
(1983) 09 PAT CK 0021

In the Patna High Court

Case No : Civil Writ Jurn. Case No. 1447 of 1980

Rameshwar Prasad Sinha

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 15-09-1983

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 115

Citation : AIR 1984 Patna 61 : (1984) PLJR 238

Hon'ble Judges : Lalit Mohan Sharma, J

Bench : Single Bench

Advocate : Narendra Prasad and Kishore Kumar Sinha, for the Appellant; Ram Chandra Jha, for the Respondent

Final Decision : Allowed

Judgement

Lalit Mohan Sharma, J.—This writ petition has been filed for quashing the orders as contained in Annexures 5, 6, 12 and 13. The petitioner further prays for a writ of mandamus directing the respondents 1 to 4 to treat him in service as a lower division clerk and to pass consequential orders.

2. The petitioner was appointed on the post of lower division clerk by the Director of Public Instruction Bihar in September, 1966 and was posted at 19 Bihar Battalion. N.C.C., Ranchi, under the control of the Education Department of the State. The appointment was scrutinised by the Central Selection Board which recommended for regularising the appointment of the petitioner. Accordingly, the D. P. I passed an order on 29-1-1969, as contained in Annexure 1. The inter se seniority of the clerks was determined on the basis of the recommendation by the Selection Board. After entertaining representations and objections of the individual candidates, a final gradation list (Annexure 2) of the lower division clerks in order of seniority was circulated on 14-7-1977. A formal order confirming the petitioner should have normally followed, but since the file dealing with his service record including his personal character roll was misplaced, the

matter was deferred. The question was, however, not dropped and reminders were issued by the concerned authorities, as shown by Annexures 8 and 9, for confirmation of such officers who were left behind by oversight.

3. On 14-12-1978, the N. C. C. Directorate declared 38 lower division clerks including the petitioner as having become surplus. The relevant letter in this regard is Annexure 5 to this writ petition. A notice of termination of their services was served on them. This decision has been challenged as illegal. However, without formally determining his service, the petitioner was deputed on temporary basis in the Directorate of Adult Education, Bihar, which is also a part of the Education Department. The order in this regard dated 26-2-1979 is Annexure 6. The petitioner was relieved with effect from 8-3-1979 for joining Adult Education at Patehpur in Vaishali district (vide Annexure 7). Although the confirmation matter was taken up by the Directorate, N. C. C. in 1979, the petitioner was not confirmed.

4. On 12-11-1979, the petitioner was shifted from Patehpur to Harsidhi, East Champaran, under the same Directorate of the Adult Education. On 22-12-1979, the petitioner was served with a letter, Annexure 9, directing him to appear at a typing test failing which it was said that he would be returned to N. C. C. Directorate. The petitioner, accordingly, appeared at the said test and he was ordered to rejoin the office at Harsidhi on 24-2-80. He was relieved by the Project Officer, Harsidhi (Annexure 10) and he joined. Patehpur Project Office on 27-3-80. He was informed by the Project Officer by Annexure 11 dated 10-3-80 that since he had been deputed to Harsidhi Office, he could not have joined at Patehpur without an order by the Director in this regard. On 26-3-80. the Director, Adult Education, informed the petitioner by Annexure 12 that he was surplus hand and his services were being returned to the Directorate, N. C. C. as his work had. not been found satisfactory in the Adult Education Directorate. The Director, N. C. C. wrote to the Director of the Adult Education that the petitioner had been declared surplus in the N. C. C. and as a result of reorganisation and consequent developments, the petitioner must be deemed to have been absorbed in the Department of Adult Education and, would not be considered to be on deputation. In this manner, the petitioner was left without any post and had to come to this Court and the present writ application was filed on 22-5-80.

5. The case was heard by a Division Bench constituted by Mr. Justice N. P. Singh and Mr. Justice S. Narain. Mr. Justice Singh held that the petitioner's prayer for quashing Annexures 5 and 6 cannot be granted for two reasons. If he Was aggrieved with these orders, passed in December, 1978 and February, 1979. he should have approached this Court earlier and should not have waited till 1980. Secondly, when he was relieved by the Directorate, N. C. C. in March. 1979, he should not have joined the Directorate Adult Education and worked there till 26-3-80 when Annexure 12 was passed. In the present situation, he cannot be allowed to challenge the orders in Annexures 5 and 6. Proceeding further, it was held that the order in Annexure 12, however, was bad on the ground of violation

of the principles of natural justice and also for the reason that the Directorate, Adult Education, could not have returned the service of the petitioner to N. C. C. Accordingly, Mr. Justice N. P. Singh quashed the order in Annexure 12 but rejected the prayer in regard to Annexures 5, 6 and 13.

6. Coming to the facts of the pre-the petitioner's prayer for quashing Annexures 5, 6 and 13 could not be rejected on the grounds mentioned above. He considered the challenge to Annexures 5 and 6 on merits and went into relevant circumstances and held that they were arbitrary and discriminatory and contravened Articles 14 and 16 of the Constitution. They were accordingly struck down as null and void. Further, the order as contained in Annexure 7 being dependant on Annexures 5 and 6 was also held to be void and was quashed. Mr. Justice S. Narain further directed respondent 3, N. C. C. Director, to treat the petitioner as holding the post of lower division assistant in his Directorate and to consider his case for confirmation in accordance with law and to confirm him if he is found suitable with effect from appropriate date. Since the two Hon'ble Judges did not agree about the final result in the case, the matter has been referred to me by the Hon'ble Chief Justice.

