
(1995) 06 PAT CK 0020
In the Patna High Court
Case No : C.W.J.C. No. 10876 of 1992

Rajendra Prasad Sinha and 7 Ors.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 27-06-1995

Acts Referred:

Citation : (1995) 06 PAT CK 0020

Final Decision : Dismissed

Judgement

B.P. Singh and Ashish N. Trivedi, JJ.—We have heard counsel for the parties at length. Respondent No. 3, the Vice-Chairman of the Notified Area Committee, Nokha, has filed a caveat in the form of a counter-affidavit to which the Petitioners have filed their rejoinder. We, therefore, proceed to dispose of this writ petition by this order.

2. The Petitioners herein have prayed for the issuance of a writ quashing the letter dated 6th May, 1992 (Annexure-1) containing a direction to the authorities to terminate all appointments, which have been made illegally without following the procedure established by law. The Petitioners have also challenged the order dated 21.9.1992 whereby Respondent No. 3 has terminated the appointment of the Petitioners on the ground that they were illegally made. Those orders are Annexure 1-A to 1-H to the writ petition.

3. The facts pleaded by the Petitioners in the writ petition are as follows:

Petitioner Nos. 1 to 4 were engaged on 1.10.86 on daily wage basis by Respondent No. 3, Notified Area Committee, Nokha, as Tax Daroga, Clerk, Safai Jamadar and Peon. Petitioner Nos. 5 to 8 were appointed subsequently with effect from different dates in the years 1986 and 1987. They were all appointed as Safai Majdoors on daily wages. Apparently, these posts were not sanctioned posts, because it is the case of the Petitioners that nine posts were sanctioned by the Government by order dated 20th October, 1986. This fact is not disputed by the Respondents, and is also apparent from the material on record. The Notified

Area Committee, Nokha, met on 6th October, 1988, and resolved to appoint the Petitioners against the sanctioned posts on a temporary basis. The resolution passed by the Committee makes an interesting reading. It refers to the fact that the Government had been pleased to sanction nine posts by order dated 20th October, 1986. The persons in the employment of the Committee had made a representation that they be appointed against those nine sanctioned posts. Since the Committee was faced with financial difficulties, it was not necessary to adopt any procedure for making fresh appointment, because if the prescribed procedure were to be followed, it would entail time and expenditure, which the Committee was not in a position to bear. In these circumstances, the Committee resolved that from amongst the persons already employed by the Committee, the Petitioners and one other may be appointed according to their ability against the posts mentioned against their names on a temporary basis with effect from the date on which the order of the Government sanctioning the posts was received, namely, with effect from 11.11.1986. The effective date from which they were appointed on temporary basis has been shown to be 11.11.1986, because that appears to be the date on which the order of the Government sanctioning the posts was received by the Committee. What is indeed not understandable is the fact that even according to the Petitioners, some of them were appointed on daily wage basis in the year 1987. If that be so, it is not understandable how they could have been appointed with effect from 11.11.1986, though on temporary basis. The decision of the Committee has been annexed as Annexure-2 to the writ petition.

4. Within five months of their appointment on temporary basis the Committee took a decision on 17th March, 1989 to grant permanency to the nine persons appointed on temporary basis pursuant to the decision of the Committee dated 6.10.88. In anticipation of sanction by the State Government, the confirmed employees were to be paid according to the prescribed pay scales. The decision of the Committee is Annexure-3 to the writ petition. Pursuant to the aforesaid decision of the Committee orders were issued granting permanency to the Petitioners. Those orders are Annexure 4 series.

5. It appears that the Government had received several, complaints about illegal appointments made by local bodies. In this connection, the Deputy Secretary, Nagar Vikash Bibhag, Government of Bihar, Patna (Respondent No. 2) addressed a letter to all the District Magistrates referring to the earlier communication including resolutions of the Government, and pointing out that several instances had been brought to the notice of the Government of appointments being made by local bodies against unsanctioned Class III and Class IV posts on daily wage basis etc. Similarly, even as against sanctioned posts appointments/promotions were being made without following the procedure prescribed by law. This was clearly illegal and cast a heavy financial burden on the State and the local bodies. It was, therefore, directed that all appointments should be made against sanctioned posts strictly in accordance with the procedure prescribed by law, and if it is found that appointments have been made illegally in the past, they should

be immediately cancelled.

