
(1993) 07 PAT CK 0028

In the Patna High Court

Case No : C.W.J.C. No's. 4227 and 4228 of 1993

Sri Bipin Bihari Singh and Sri Brajesh Kumar Sinha

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 20-07-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309

Citation : (1994) 42 BLJR 283

Hon'ble Judges : S.B. Sinha, J;R.N. Prasad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—Both these writ application involving common questions of fact and law were taken up for hearing together and are being disposed of this common judgment.

2. The petitioners have filed these writ applications questioning the order dated 26-3-1992 passed by the Deputy Secretary of the Minor Irrigation Department which is contained in Annexure-5 to the CWJC No. 4227 of 1993, in terms whereof the petitioners have been reverted back to the initial post of Work Sarkar/Pump Operator.

3. The fact of the matter is as follows :-

The petitioners were admittedly appointed in the work charge establishment. On or about 1-2-1990 a representation was made by the petitioners for change of the posts from Work Sarkar/Pump Operator to the post of Junior Accounts Clerk as they allegedly possessed higher qualification. It is stated that their cases were recommended by the competent authorities.

4. The petitioners have also contended that the State of Bihar also issued a Circular letter dated 2nd February, 1991 whereby and whereunder upon recommendations of a High Level Committee, 24 persons were directed to be

posted in the regular establishment from the work charge establishment. The said letter dated 2nd February, 1991 is contained in Annexure-2 to the writ application.

The petitioners were thereafter allegedly appointed as Junior Accounts Clerk on the basis of the recommendations of the Establishment Committee on a scale of pay of Rs. 975-1540, The letter of appointment dated 10-4-1991 is contained in Annexure-3 to the CWJC No. 4228 of 1993.

5. However, one Shri Kameshwar Prasad Gupta made a representation to the effect that whereas he was appointed in the Class IV post but the petitioners have been appointed in Class III posts, although he was senior to the petitioner. Thereafter the impugned order dated 26-3-1992 has been passed.

6. Again on 27-3-1993 the Chief Engineer, Minor Irrigation Department purported to be on the basis of the Government order dated 22-3-1993 stated that the respondent No. 4 has been acting as Account Clerk and in order to co-commode him he was posted on the vacant post of the Accounts Clerk and directed that the salary in the scale of pay of Rs. 975-1540 on regular basis be paid to him. A copy of the said letter dated 27-3-1993 is contained in Annexure-8.

7. In this case, a counter-affidavit has been filed on behalf of the State wherein it has been inter alia been contended as follows :-

That with regard to the statements made in paragraph of the writ application, it is stated that Sri Bipin Bihari Singh is working as Junior Accounts Clerk in Minor Irrigation, sub-division, Jhajha in the district of Jamui. He was previously posted at Jahanabad Minor Irrigation Division as work Sarkar. The Chief Engineer, Minor Irrigation Depot, Patna changed his cadre from work Sarkar to Junior Accounts Clerk vide memo No. 2435 dated 10-4-91 provisionally while passing the above order the inter-se seniority, educational qualification of other work Sarkar were not taken into consideration. On a complaint having been made to the Government by Sri Madhu Singh, M.L.A. The Government after the examination of the matter cancelled the above mentioned order passed by the Chief Engineer vide letter No. 1105 dated 28-3-1992.

That since the order of Chief Engineer, Patna was ab initio unjust, illegal and discriminatory, it was cancelled by the Government without asking for any show-cause from the petitioner. As regards Sri Kameshwar Pd, Gupta, Pump Operator, the order issued by memo No 2266 dated 27-3-1993 by the Chief Engineer, Patna has been cancelled by the Government. Sri Kameshwar Prasad Gupta is basically a Pump Operator in the scale of 900-1150. He could be posted in the higher scale post of Accounts Clerk without taking into the consideration the claims of persons similarly posted in the department.

That with regard to the Statements made in paragraph 6 of the writ application, is not a fact. The matter had not been examined at the level of Chief Engineer

according to rule as the petitioner's cadre was changed without considering the cases of similarly situated persons. Moreover, the very order of the change of cadre was conditional as well as provisional which is evident from the order contained in Annexure-3 of the writ application.

8. Mr Ranjit Kumar, the learned Counsel appearing on behalf of the, petitioner has raised a question in support of this application.

The learned Counsel submitted that the services of the petitioners were regularised in terms of Rule 56 of the Bihar Service Code.

9. He further submitted that from a perusal of Annexure-3 to the writ it would appear that the said order dated 10-4-1991 could be cancelled only in the event any senior to the petitioner laid a claim for the same post and not otherwise.

