalid for other. A fiction must be given full operation with continuity by payment of salary for the period that the right to work was wrongly denied. Reinstatement was evidence that the termination itself was illegal. The right to work was wrongly denied. Denial of salary in the circumstances is a continuing wrong. Delay has no relevance in the facts to defeat the claim for salary. Reliance has been placed on Om Prakash Vs. The State of Bihar and Others, .

3. It was next submitted that consistency in the orders of the Court in common cases must be maintained. Reliance was placed on Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, . Salary had been allowed in several writ applications to similarly situated persons, i.e. CWJC Nos. 16854 of 2009, CWJC Nos. 2256 of 2012 Reported in Ganpati Prasad Sahu Vs. The State of Bihar and Others, Reported in Ganpati Prasad Sahu Vs. The State of Bihar and Others, and LPA Nos. 230 of 2011 Reported in 2012 (3) PLJR 547, LPA Nos. 224 of 2011 Reported in 2012 (3) PLJR 547 and LPA Nos. 298 of 2011 Reported in 2012 (3) PLJR 547.

4. Learned Counsel for the State opposing the application submits that undisputably the appointment was prior to registration in the Nursing Council making it irregular. Regularisation has to be prospective and is not retrospective. The petitioner has not questioned the prospective regularisation from 20.9.2007. She cannot accept a part of the order directing the regularisation prospectively and simultaneously challenge another part of the same order which denies her salary for the period prior to regularisation. The petitioner joined in September 2007 but did not raise any grievance for long years till she filed the present application belatedly in February 2012. There is no whisper of an explanation for the delay. The correctness of the earlier orders sought to be relied upon are the reason for reference to this Full Bench. Reliance was placed on CWJC No. 14720 of 2009 by another learned single Judge denying similar claim.

5. In view of the fact that CWJC No. 9066 of 2003 was disposed without examining the termination order on merits we thought it proper to peruse the pleadings in the same. It was not the case of the petitioner that she was

registered with the Nursing Council before her appointment and neither was any certificate of registration enclosed. The appointment on the face of it was irregular. The learned single Judge did not pronounce on merits. The order annulling the termination lost its relevance and validity after the order of the Letters Patent Court directing reconsideration of the appointment and possible regularisation in accordance with the guidelines in Uma Devi (supra) which was accepted by the petitioner. The order of the learned single Judge merged with that of the Division Bench and did not continue to exist parallel in its individual identity as an unchallenged order attaining finality. The two orders in inconsistency cannot co-exist together. The principle for merger of judicial orders shall have full application. We are in respectful disagreement with the observation to the contrary in paragraph 23 of (Om Prakash) (supra).

6. This doctrine of merger was considered and explained in Amba Bai and Others Vs. Gopal and Others, observing as follows:--

11. If the judgment or order of an inferior court is subjected to an appeal or revision by the superior court and in such proceedings the order or judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court. The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject-matter and the judgment of the inferior court is deemed to lose its identity and merges with the judgment of the superior court.

7. We find considerable force in the submission on behalf of the State that the petitioner cannot blow hot and cold simultaneously. It is a settled principle of law that a person cannot retain the benefit of a part of the order and simultaneously challenge another part of the same order. Once the direction to be considered afresh for regularisation was accepted and the subsequent order of regularization from September 2007 has not been challenged but accepted without demur by joining in September 2007 it is impermissible for her to question the very order for regularisation by seeking salary for the period prior to regularisation. The fact that the earlier period may have been counted by fiction for purposes of pension only cannot lay the foundation for a relief factually impossible. If regularisation has been done subsequently and accepted, the question of wrongly being denied the right to work for the interregnum period does not arise. The principle of "No work no pay" therefore applies.

8. The principle of blowing hot and cold, or approbate and reprobate was noticed in R.N. Gosain Vs. Yashpal Dhir, observing as follows:--

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void

for the purpose of securing some other advantage". [See: *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*, Scrutton, L.J.] According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)

9. We further find considerable force in the submission of the respondents that the claim itself is highly belated. If reinstatement was ordered and accepted in September 2007 there is no whisper of even a suggestion why the writ petition has been filed nearly five years later in February 2012. Arrears of salary and continued denial of salary are different issues. In the former case principle of limitation will be attracted. In the latter the right would accrue for every month of denial extending limitation accordingly. Arrear of salary constituting a money claim in the present case has become barred by limitation after three years in 2010 as held in *N.M. Siddique Vs. Union of India (UOI)*, observing:--

13. It is indisputable that the proper article of the Limitation Act, 1908 to apply is Article 102. It prescribes a period of three years from the date when the wages accrue due....

10. If the normal remedy under the ordinary laws of the land has become barred by limitation resort cannot be had to the extraordinary jurisdiction.

11. Even if relief by payment of salary for the period in question has been granted to others, the plea of parity can have no application as the questions presently being considered by us do not appear to have been raised or considered earlier in any of the orders relied upon. Those orders do not constitute precedent and there is no ratio in the same.

12. CWJC No. 14720 of 2009 relied upon by the respondents was dismissed as "a mischievous kind of writ application" with no principles discussed. In (*Om Prakash*) (*supra*) the facts were substantially different. The five man committee had denied regularisation which was challenged. In CWJC No. 2256 of 2012 Reported in *Ganpati Prasad Sahu Vs. The State of Bihar and Others*, invoking principles of equity, 50% of arrears was directed to be paid for the period in question. In LPA No. 230 of 2011 Reported in 2012 (3) PLJR 547 and analogous cases the issue again was of challenge to the five man committee report denying regularisation after reconsideration.

13. In CWJC No. 11015 of 2012 relied upon by the petitioner, a discordant note was struck, but on principles of judicial decorum and propriety the Single Judge followed earlier co-ordinate Bench decisions observing:--

Even while the Court finds substance in the objection on behalf of the State, considering that similar orders have been given in the recent past, judicial propriety restrains the Court from rejecting the writ application on grounds of delay.

14. It was also noticed that none of the earlier Bench orders had noticed the

observations in paragraph 23 of Sitendra Kumar Singh (supra) holding as follows:--

23.....However the petitioners will not be entitled for their salary/ remuneration for the period that they have not actually worked.

15. The changed trend of judicial view that back wages were not to be automatically granted as a matter of course was also noticed referring to Reetu Marbles Vs. Prabhakant Shukla, . In conclusion it was observed as follows:--

If the petitioners were denied back wages for the period from termination till reinstatement and the appeal was a continuation of the original proceeding.....full effect has to be given including paragraph 23 of the judgment. These aspects do not appear to have been raised in the earlier orders relied upon by the petitioner. Be that as it may, if others similarly situated have moved this Court in 2012 for arrears of salary with regard to the same period and directions have been given for payment of 50% of the basic salary, judicial propriety requires this Court to follow the same.

16. The judicial decorum required to follow a Bench of coordinate jurisdiction is the occasion for the present reference.

17. We therefore are of the opinion for the reasons discussed that the claim of salary for the period prior to regularisation merits no consideration. The order dated 20.9.2007 to the extent calls for no interference. The writ application is dismissed.

Samarendra Pratap Singh, J.

I agree.

Vijayendra Nath, J.

I agree.