Pursuant to the direction of Respondent No. 2 a show cause notice was issued by the Notified Area Committee to the Petitioners on 3rd July, 1992, which is Annexure-5 series. All the notices called upon the concerned employee to show cause why his appointment be not cancelled, since he was appointed without following the procedure prescribed by law. In some of the notices it has also been mentioned that the concerned employee was guilty of unauthorised absence from duty. This is not very relevant, because the order ultimately, passed did not refer to the unauthorised absence of the employees concerned, as a ground for cancellation of the appointment. The Petitioners filed show cause in response to the notices issued to them, and their show cause is Annexure-6 series. It was thereafter that the impugned orders (Annexures 1-A to 1-H) were passed on 21.9.1992. The impugned orders refer to the communication of the State of Bihar dated 6.5.1992 (Annexure-1), and further state that the show cause submitted by the concerned employee was considered and the Committee decided to terminate the employment of the concerned employee.

6. It is, therefore, apparent from the impugned orders that they have been passed pursuant to the directive of the Government dated 6.5.1992 (Annexure-1), meaning thereby, the services of the Petitioners have been terminated on the ground that they were not appointed in accordance with law and their appointments are illegal. The termination order does not either mention or proceed on the basis of any proved misconduct so as to cast a stigma.

7. Counsel for Respondent No. 3 has contended that the appointments were illegally made without following the procedure prescribed by law. In fact, no procedure whatsoever was followed. A show cause notice had been issued, and only after considering the show cause filed by the Petitioners, the impugned orders terminating their services were issued.

8. From the facts stated by the Petitioners in the writ petition, it is quite apparent that the appointments were illegally made. It is not the case of the Petitioners that the posts were ever advertised, and that the candidates concerned were ever subjected to any selection process for judging their relative merit. Apparently, they were all appointed on the basis of their individual approaches, and on considerations not legal. Assuming that it is permissible for an appointing authority to make appointment on purely temporary basis for a short duration having regard to the exigency of service, it would be illegal to confirm those persons in permanent service without subjecting them to the process of selection prescribed by law. A person illegally appointed cannot be regularised, because that would amount to back-door entry into Government service (See J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., Tine same decision had held that the judgment of the Supreme Court in H.C. Puttaswamy and others Vs. The Hon"ble Chief Justice of Karnataka High Court, Bangalore and others, was in exercise of jurisdiction under Article 142 of the Constitution and was not in the nature of a binding precedent. In the instant case

the Petitioners initially entered service on daily wage basis without being subjected to any test, and without any other citizen having an opportunity of applying for appointment against the posts in response to any notice or advertisement issued, calling for application from qualified candidates. What, however, is surprising is the fact that after the posts were sanctioned the Committee decided to appoint the Petitioners as temporary employees against the sanctioned posts. The reasons in the resolution are indeed amusing. The reasons disclosed are that the prescribed procedure for appointment, if followed, would take time, and secondly that it will involve expenses, which the Committee was not in a position to bear. This is novel device to avoid the law, including the constitutional mandate. But the Committee was not satisfied with conferring temporary status on the Petitioners, because it went further, and only five months later by its decision (Annexure-3) it decided to confirm the Petitioners against the sanctioned posts, thereby conferring permanency. The facts are eloquent, and the motivations are also apparent. In this connection it will be useful to remember the observations of the Supreme Court in *Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others*, and in *Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others*, . In *K.S.P. College Stop-Gap Lecturers' Association* it was observed:

Ad hoc appointments, a convenient way of entry usually from back door, at times even in disregard of rules and regulations, are comparatively recent innovations to the service jurisprudence. They are individual problem to begin with, become a family problem with passage of time and end with human problem in Court of law. It is unjust and unfair to those who are lesser fortunate in society with little or no approach even though better qualified, more meritorious and well deserving. The infection is widespread in Government or semi-Government departments or State financed institutions. It arises either because the appointing authority resorts to it deliberately as a favour or to accommodate someone for any extraneous reason ignoring the regular procedure provided for recruitment as a pretext under emergency measure or to avoid loss of work etc. Or the rules or circulars issued by the department itself empower the authority to do so as a stop-gap arrangement. The former is an abuse of power. It is unpardonable. Even if it is found to have been resorted to as a genuine emergency measure the Courts should be reluctant to grant indulgence. Latter gives rise to equities which have bothered Courts every now and then.

