

(2013) 10 PAT CK 0007

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 13868 of 2013

Rajendra Kumar Singh and Dinesh Prasad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Bihar State Universities Act, 1976 — Section 35, 4(1)(14)

Citation : (2014) 1 PLJR 689

Hon'ble Judges : Mihir Kumar Jha, J

Bench : Single Bench

Advocate : Abhinav Srivastava, for the Appellant; Subhash Pd. Singh, GA-7 for the B.R.A. and Mr. Harendra Kumar Tiwary, for the Bihar University, for the Respondent

Final Decision : Dismissed

Judgement

Mihir Kumar Jha, J.—Heard learned counsel for the parties. The prayer of the petitioner in this writ application reads as follows:-

Issuance of a direction, order or writ including writ in the nature of mandamus commanding the concerned respondent authorities to take steps towards regularizing the services of the petitioners against their respective posts at S.R.A.P. College, Barachakia, East Champaran (hereinafter referred to as "the University"), which is a constituent unit of the B.R. Ambedkar Bihar University, Muzaffarpur (hereinafter referred to as "the University"), w.e.f. the dates of their initial appointments against their respective posts:

Issuance of a direction, order or writ including writ in the nature of mandamus commanding the concerned respondent authorities to take steps towards making payment of arrears of salary and extending other benefits treating the petitioners to be continuously working against their respective posts with effect from the dates of their initial appointments at the College and also, extend other consequential benefits, which they are entitled to in accordance with law.

2. Learned counsel for the petitioners in support of the aforementioned prayer has submitted that once the services of the petitioners were absorbed under the orders of the Vice-Chancellor of Bheem Rao Ambedkar Bihar University, Muzaffarpur in terms of the judgment of this Court passed in C.W.J.C. No. 8377 of 2001 and its analogous cases disposed of on 31.03.2003, the petitioners cannot be denied the benefit of their such regularization of service from the very first day of their appointment. In this regard, he has also cited example of other employees of T.N.B. Law College under Bhagalpur University who were given the benefit of such regularization from the date of their first appointment as was communicated in an order of the Deputy Secretary to the Government dated 02.05.2007 which according to him was passed in compliance of orders of this Court dated 5.8.2005 and 17.4.2007 in C.W.J.C. No. 2300 of 2000 and M.J.C. No. 203 of 2006.

3. Learned counsel for the State on the other hand has submitted that the case of the two petitioners is clearly distinguishable, inasmuch as, when their initial appointment was made by the Governing Body of the College, which was then only an affiliated college of the University, there were no sanctioned post available for their appointment absorption/regularization and in fact it was only when the State government had sanctioned post for them by an order dated 14.01.2006, that the petitioners services could be regularized w.e.f., 25.02.2006. In this regard, he has relied on the provisions of Section 35 of the Bihar State University Act (hereinafter referred to as the Act). He had also clarified that the precedent of retrospective regularization of service of non-teaching employees of T.N.B. Law College is wholly distinguishable on facts and in law, inasmuch as, they were not only governed by the recommendation of Justice S.C. Agarwal Committee as approved by the Apex Court in the case of State of Bihar and Others Vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and Others, in respect of teaching and non-teaching employees of 36 colleges which were made constituent on 19.8.1986.

4. Facts which are not in dispute and would be sufficient to be noticed for disposal of this writ application lie in a very narrow compass. The College namely, Sheodeni Ram Ayodhya Prasad College, Bara Chakia (hereinafter referred to as "the College") was established in the year 1969-70 and was affiliated to the then Bihar University. The petitioner No. 1 claims to have been appointed on the post of Assistant Accountant on 04.01.1978, and the petitioner No. 2 was appointed against the post of Peon on 01.03.1978. The College subsequently became a constituent Unit of Bihar University w.e.f. 01.10.1980 and though the University in exercise of its power u/s 4(1)(14) of the Act had absorbed the services of the teaching and non-teaching employees working within the sanctioned posts as were available while the college was an affiliated unit of Bihar University but the services of the petitioners and few others non-teaching employees of the College were not absorbed as a result whereof they had moved this Court seeking a direction for regularization of their services.

5. This Court in the first instance in the order passed in C.W.J.C. No. 9098 of 1997 and C.W.J.C. No. 2355 of 1998 and C.W.J.C. NO. 12551 of 1998 had remitted the matter back to the State Government for considering the claim of the petitioners and others for their regularization/absorption of service. Such prayer of the petitioners was, however, rejected by the State government by an order dated 03.05.2001 and that order was assailed separately again before this Court by the aggrieved persons in three writ petitions including the petitioners who had filed their separate writ application being C.W.J.C. No. 11697 of 2002. The aforesaid writ application of the petitioners with those two other writ petitions were disposed of by a common judgment dated 31.03.2003, wherein, while dismissing the connected writ application C.W.J.C. No. 11837 of 2012, a direction was given to the State Government to reconsider the case of the petitioners as also the petitioners of C.W.J.C. No. 8377 of 2001.

