
(1991) 01 PAT CK 0010
In the Patna High Court
Case No : CWJC No. 1099 of 1987

Shyam Bihari Prasad Singh	Vs	APPELLANT
State of Bihar and Others		RESPONDENT

Date of Decision : 03-01-1991

Acts Referred:

Constitution of India, 1950 — Article 16
Contract Act, 1872 — Section 70

Citation : (1991) 39 BLJR 1024 : (1991) 2 PLJR 442

Hon'ble Judges : Ram Nandan Prasad, J

Bench : Single Bench

Judgement

Ram Nandan Prasad, J.—The petitioner who claims to be working as Lab-in-charge in the Department of Physics in Ramdayalu Singh College, Muzaffarpur, with effect from 12-2-1982, has prayed in this application for issue of a writ of mandamus or any other writ of like nature directing the respondents namely, Vice Chancellor and other authorities of the Bihar University to make payment of his arrears of salary from 1st April, 1982 on wards till date. The State of Bihar has been made respondent No. 1 in this application and the petitioner's further prayer is that the latter may be directed to sanction one post of Lab in-charge in the Department of Physics in the aforesaid college with effect from 11-2-1982 so-as-to get the petitioner absorbed in a sanctioned post from that date.

2. The accepted position is that previously there used to be demonstrators in every department of all such subjects where practical classes are required to be held but sometime in 1973 the Government took a decision to upgrade their posts and those suitable among them in due course promoted as lecturers. The result was that the work in the practical classes of the various subjects started getting dislocated. In order to remove this difficulty a Circular dated 17-8-1989 was issued by the Govt. of Bihar and addressed to the Registrars of the different Universities in the State (Annexure-1) stating therein that the Government has taken a decision that wherever there was no demonstrator or lab assistant, one lab-in-charge for every 32 students may be appointed. On the basis of the

yardstick provided in this Circular the University authorities are said to have moved the State Government for sanction of the requisite number of posts of lab-in-charge. It is also not disputed that till date the sanction for the post of lab-in-charge in different subjects has not yet been received by the University from the State Government for many of the colleges including the R.D.S. College.

3. Petitioner's case as stated in his application is that he had passed his B.Sc. in 1980 and was in search of a job and reliably learnt in August, 1981 that there was requirement of lab-in-charge in the Department of Physics in R.D.S. College, Muzaffarpur and he addressed his application on 29-8-1981 for the said post to the Vice-Chancellor, Bihar University through the Principal R.D.S. College (Annexure-5 no date however is mentioned in the application) and on the basis of the said application the Vice-Chancellor was pleased to appoint the petitioner on the post of lab-in-charge and this decision was incorporated in the office order of the University signed by the Deputy Registrar as contained in Memo No. B 5915-18 dt. 11-2-1982 (Annexure-2). The petitioner claims that on the basis of this order he submitted his joining report (Annexure-6) to the Principal of the College on 12-2-1982 and since then he is working there in the capacity of lab-in-charge in the Department of Physics in that college. It is, however, undisputed that there was no sanctioned post of lab-in-charge in the Department of Physics in R.D.S. College, Muzaffarpur and that the aforesaid appointment of the petitioner was on an unsanctioned post. It appears that likewise perhaps appointments had been made in other colleges also on unsanctioned posts and when this came to the notice of the State Government it issued a direction to all the Universities as contained in its letter No. JP 002/80 Shikchha 1037, dated 7-7-1983 (Annexure-A in the counter-affidavit) stating that the Government has taken a decision that whatever appointments have been made on unsanctioned posts should be terminated with immediate effect and that if in spite of this direction if any further payment is made against any unsanctioned post then the Vice-Chancellor, Financial Adviser and the Registrar will be held responsible for such unauthorised payment and that necessary action may be taken against them in this connection.

