

(2016) 01 PAT CK 0016

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 6066, 6746, 6247, 6220 and 8263 of 2013

Sardar Vishwajit Patel and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Constitution of India, 1950 — Article 141, Article 142

Citation : (2016) 01 PAT CK 0016

Hon'ble Judges : Shivaji Pandey, J.

Bench : Single Bench

Advocate : Sheela Sharma, for the Appellant; Ashish Kumar Lal, for the Respondent

Final Decision : Allowed

Judgement

Shivaji Pandey, J.—1. Heard learned counsel for the petitioners and learned counsel for the respondents.

2. All the cases are being disposed of by a common order, as the common points involved in these cases.

3. For convenience it is relevant to deal with the fact of C.W.J.C. No. 6066 of 2013 which is as follows:--

"The petitioner was appointed as Panchayat Shiksha Mitra on 1/7/2003 for the period of 11 months, as per the Rules, again the period was extended for 11 months from 1/7/2004 to 31/5/2005 and further from 1/7/2005 to 31/5/2006 was extended. As the petitioner had worked satisfactorily for 33 months, again the period was extended for 11 months, vide letter No. 41 dated 1/6/2006."

4. In the meantime, the Bihar Panchayat Primary Teacher (Selection and Service Conditions) Rules, 2006 was enforced. In terms of Rule 20 (iii), the Shiksha Mitra was deemed to have been appointed as Panchayat Teacher.

5. When this petitioner and petitioners of other cases were not paid any salary, they filed representation before the authority concerned for payment of their salary.

6. A Three-Member Committee was constituted to enquire into the matter and take appropriate steps with regard to arrear of salary of the petitioner and other Panchayat Teachers.

7. Ultimately, the appointment of the petitioner was cancelled, vide order dated 6th November 2007 on the ground that his appointment was found to be illegal, as he was engaged on the basis of competitive examination conducted by the then Mukhiya which is not the method of proper selection.

8. Being aggrieved by the order of termination, the petitioner and other Panchayat Shikshak approached this Court in CWJC No. 157/2008 and this Court heard the group of cases where the identical issue was involved and held that the then Mukhiya has not committed any illegality in following proper procedure of selection to test the competency of the candidates and set aside the order of termination passed by the respondent but with liberty to file representation in the light of law laid down. Representation was filed by the petitioner but his representation was rejected.

9. In C.W.J.C. No. 16463 of 2010 (Randhir Kumar v. the State of Bihar), the Writ Court had gone along with the order of the respondent and held that services have rightly been terminated, as there is no mode for selection of Panchayat Shiksha Mitra through the competitive examination.

10. Against that, Randhir Kumar had moved before this Court in LPA No. 273 of 2011 and the Division Bench had taken a view that method and mode applied by the Mukhiya for selection of candidates, cannot be said to be wrong where the Court held that the appointment made through that process, cannot be cancelled where the selection has been made on the basis of written examination in absence of any fraud, misrepresentation or mala fide but said that the order will not be treated as a precedent. The petitioner approached this Court in C.W.J.C. No. 16386 of 2011, in view of the order passed in LPA No. 273 of 2011, the Court set aside the order of termination. Later on, one Renu Kumari approached this Court in CWJC No. 8072 of 2013 with the complaint that she has not been paid salary for the period she had worked as Shiksha Mitra and so much so that she is also entitled to the entire back wages during the period she remained present but was not allowed to do any work on account of illegal order of termination. In that case, the Court has held that an employee cannot be deprived of the salary for the period performed the duty and on that account, the Court has directed for payment of salary from the period 1/3/2007 to 31/10/2007 but did not grant relief for the period she remained terminated placing reliance on the judgment reported in , AIR 1991 SC 2010 (Union of India v. K.V. Jankiraman) and recorded the certain paragraphs where the Court has held that in a case order of reinstatement in service ipso facto, will be entitled to

the back wages as there is no inflexible rule that in every case when an employee is exonerated in discipline and criminal proceeding, he would be entitled to the wages for the intervening period and while dealing with the subject of payment of back wages, the Court should apply pragmatic approach to the facts and circumstances of the case and decide the issue of entitlement of the back wages. It will be relevant to quote certain paragraph of the judgment which is as follows:--

"We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of nonavailability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated from disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the, administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

"However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

11. The Hon"ble Supreme Court in Shiv Nandan Mahto v. State of Bihar and ors., , (2013) 11 SCC 626 has also dealt with the similar issue and directed to pay the entire amount of the back wages there the Court has taken view that as the Division Bench has passed a cryptic order on a wrong consideration of fact,

was the reason to pass an order in favour of the employee. It will be relevant to quote paragraph of Renu Kumari case which is as follows:--

"Learned counsel for the petitioner has placed reliance on a judgment of the Apex Court in the case of Shiv Nandan Mahto v. State of Bihar [, (2013) 11 SCC 626. The said judgment of the Apex Court is a very short order of 9 paragraphs. From the perusal of the judgment it is clear that taking note of the peculiar facts of the case the Apex Court held that the Division Bench was not right in rejecting the appeal of petitioner by four line order rejecting her claim for full back wages on the principles of "no work no pay". The Apex Court found that the Division Bench has not examined the facts in detail before passing the said cryptic order. Therefore, in the facts of the case, it directed the respondents to pay full back wages. From the facts noticed by the Apex Court it appears that the appellant was appointed as clerk and continued in service all through but was not given a posting after taking over of the school for one reason or the other. Apparently the said order of the Apex Court is an order under Article 142 and in the special facts and circumstances of the case and not a law laid down in terms of Article 141 of the Constitution of India."

12. In the present case, it is a fact that there is no provision under the Rule for the appointment through the competitive examination, only the appointment has to be made on the basis of marks obtained by the respective candidates.

13. The Court in Division Bench, has found that there was no mala fide act while making appointment to the person concerned, on that reason, the Court has directed for their continuation in service but did not grant any relief of back wages.

14. It is a duty of the Court that while passing the order of back wages has to apply balancing approach, reason is that it is duty of the employee concerned to make an averment in their pleadings, during that period he remained unemployed. If he continued to earn his livelihood, in that situation to that extent, he cannot claim, he is entitled to the back wages, but in certain cases, the Hon"ble Supreme Court has granted 50% or 25% back wages and this Court in Renu Kumari case has refused to grant any benefit of back wages, certainly the principle of no work no pay will not apply to the fact of the case. The petitioner has wrongly been terminated and for the act of the employer, the employee cannot be said that he is not entitled to any back wages during the period he remained under illegal termination on the basis of principle of no work no pay.

15. But applying the balancing factor, facts and circumstances of this case, this Court is of the view that for the ends of justice, the petitioner be paid 25% back wages for the period he remained outside the service and the petitioners are also entitled to salary for period they performed their duty.

16. With the above observation/direction, this petition is allowed to the aforesaid extent.