

(1992) 12 PAT CK 0037

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 10467 of 1992

Sheela Sinha

APPELLANT

Vs

The State of Bihar and others

RESPONDENT

Date of Decision : 17-12-1992

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 142(1), 16, 226
Industrial Disputes Act, 1947 — Section 25(F)

Citation : (1993) 1 PLJR 378

Hon'ble Judges : S.B. Sinha, J;I.P. Singh, J

Bench : Division Bench

Advocate : Sadanand Jha, Naresh Dikshit and Indu Bhushan Singh, for the Appellant; J.P. Karn for the State, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—The petitioner in this application has prayed for the following reliefs: (a) Issuance of a direction, order or a writ in the nature of Mandamus/ Certiorary quashing the order dated 20.8.1992 contained in Annexure-14 vide which the appointment of the petitioner was cancelled.

(b) Issuance of a direction, order or writ in the nature of mandamus commanding the respondents to continue to treat the petitioner in service notwithstanding Annexure-14, that is to treat her to be in continuous service with all attendant benefits.

(c) Issuance of direction, order or writ in the nature of mandamus commanding the respondents not to apply the contents of Annexure-13 so far as it applies to the petitioner.

(d) Issuance of a direction, order or appropriate declaration that the petitioner was entitled to preferential treatment in appointment on class IV post in view of the Annexure-4 dated 19.12.1979.

(e) Issuance of a direction, order off writ in the nature of mandamus,

commanding the respondents to treat the appointment of petitioner as legal and perfectly valid in view of Annexure-4.

(f) Issuance of a direction, order or writ in the nature of mandamus commanding the respondents to issuance of Annexure-14 and continue to make regular payment after she is allowed to work as Class-IV staff.

(g) Any other relief or reliefs to which the petitioner may be deemed entitled in the eyes of law.

The fact of the matter lies in a very narrow compass. 2. The petitioner's husband Shri Binay Kumar Sharan is an Ex-Air Force Personnel having retired on 1.5.1991. The petitioner got herself registered in the employment exchange on 24.11.1988.

3. The petitioner filed an application before the Director Secondary Education for appointment in a Class IV post. The said application is contained in Annexure-2 to the writ application.

4. By reason of a letter dated 21.12.1990 the petitioner was recommended to be appointed in a IVth grade post in the Govt. Girls School by the District Education Officer which is contained in Annexure-3 to the writ application.

It has been contended that in terms of a letter bearing No. RI-603/67 P. 22533 dated 18.12.1978, the policy decision of the State of in the matter of appointment of Class III & IV posts to the effect that preference shall be given to the Ex-Servicemen, has been conveyed to all concerned. The said letter is contained in Annexure-4 to the writ application.

5. It appears that one Shri Shiv Shankar Yadav, M. L. A. requested the Education Minister by a letter dated 5.3.1991 (Annexure-5) that the appointment of the petitioner be considered and the Education Minister also put a note therefor directing the Education Commissioner to take appropriate action in the light of the aforementioned recommendations.

6. Thereafter an appointment letter was issued to the petitioner to a temporary post of a peon in the scale of Rs. 775 to 955/- copy whereof is contained in Annexure-6 to the writ application.

The petitioner, was later on deputed to another School.

7. The petitioner in Paragraph 16 of the writ petition stated as follows :?

That it is stated that on 22.6.1992 a State Level meeting under the Presidentship of Director, Secondary Education was held which was attended by Deputy Directors of Education, RDDEs and DSEs. In para (3) of the aforesaid meeting, it was inter-alia stated that illegal appointment in class III & IV are being made without keeping in view and following the rules and procedures detailed by the Personnel and Administrative Reforms Department and the names of such illegal appointees are being sent for approval to the Director. It was also stated that

approval to irregular appointments won't be given at this level. Circulars received from Ministers should be sent to the department and steps should be taken first to obtain Government orders duly. In the aforesaid para-(3) of the meeting it was also pointed out that appointment on Class IV post should be done according to the Rules of the Department of Personnel and Administrative Reforms from the panel prepared for the State. The Director, thus directed all the Regional Officers to look into the appointment made and cancel all the illegal appointments prior to 15.7.1992 and in-from the Director accordingly. The contents of the aforesaid meeting was issued under Memo No. 1390 dated 8.7.1992 by the Director, Secondary Education.

8. Thereafter by reason of the impugned order dated 20th August, 1992, the appointment of the petitioner was cancelled inter alia on the ground that the procedures laid down by the Personnel and Administrative Reforms Department for appointment in Class IV posts had not been followed in the case of the petitioner.