4. Annexure-7 is a letter dated 18-5-1982 sent by the Principal of the R.D.S. College, Muzaffarpur to the Vice-Chancellor of the Bihar University in which he made a request that on the ground of shortage of hands appointments of five persons on the post of lab-in-charge in different department in the R.D.S. College had been made and the request is to allow these five persons acting as lab-in-charge to continue in the post with prospective effect from the date of joining. There is nothing to show that the University or the Vice-Chancellor took any action on this letter of the Principal. Admittedly, the petitioner's salary from April, 1982 was stopped presumably because there was no sanction for the post on which he had been appointed. The next relevant document is Annexure-3 which is an office order of the Bihar University, Muzaffarpur under the signature of the Registrar as contained in Memo No. 301-R, dated 7-8-1985. This office order mentions that the Vice-Chancellor has been pleased to order that Shri

Shyam Bihari Pd. Singh (petitioner) working as lab-in-charge in the Department of Physics at R.D.S. College, Muzaffarpur, will draw his regular salary in the prescribed scale plus order admissible allowances with effect from 1st August, 1985 against the sanctioned vacant post of lab-in-charge in the Department of Physics at Jamnilal College, Hajipur till such time the post of lab-in-charge in Physics at R.D.S. College is sanctioned by the State Government. Annexure-4 which is a letter from the Education Department to the Vice-Chancellor of the Bihar University as contained in Memo No. 624, dated 20-4-1981 states that one post each of lab-in-charge has been sanctioned by the State Government in the Department of Physics and Chemistry in Jamnilal College, Hajipur. The petitioner thus claims that by virtue of Annexure-3 he is now working on a sanctioned post from 1st August, 85 and the order contained therein itself mentions that the petitioner will continue to work on this post till the post of lab-in-charge in Physics is sanctioned by the State Government and so he is legitimately entitled to receive his salary in the prescribed scale for the Post of lab-in-charge.

5. A counter-affidavit has been filed on behalf of respondent Nos. 2, 3 and 5, namely, the Bihar University Registrar the Vice-Chancellor and the Financial Adviser of the University. It is stated therein that the post of lab-in-charge was not sanctioned by the State Government in the R.D.S. College in the Department of Physics and as such the University had no alternative but to stop the payment of the salary of the petitioner from April, 1982. It also mentioned that on receipt of the Govt. Circular (Annexure-A) the University communicated the same to the Principals of all the College and called upon them to terminate the services of such employees who have been appointed on non-sanctioned post. It is also stated that the appointment of the petitioners was never against any sanctioned post and his appointment was never approved by the University.

6. In course of hearing a supplementary counter-affidavit was filed on behalf of the respondent Nos. 2 and 3 in which the stand that the appointment of the petitioner was not on any sanctioned post and was in clear violation of the direction of the State Government has been reiterated. It has further been stated therein that the University had no option but to stop the payment of salary to the petitioner as sanction from the Government could not be received inspite of repeated reminders. It has also been stated in the supplementary counter-affidavit that the petitioner had filed a representation before the Chancellor and the latter after considering the entire matter was pleased to reject the representation of the petitioner on 26-8-1987 in which prayer had been made for payment of his salary. With the supplementary counter affidavit the letter dated 29-7-1983 issued by the Registrar-cum-Special Executive Officer to all Principals, Heads, of the Department and Finance Officers communicating the orders of the State Government which had been received under Annexure-A has been enclosed as Annexure-B, Annexure-D attached to the supplementary counter-affidavit is copy of the letter received from the Governors, Secretariat by the University stating that the representation of the petitioner had been rejected by the Chancellor.

7. Since the admitted position is that appointment of the petitioner on the Post of Lab-in-charge was on an unsanctioned post, this appointment was clearly in violation of Section 35 of the Bihar State Universities Act, 1976 (hereafter referred to as the Act). This statutory provision places a clear bar on the creation of any teaching or non-teaching post having financial liability without the prior approval of the State Government. In the case reported in 1984 PLJR 626 Amarendra Kumar Thakur v. State of Bihar, it has been clearly held that an appointment on a post without prior sanction of the post by the State Government, being in violation of Section 35 of the Act is invalid and could be treated as non-est. In this decision it has also been observed that since there has been no appointment in the eye of law the person working against posts which are not sanctioned by the Government are so doing in violation of Section 35 of the Act and the University and the State Government could ignore the appointment and not take note of it. It has been held in the case reported by 1985 PLJR NOC 29 Rameshwar Prasad and Ors. v. The State of Bihar and Ors. that the provisions of Section 35 of the Act are mandatory and not merely directory. It may be noted that in the above two cases some of the petitioners were lab-in-charge and their claims stood on similar footing as that of the present petitioner. In view of the aforesaid decisions the legal position is clear that the so called appointment of the petitioner under Annexure-2 is totally illegal and invalid and as such non-est in the eye of law. As has been observed in the case of Amarendra Kumar Thakur, (supra) the petitioner cannot be treated to have any appointment at all in the eye of law on the Post of Lab-in-charge.

