

(2021) 09 PAT CK 0003

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 22950 Of 2019

Nidhi Raj Anand

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 01-09-2021

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Citation : (2021) 09 PAT CK 0003

Hon'ble Judges : Partha Sarthy, J

Bench : Single Bench

Advocate : Chitranjan Sinha, Sidhhartha Prasad, Amit Prakash, Dr. Anand Kumar

Final Decision : Allowed

Judgement

1. Heard Sri Chitranjan Sinha, learned Senior Advocate appearing for the petitioner, Sri Amit Prakash, learned counsel for the State of Bihar and Dr. Anand Kumar, learned counsel for the Bihar Rajya Pul Nirman Nigam Limited ('BRPNL' in short).

2. The petitioner has filed the instant writ application for the following reliefs:

" I. To issue writ in the nature of certiorari for quash-ing the order contained in memo no. 2621 dated 16.08.2019 read with corrigendum contained in memo no. 2674 dated 17.08.2019 issued under the signature of Managing Director, Bihar Rajya Pul Nirman Nigam Limited whereby and whereunder pe-titioner's regular appointment made on the post of Secretary (Company Affairs) vide order contained in memo no. 2693 dated 07.09.2012 has been cancelled and petitioner has been directed to work on the post of Secretary (Company Affairs) as a contractual em-ployee and it has further been directed that petitioner would be entitled to the payment of honorarium in light of the letter of development commissioner contained in memo no. 93 dated 03.07.2019 issued in pursuance of the recommendation of high level com-mittee.

II. It is further prayed that during the pendency of in-stant application the effect

and operation of order contained in memo no. 2621 dated 16.08.2019 read with corrigendum contained in memo no. 2674 dated 17.08.2019 issued under the signature of Managing Director, Bihar Rajya Pul Nirman Nigam Limited be stayed and the petitioner be allowed to work on regular post of Secretary (Company Affairs)

III. To pass such other order(s) direction(s) for which petitioner is entitled in the facts and circumstances of the instant case."

3. The case of the petitioner in short is that the Board of Directors of the BRPNNL being competent under Article 79(22) of the Memorandum of Association resolved to create the post of Secretary (Company Affairs) in the pay scale of Rs. 1060-1580. Mr. S. Subba Rao was appointed as a regular Secretary of the BRPNNL and held the post till his resignation in the year 1982. In the year 2008 the competent authority decided to make contractual appointment on the post of Secretary (Company Affairs). Pursuant to an advertisement for making contractual appointment, vide order dated 29.5.2009, after following due process, the petitioner was appointed as Secretary (Company Affairs) on contractual basis. The petitioner continued to discharge her duty and her terms of contract was extended from time to time. In the year 2011 the BRPNNL issued an advertisement for appointment of Company Secretary in the unrevised scale 10,000-15,200 and revised scale of 15,600-39,100. A selection committee was constituted vide memo no. 12985 dated 25.11.2011 under the orders of the Governor, Bihar. The selection committee proceeded with the process of selection against the advertisement pursuant to which eight persons including the petitioner had applied. The said five members selection committee headed by the Secretary, Road Construction Department, recommended the petitioner for appointment on the post of Secretary (Company Affairs) which was accepted by the Board of Directors of the BRPNNL and a letter of appointment dated 7.9.2012 was issued. The petitioner submitted her joining on 10.9.2012. It is further case of the petitioner that on 2.7.2019 a high level meeting was convened for fixing the honorarium of Company Secretary appointed on contract and who are working in different Government Nigam.

In pursuance of the said meeting, the Development Commissioner issued a 'Peet Patra' dated 2.9.2019 stating that the decision of the high level committee would be applicable w.e.f. 1.7.2019 and that the Managing Directors of the respective Nigams would be accountable for payment of the fixed honorarium as per the decision of the high level committee.

4. The Managing Director of the BRPNNL wrote to the Development Commissioner, Bihar, that the petitioner has been regularly appointed on the post of Company Secretary vide office order dated 7.9.2012 and she was being paid salary in the revised scale of Rs. 15,600-39,100 grade pay Rs. 5400/- . The Development Commissioner, Bihar, wrote back to the Managing Director of the BRPNNL that Company Secretaries are appointed only on contractual basis and that appointment and payment being made to the petitioner was improper and

reflected financial irregularity. An order contained in memo no. 2621 dated 16.8.2019 was issued under the signature of the Managing Director, BRPNNL, cancelling the petitioner's appointment vide memo no. 2621 dated 7.9.2012 and changing the petitioner's service from 'permanent' to 'contractual'. Later a corrigendum contained in memo no. 2674 dated 17.8.2019 was issued under the signature of the Managing Director, BRPNNL, mentioning the honorarium to be paid to the petitioner. It is stated that the petitioner joined the post on contractual basis under protest and communicated the same to the Managing Director of BRPNNL by letter dated 19.8.2019.