9. Dr. Sada Nand Jha, Learned Counsel appearing on behalf of the petitioner has raised a short question in support of this application.

10. The Learned Counsel submitted that the petitioner's appointment could not have been cancelled without giving her an opportunity of hearing.

It has been contended that as the petitioner had been appointed pursuant to the policy decision of the State to the effect that the Ex-Servicemen should be preferred, the decision of the authorities of the State of Bihar as contained in Annexure-14 to the writ application cannot have any application whatsoever.

The Learned Counsel in support of his contention has relied upon an un-reported decision of this Court in Madan Giri and others v. Union of India and others in CWJC No. 2870 of 1980 disposed of on 23 January, 1981 and Bihar State Co-operative Marketing Union Ltd. through Administrator and another v. Shailednra Kumar Singh and another in CWJC No. 9371 of 1991 disposed of on 23.10.1992.

11. Mr. J. P. Karn, learned Standing Counsel No. 5 appearing on behalf of the respondent, on the other band, submitted that evidently the petitioner was appointed without following the procedures laid down in the recruitment rules and in violation of the provisions of Article 16 of the Constitution of India.

12. In this case it has been accepted that the mandatory procedure laid down, the recruitment rules were not followed nor the provisions of Article 16 of the Constitution of India has been complied with in the matter of appointment of the petitioner.

13. Neither the name of the eligible candidates were called for from the Employment Exchange nor any advertisement was issued filling up the vacancy nor the petitioner had been appointed by the competent authority.

14. The petitioner merely filed an application for her appointment on

compassionate ground. The then Director of Secondary Education by a letter dated 21.12.1990 as contained in Annexure-3 to the writ application directed the District Education Officer, to take into consideration the case of the petitioner as the petitioner being a wife of an Indian Air Force Staff was to be given preference in the matter of appointment to the post of Class IV staff.

15. However, from a perusal of the policy decision of the State as reflected in the circular letter dated 19.12.78 as contained in Annexure-4 to the writ application, it appears that preferences were required to be given only to ex-military personnel and not to their wives.

16. Admittedly the petitioner's husband retired from military service, presumably on his attaining the age of superannuation. Only because the petitioner happened to be the wife of a retired Air Force Personnel, she was not entitled to any preference in the matter of obtaining an appointment either by reason of Annexure-4 to the writ application or otherwise. Even if the said circular letter dated 19.12.1978 as contained in Annexure-4 to the writ application was applicable in the case of the petitioner, she being only entitled to preference, her case could have been considered alongwith other eligible candidates and only upon following the procedures laid down under law.

17. The petitioner apparently and on her own showing was appointed on extraneous considerations i.e. on the basis of a letter of Shri Shiv Shankar Yadav dt. 5.3.1991 as contained in Annexure-5 to the writ application and the directions of the Education Minister contained therein as also on the basis of the purported recommendations of the Director Secondary Education.

18. From a perusal of the appointment letter of the petitioner dated 15.3.1991 as contained in Annexure-6 to the writ application, it is evident that the petitioner was appointed pursuant to the direction of the Minister of Human Resources Development and the Director Secondary Education. The petitioner was appointed in a Nationalised Secondary School.

19. The State of Bihar in exercise of its power conferred upon it under the Bihar Non-Government Secondary Schools (Taking over of Management and Control Act) has framed rule known as "Bihar Nationalised Secondary Schools" (Service Conditions) Rules, 1983. The said 1983 Rules were not amended in the year 1988. The aforementioned 1983 Rules inter alia provide for the procedure for appointment of teaching and non-teaching staff in nationalised school.

20. The appointment of the petitioner thus being governed by the statutory rules, the provisions thereof could not have been totally ignored by the authorities of the State of Bihar in the matter of the appointment of the petitioner.

21. In terms of the aforementioned Rules, appointment in a class IV posts has to be made by a committee as is evident from Sub-Rule (2) of Rule 8 thereof. The said rules further provide that while making appointments of class IV employees, the procedures laid down in circular letter No. 1466 dated 3.11.1980 issued by

the Personnel and Administrative Department in the matter of appointment have to be followed, in terms whereof a panel has to be prepared at the district level upon following the procedures laid down therein. The appointing authority in terms of the aforementioned Rules is the Headmaster of the concerned School. There cannot, therefore, be any doubt that the petitioner's appointment being wholly illegal she did not derive any legal right to continue in the said posts.

