

(2003) 03 JH CK 0103

In the Jharkhand High Court

Case No : Writ Petition (S) No"s. 3769 of 2001 and 1625 and 2640 of 2002 and CWJC No"s. 570 and 1647 of 2001

Sanjiv Kumar Singh and Others, Dara Singh and Others,
Sanjay Kumar and Others and Deepak Kumar and Others

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 07-03-2003

Acts Referred:

Constitution of India, 1950 — Article 226, 226(2)
Industrial Disputes Act, 1947 — Section 25F

Citation : (2003) 2 JCR 555

Hon'ble Judges : Vikramaditya Prasad, J

Bench : Single Bench

Advocate : A. Alam, Mihir Kumar Jha, Ajit Kumar and Nilesh Kumar Agarwal, In CWJC No. CWJC Nos. WP S Nos. 570 and 3769 of 2001 and 1625 and 2640 of 2002 and J. Mazumdar, in 1647 of 2001, for the Appellant; A.K. Mehta and Mahesh Kumar Sinha, for the Respondent

Judgement

Vikramaditya Prasad, J.—Heard the learned counsel for the parties.

2. All these writs have been heard together and are being disposed of by a common order as they arise out of the same facts and same Annexure A of the counter affidavit filed in WP(S) No. 3769 of 2002. This Annexure A is Annexure 11/A of this writ. Annexure A shows that the appointments made to Class III and Class IV posts in the Mechanical Division of the Road Construction Department were found to be made against sanctioned posts without following the procedure for appointment, such as, issuing of the advertisement, observance of the rules of reservation etc. Moreover, many such appointment letters were issued from the level of the Chief Engineer, Mechanical Division and though the subject mentioned in such letters were different but they have been treated to be appointment letters. Consequently, the Government for the aforesaid reasons terminated the services of the petitioners and also directed for Initiation of a criminal proceedings against erring officers. This letter was issued by the Special

Secretary, Road Construction Department, Government of Bihar. Consequent to that letter the appointments of altogether 611 employees were terminated with effect from 29.8.1998. Against this termination order, the petitioners have filed these writs for a direction to quash that annexure. It appears that prior to filing of these writs another writ had been filed in this High Court being CWJC No. 2566 of 1998 (R), which was disposed of by order dated 27.7.1999 (Annexure II). That writ was to regularise the services of the petitioners of that writ, but it appears that a stay was also granted in that writ, but during the pendency of that writ the termination occurred, consequently that writ for regularization became infructuous. Therefore, the Court gave a liberty to the petitioners of that writ to challenge the termination order and also the interim order passed in that case stood vacated. Meaning thereby that the termination order was not challenged in that writ and under the liberty, the petitioners have filed this writ. This impugned order has been challenged mainly on the grounds that no individual notice of termination or show cause or any retrenchment order was served upon the petitioners and thus, the rules of natural justice have not been followed and the compliance of Section 25(F) of the Industrial Disputes Act has not been made and for release the salary which has been withheld by the respondents even for the period for which they worked. In substance the ground is that the valid procedure, for removal/ retrenchment has not been followed.

3. Short facts of the case are that in the year 1988 a new mechanical circles/ Division/Sub-Division for extension and unification of mechanical organization of the Road Construction Department was created. In the year 1984 there was a Government circular that no appointment under work charge establishment should be made and those work charge employees appointed till 1984 were absorbed. It was incumbent upon the Superintending Engineer (Medical Circle) to maintain and operate those equipments and perform the time bound duty assigned to them with regard to the Road construction through machines. They have no option except to take work from the persons on daily wages as there was no staff and the appointment of regular staff had been stopped. According to the petitioners, the persons who were appointed in the year 1963 most of them either retired or died and consequently 5000 regular posts of Field Staff are vacant. Annexure 5 is a chart mentioning the letters of appointment and extension letters, which were made with effect from 20.1.1995. In the appointment letter itself, it was stated that the appointment was purely provisional and temporary and will be terminated at any time. It is further stated that by Annexure 6, the appointment was sought to be regularized Annexure 6 is a general notice by which the petitioners so appointed were directed to submit their applications for regularization on their services to their controlling officer and according to the petitioners thereafter their services were regularized as it appears from the service book. Then it is alleged that due to differences between Superintending Engineers these problem arose and the services of the petitioners were terminated. According to the petitioners mere service of notice in general as it has not been served individual does not serve the principle of natural justice

and hence the prayer has been made to quash the impugned order dated 29.8.1998.

4. Respondents appeared and filed counter affidavit. The case of the respondents is that the notice for cancellation of the appointment was issued jointly, when a question was asked from them whether individually notices were served, answer was that no individual notice was served before terminating the services of the petitioners. The cancellation order was defended on the ground of Annexure A, It was also averred by the respondents in paragraph- 8 that although no such individual order of termination issued but all such appointed persons were retrenched as the same had been declared as illegal by the department. After retrenchment no such persons are doing their duties, as such, the question of making their attendance does not arise. It was also submitted that the appointment and regularization against a sanctioned vacancy has not been taken up by the department so far.

5. The basic question was raised with regard to maintainability of the writ. It has been stated by the respondents that the State of Bihar has passed the order, therefore, this writ is not maintainable in the Jharkhand High Court. The petitioners said that when the cancellation letter was issued they were posted in Jharkhand area, therefore, the learned counsel for the petitioners submits that part of the cause of action has taken place in the Hazaribagh, which is in the territorial jurisdiction of this High Court, therefore, the writ can lie. The learned counsel for the respondents, State of Bihar, had taken time to file some decision of the Division Bench of this Court with regard to non-maintainability of the writ on the aforesaid ground but he failed to produce any such decision.