5. It is submitted by Sri Chitranjan Sinha, learned senior counsel for the petitioner, that the provisions of Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 ('the Rules' in short) is applicable to the employees of the BRPNNL including the petitioner herein. In spite of the impugned orders having serious civil consequences to the petitioner, neither any approval from the Board of Directors was taken as required under Article 79(22) of the memorandum of association of BRPNNL nor was any notice issued to the petitioner or proceeding initiated under the Bihar CCA Rules, 2005 before passing of the impugned orders. It is submitted that even if a proceeding would have been started, such an order, as impugned herein, could not have been passed. The petitioner was appointed on a vacant sanctioned post created by the competent authority after following the procedure which included inviting applications to an advertisement and selection being carried out by a selection committee duly constituted under the orders of the Governor, Bihar. The order impugned changing the status of a permanent employee to a contractual employee without any notice whatsoever and for no good reason was unheard of. Learned senior counsel for the petitioner in support of his contention relied on the judgment of the Hon'ble Supreme Court in the case of Baleshwar Das vs. State of U.P. (AIR 1981 SC 41).

6. A counter affidavit and a supplementary counter affidavit has been filed on behalf of the BRPNNL and a separate counter affidavit has been filed on behalf of the Development Commissioner, Bihar.

7. The stand of the respondents BRPNNL is that after her selection by the committee headed by the Principal Secretary, the appointment of the petitioner has not been approved by the State Cabinet which was necessary for appointment of gazetted officer of the State Government. A high level meeting was convened under the Chairmanship of the Development Commissioner, Bihar, for fixing the honorarium of Company Secretary working on contractual basis in various Government corporations. The order applies to all Corporations. It is stated that the office order appointment dated 7.9.2012 clearly mentions that the appointment of Company Secretary in Corporation would always be temporary / contractual. The change in status of the petitioner was done in compliance of the order dated 2.7.2019 issued by the Development Commissioner, Bihar. It is pursuant to the decision taken on 2.7.2019 in the high

level committee meeting convened under the chairmanship of the Development Commissioner for fixing the honorarium of Company Secretary working on contractual basis that by order dated 5.8.2019 of the Development Commissioner, the petitioner's appointment was cancelled, appointment letter dated 7.9.2012 itself mentioning that the appointment will always be temporary, and that it could be revoked at any stage by giving one month's notice. Learned counsel for the BRPNNL in support of his contention relies on the judgment in the case of *Bharat Singh vs. State of Haryana* (AIR 1988 SC 281), *State of Karnataka vs. All India Manufacturers Organization* [(2006) 4 SCC 683], *Indian Drugs and Pharmaceuticals Ltd vs. Workmen, Indian Drugs and Pharmaceutical Ltd* [(2007) 1 SCC 408] and *Kalpataru Vidya Samasthe (R) and ors vs. S D Gupta & another* [(2005) 7 SCC 524].

8. By filing a separate counter affidavit, the stand of the Development Commissioner, Bihar is that on 2.7.2019 a high-level committee meeting was convened under the chairmanship of the Development Commissioner for fixing the honorarium of company secretary working on contractual basis in various government Nigam. Honorarium was fixed with effect from 1.7.2019. This order applies to all Nigams whether the Development Commissioner, Bihar, was in the Board of Directors or not. It was further stated that in all Nigams, Company Secretaries are working on contractual basis and thus in order to maintain uniformity, the honorarium was fixed. It was found that in the BRPNNL the petitioner was appointed on regular basis, however, as in the joining letter it was mentioned that the appointment will be temporary and he could be removed by giving one month's notice, the order impugned was passed whereby the petitioner's regular appointment was cancelled and he was directed to work on the post of Secretary (Company Affairs) as a contractual employee. Learned counsel for the respondent no. 6 in support of his contention relied on the judgment of the Hon'ble Supreme Court in the case of *Indian Drugs and Pharmaceuticals Ltd* (supra).

9. Heard learned senior counsel for the petitioner, learned counsel for the BRPNNL and learned counsel for the Development Commissioner Bihar.

10. Having heard learned counsel for the parties, the facts relevant in the instant case are that in the year 2011 the BRPNNL issued an advertisement for appointment on the post of Company Secretary in the BRPNNL in the unrevised scale of Rs.10,000-15,200 and revised scale of Rs.15,600- 39,100. In response to the said advertisement eight applications were received including that of the petitioner herein. It would be relevant to note here that the petitioner at the time of making the application was already working in the BRPNNL as Secretary (Company Affairs) on contractual basis. On scrutiny of applications four out of the eight persons were found to be clear having the requisite qualifications/experience and they were called for interview. Of the four candidates only two candidates appeared before the selection committee on 30.7.2012 and the selection committee recommended the name of the petitioner for appointment.

