
(2011) 11 PAT CK 0032

In the Patna High Court

Case No : LPA No. 1975 of 2010 in CWJC No. 392 of 2003

Meena Mishra

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 18-11-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 311

Citation : (2012) 1 PLJR 366

Hon'ble Judges : Shivaji Pandey, J; Shiva Kirti Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shiva Kirti Singh & Shivaji Pandey, JJ.—Heard learned counsel for the appellant and the learned counsel for the State. By the order impugned before the writ court contained in Annexure-27, the service of the appellant/writ-petitioner has been terminated after recording a finding that her very entry on the post of Assistant Teacher due to leave vacancy in Government Girls High School, Purnea was illegal because there was no advertisement or interview nor the roster system was followed. The learned Single Judge has considered the matter in detail and on deep analysis of the facts has found and held that entry of the appellant in service was illegal and hence she cannot be permitted to continue in service in view of settled law to that effect,

2. The impugned order passed by the inspectress of Schools-cum-Deputy Director of Education, Bihar, Patna dated 17th December, 2002 is a speaking order and the basic facts mentioned in that order have been found to be correct by the writ court.

3. The learned counsel for the appellant has raised two major issues. Firstly, according to him large number of similarly appointed assistant teachers are continuing in service in the State of Bihar. He has impleaded some of them as respondents. On that ground he wants this Court to permit the appellant to

continue in service. We are of the considered opinion that Article 14 of the Constitution of India can be claimed only for positive action and not in negative manner. Once the authorities and the writ court have found that the appellant was given a back-door entry in service without following the rules of recruitment in any manner, only because some others may be continuing on account of illegal appointment, cannot give any benefit to the appellant

4. The second issue raised on behalf of appellant is that by an order dated 6th September 1990, contained in Annexure-6, appellant was promoted to higher post and scale by the Director, Secondary Education, Bihar and, therefore, the impugned order declaring the entry of the appellant in service as illegal could not have been passed by the Inspectress of Schools-cum-Deputy Director of Education, Bihar. On its face, the argument appears to be attractive but it has no substance because it has been held in large number of cases that where illegality in entry into service is matter of enquiry, only the principle of natural justice has to be adhered to and the person who is found to have been taken into service illegally cannot claim shelter of Article 311 of the Constitution of India or the service rules requiring disciplinary proceeding for removal. In the present case, several opportunities of show cause were given to the appellant, both by the Director and by the Inspectress of Schools and ultimately the authority who passed the impugned order gave two show cause notices. In the first show cause notice dated 9th August, 2002 (Annexure-22) it is mentioned by the Inspectress of Schools that action was being taken by her pursuant to the direction of the Director, Secondary Education, " Bihar contained in letter dated 21st March, 2002. Clearly such direction was given by the Director because he found that the appellant had been allowed entry into service illegally and against the norms of appointment and constitutional mandates by the District Inspectress of Schools, Purnea. The enquiry, therefore, was entrusted to the Inspectress of Schools, Bihar, a superior authority. In this background the writ court has noted at Page-7 of the judgments that the learned Senior Counsel for the petitioner did not challenge the power of Respondent No. 4 to issue the impugned order of termination, as contained in Annexure-27.

5. On merits, learned counsel for the appellant lastly submitted that in a recent judgment in the case of State of Karnataka and Others Vs. M.L. Kesari and Others, a different view has been taken and the judgments of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, has been interpreted to mean that even where entry is without advertisement, it will only be an irregular entry and not an illegal one. On the other hand there are two other recent judgments of the Apex Court rendered after the judgment of M.L. Kesari (supra) in which the Apex Court has interpreted the judgments in the case of Uma Devi (supra) to mean that if the entry into service is in violation of constitutional mandate and de hors the service rules, it will be an illegal entry which cannot be regularized or condoned. The aforesaid judgments are in the case of Union of India (UOI) and Another Vs. Arulmozhi Iniarasu and Others, and State of Rajasthan vs. Dayal Lal, 2011(4) PLJR 90 (SC).

6. Learned counsel for the appellant also placed reliance upon the judgment of a Division Bench of this Court in the case of A. Subash Babu Vs. State of A.P. and Another, In that case, service was terminated on the allegation that it was illegal, without holding any enquiry. The facts of the present case are different. In another case, i.e. Mahanth Yadav Vs. The State of Bihar and Others the Division Bench relied upon the State of Karnataka vs. M.L. Kesari (supra) which view has not been followed in the later two judgments of the Apex Court, mentioned above.

7. In yet another Division Bench judgment, referred to by the learned counsel for the appellant, in the case of State of Bihar vs. Anil Kumar, 2011(3) PLJR 545, the facts were different and the matter was attempted to be reopened after service had already been regularized and the employee had put in 21 years of service. The facts of that case were quite different. We may usefully refer to the Division Bench judgment of this Court to which one of us (Shiva Kirti Singh, J.) was a member. In that case reported in Ashok Kumar Vs. The State of Bihar and Others a detailed consideration was given to an earlier Full Bench judgment of this Court as well as other relevant judgments for arriving at the conclusion that an entry into service de hors the rules of recruitment and the constitutional mandate would be illegal and not irregular. We are inclined to follow that view. Other submissions on facts advanced by the learned counsel for the appellant are not relevant and are covered by issues already dealt with. In the result, we find no merit in this appeal. It is accordingly dismissed.