22. In Madan Giri's case (supra) a Division Bench of this Court held :?

I must point out that an order of cancellation stands on a footing different from that of an order of termination of service. And, it is well settled that if an order of appointment was irregular, the principles of natural justice have to be complied with by giving the persons, whose appointment is being cancelled, an opportunity of showing cause against the said order.

23. Evidently, therefore, in that case the appointment of the petitioner, thus was sought to be cancelled on the ground that the same was irregular. However, in this case, as noticed hereinbefore the appointment of the petitioner is not only illegal but the same is a nullity having been made in violation of the provisions of statutory rules.

However, a Full Bench of this Court in Bijoy Kumar Bharti v. State of Bihar reported in 1983 BLJR 536 has held that principles of natural justice are not required to be complied with in a case where an order of promotion or recruitment had been made in violation of statutory Rules.

24. In the case of Bihar State Co-operative Marketing Union Ltd. through Administrator (supra) the Division Bench was considering a matter arising out of an order dated 25th October, 1991 passed by the Presiding Officer, Labour Court, Patna being an authority of the Bihar Shops and Establishment Act. In that case, it was held that the order of termination was passed as against the respondent thereof in violation of section 25 (F) of the Industrial Disputes Act, the same was nullity. Although the Bench held that the said finding itself was sufficient for dismissal of the writ application, it proceeded to consider the question that the petitioner before it being a Public Sector Undertaking is expected to resort to fair play and in that context it was held that the decision of the Supreme Court in Shrawan Kumar Jha and others Vs. State of Bihar and others, was applicable. In the said judgment, the division Bench proceeded on the basis that it was immaterial as to whether the principles of natural justice had been complied with or not.

The conditions of service of an employee employed in an Establishment being governed by the Bihar Shops and Establishment Act and the rules framed thereunder, the termination of service must be in conformity with the provisions thereof.

25. In that case as it was held that statutory condition were not complied with and there was no reasonable cause for termination of the said service, the

question as to whether the principles of natural justice were required to be complied with or not was not necessary to be determined therein. The said decision is therefore, not an authority for the proposition that prior to cancellation of an illegal appointment the principles of natural justice have to be complied with or not, nor the same is a binding precedent. The observations of the Bench are, therefore, in the nature of obiter. (supra).

26. In *Raj Kishore Kumar Sinha and Others Vs. State of Bihar and Others* upon which also a strong reliance has been placed by Dr. Sadanand Jha, the Full Bench did not decide any question whatsoever. No reason has been assigned by the Full Bench nor did it consider the effect of various other Supreme Court decisions.

In that case the Full Bench itself held :?

It is not necessary for us to go into the larger issue as to whether the principle of natural justice would apply where the initial appointment has been made in violation of Article 16 of the Constitution of India for the simple reason that in the present case upto now there has been no formal order of termination of service.

27. It is relevant to note that recently S. N. Jha, J, speaking for the division Bench in *Teja Prasad and Others Vs. The State of Bihar and Others* has held that the principles of natural justice are not required to be complied with where the appointment had been made in violation of the provisions of the statute, although His Lordship was a party to the Full Bench in *Rajkishore Kumar Sinha's* case.

28. In *M.L. Gupta and Others Vs. Instrumentation Ltd. and Others* upon taking into consideration various decisions of the Supreme Court and this Court it has been held :?

Articles 16 of the Constitution of India provides that all citizens of India are entitled to get equal opportunity for the purpose of obtaining employment in State Service.

In order to fulfil such a condition, it is necessary to consider the cases of all citizens who are eligible to be appointed. For that purpose it is not only necessary to call for the names from the Employment Exchange, but the same in some cases also requires due advertisement of posts in newspapers by notifying the vacancies and the requisite qualifications therefor so that all eligible candidates may apply for their appointment in the said posts.

It was further observed :?

From the decisions of the Supreme Court as also of this Court, as referred to hereinbefore, it will thus be evident, that any appointment which was made by a person having no authority to do so or the appointments which have not been made following the mandatory provisions of the recruitment Rules and Articles 14 and 16 of the Constitution. Such appointments should be held to a nullity. In

this view of the matter, in my opinion, this Court in exercise of its writ jurisdiction cannot direct regularisation of the services of the employees when the same would be violative of Articles 14 and 16 of the Constitution.

29. The principles of natural justice as is well known is based upon two basic principles viz Audi Alteram Partem and Hemo Debito Esee Judex in Propria Causa, The principles of natural justice have been developed by the apex court from time to time adding new concepts therein. In some decisions the apex court has gone to the extent of holding that the principles of natural justice are embodied In Article 14 of the Constitution of India.

