

(1999) 02 PAT CK 0022
In the Patna High Court
Case No : C.W.J.C. No. 10223 of 1989

Prem Kumar Pathak, "Jyoti"

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 03-02-1999

Acts Referred:

Citation : (1999) 02 PAT CK 0022

Final Decision : Dismissed

Judgement

Ashok Kumar Ganguly, J.—The point for deciding the controversy raised in this Writ Petition is whether the petitioner's claim to be treated as Laboratory Technician with effect from 1st March, 1977 or alternatively atleast with effect from 1st February, 1978 is correct" or whether the respondents" stand that the petitioner should be treated as a Laboratory Technician with effect from the date of his promotion to the said post i.e. with effect from 25th April, 1980 is correct?

2. In order to appreciate the aforesaid controversy certain basic facts are stated below:

It appears from the Writ Petition that the petitioner was initially appointed in L.N. Mishra Institute of Medical Emergency on muster roll and on a daily wage basis on Rs. 7/- per day. Subsequently by an order dated 27th May, 1977 passed by the said Institute the petitioner was put on the pay scale of Rs. 240-300-E.B.-8-396 by way of purely ad hoc and temporary arrangement. This will appear from Annexure-4 to the Writ Petition. Thereafter the services of the petitioner was regularised in the post of Laboratory Technician in the said Instituted by an order dated 28th January, 1978 with effect from 1st January, 1978. It is not in dispute that the said Institute is a private Institute is a private Institute and the petitioner has admitted this fact in paragraph 29 of the Writ Petition.

3. It is also not in dispute that the said Institute was taken over under the provisions of the Bihar Private Medical Colleges (Taking Over) Act, 1987 (hereinafter referred to as the said Act) and after the said take over the service

of the petitioner was also absorbed in Nalanda Medical College Hospital (hereinafter called the N.M.C.H.). This will appear from Annexure-7 which is dated 17th February, 1978. From the said document it appears that on the said take over the petitioner was appointed by the Principal of the N.M.C.H. as Laboratory Assistant in N.M.C.H. on a temporary basis with effect from 1st February, 1978. The petitioner's case is that against such appointment he made a representation but, however, copy of such representation/objection alleged to be filed by the petitioner has not been disclosed with this Writ Petition. Thereafter another order dated 28th February, 1980 was issued by the Principal of the said N.M.C.H. by which it was stated that the petitioner was absorbed as a Laboratory Assistant instead of being appointed so. The petitioner was thereafter subjected to a training for appointment to the post of Laboratory Technician alongwith other employees. The petitioner underwent such training and upon completion of the said training the petitioner as case was considered by the Departmental Promotion Committee and the petitioner was promoted to the post of Laboratory Technician in the pay scale of Rs. 240-6-300-EB-8-396 with effect from 24.4.1980. The said order of the petitioner's promotional appointment is at Annexure-9 to the Writ Petition but the petitioner's contention is that he was appointed in the paid Private Institute to the post of Laboratory Technician on 1st January, 1978. Thereafter, on take over the petitioner was appointed in N.M.C.H. from 1st February, 1978 to a lower post, namely, to the post of Laboratory Assistant. According to the petitioner, this is wrong. The petitioner's case is that he should have been appointed on the post of Laboratory Technician in N.M.C.H. with effect from 1st February, 1978 and his seniority in the said post of Laboratory Technician should be counted from that date.

4. In support of this contention, learned Counsel for the petitioner submits that the petitioner has obtained from the department of Clinical pathology of P.M.C.H., Patna a certificate of training as Laboratory Technician and for that purpose he attended the training from January, 1971 to December, 1971. The petitioner states that he made several representations for giving him seniority as Laboratory Technician from an earlier date but ultimately his representation was rejected and by the impugned order dated 23.11.1989 as contained in Annexure-1, the respondent authority has accepted the petitioner's appointment in the post of Laboratory Technician only with effect from 25 April, 1980. The said order dated 23.11.1989 passed by respondent No. 4 has been challenged by the petitioner by filing this Writ Petition.