6. In compliance of the order of this Court, the State Government had passed the order on 13.01.2006 sanctioning the posts for the petitioners as also for the petitioners of CWJC No. 8377 of 2001 and further had regularized their services on such newly sanctioned posts w.e.f. the date of the order. The University thereafter had passed the consequential order on 25.02.2006 directing regularization of their service only with prospective effect i.e. the date notified by the State Government being 13.01.2006.

7. Mr. Abhinav Srivastava, learned counsel appearing on behalf of the petitioners has submitted that once the posts held by the petitioners and others in the college were sanctioned by the State Government, it had to essentially refer back to the date of initial appointment of the petitioners. For this purpose he has referred to the staffing pattern as also the judgment of this Court dated 31.3.2003 in the case of the petitioners. For this purpose, he had also referred to a precedent of the employees of T.N.B. Law College.

8. First of all, this Court would go into the question of the scope of Section- 35 of the Act which specifically prescribes prior approval of the sanction of post by the State Government for appointment on teaching and non-teaching posts either for constituent or affiliated colleges. In fact in the case of the petitioners themselves, it was held in the judgment dated 31.3.2003 that Section-35 of the Act creates injunction against creation of teaching and non-teaching post involving the financial liability increase of pay and allowances as well as appointment on any post etc., without prior approval of the State Government. In fact their prayer for regularization was not allowed by this Court in the judgment dated 31.3.2003 and the matter was remitted back to the State government to examine this very issue of sanction of post against which they came to be appointed and had claimed their regularization.

9. As noted above while the College was affiliated the post of Assistant Accountant was never sanctioned. Though there was a sanctioned post for Peon but that had already been occupied by a person senior in appointment and continuation to petitioner No. 2. In fact it was the case of the petitioners

themselves that for them the Governing Body had created additional post under its resolution dated 25.05.1977. Let it be noted that the College was affiliated in 1969-70 but the additional post were sought to be created by the Governing Body on 25.05.1977, whereas Section 35 of the Bihar State Universities Act had already come into force w.e.f., 31.12.1976 requiring prior specific approval of the State Government on the sanction of additional post. There is no order of the State Government on record to show that the post which was sought to be created by the Governing Body of the affiliated College on 25.05.1977 had also received approval and sanction of the State Government. Thus those posts created by the Governing Body on 25.05.1977 cannot be treated to be the sanctioned post so as to facilitate the absorption of the petitioners w.e.f., their first date of appointment.

10. Faced with this situation, Mr. Srivastava then has submitted that the staffing pattern had come into force in the year 1980 and at least from the year 1980 such post would be deemed to have been sanctioned. This Court is also not in a position to accept the aforementioned submission for more than one reason. The staffing pattern were in fact only the standard set out as per the report of Bandhopadhyay Committee which had prescribed the yard stick for creation and sanction of post. In fact when the said staffing pattern as recommended by the Bandhopadhyay Committee was accepted by the State Government, the Universities were directed to submit proposal for specific sanction of post by giving all the details including the number of students admitted in the last three years as also the work load and such proposal for creation of post had to be sent and routed through the University for its being ultimately sanctioned by the State Government.

11. There is also no evidence on record to show that the post which were included in the staffing pattern were sanctioned for the petitioners by any specific order of the State Government prior to the order in question dated 13.01.2006. Thus in absence of any specific order of sanction of post on which the petitioners claim their absorption from the date of their initial appointment they cannot also claim their retrospective absorption.

12. It has to be noted that a similar plea was raised by the petitioners in their earlier writ application which was not accepted by this Court wherein, the concept of posts created by the Governing Body on 16.03.1980 was specifically rejected and it was also noted that in case of the petitioners there was also no evidence of their payment of salary while such payment of salary was being made to other petitioners of C.W.J.C No. 8377 of 2001. In fact these two petitioners did not receive payment of salary even after the College became constituent only on account of their being no sanctioned post available for them. In this regard, it would be useful to quote relevant paragraph No. 15 of the earlier interparty judgment dated 31.3.2003 in CWJC No. 11697 of 2002 dated 31.3.2003 in CWJC No. 11697 of 2002 which reads as follows:-

In the facts and circumstances, I am of the view that distinction can be made

between the cases of five petitioners of CWJC No. 8377/2001 namely Daroga Prasad Yadav, Nagendra Singh, Rama Nand Thakur, Sarveshwar Prasad and Sheo Nath Prasad and two petitioner of CWJC No. 11697/2002 namely, Rajendra Kumar Singh and Dinesh Prasad who were appointed between 1976-1978 i.e. much prior to the process of conversion of the College as constituent College began. Not only they were appointed earlier, except Rajendra Kumar Singh and Dinesh Prasad, others were also paid salary regularly from 1.1.1985 till 1993. In their case, it cannot be said that salary payment was irregular a ground on which the claim of others has been negated by the Government. Though along with Daroga Prasad Yadav, Nagendra Singh, Ramanand Thakur, Sarveshwar Prasad and Sheo Nath Prasad, five others who are petitioners in CWJC NO. 8377/2001 were also paid salary from 1.1.1985, their cases stand on different footing as they were appointed on the eve of conversion of the College as constituent College and therefore their appointment cannot be said to be bona fide as held above.

