

(2007) 02 PAT CK 0095
In the Patna High Court
Case No : CWJC No. 12980 of 2004

Prem Chandra Jha and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 05-02-2007

Acts Referred:

Citation : (2007) 02 PAT CK 0095

Final Decision : Dismissed

Judgement

Sudhir Kumar Katriar, J.—Four petitioners have joined this writ petition with the prayer to quash the following orders whereby their services as Constables in, the Bihar Police Force have been dispensed with:

- i) Order dated 30.4.2002, issued under the signature of the Superintendent of Police, Samastipur, dispensing with the services of petitioner No. 1 (Prem Chandra Jha).
- ii) Order dated 30.11.2002, issued under the signature of the Superintendent of Police, Jamui, dispensing with the services of petitioner No. 2 (Umesh Kumar Verma).
- iii) Order dated 30.12.2001, issued under the signature of the Superintendent of Police, Darbhanga, dispensing with the services of petitioner No. 3 (Kumar Raju).
- iv) Order dated 10.12.2001, issued under the signature of the Superintendent of Police, Darbhanga, dispensing with the services of petitioner No. 4 (Arun Kumar Jha).

Prayer has also been made to restore their services as Constables with consequential benefits.

2. A brief narration of facts is essential to dispose of this writ petition. The facts with respect to the four petitioners are similar except that those are contained in different orders marked as annexures. The four petitioners had shown acts of bravery in four different occurrences of criminal nature where they had helped in

the arrest of accused persons and in containing crime. Impressed by their putative acts of bravery and performance which was by way of social service, the S.P. had, by his separate communications dated 30.6.97 (Annexure 1), 25.9.97 (Annexure 2), 5.3.97 (Annexure 3), and 3.6.97 (Annexure 8), recommended to the State Government for their appointment as Constables. The State Government had acceded to the request leading to their appointments. The appointment letters are not on record. Later on, legality of their appointments were scrutinised, show-cause notices were issued to the petitioners, and separate enquiry proceedings were initiated. They participated in the enquiry leading to the impugned orders whereby their services have been terminated, being in violation of the provisions of Section 661(b) of the Bihar Police Manual (hereinafter referred to as "the Manual").

3. While assailing the validity of the impugned orders, learned Counsel for the petitioners submits that acts of bravery shown by the petitioners can surely lead to permissible departure from the prescribed procedure for their appointment, because their acts had helped the Government in containing crimes and arrest of notorious criminals. He relies on the order of a learned single Judge of this Court of 27.7.2006 (Annexure 11), passed in CWJC No. 3461 of 2004 (Kamal Chandra Sah v. State of Bihar), whereby the order of termination of service in identical situation has been set aside, treating it to be a permissible departure.

3.1) He relies on the following reported judgments of the Supreme Court:

(i) Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others,

and

(ii) Shridhar Vs. Nagar Palika, Jaunpur and Others,

3.2) He next submits that the petitioners are fully qualified to be appointed to the posts of Constables and are now hit by the age bar. He lastly submitted that the person responsible for making illegal appointments will also have to be dismissed for making illegal appointments. He relies on the Division Bench judgment of this Court reported in 2004 (1) BLJ 733 (State of Bihar v. S.S. Mullick).

4. The respondents have placed on record their counter affidavit and have opposed the writ petition. Learned Standing Counsel submits that the Manual is a subordinate legislation framed in terms of Sections 7 and 12 of the Police Act 1861. Therefore, the procedure prescribed in Rule 661(b) has to be meticulously followed. He relies on the following reported judgments:

(1) Sudhir Kumar Vs. The State of Bihar and Others,

(ii) 2003(3) PLJR 159 (Ram Narayan Harijan v. State of Bihar)

4.1) He next submits that the impugned orders had been passed by the Director General of Police who is not the appointing authority in terms of Rule 661(b) of

the Manual. The power vested in the District Superintendent of Police cannot be exercised by the Director General of Police. He relies on the judgment of the Supreme Court reported in *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others*, . He lastly submits that the judgment in CWJC No. 3461 of 2004 is clearly distinguishable on facts.

5. I have perused the materials on record and considered the submissions of learned Counsel for the parties. The Preface to the official publication of Bihar Police Manual 1978, Vol. I, reads as follows:

PREFACE

The Bihar Police Manual, 1978 (Vol.I (Rules), Vol.II (Forms) and Vol.III (Appendices) is issued by and with the authority of the State Government under Sections 7 and 12 of the Police Act V, 1861. All the rules etc. therein are binding on all police officers and are an authoritative guide to other concerned officers of Government.

Reference may be made to the following judgments of different Division Benches of this Court wherein it has been held that the Bihar Police Manual has been framed under the rule-making powers:

- i. *Sri Narayan Sharma Vs. State of Bihar and Others*,
- ii. *Rameshwar Nath Mishra and Others Vs. The State of Bihar and Others*
- iii. *Md. Hasnain and Others Vs. The State of Bihar and Others*,

It thus appears to me that the Manual is a subordinate legislation under the rule making power conferred by Sections 7 and 12 of the Act and/or Article 309 of the Constitution.