Clause 2 of Article 226 of the Constitution reads as follows--

"(2), The power conferred by Clause (1) to issue directions, orders or writs to any Government authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories,"

No doubt order of cancellation was issued at Patna but its effect was at Hazaribagh and only after the effect occurred at Hazaribagh, the petitioners could get cause of action. Consequently, the cause of action arose for the petitioner at Hazaribagh within the territorial jurisdiction of this Court consequently under the aforesaid provisions this Court had power to entertain such writs. So for maintainability of this writ is concerned, this Court had territorial jurisdiction and on this score these writ cannot be dismissed.

6. The second question is whether in absence of any show cause notice issued to individual petitioners, the services of the petitioners could have been terminated. The learned counsel for the respondents have relied upon on the case of Ashwani Kumar and Others Vs. State of Bihar and Others, this was also relied by the

learned counsel for the petitioners. In that case the appointments were made against the sanctioned post and the position was that advertisement was not made, procedure of appointment was not followed even policy of reservation was not followed. Therefore, the Secretary of the concerned Department cancelled those appointments, though before cancellation of those appointments a committee was constituted and the person likely to be affected were given opportunity of being heard. In this case nothing has been shown by the learned counsel for the petitioner that the petitioners were appointed against the existing posts because in the whole writ petition any advertisement letter has not been annexed saying that the petitioners applied pursuant to the advertisement. The Hon'ble Supreme Court in the judgment (Supra) held that the candidates who have been appointed in an unauthorised manner and against non-existent vacancies is a nullity. In this case three documents (1) the appointment letter (2) the letter issued by the Superintending Engineer, in which it has been indicated that the concerned employees may apply for their regularization and (3) specimen copy of the service book have been enclosed and relied upon by the learned Counsel for the petitioners. But the basic question is that if the post were not sanctioned, appointments were not properly made according to the procedure then- as held by the Apex Court even the regularization was there and the service book was opened then also it will be a nullity: Therefore, in view of Ashwani Kumar's case, if the letter was issued inviting application for regularisation of service and the service book was opened, that does not make any difference.

7. Now coming to the question of principle of natural justice. In that case, a committee was constituted which had scrutinized the replies of all the concerned persons and heard them personally. But that committee was constituted under the orders of the Court to examine the validity of the appointment and pursuant to that the committee by public notice called upon the petitioners of that case and the petitioners of that case had appeared. In that case the Apex Court held that since the petitioners had appeared prior to their termination, therefore, basic rule of principles of natural justice was not violated. This answer came from the State that before terminating the petitioners they were already given an opportunity of being heard and at the time no order of termination had taken place and the Apex Court after considering all the matters held that the petitioners had appeared and the total proceeding was conducted in presence of the petitioners, therefore, the rule of principles of natural justice were not violated. In paragraph 17 of the judgment, the Apex Court held that so far as the principles of natural justice is concerned, it has to be stated outset that the principles of natural justice cannot be subjected to any strait Jacket formula. They will vary from case to case, from circumstances to circumstances and from situation to situation.

8. Now question therefore, again remained for examining on this point whether the principles of natural justice has been violated. The petitioners had also relief on a decision reported in Basudeo Tiwary Vs. Sido Kanhu University and Others,

Paragraph 12 of that decision is important which reads as follows :

"In order to arrive at a conclusion that appointment is contrary to the provisions of the Act, Statutes, rules or regulations etc. a finding has to be recorded and unless such a finding is recorded, the termination cannot be made but to arrive at such a conclusion necessarily an enquiry will have to be held as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedence stands unfulfilled. To arrive at such a finding necessarily enquiry have to be held and in holding such an enquiry the person whose appointment is under enquiry will have to be issued a notice. If notice is not given to him, then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected is not given notice of such a proceeding and as conclusion is drawn in his absence, such a conclusion would not be just, fair and reasonable as noticed by this Court in DTS Mazdoor Sabha case."

In paragraph 13, the Apex Court held as follows ;

"Admittedly in this case, notice has not been given to the appellant before holding that his appointment is irregular or unauthorised and ordering termination of his service. Hence, the impugned order terminating the service of the appellant cannot be sustained."

9. In this case as per Annexure A, there has been an enquiry with regard to the propriety of the appointment and it was found that the departmental procedures for appointment were not followed, the posts were, not sanctioned and advertisement etc. were not published but even though as said in the aforesaid situation that during the course of enquiry a notice was required to be given to person whose services were likely to be terminated.

10. In that case the appointments were challenged under the provisions of Section 35(3) of the Bihar State University Act, 1976, which provides as follows :

"In that case the appointment or promotion made contrary to the provisions of the Act, Statute, rules or regulations or in any irregular or unauthorised manner shall be terminated at any time without notice."

11. Even in that case the observance of the principles of natural justice were required to be followed. When the respondents say that in this case the appointments were made subject to the condition that the services are purely temporary and provisional basis and can be terminated even without any notice. Then it cannot be made any difference from that case and this case.

12. Consequently, I am of the considered view that in this case also the petitioners were required to be noticed and asked to submit show cause as to why their appointments should not be terminated. In the aforesaid circumstances the rule of natural justice has been violated. Consequently, the impugned order is quashed. The respondents are directed to issue a fresh show cause notice upon the petitioners even a general notice inviting show cause and within a

period of three weeks from the date of such notice, the petitioners will file their show cause and thereafter the respondents will dispose of their show cause within a period of one month thereafter.

13. So far the salary is concerned, the petitioners are entitled to their salary for the period for which they have actually worked with the department and that will be paid to them before disposal of the show cause. Subsequent thereto if the show cause is not allowed then the provision of Section 25(F) of the Industrial Disputes Act will be followed.

14. All the writs are disposed of at the stage of admission itself.