13. As a matter of fact, it was pursuant to the aforementioned order of this Court dated 31.03.2003 that the State Government had sanctioned the post of Assistant Accountant (Accounts Clerk) and Peon for the two petitioners which was to continue only till the continuation of the petitioners in service and would be deemed to have come to an end on their retirement, death/resignation. The relevant portion of the order of the State Government dated 13.01.2006 (Annexure-9) reads as follows:-

14. The aforementioned order of the State Government therefore, will leave nothing for speculation that the post for the petitioners were created by way of additional post only w.e.f. 13.01.2006 and therefore, their regularization from an earlier date of service was neither allowed by the State government nor could have been made by the University.

15. It has to be kept in mind that the petitioners had kept mum for a period of more than seven years since January 2006 and have filed the present writ application only on 22.07.2013 without even assailing the aforementioned Government order dated 13.01.2006 and the consequential order passed by the University on 25.02.2006 which reads as follows:-

16. Thus the delay of more than seven years in assailing the order of the State Government and the University by itself would be sufficient to dismiss this writ application on the ground of delay and laches on the part of the petitioners in moving this Court. The petitioners in fact having been absorbed in service of the University in the year 2006 have been given the prescribed pay scale and the post of Accounts clerk and Peon respectively w.e.f. 13.01.2006, they cannot now after seven years claim more than that specially when their earlier writ application did not envisage such regularization of service from the date of their first appointment.

17. Any such direction issued today by this Court to regularize the service of the

petitioners with retrospective effect of their date of first promotion would be not only in teeth of Section- 35 of the Bihar State University Act but would run contrary to the law laid down by the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, and reiterated by a Full Bench of this Court in the case of Ram Sevak Yadav Vs. The State of Bihar and Others, wherein, it has been held that for regularization availability of sanctioned post is a condition precedent.

18. As noted above additional post for the petitioners were sanctioned by the State Government on the proposal of the University and in keeping with the guidelines laid down in the staffing pattern only w.e.f. 13.01.2006 and the petitioners having also accepted the same for a period over seven years now cannot expand their ambition to get regularization of their service with retrospective effect only to claim salary for the period of twenty-five years from 1980 to 2005 to which they were not held entitled even in their own earlier case decided on 31.3.2003 in CWJC No. 11697 of 2002 which being an inter-party judgment would equally bind the petitioners.

19. The illustration given by the learned counsel for the petitioners of retrospective regularization by citing the case of the employees of T.N.B. Law College in view of the order of the State Government dated 2.5.2007 is also wholly misplaced. First of all, it has to be kept in mind that the T.N.B. Law College was one of the 36 constituent colleges which were made constituent in the 4th phase in 1986 and for them, the issue of absorption in terms of Section 4(1)(14) of the Act had become the subject matter of consideration before this Court and the Apex Court in the case of State of Bihar and Others Vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and Others,

20. In fact, when in a space of almost twenty years, no decision was taken for absorption of any teaching and non-teaching employees of these 36 colleges, the Apex Court had initially constituted Justice S.C. Agarwala Commission which was assigned the task of recommending the names of the teaching and non-teaching employees who were either to be absorbed on sanctioned posts or recommended posts up to 30.4.1986. Justice S.C. Agarwala Commission, thereafter, having examined each and every college with reference to the sanctioned posts or recommended posts up to 30.4.1986 had submitted its report for each and every employees of those colleges and consequently, again those already sanctioned posts or recommended posts up to 30.4.1986 i.e. before the colleges became constituent on 19.8.1986.

21. A decision only thereafter was taken by the Apex Court in the case of Mahasangha (supra) that order of absorption against those posts shall be issued by the Universities. Thus, for them, unlike in the case of petitioners, there was a sanctioned post or a recommended post up to 30.4.1986 and consequently, the order issued by the State Government on 2.5.2007 with reference to the order of this Court dated 5.8.2005 in CWJC No. 2300 of 2000 in the backdrop of the direction given by the Apex Court in the case of Mahasangha (supra) accepting

the report of Justice S.C. Agarwala Commission in toto, cannot be cited as an illustration.

22. As noted above, the college of the petitioner was made constituent way back on 1.10.1980 and there was no stipulation that every working employee shall automatically be absorbed in service. In fact, the absorption was to be made only against the sanctioned and existing post and for the petitioner, there was no such sanctioned post which for the first time came into existence only upon creation of the sanctioned post on 25.2.2006. It is this aspect of the matter which will make a complete distinction in the case of the petitioners vis-a-vis the case of the employees of the T.N.B. Law College. That being so, this application is wholly misconceived and is, accordingly, dismissed.