6. It is in this background that I reproduce Clause (b) of Rule 661 of the Manual hereinbelow for the facility of quick reference:

661(b) By whom appointed.-Constables shall be appointed by district Superintendent of Police for which a list will be prepared by the selection Board duly constituted for the purpose.

It is thus manifest that the District Superintendent of Police is the appointing authority for Constable in the Bihar Police Force who can be appointed by him on the basis of a list prepared by the Selection Board duly constituted for the purpose. The admitted case of the parties is that this provision was not invoked for appointment of the four petitioners who were instead appointed by a back-door entry. Once the law prescribes a particular procedure for an official act, then it would not be open to the authorities to adopt a different procedure, and the official act has to be done as per the established procedure. Appointments of the petitioners were made in complete violation of the aforesaid provisions and is impermissible in law. Learned Standing Counsel has rightly relied on the judgment of a learned single Judge of this Court in the case of *Sudhir Kumar*

(supra), and Ram Narayan Harijan (supra).

7. There is another aspect of the matter. Law is well settled that public employment in this country is a national wealth, and every citizen should have unrestricted access to the same. The same is possible only if vacancies are widely advertised and open competition as per the prescribed selection procedure is followed, otherwise those become back-door entries and would be illegal, subject to well-recognised exception like compassionate appointment.

8. There is yet another aspect of the matter. Such an exercise of discretion, as has been resorted to by the respondent authorities in the present case, is not permissible under the provisions of the Manual, are violative of Article 14 of the Constitution of India. It is capable of grave mischief and favouritism and, equally, those who have not been considered in similar circumstances, have been subjected to hostile discrimination. It is open to the State Government to make a statutory provision to consider cases of all such persons who can be rewarded with jobs, showing exemplary acts of bravery which have the tendency to contain crimes in the society. In the absence of such a provision of law uniformly applicable to all such persons, the appointments Per Se become discriminatory and arbitrary. I had the occasion to refer comparable cases for the consideration of Government. Those were cases where the State Government was distributing largesse by way of jobs or cash compensation to victims of a carnage or the like. This needs serious consideration because the manner in which the State Government was doing it was resulting in discriminatory and arbitrary action. The Court felt that all similarly circumstanced persons were not being given the largesse by way of jobs or monetary compensation.

9. I do appreciate the object on the part of the respondent authorities in appointing the petitioners but the same falls foul of the constitutional norms and the statutory provisions. The appointments may be bonafide acts but impermissible in law. It goes without saying that it will be open to the State Government to frame an enactment or statutory rules in this behalf for uniform application in a polity governed by the rule of law, rather than rule of men, as has happened in the present case.

10. I must consider the reliance placed by learned Counsel for the petitioners on the order dated 27.7.2006 (Annexure 11), passed in CWJC No. 3461 of 2004. It is relevant to state that the judgment of this Court in the case of Sudhir Kumar (supra), was handed down on 3.8.99, and that of Ram Narayan (supra) on 7.4.2003, whereas the judgment in CWJC No. 3461 of 2004 was handed down on 27.7.2006. The two earlier judgments were not brought to the notice of the learned Judge. It is relevant to state that all the three cases like the present one relate to Interpretation of the provisions contained in Clause (b) of Rule 661. Secondly, the status/ character of the Manual was also not brought to the notice of the learned Judge. As stated hereinabove, the Manual is a subordinate legislation under the rule-making powers, whereas it has been noted in the order of Kamal Chandra Shah (supra) as follows:

It is true that the Government of Bihar, by making the Manual and by providing therein Rule 661(b) has directed all its officers including the Director General of Police to recruit constables in the manner as has been provided for in the said Rule. It is the Government of Bihar who has created that Rule and it is, therefore, open to the Government of Bihar to make a departure from that Rule in appropriate cases and the same was done in the instant case by the Government of Bihar for the purpose of rewarding the petitioner for his bravery. It was unjust on the part of the Police Department of the State to think that Government of Bihar cannot make a departure in an appropriate case. It is true that no officer of the Government of Bihar is capable of acting contrary to the said rule and, accordingly, no officer of the Government can give an appointment contrary to what has been prescribed in Rule 661(b) of the Manual. However, the Government of Bihar itself could make an exception and the same was done in the instant case. It must be kept in mind that the Manual, as it stands, is a creation of the Government of Bihar in its executive side and not of the Government of Bihar in its legislative side and, accordingly, executive Government of Bihar can always make an exception to Rule 661(b) of the Manual in deserving cases, but such exception must be made consciously and the same must be apparent on the face of the records.

(Emphasis added)

I, therefore, respectfully disagree with the judgment to the extent that it seeks to lay down that the Manual is in the nature of executive instructions, and not a subordinate legislation.