10. According to the learned Counsel as the impugned order has been passed on the basis of a complaint made by a local M.L.A, as would be evident from the Statements made in Annexure-3 to the writ application, the said order must be held to be illegal.

11. Mr. J.N. Jha, the learned Government pleader No. 1 appearing on behalf of the State, however, submitted that the appointment of the petitioner was provisional. He further drew our attention to Clause 5 of the letter dated 10-4-1991 as contained in Annexure-3 to the writ application which reads as follows :-

Mukhya Abhiyanta, Laghu Sichai Vibhag, Patna ki parichatriya sabhi tritiya vargh ke karmuchariyo jo padpariwartan ke liye ichuk ho, kee suchi mein paya jyagna to shri singh ko purba pad par padasthapit kar diya Jayega.

12. The learned Counsel further submitted that the case of the petitioner would be governed under Rule 59 of the Public Works Department Code and not Rule 56 of the Bihar Service Code.

13. It is now well-known that in terms of Articles 14 and 16 of the Constitution of India all citizens of India have a right to be considered for appointment.

14. It is also well-known that where the service conditions are governed by any Statute or Statutory rules, regularisation in service by way of absorption would be violative of the said rules as also Article 309 of the Constitution of India and thus no recruitment can be made in contravention of the provisions of the Statutory rules and Article 16 of the Constitution of India.

In recent decision of this Court in *Shrimati Madhuri Kumari v. The State of Bihar and ors.*, reported in 1993 (1) PLJR 449 this Court held as follows :

It is now well-known that in a case where the conditions of service are governed by any Statute or Statutory rules, regularisation in service by way of absorption would be violative of the said Rules as also Article 309 of the Constitution of India, It is now well-known that regularisation cannot be a mode of recruitment.

Further no recruitment can be made in contravention of the provisions of the statutory Rules or Article 16 of the Constitution of India.

15. Reference in this connection may also be made to Teja Prasad and Others Vs. The State of Bihar and Others State of Haryana and ors. v. Plara Singh and ors., reported in 1992 (5) JT 179 Karnataka State Private College Stop-Gap Lectures Association v. State of Karnataka and ors. reported in 1992 (2) JT 373 (SC) and M.L. Kamra v. New India Assurance Co., reported in 1992 (1) SCC 30

16. Further in this case, the petitioner's appointment was merely provisional. The petitioners evidently were working in work charge establishment as work Sarkar/Pump Operator. The said posts are class IV posts. Their services could have been transferred to the regular establishment in term of Note 3 of Rule 57 of PWD Code only in the same category and not to a higher category. From a perusal of the order as contained in Annexure-2 to the writ application, it is evident that the State merely granted its approval for their posting in the regular establishment in place of work charge establishment with effect from 8-2-1991.

17. The State in the aforementioned letter dated 2nd February, 1991 did not permit the Establishment Committee to appoint the petitioner in Class III post and that too ignoring claim of the others who were similarly situated.

18. It is not the case of the petitioners that prior to their appointment, the cases of other persons similarly situated had been taken into consideration nor is it their case, that any advertisement had been made or even the Employment Exchange had been notified about the existing vacancy.

19. The appointments of the petitioners were absolutely provisional in nature and had been made till further orders. The same was also subject to the concurrence of the finance Department. The petitioners have also not stated that the Finance Department has granted concurrence of their appointment.

20. It has further been mentioned that if any senior lays a claim over the post, the appointee would be reverted to the original post.

21. Admittedly respondent No. 4 claimed himself to be senior to the petitioner.

Further from a perusal of the impugned order as contained in Annexure-5 to the writ application, it would appear that the Chief Engineer has permitted the change of cadre illegally and while doing so the cases of senior persons had not been taken into consideration. The petitioners evidently were appointed through back-door.

22. In this view of the matter, in our opinion, this is not a fit case in which we should exercise our discretion under Article 226 of the Constitution of India in favour of the petitioner.

23. It is true that the aforementioned order has been passed on the basis of a complaint made by M.L.A. In our opinion, however, a representative of the people, he was entitled to bring to the notice of the State about any illegal action

of an officer and upon receipt thereof the State was also obliged to make an enquiry in that regard. No exception therefore, can be taken to the impugned order, as the same had been passed upon an enquiry held on the basis of a complain made by a M.L.A.

24. Further as noticed hereinbefore, the Chief Engineer could not have changed the cadre of the petitioners from Work Sarkar/Pump Operator to Junior Accounts Clerk which is a higher post.

25. The petitioners in the facts and circumstances of the case have not acquired any legal right to continue to occupy the said post.

26. In the result, these writ applications are dismissed but without any order as to costs.

R.N. Prasad, J.

27. I agree.