In *Delhi Development Horticulture Employees' Union* the Court observed:

...Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take

judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years

9. It is a notorious fact that in the State of Bihar the appointing authorities have a Code of their own, not in accord either with the Constitution of India or with the laws or rules framed by the State of Bihar, or with the instructions, directions, circulars and resolutions issued by the State of Bihar in regard to the procedure for appointment. The appointing authorities observe the provisions of Articles 14 and 16 of the Constitution in their breach. Perhaps, they have forgotten the very existence of those Articles in the Constitution of India, and this business of clandestine appointment for whatever consideration, is so carried on by them fraudulently and with impunity regardless of the warnings issued by the State from time to time. They believe that by the time the illegal appointments are discovered, the persons concerned may have put in several years of service so as to justify their regularisation on humanitarian consideration. It is very often pleaded that the poor employees are not to blame. That does not hold good, at least in this State, because it is known to all concerned that employment is bought, since merit is no consideration, and the objective can be best achieved only if the rules are thrown to the wind and a procedure is adopted which is clearly contrary to all norms of fairness and equality. In fact, the Supreme Court itself was constrained to take judicial notice of the fact that where the rules are thoroughly disregarded, and in blatant violation of the law appointments are made, they are made for monetary consideration. It would, therefore, be difficult to say that one, who has bought an employment is not to blame, and that he is free of any guilt. Misplaced sympathy for such a person may have the effect of depriving other eligible and meritorious candidates of even an opportunity of applying for the posts for which they may be considered, even if not appointed. Every appointment of this nature, therefore, breaches Articles 14 and 16 of the Constitution, and it would be difficult for the Court to bring in equitable considerations while dealing with such cases in writ jurisdiction.

10. The postulate of Article 16 of the Constitution is that every citizen must have equality of opportunity in the matter of employment under the State. It is well-settled that even if specific rules are not framed for appointment, the executive power of the State being co-extensive with its legislative power, it may make an appointment even in the absence of rules, but in accordance with law, and the constitutional provisions. As long as a fair procedure is followed, the mere fact that specific rules have not been framed, will not denude the State of its power to make appointment in exercise of its executive authority. It is, however, a

condition of the exercise of such power that the same should be exercised not contrary to the law or rules already framed. The law is well-settled, and I may only refer to a few decisions of the Supreme Court to show that this has always been the law. In this connection, reference may be made to the decisions, reported in R.N. Nanjundappa Vs. T. Thimmiah and Another, and B.N. Nagarajan and Others Vs. State of Karnataka and Others, Both these decisions have been relied upon as binding precedents by the Supreme Court in a recent decision, reported in V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others, Similarly, the rule of audi-alteram partem is not attracted if an illegal appointment is terminated on the ground of illegality, without reference to any misconduct on the part of the concerned employee [Sec Dr. Suresh Chandra Verma and others Vs. The Chancellor, Nagpur University and others,

11. In the instant case, the Petitioners were initially appointed on daily wage basis. After the posts were sanctioned, they were appointed on temporary basis against those posts, and only a few months later they were confirmed against those posts. Apparently, at no stage were the posts advertised. The Petitioners were not subjected to any process of selection to judge their relative merit. The appointments were, therefore, clearly in breach of Articles 14 and 16 of the Constitution of India. I have no hesitation in coming to the conclusion that these are appointments procured on the basis of extraneous considerations. The action taken by the Committee is, therefore, justified and in accordance with law. In any event, no interference is called for by this Court in exercise of its writ jurisdiction, because if the impugned orders are interfered with, it would have the effect of perpetuating an illegality by reviving the orders of appointment which are patently illegal.

12. The writ petition is, therefore, dismissed. However, when the posts are regularly filled up, the Petitioners if eligible, may also be considered for appointment, if they apply, and age relaxation to the extent of their continuous service may be granted to them.