5. The petitioner has also stated that he has got the salary on the post of Laboratory Technician and this averment made by the petitioner in paragraph 38 of the Writ Petition has not been denied.

6. In this matter the State respondent has not filed any counter affidavit nor has the learned Counsel for the State made any submission. The claim of the petitioner has been resisted mainly by the learned Counsel appearing for the private respondents. First of all learned Counsel for the private respondents

submits that the petitioner has made suppression of material facts in the Writ Petition and in support of the same learned Counsel has drawn the attention of this Court to paragraph 6 of the Writ Petition in which the petitioner has stated that he read upto Matriculation level and in the said paragraph it has been categorically stated by the petitioner that because of some pressing family problems, the petitioner could not pursue his studies further. But the learned Counsel for the private respondents has filed a counter affidavit In which it has been stated that the petitioner has suppressed the fact with an intention. The learned Counsel stated that the petitioner appeared in the Pre University examination and that he was a regular student of a College at Darbhanga in Pre University Class and appeared in the said examination in the month of April, 1971 and his Roll number and everything has been quoted in paragraph 13 of the counter affidavit filed on behalf of respondent Nos. 8, 9 and 13. It has also been stated that even in the service book of the petitioner his education of Pre University Js mentioned. It has been stated that this fact about the petitioner's qualification has been suppressed by the petitioner in order to contend before the Court that he received training in the department of Clinical Pathology in the Patna Medical College Hospital between January, 1971 and December, 1971. In other words learned Counsel for the private respondents submits that if the petitioner contends that he was appearing as a regular student in the Pre University course from Darbhanga which was held in April, 1971 itself, it was not possible for him to contend that at the same time he was receiving training at P.M.C.H., Patna as it is common knowledge that the distance between Darbhanga and Patna is more than 100 Kms. In that context it has been asserted by the learned Counsel for the respondents that the genuineness of the petitioner's training certificate is extremely doubtful. The fact that the petitioner's educational qualification is upto Pre University level which has been stated in paragraphs 13 and 14 of the counter affidavit filed by the private respondents has not been denied by the petitioner in the rejoinder affidavit filed in reply to the same. In his rejoinder affidavit the petitioner has not denied the fact that as a regular student the petitioner pursued his studies at the Pre University level in Darbhanga. This Court does not understand how as a regular student the petitioner was pursuing his studies at Darbhanga and at the same time was receiving training at P.M.C.H., Patna for the aforesaid certificate.

7. In any event this Court does not appreciate the deliberate false statement made by the petitioner in paragraph 6 of the Writ Petition filed by him in 1989 that after matriculation he did not pursue his academic studies any further. In the context in which this statement has been made, the allegation made by the private respondents becomes very plausible that the claim of certificate obtained by the petitioner from P.M.C.H. after receiving training between January and December, 1971 becomes highly doubtful. Whether the said claim is doubtful or not this Court is not passing any conclusive Judgment on the same but one thing is sure that the petitioner has indulged in suppression of material facts by filing a Writ Petition. This itself is sufficient to disentitle the petitioner from obtaining any

relief from this Court. Apart from that on merits also the petitioner does not have a good case. It is not in dispute that the petitioner was previously working in a Private Institute which was taken over under the provisions of the Bihar Private Medical College (Taking Over) Act, 1978. u/s 6 of the said Take Over Act the determination of the terms of the teaching staff and other employees of the College is provided for.

8. It may be noted that in some take over legislation there are provisions whereby the existing staff of the taken over organisation are enmasse absorbed in Government on the same scale of pay and on the same terms but here Section 6 of the said Act is not in those terms. Particularly Sub-section (3) of Section 6 of the said Act authorises the State Government to act on the basis of the report of a Committee and on the basis of such report the State Government will consider the case of each member of the staff and the Government may decide to absorb or terminate the services of the employees of the taken over organisation or to allow him to continue on ad hoc basis for a fixed terms or on contract and shall where necessary re-determine the rank, pay allowances and other conditions of service.

