
(2005) 07 PAT CK 0006

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4564 of 2004

Nalani Kumar Jha and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 25-07-2005

Acts Referred:

Citation : (2005) 07 PAT CK 0006

Final Decision : Dismissed

Judgement

R.N. Prasad, J.—The petitioners have approached this Court under Article 226 of the Constitution of India for quashing the orders contained in memo No. 211 dated 10.1.2003, Annexure-5 memo No. 1991 dated 12.12.2002, Annexure-6 and memo No. 654 dated 24.3.2001, Annexure-7 issued under the signature of Director, Land Acquisition and Rehabilitation, respondent No. 3, whereby the services of the petitioners have been terminated.

2. The case of the petitioners is that petitioner No. 1 was appointed on the post of Amin on 22.11.1989 by Land Acquisition Officer, Ranchi Annexure-1; petitioner No. 2 was appointed on the post of Treasure Guard on 12.9.1989 by Land Acquisition Officer, Chatiyama, Annexure-2; and petitioner No. 3 was appointed on the post of Amin on 21.11.1989 by Land Acquisition Officer, Muzaffarpur, Annexure-3 purely on temporary basis with a condition that their services shall be terminated without any notice. Their appointments were approved by the Director, Land Acquisition and Rehabilitation. They were transferred from one place to another and were paid salary of the post. On 29.9.1998 a notice to show cause and produce relevant documents including the appointment letters was published in the daily newspapers "Aaj". The petitioners submitted show cause along with appointment letters. Respondent No. 3 thereafter vide orders Annexures 5, 6 and 7 terminated the services of the petitioners on the ground that their appointments are illegal as the Land Acquisition Officer was not competent to make appointment. In the writ petition the orders of the Single Bench, L.P.A. and the Supreme Court have been annexed to show that in similar

situation relief has been granted by the Court and also that the termination of the services, of petitioners after 12 years is bad in law.

3. A counter affidavit has been filed on behalf of the respondents stating therein that after coming to know about the illegal appointments in the Land Acquisition and the Rehabilitation offices preliminary inquiry was conducted. The government accordingly directed thorough inquiry by the Cabinet (Vigilance) Department and after inquiry it was found that appointments have been made illegally and accordingly action was initiated against those officers involved in illegal appointments by lodging FIR against them in which 44 officers were made named accused. The notices were also issued to the illegal appointees including the petitioners through newspapers on 29.9.1998 and also individually through registered post and on consideration of the show cause and the papers submitted by the petitioners their services have been terminated on the ground that no advertisement was published nor their names were called from the Employment Exchange. The appointments were banned vide letter dated 11.6.1986 Annexure-C. The appointments were made in the year 1989 in violation of the said direction. The power vested to the Land Acquisition Officer for temporary appointment was withdrawn vide letter No. 7836 dated 2.12.1983 Annexure-B and, as such at the relevant time in the year 1989 the Special Land Acquisition Officer was not competent to make appointment. The appointments were made ignoring the relevant rules and process of selection, the details of which have been mentioned in the order of termination of the services Annexures 5, 6 and 7. Temporary appointment was made with a condition that their services can be terminated any time without notice to them. They were appointed in exigency of work and once the work is completed they cannot be allowed to continue. The initial appointment itself was illegal and void. Their continuance in service would not legalize initial illegal appointment. Their services have been terminated according to the terms and conditions of the initial appointment. The petitioners were allowed opportunity to show cause against the illegal appointments. The State Government filed L.P. As. against the orders passed by the Single Bench. L.P.A. No. 675/2000 along with 27 L.P.As. were heard analogous and the Division Bench allowed the appeals and set aside the judgment of the Single Bench. The judgment passed in L.P.As. has been annexed as Annexure-F to the counter affidavit.