The petitioner was appointed by office order dated 7.9.2012 pursuant to which the petitioner joined on 10.9.2012 and started working as a regular employee.

11. With respect to the selection committee which recommended the name of the petitioner for appointment, it may be noted that the said selection committee was constituted by resolution dated 25.11.2011 on the orders of the Governor, Bihar, and comprised of the Secretary, Road Construction Department, the Chairman and the Managing Director of the BRPNNL. and a representative each of the Finance Department and General Administration Department of Government of Bihar, not below the rank of Deputy Secretary.

12. Further from perusal of the contents of the advertisement it would transpire that the BRPNNL was inviting application for the post of Company Secretary in the pay scale of Rs.10,000-325-15,200 (unrevised) and Rs.15,600- 39,100 (revised). Nowhere in the advertisement did it state that the appointment was on contractual basis or for a fixed period. The fact that the appointment was on a regular basis is not only evident from the contents of the advertisement but also from the contents of the order of appointment of the petitioner dated 7.9.2012 as also from the contents of the impugned order dated 16.8.2019 which clearly mentions that the regular appointment of the petitioner has not been found to be in order.

13. At this stage it would be relevant to refer to the judgment relied on by learned senior counsel appearing for the petitioner in the case of Baleshwar Das (supra) wherein the Hon'ble Supreme Court held that a person would be said to hold a post in a substantive capacity when he holds it for an indefinite period and not for a definite or temporary period. Paragraph nos. 32 and 33 are being quoted herein below for ready reference:

"32. What, in the context, is a substantive ca-pacity vis-a- vis an appointment to a post ? In our view, the emphasis imported by the adject-ive "substantive" is that a thing is substantive if it is "an essential part or constituent or relat-ing to what is essential". (Black's Legal Dictio-nary, 4th Edn. P. 1597.) We may describe a capacity as substantive if it has "independent existence" or is of "considerable amount or quantity". What is independent in a substantial measure may reasonably be described as sub-stantive. Therefore, when a post is vacant, however designated in officialese, the capacity in which the person holds the post has to be ascertained by the State. Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post. To approximate to the of-ficial diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradistinction to a person who holds it for a definite or temporary period or holds it on pro-bation subject to confirmation.

33. Once we understand 'substantive capacity' in the above sense, we may be able to ratio-nalise the situation. If the appointment is to a post and the capacity

in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been pre-scribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity."

14. The petitioner herein continued to work on the regular post of Secretary (Company Affairs) from the date of her appointment in the year 2012 till the order impugned was passed pursuant to the high-level meeting held in 2.7.2019 convened for the fixing the honorarium of the Company Secretary appointed on contract basis. From perusal of the minutes of the meeting as contained in Annexure-7 to the writ application it would transpire that the same does not deal with those Company Secretaries who have been appointed on regular basis as the petitioner herein. The contents of the minutes are clear in so far as the same deal with fixing the honorarium of Company Secretaries working on contract basis. In the opinion of the Court the decision taken in the said meet meeting has no applicability in the case of the petitioner who was appointed on regular basis after following the due process and the respondent authorities in applying the said decision and consequently changing the nature of the appointment of the petitioner from permanent to contractual by the order impugned have clearly committed an error.

15. The contention of learned senior counsel for the petitioner that Bihar CCA Rules, 2005 is applicable in case of employees of the BRPNL and further neither any notice was issued to the petitioner nor any proceeding under the Rules, was initiated against her before passing the order impugned has neither been denied nor contested by the respondents. The orders impugned are fit to be set aside on this ground alone.

16. Coming to the judgments relied upon by the learned counsel for the respondents paragraph no. 13 in the case of Bharat Singh (supra) holds that in a writ application, when a point of law is required to be substantiated by facts, the party raising the point must plead and prove such facts either in his writ petition or in his counter affidavit, as the case may be. In case the facts are not pleaded or the evidence in support of such fact is not annexed to the writ petition or to the counter affidavit, the court will not entertain the point. In the case of State of Karnataka and another vs. All India Manufacturers Organization and others (supra), learned counsel for the respondents relied on the judgment, particularly paragraph no. 56 thereof to contend that an instrumentality of the State cannot have a case to plead different from that of the State. There can be no debate with respect to the ratio of the aforesaid two judgment as held by the Hon'ble Supreme Court.