8. The petitioner's claim is next based on Annexure-3, namely, the office order of the University as contained in memo No. 301-R, dated 7th August, 1985. It has been urged that this order shows that the Vice-Chancellor had appointed the petitioner as lab-in-charge against the sanctioned vacancy of the said post in Jamnial College, Hajipur till such time the Post of Lab-in-charge in Physics is sanctioned in R.D.S. College, Muzaffarpur. It is contended that atleast from the date of issued of this order the petitioner should be treated as working on a sanctioned post. In my opinion, this contention cannot be accepted. It may first be noted that the petitioner has not been able to show that the Vice-Chancellor was competent to issue such an order directing that a person having been appointed on an unsanctioned post in a particular college may draw his salary against the sanctioned post in another college. No rule or statute which empowers the Vice-Chancellor to do so has been pointed out. Further, such appointment cannot be treated as permissible and legal as it would mean circumventing by this device the statutory bar placed against new appointments u/s 35 of the Act. If such appointments were to be permissible it would that the Vice-Chancellor would go on making appointments on unsanctioned posts in contravention of Section 35 and then give it the cover of legality by passing orders that it should be treated as appointment against sanctioned post in another college. In my opinion, therefore, Annexure-3 cannot be treated as a legal and valid order. In the context, it is also worth nothing that it was the

petitioner who appear, to have made such a request to the Vice-Chancellor for enabling him to draw the salary from the sanctioned post of lab-in-charge in Jamnilal College, Hajipur. This becomes clear from Paragraph 6 of Annexure-12 which is a representation of the petitioner to the Vice-Chancellor in which prayer has been made for payment of his salary from April, 1982 onwards. It is unfortunate that the Vice-Chancellor succumbed to the manouverings of the petitioner and passed the order Annexure-3. Further, there is nothing to show that the petitioner in fact ever went to Jamnilal College, Hajipur and made a request that his salary be paid from there. But whether he did go there or not is not of much consequences for the simple reason that the order Annexure-3 cannot be regarded as valid and operative. Hence the contention of the petitioner that since the issue of the order as contained in Annexure-3 he must be deemed to be working on sanctioned post must be rejected. As already indicated above the petitioner had made a representation to the Vice-Chancellor also but that has also been rejected. Since the petitioner was appointed and allowed to continue on the Post of Lab-in-charge in an illegal manner in contravention of the statutory provision as well as the specific directive of the State Government and his appointment was non-est in the eye of law, hence the petitioner cannot be said to be "an appointee" to the Post of Lab-in-charge in the R.D.S. College and as such he cannot be held entitled to receive "salary" for the said post.

9. Now the question arises whether the petitioner having worked in the college in the capacity of lab-in-charge, though not validly holding the post, should receive any remuneration for the work he as done. On behalf of the respondents, it has been stated that since the appointment was against non-sanctioned post the University is not in a position to make payment of any remuneration to the petitioner. But I am unable to see how the University can wriggle out of the responsibility of making payment to the petitioner and reimbursing him for the work he has done in the capacity of lab-in-charge in the college. The first illegality was committed when on the recommendation of the Principle of R.D.S. College the Vice-Chancellor issued the order of appointment Annexure-2 in violation of the mandatory provision of Section 35 of the Act. What is worse is that inspite of the fact that the State Government under its circular dated 7th July, 1983 (Annexure-A) clearly directed that appointments made to non-sanctioned posts should be terminated immediately, and the University itself under Annexure-B communicated the same to all the Principals and also directed that persons working against the non-sanctioned post should be clearly told in writing that they shall no longer remain engaged on such work, still in violation of all these the Vice-Chancellor issued the order as contained in Annexure-3 in 1985. It is a matter for consideration of the University whether in terms of Annexures-A and B which clearly mention that any non-compliance will saddle the authority who violates the directive with personal liability, suitable action may be taken against the Principal and then the Vice-Chancellor. Be that as it may, the undisputed position is that although the University has been harping on the fact that the petitioner is working against the non-sanctioned post, it never took