4. The submission of the learned counsel for the petitioners is that the petitioners were appointed by Land Acquisition Officer in the year 1989 and they continued in service for more than 12 years and, as such, even though the appointment was not made by the person who was competent to make appointment the termination of the services of the petitioners is bad in law. The equity is in their favour. Moreover in some cases the termination order has been quashed. L.P.A. filed against the said order was also dismissed and as such, the petitioners are entitled to relief as prayed for. On the other hand, counsel for the respondents submitted that the initial appointment itself was in violation of the Constitutional mandate and the rules of appointment and, as such, it is illegal

and void. The continuance of the petitioners on the basis of illegal appointment would not legalise the initial appointment. The order of Single Judge was challenged in L.P.As. and the Division Bench has set aside the order of the Single Bench. The respondents are competent to terminate the illegal appointments and, as such, the petitioners are not entitled to any relief.

5. The petitioners are aggrieved by the order of the respondents whereby their services have been retrenched. Therefore, the question which has to be determined is as to whether the petitioners are entitled under the law to get the relief in Court of law. In this regard it would not be out of place to mention that the mandate of the Constitution is that every one is equal before the law. Article 16 of the Constitution deals with equality of opportunity in the matter of public employment and it says that each and every citizen of India has a right to get an opportunity of employment/appointment in any office under the State or in the offices which have instrumentality of the State under Article 12 of the Constitution. To satisfy the mandate of the Constitution as indicated above, the advertisement inviting applications for appointment or calling names from Employment Exchange for appointment is a must. The reason is that if an advertisement is made or names are called for from Employment Exchange the persons, who are eligible for appointment, may apply and get an equal opportunity of appointment in the offices of the State/offices which have instrumentality of the State under Article 12 of the Constitution. Thereafter the process of selection, according to the rules of appointment is essential and it is because of the said process the efficient persons are identified and such persons are offered appointment so that the work entrusted to such appointees may be discharged smoothly. Therefore, for valid appointment the aforesaid requirement is a must. If the said mandate of the Constitution/rules of appointment is not followed, then the appointment, cannot be held to be legal.

6. In the instant case the petitioners claim to have been appointed in the year 1989 by the Land Acquisition Officer. In the writ petition it has been stated that notice was issued by the department and thereafter they were appointed. In the counter affidavit specific averment has been made that there was neither any advertisement nor names were called for from the Employment Exchange and appointments have been made by the Land Acquisition Officer, who according to the respondents had no power to make appointment. In the writ petition averment has been made that in the year 1978 power of appointment was given to the Land Acquisition Officer, but no document has been annexed. In the counter affidavit specific averment has been made that the power given to the Land Acquisition Officer was withdrawn vide letter No. 7836 dated 2.12.1983, Annexure-B. No reply to the counter affidavit has been filed by the petitioners. If the petitioners claim that the Land Acquisition Officer had power to make appointment it is for them to establish that he had power to make appointments but except the averments in the writ petition no document/paper had been brought on the record to show that the Land Acquisition Officer was vested with the power of appointment which the petitioners have failed to establish. In view

of categorical statement in the counter affidavit that the mandate of the Constitution had not been satisfied nor any process of selection was made and the petitioners were illegally appointed it cannot be said that their initial appointment was legal and valid. Even if for the sake of argument it is accepted that they were appointed by Land Acquisition Officer who had power to make appointment then also the petitioners appointment cannot be said to be valid because of the fact that the person, who had power to make appointment had to satisfy the mandate of the Constitution i.e. advertisement inviting applications for appointment and also that the rules of appointment had been followed and process of selection was made. Thus, on consideration the claim of the petitioners in any view of the matter cannot be said to be legal and it can safely be said that the initial appointment itself was illegal.

7. The next contention of the petitioners is that since they have continued in service for more than 12 years continuously the order of termination of their services is bad in law and liable to be struck down. In this regard it would not be out of place to mention herein that merely because of continuing in service on the basis of illegal appointment the petitioner's appointment cannot be validated and the petitioners cannot claim any legal right by Virtue of illegal appointment. In the case of E. Ramakrishnan and Others Vs. State of Kerala and Others, , the question of regularisation cropped up and the Apex Court held that the petitioner's appointment de hors the rules of appointment and their continuity in service for a long period of 14 years will not entitle them to relief for regularisation. The petitioners cannot invoke to seek regularisation de hors the rules of appointment. In the case of Ashwani Kumar and Others Vs. State of Bihar and Others, again the question of regularisation cropped up the Apex Court considered the entire aspect of the matter and answered the question in this manner :-

Question of regularisation in any service including any Government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the concerned incumbents have continued to be employed for a long period of time with or without any artificial breaks and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularise them so that the concerned employees can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then

arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the concerned incumbent. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could even be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such illegal entrant would ever survive for consideration, however, competent the recruiting agency may be.