17. In the case of Indian Drugs and Pharmaceutical Ltd. (supra) learned counsel for the respondents relied on paragraph no. 14 of the said judgment of the Hon'ble Supreme Court which is quoted herein below for ready reference:

"The distinction between a temporary employee and a permanent employee is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only a permanent employee who has a right to continue in service till the age of superannuation (unless he is dismissed or removed after an inquiry, or his service is terminated due to some other valid reason earlier). As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Hence, it follows that no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation."

18. From the contents of the paragraph no. 14 quoted herein above, in the opinion of the Court the same is of more assistance to the case of the petitioner as from the contents of the order impugned itself there remains no doubt that the petitioner was a regular/permanent employee having been appointed on the regular post of Secretary (Company Affairs) and thus her status could not have been changed from a regular employee to that of a contractual employee without following the due process of law.

19. The next judgment relied on by learned counsel for the respondents is in the case of Kalpataru Vidya Samasthe (supra) and more particularly paragraph nos. 7 and 8 thereof which is quoted herein below for ready reference:

7. It is now well-settled principle of law that the appointment made on probation/ad hoc for a specific period of time and such appointment comes to an end by efflux of time and the person holding such post can have no right to continue in the post. In the case of Director, Institute of Management Development v. Pushpa Srivastava, a three Judge-Bench of this Court considered the identical question and held in paragraph 20 of the Judgment as under: (SCC p. 37)

"20. Because the six months' period was coming to an end on 28.2.1991, she pre-ferred the writ petition a few days before and prayed for mandamus which was granted by the learned Judge under the im-pugned judgment. The question is whether the directions are valid in law. To our mind, it is clear that where the appoint-ment is contractual and by efflux of time, the appointment comes to an end, the re-spondent could have no right to continue in the post. Once this conclusion is arrived at, what requires to be examined is, in view of the services of the respondent being con-tinued from time to time on 'ad hoc' basis for more than a year whether she is enti-tled to regularization? The answer should be in the negative".

8. In the instant case, as noticed above, the re-spondent has accepted the appointment includ-ing the terms and conditions stipulated in clause 11 of the appointment order and rejoined the post from 4-9-1995 and continued in the post up to 29-2-1996 on which date the period of six months came to an end. He raised grievances before the Tribunal after the probationary pe-riod came to an end by efflux of time. Having accepted the terms and conditions stipulated in the appointment order and allowed the period for which he was appointed to have

been lapsed by efflux of time, he is not permitted to turn back and said that the appointment dehors the Rules or the terms and conditions stipulated in the appointment, were not legally valid."

20. The aforesaid judgment of the Hon'ble Supreme Court is also of no assistance to the respondents in the facts of the case as the petitioner has specifically pleaded in the writ application that after issuance of the orders impugned she joined the post on contractual basis under protest and communicated the same to the Managing Director by her letter dated 19.8.2019 (Annexure-12). In replying to the contentions of the petitioner, in the counter affidavit filed on behalf of the BRPNNL the respondents accept the same to be a matter of record. Learned senior counsel appearing for the petitioner relying on the judgment of Central Inland Water Transport Corporation Ltd. & Anr. vs Brojo Nath Ganguly and another [AIR 1986 SC 1571] submits that it is now well established that an instrumentality or agency of the State being the State under Article 12 of the Constitution is subject to the constitutional limitations and its actions are State actions which must be judged in light of the fundamental rights guaranteed by Part III of the Constitution. As held in the case of Tulsi Ram Patel [(1985) 3 SCC 398], violation of the principle of natural justice by a State action is the violation of Article 14 of the Constitution.

21. In view of the facts enumerated hereinabove, the petitioner who was appointed after following the due process as a regular Secretary (Company Affairs) in the BRPNNL, admittedly without issuing any notice or starting a proceeding under the Rules, the respondent authority came out with the order impugned changing her status from a regular/permanent employee to that of a contractual employee. The order impugned is clearly arbitrary, illegal, in violation of the principle of natural justice and unsustainable. The order contained in memo number 2621 dated 16.8.2019 as also the corrigendum contained in memo no. 2674 dated 17.8.2019 issued under the signature of the Managing Director, BRPNNL, are both set aside. The order contained in memo no. 2693 dated 7.9.2012 appointing the petitioner as Secretary (Company Affairs) is restored with all consequential benefits. The petitioner will be entitled for the arrears of salary and other amounts due for the entire period as a regular Secretary (Company Affairs) which shall be paid to the petitioner by the Managing Director, BRPNNL within a period of three months from the date of receipt of a copy of this order after deducting the amount of honorarium etc., which may have been paid to the petitioner for the said period.

22. The writ application stands allowed.