30. In Union of India and Another Vs. Tulsiram Patel and Others, , the Supreme Court of India held : "Principles of natural justice are not creation of Articles 14 of the Constitution of India but merely they are constitutional guardian. The principles of natural justice can be traced their ancestry to ancient civilizations and long past history."

31. The Supreme Court in that case traced history of the principles of natural justice in paragraphs 72 to 80 of the judgment and therefore, discussed various principles involved therein in paragraphs 81 to 83, thereof.

The Supreme Court thereafter proceeded to consider the question as to how the said provisions have been interpreted by the courts.

The Supreme Court held :?

"The principles of natural justice have thus come to be recognised as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equity which the subject matter of that article." Shortly, put the syllogism runs thus : violation of a rule of natural justice results in arbitrariness which is the same as discrimination where discrimination is the result of State Action. It is a violation of Article 14. Article 14 however is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of "State" in Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially.

32. In Tulsi Ram Patel's case (supra) the Supreme Court thereafter held that a statutory provision either specifically or by necessary implication exclude any application of the principles of natural justice. The Supreme Court therefore, concluded that the principles of natural justice not only can be modified but also it can be excluded.

33. In Union of India (UOI) Vs. Col. J.N. Sinha and Another, , it has been held :?

But if on the other hand, a statutory provision either specific or by necessary

implication exclude the application of any or all the rules of principles of natural justice then the court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purposes for which it is conferred and the effect of exercise of that power.

34. Reference in this connection may also be made to R.S. Dass Ors. Vs. Union of India (UOI) and Others, .

35. However, it is well known that there are certain exceptions to the principles of natural justice.

In case of Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and Others, it has been held :?

From this perspective, the question is whether omission to record reasons vitiates the impugned order or is in violation of the principles of natural justice. The omnipresence and omniscience (Sic) of the principles of natural justice acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play. But the applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order-decision on the rights of the person and attendant circumstances.

36. In Ex. Capt. K. Balasubramanian and Others Vs. State of Tamil Nadu and Another, it has been held that principles of natural justice need not be complied with when the order does not involve civil consequences.

In Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, , it has been held that the principle of natural justice are not required to be complied with in a case of compulsory retirement.

37. In National Institute of Mental Health & Neuro Sciences v. K.K. Raman reported in AIR 1992 S.C. 1806, it has been held that for selection or non-selection of a person in absence of a statutory requirement, the authority is under no legal obligation to record reason in support of its decision and even the principles of natural justice have no application in such a case.

38. In Ram Krishna Verma and Others Vs. State of U.P. and Others, , it has been held :?

The 50 operators including the appellants/private operators have been running their stage carriages by blatant abuse of the process of the court by delaying the hearing as directed in Jeewn Nath Wahal case and the High Court earlier thereto. As a fact, on the expiry of the initial period of grant after September, 29, 1959 they lost the right to obtain renewal or to ply their vehicles, as this Court declared the scheme to be operative. However, by sheer abuse of the process of

law they are continuing to ply their vehicles pending hearing of the objections. this Court in *Grindlays Bank Ltd. v. ITO* held that the High Court while exercising its power under Article 226 the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party responsible for it. In the light of that law and in view of the power under Article 142 (1) of the Constitution this Court, while exercising its jurisdiction would do complete justice and neutralised the unfair advantage gained by the 50 operators including the appellants in dragging the litigation to run the stage carriages on the approved route of area or portion thereof and forfeited their right to bearing of the objections filed by them to the draft scheme dated February, 26, 1959 Moreover, since this Court in *Jeewn Nath Wahal* case upheld the approved scheme and held to be operative, the hearing of their objections would be a procedural formality with no tangible result. Therefore, the objections outlived their purpose. They are, therefore, not entitled to any hearing before the hearing authority.

39. In *S.L. Kapoor Vs. Jagmohan and Others*, , the Supreme Court held :?

As we have said earlier whereon the admitted and undisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice not because it is not necessary to observe natural justice but because courts do not issue futile writs.

40. In this view of the matter, in my opinion, not only that the principles of natural justice were not required to be complied with but in any event in view of the admitted position this Court should not issue a futile writ.

41. Before parting with this case, it may however be observed that if the petitioner had worked, the State should pay salary lawfully due to the petitioner for the period during which she was actually worked. This application, is, therefore, dismissed with the aforementioned observations, but there will be no order as to costs.

I.P. Singh, J.

I agree.