11. I must now deal with the judgments relied on by the learned Counsel for the petitioners in *Sundarjas Kanyalal Bhatija* (supra), and *Shridhar* (supra), which are in substance to the effect that judgment of one single Judge binds another. In view of the foregoing discussion, the proposition of law is inapplicable to the facts and circumstances of the present case. Law is well settled that judgment of a learned single Judge binds another single Judge and, in the event of disagreement, he may refer the legal question to a Division Bench for consideration. Law is equally well settled that this proposition of law is subject to the law of *Per Incuriam*, whereunder the judgment of one Bench does not bind another Bench of co-ordinate jurisdiction if the earlier judgment has been rendered overlooking another binding precedent or overlooking material provisions of the statute which, if considered, will lead to a different conclusion.

12. The law relating to judgments being *Per Incuriam* has been the subject matter of a long line of cases. In one sense, it is an exception to the doctrine of precedence where the court refuses to feel bound by a judgment which normally binds it. The law relating to judgments *Per Incuriam* was discussed by this Court in the case of *Ram Laxman Glass (P) Ltd. and Others Vs. State of Bihar and Others*, , Paragraphs 7.1 and 7.2 of which are reproduced hereinbelow for the facility of quick references:

7.1 The Supreme Court has dealt with the law relating to Per Incuriam in its judgment reported in (1990) 3 SCC 684 (Punjab Land Development and Reclamation Corporation Ltd. v. The Presiding Officer). The following portion of the judgment occurring in paragraph 40 of the judgment illumines the position:

We now deal with the question of Per Incuriam by a reason of allegedly not following the Constitution Bench decisions. The Latin expression Per Incuriam means through inadvertence. A decision can be said generally to be given Per Incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court....

The Supreme Court observed as follows in paragraph 43 of the report:

As regards the judgment of the Supreme Court allegedly rendered in ignorance of a relevant constitutional provision or other statutory provisions on the subjects covered by the, it is true that the Supreme Court may not be said to "declare the law" on those subjects if the relevant provisions were not really present to its mind....

7.2 This issue had arisen before the Supreme Court in its judgment reported in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, Paragraphs 40 and 41 are relevant in the present context and are set out hereinbelow for the facility of quick reference:

40. "Incuria" literally means "carelessness". In practice, Per Incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". (Young v. Bristol Aeroplane Co. Ltd.). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words, can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio. in the technical sense that has come to be attached to the phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind". (Salmond on Jurisprudence 12th Edn. p. 153). In Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. the court did not feel bound by earlier decision as it was rendered without any argument, without reference to the crucial words of the rule and without any citation of the authority". It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The Bench held that, "precedents

sub-silentio and without argument are of no moment." The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In *B. Sharma Rai v. Union Territory of Pondicherry* it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles laid down therein." Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

13. In that view of the matter, I do not feel bound by the order in *Kamal Chandra Shah* (supra), having been rendered without noticing the earlier judgments of this Court, and also overlooking the statutory character of the Manual.

14. There is yet another aspect of the matter. It remains to be considered whether the order of this Court of 27.7.2006 (Annexure 11) is covered by the law of precedents. The following observations in the order dt. 4.2.2005, passed in *CWJC No. 8677 of 2003 (Shabbir Alam v. Bihar State Electricity Board and Ors.)*, may be noticed, referring the issue for an authoritative pronouncement of a larger Bench:

4. I have no manner of doubt that the position in law has become extremely confusing on account of conflicting judgments and no consistency of principles, and exceptions, if any, are discernible. The problem is accentuated not only before the single Judge Benches but also Division Benches on account of a very unhappy reality pervasive all over India and has a direct bearing on our established principles of law of precedence which have grown during the days when all important matters were disposed of at the stage of "Hearing", and has now fundamentally changed on account of the flood of litigations. On account of a multiplicity of factors, most of the matters are now disposed of at the stage of admission by short orders and are profusely cited at the Bar. Can these really be treated as orders or judgments strictly within the law of precedents.

5. I am, therefore, of the view that the issues indicated above may be placed before a Bench of five or three Judges for an authoritative pronouncement. Put up before Hon^{ble} the Chief Justice for appropriate orders.

15. I must also deal with the contention advanced by learned Standing Counsel that the act of bravery leading to the appointment of *Kamal Chandra Shah* was far more laudable compared to the present petitioners which is far less. That was a case, in his submission, where that petitioner had shot dead four criminals and had in return received injuries. In the present case, the alleged acts of bravery

are far behind which can never merit such back-door entry into service, and does not justify such a sharp departure from the statutory rules. In view of the foregoing discussion. I do not feel the necessity of examining this submission. I am perhaps incapacitated in examining the question which can be decided only after the Manual/statute book provides the definition of bravery, failing which it may not be appropriate on the part of the court to examine the efficacy or the value of the alleged acts of bravery. Such assessment, either by the executive or in judicial review, must rest on surer foundations.

16. In the result, the writ petition is dismissed. In the circumstances of the case, however, there shall be no order as to costs.