8. It is, thus, obvious from the judgment of the Supreme Court as referred to above that if the initial appointment is illegal and tainted, continuance for some longer time would not validate the initial appointment and, as such, the person cannot legally claim for regularisation, A Division Bench of this Court in the case of Ranjeet Kumar Singh and Others Vs. State of Bihar and Others, has held regularisation of the persons whose appointment was on non-sanctioned post or de hors the rules of appointment and in violation of Articles 14 and 16 of the Constitution of India, in such a situation regularization cannot be ordered on the ground that the persons remained in service for long period. Any appointment made in violation of Articles 14 and 16 of the Constitution i.e. without advertisement or compliance of the due procedure is void ab initio and the appointees have no right to claim regularization/absorption.

9. Thus, on consideration as discussed above, the continuance of the persons in service on the basis of illegal appointment would not confer any legal right to continue in service or for regularisation of their services. In the instant case it has already been held that the appointment of the petitioners is in violation of the mandate of the Constitution, the rules of appointment/process of selection and they were appointed by a person who had no power of appointment as such, they would not acquire any legal right for continuing in service.

10. The further contention of the petitioners is that some of the persons have been granted relief i.e. termination order has set aside. The order of the Court has also been annexed. In this regard it is to be noticed that the basic requirement of law/mandate of the Constitution for appointment was not considered and the order was passed granting relief. Moreover, similar question was involved in the case of The State of Bihar and Ors. v. Prashant Kumar Sharma L.P.A. No. 675 of 2000. The said L.P.A. was heard analogous with 27 other L.P.As. and a Division Bench, after considering the various aspects including the basic requirement of law, the mandate of the Constitution, the various decisions of the Apex Court and this Court has held that if the initial

appointment itself is in violation of the mandate of the Constitution/rules of appointment/process of selection and continued for long period by virtue of the illegal appointment such appointee cannot claim any legal right to remain in service and accordingly allowed all the L.P.As. and set aside the judgment and order of the Single Bench. The judgment was delivered on 29th of January 2003. The copy of the judgment has been annexed as Annexure-F to the counter affidavit. Thus, the contention of the counsel for the petitioners, in my opinion, has no substance.

11. Counsel for the petitioners lastly contended that even though the appointment of the petitioners is illegal but continued for long time, the equity is in their favour. In this regard it would not be out of place to mention herein that the doctrine of equity is applied to a person who comes with clean hands. The equity will not grant relief against forfeiture for breach of covenant where the breach in question was flagrant. The persons who claim equity must do equity. The equity does not depart from statute or law nor does it refuse to follow common law. The petitioners are claiming equity though their initial entry in service was illegal. Such appointment would not be legal or valid because of continuance for long time on the basis of such illegal entry. Continuance in service on the basis of illegal appointment, in my opinion would not create legal right in their favour. If on the basis of such illegal appointment the petitioners are allowed to continue in service it would be contrary to the mandate of the Constitution as enshrined in Articles 14 and 16 of the Constitution as the other persons who had right under the Constitution to get an opportunity of appointment would be deprived of their Constitutional right though there was no fault on their part. The equity would not run contrary to law and the rights of equality before the law would be equal opportunity of appointment guaranteed under the Constitution of India. Therefore, on consideration I find that equity is also not in favour of the petitioners. The Division Bench has also considered the question of equity while disposing of the L.P.As. and held that equity is not in favour of the illegal appointees.

12. Thus, on consideration as discussed above, I find no merit in this writ petition. It is accordingly dismissed.