9. Therefore, the petitioner's absorption on 1st February, 1978 N.M.C.H. was in the post of Laboratory Assistant and not In the post of Laboratory Technician. This can be done by the authority on the basis of Sub-section (3) of Section 6 of the said Act. Under the aforesaid provision the petitioner has no right to automatically continue on the post of Laboratory Technician. But the petitioner's right to continue is subject to the provisions of Sub-section (3) of Section 6 of the said Act which as pointed out above, authorises the State Government to re-determine the terms of employment of the petitioner and that was done by the respondents authorities.

10. Thereafter the petitioner was asked to go on training. The petitioner has stated in the Writ Petition that he protested against this but no contemporaneous written objection or protest is on record. The petitioner was thereafter sent for training and upon completion of training he was promoted to the post of Laboratory Technician. This Court does not find any error in the entire exercise of the State respondents. The claim of the petitioner of continuity of his service in the same post on which he was working in a private Institute Is not granted under the law and the petitioner has also undergone necessary training in order to have his case considered for promotion to the higher post and that was granted to the petitioner. In that view of the matter, this Court is of the opinion that no relief can be granted to the petitioner.

11. Learned Counsel for the petitioner, however, has relied on certain decisions of the Supreme Court. The first decision on which reliance was placed was in the case of the The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, . In paragraph 44 of the said Judgment, the learned Judges of the Supreme Court has summarized the legal position and the learned Counsel for the petitioner placed reliance on Sub-

paragraphs (B) and (C) of paragraph 44 of the said judgment. In the instant case the appointment of the petitioner to the post of Laboratory Technician was not with N.M.C.H. or with the Government but was in a private institution. Therefore, there is no question of the petitioner's uninterrupted continuing in the same post since the two organisations are different and the petitioner was absorbed in the N.M.C.H. under the provisions of Sub-section (3) of Section 6 of the said Act to the post of Laboratory Assistant and the post of Laboratory Technician being a promotional post, the petitioner was promoted to the said post only after receiving training and only after his case was recommended for promotion to the said post by the Departmental Promotion Committee. In this fact situation, the ratio of Sub-paragraphs (B) & (C) of paragraph 44 of the Judgment in Direct Recruit Class II Engineering Officer's Association (supra) is not applicable. In fact here the absorption of the petitioner is under a particular provision of the statute as mentioned above and under Sub-section (3) of Section 6 of the said Act, the respondents right to redetermine the petitioner's terms of employment with the State Government cannot be questioned.

12. The order decision which was relied upon by the learned Counsel for the petitioner was in the case of Nirmal Kumar Choudhary and Ors. v. State of Bihar and Ors. reported in : (1988)ILLJ540SC . That was a case of determination of principle of seniority and amalgamation of different wings of Engineer in the Department of Agriculture and where a combined gradation list is prepared. Such amalgamation has taken place in different wings of the same department in the State Government. Here the fact situation is totally different. Here there has been no amalgamation, on the other hand under the aforesaid take over law the private Institution has been taken over along with the employees and the terms and conditions of service of such employees are to be regulated u/s 6(3) of the said Act as pointed out above. Therefore, this decision in Nirmal Kumar (supra), is also of no assistance to the petitioner.

13. The last decision cited was in the case of the Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, . The said decision is an authority to show the extended application of the writ of mandamus. In a very erudite Judgment, the Supreme Court has discussed the scope of writ of mandamus and its reach in certain situation. But here those principle are not applicable Inasmuch as the petitioner does not have, as pointed out above, a good case on merits. Therefore, the principles decided in the case of the Comptroller and Auditor General (supra) are not remotely attracted to the facts of this case.

14. For the reasons discussed above, this Writ Petition is dismissed and no relief can be granted to the petitioner. There will be no order as to cost.