any definite and decisive step to intimate him that he should stop working in the capacity of lab-in-charge in R.D.S. College. The petitioner claims that he has been working continuously in this capacity. In the supplementary counter-affidavit it has been stated that it is the Principal who will be able to state clearly how for this claim of the petitioner is correct. The point under consideration is payment in terms of Section 70 of the Contract Act for re-imbursement for the service which he has rendered lab-in-charge in R.D.S. College, Muzaffarpur. Since the University never took the decisive step as directed in Annexure-B, it cannot escape the responsibility of re-imbursing the petitioner for the service he has rendered in the capacity of lab-in-charge. The principle embodied in Section 70 of the Contract Act places such a liability on the respondent. In this connection the petitioner has placed reliance on the decisions of this Court in C.W.J.C. No. 2521/89 disposed of on 10-4-1990 and C.W.J.C. No. 10426/86 disposed of on 23-8-1990. In these cases also the appointments were not valid but the Court directed that the persons who had worked and rendered their services should receive remuneration for the period they have worked. Both these cases were decided by Division Bench. On behalf of the respondent reliance has been placed on the decision of this Court in C.W.J.C. No. 3249/82 disposed of on 8-1-1988. In that case the appointment appears to have been made by the Principal. The position in the present case is different in as much as the University itself acting through the Vice-Chancellor appears to have issued the orders as contained in Annexures-2 and 3 and as such the University cannot escape the liability of reimbursing the petitioner for the period he has worked.

10. Besides asking for the relief regarding his remuneration the petitioner has also made a further prayer that a direction may be issued to the State Government to sanction one post of lab-in-charge in the Department of Physics in R.D.S. College so that the petitioner may be absorbed in that post. It has already been indicated above that the so-called appointment of the petitioner was in clear contravention of Section 35 of the Act and therefore totally illegal and invalid and non-est of the eye of law. It is not disputed that the Principal had not put up any notice or advertisement for general information for appointment on the post on which the petitioner was given the appointment as lab-in-charge and the Principal ignoring all norm of propriety and by sidetracking the settled procedure that any appointment has to be made after putting notice for general information, recommended the petitioner's name for appointment to the University which ultimately resulted in issuing of the Office order Annexure-2. Thus the first illegality committed by the Principal of the R.D.S. College was in making recommendation for appointment to an unsanctioned post and the second and graver illegality was to make the re-commendation in complete violation of Article 16 of the Constitution. In this regard, the conduct of the Principal must be regarded as highly improper and he appears to have acted illegally in collusion with the petitioner in making recommendation for his appointment on the unsanctioned post of lab-in-charge in his college. The petitioner, therefore, has no claim whatsoever to the post of lab-in-charge in

the R.D.S. College and hence he has no locus standi to ask for a direction to the State Government for sanctioning the Post of lab-in-charge in the Department of Physics in the R.D.S. College, Muzaffarpur. He prayer in this regard is therefore misconceived and untenable.

11. Whenever the post is sanctioned, it will have to be filled up after following the due procedure namely after general notice and then adopting the prescribed selection procedure for the same. The fact that the petitioner had worked on the unsanctioned post for sometime will not entitle him to any claim or right for the post in question.

12. Keeping in view the principle contained in Section 70 of the Indian Contract Act it has been ordered above that the petitioner should be re-imbursed for the period he worked in the capacity of lab-in-charge on the unsanctioned post in the R.D.S. College. However, it is made clear that the fact that the petitioner is being allowed to be reimbursed for the service he has rendered while working in the capacity of lab-in-charge in R.D.S. College, does not give him any claim or right to continue to work in that capacity on that post. As indicated above, the orders as contained in Annexures-2 and 3 on the basis of which he has worked in the capacity of lab-in-charge in that college are totally illegal and incompetent and indeed are in contravention of the statutory provision. As such the University will be at liberty to take such steps and action as may be necessary in this regard.

13. In the result the only relief which can be given to the petitioner is of being re-imbursed as indicated above and nothing more. The application is disposed of accordingly.