7. The case was argued at length by Mr. Narendra Prasad, appearing for the petitioner, and Mr. R. K. Jha, appearing for the respondents. During the course of hearing of the case before me, the State counsel stated that the petitioner was being retrospectively posted at Goraul with effect from 25-3-1980 and would be paid the entire arrears of his salary with effect from that date when he joined. The petitioner's counsel stated that the petitioner would be joining accordingly and drawing his salary without prejudice to his right to be absorbed in N. C. C. as mentioned in the application. The State counsel clarified the position that it was not practicable to pay the petitioner from the funds of the N. C. C. for the past period, even if he succeeded. On behalf of the petitioner. Mr. Prasad accepted the suggestion that even in the event of success of this writ application, he would not be claiming any additional amount by way of wages or salary for the past period on the ground that he was entitled to be posted under the N. C. C. Directorate with retrospective effect, but he would be entitled to be posted in the N. C. C. Directorate and would be entitled to the salary on that basis from the date of the judgment. This order was recorded in the order sheet on 26-9-1982. Since I was not available for further hearing of the case, the hearing could not be concluded and the case remained part-heard. I was sitting in Division Bench for a considerable period and the case was placed for further hearing in August, 1983.

8. Mr. Justice Narain has considered at some length the circumstances in which the petitioner was declared surplus and the orders in Annexures 6 and 7 were passed and has given reasons for holding them as ultra vires and consequently Annexure 13 also is illegal. Mr. Justice Singh has not adverted in his judgment to this aspect and has assumed the conclusion of Mr. Narain as correct. Before me the view of Mr. Justice Narain was not challenged on behalf of the respondents. I have considered the reasons given by Mr. Justice Narain and I agree with him.

But in the circumstances, it does not appear necessary for me to deal with this aspect again. I will now proceed to deal with the questions on which there is divergence of opinion.

9. It is true that the High Court in the discretion should reject an application under Article 226 of the Constitution on the ground of inordinate delay and laches on the part of the applicant. But a mere delay, short of laches, cannot be considered as a bar to granting relief to the petitioner. Laches is such negligence or omission to assert a right as taken in conjunction with the lapse of time and other circumstances causing prejudice to the adverse party operates [as a bar in a court of equity. In case of delay, it is the duty of the petitioner to explain the circumstances in justification of his coming to Court belatedly; and if he does so to the satisfaction of the Court, his case has to be considered on merits ignoring the delay. For deciding this aspect, each case will have to be considered on its own facts and circumstances. No general rule in this regard is possible to be stated for universal application.

10. Coming to the facts of the present case, it will be seen that the petitioner was relieved from his posting in N. C. C. for joining the Adult Education Directorate in March, 1979 and he came to this Court in May, 1980, that is about one year and three months later. Both the Directorates of N. C. C. and Adult Education are wings of the Education Department and the legal implication of his shifting from one wing to another was not quite clear to the authorities in either of the two wings. By order in Annexure 12 passed on 26-3-80, the Adult Education Directorate was assuming that the petitioner continued to be a staff of the N. C. C. and was working in the Adult Education Directorate as a temporary measure presumably on deputation and his services, therefore, could be validly returned to N. C. C. In reply by the other wing (Vide Annexure 13 dated 1-4-80) it was stated that the petitioner must be treated to have been absorbed in the Adult Education wing and he could not be treated as on deputation. None of the two Directorates suggested that the petitioner's service had been terminated in March, 1979 in pursuance of the order in Annexure 5 declaring him surplus and that it was a case of re-appointment in Adult Education wing. If in this state of uncertainty, the petitioner could not correctly appreciate the legal consequence of Annexures 5 and 6, he should not be penalised for the delay.

11. Mr. R. K. Jha, next contended that the prayer for quashing Annexures 5 to 7 and 13 should be held to be barred by the principles of estoppel and waiver. A plea of estoppel is applicable where a party by his conduct led another party to act to his disadvantage and he has gained advantage not due to him. It is an admitted fact in the present case that by joining the Adult Education Directorate, the petitioner did not draw a higher salary. By obeying the order, he, therefore, cannot be said to have derived any advantage nor did he put the State to any disadvantage. Ordinarily, a State servant can be sent to another department on deputation. Here, the petitioner was being shifted from one wing to another in the same department of education. I, therefore, hold that the main relief asked

for by the petitioner cannot be refused on the ground of estoppel.

12. So far the question of waiver is concerned, the position is no better for the State. Waiver means abandonment of a right and its basic requirement is that it must be an intentional act with knowledge of one's rights. There can be no waiver unless the person who is said to have waived is fully informed as to his rights and with full knowledge about the same he intentionally abandons them. As stated earlier, neither the officers in the Education Department nor the petitioner can be said to have appreciated that by joining Adult Education Directorate the petitioner was giving up his right to remain in the N. C. C. On this basis, therefore, the prayer in the writ application against Annexures 5 to 7 and 13 cannot be refused.

13. For the reasons mentioned above, I agree with Mr. Justice S. Narain and quash Annexures 5, 6, 7 and 13 and direct respondent 3 to treat the petitioner as holding the post of a lower division assistant in the N. C. C. Directorate and to consider his case for confirmation with effect from the appropriate date in accordance with law. The petitioner shall be immediately reinstated in the N. C. C. Directorate but in view of the order dated 20-9-82 recorded on the basis of a concession made by him he will not be paid any amount by way of the difference of salary for the past period. He will, however, be entitled to the seniority in service and other benefits on the basis of continuity of service. The writ application is accordingly allowed, but without costs.