
(1994) 03 PAT CK 0048

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 10378 of 1993

Sukh Sagar Prasad and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 23-03-1994

Acts Referred:

Citation : (1994) 03 PAT CK 0048

Judgement

S.B. Sinha, J.—In this application the Petitioners have prayed for issuance of a writ of or in the nature of mandamus directing the Respondents to absorb them in the present/future vacancies in the college under the University Service as per the resolution of the State of Bihar dated 10.5.1991 as also for issuance of an appropriate writ for quashing the order as contained in letter dated 21.9.1993 as contained in Annexure-14 to the writ application whereby and whereunder the Respondent No. 7 directed to terminate their services.

2.2. The Petitioners are said to have been appointed by the Bhagalpur University in Class III and IV posts prior to 10.5.1986. The Bhagalpur University, however, was bifurcated and the colleges in question have been handed over to Sidha. Kanhu University, Dumka (hereinafter referred to as the University).

3. The Petitioners have contended that by a resolution dated 14.5.1977 as contained in Annexure-15, the Bhagalpur University delegated to the principals of the concerned colleges, the power of appointment of Class III and IV posts subject to the approval of the Vice-Chancellor or the Syndicate.

4. It has been stated that the Principal of Madhupur College, Deoghar in exercise of to said power purported to be upon inviting applications on the basis of the notice published in the notice (sic) and upon interview selected the Petitioners.

5. The Petitioner No. 1 is said to has been appointed by an order dated 17.5.1985 The Petitioner No. 2 was appointed on 17.12.85. The Petitioner No. 3 was appointed on 29.1.1987. The Petitioner No. 4 was as pointed on 15.2.1986 and the Petitioner Nos. 4 and 6 were appointed on 4.4.1986 and 13.4.1986

respectively.

6. According to the Petitioners the order directing their appointment had been communicated to the University, whereafter the Registrar of the Bhagalpur University recommended to the State Government for sanction for creation of Class-IV posts, in the said College.

7. Allegedly on 10.5.1991 the State of Bihar adopted a resolution relating to creating of posts in accordance with staffing pattern for appointment and absorption of Class-III and class-IV non-teaching staff in the constituted colleges. By reason of the said resolution was laid down that incumbent to posts created on the basis of the staffing pattern, and who were appointed prior to 10.5.1986 were to be absorbed and retained on existing or further vacancies. A copy of the said resolution contained in Annexure-8 to the writ application.

8. Allegedly despite the said order the services had been terminated.

9. It is stated that the Petitioners were appointed within the norms of staffing pattern fixed by the Inter-University Board keeping view the number of students admitted in can colleges.

It has further been stated that the Supreme Court of India in a similar situated in writ petition (C) No. 409 of 1991 as contained in Annexure-19 to the reply to the counter-affidavit disposed of similar writ application directing:

After hearing learned Counsel for the parties we direct the Respondents to consider the Petitioner's case for absorption strictly in accordance with the terms and condition of agreement entered into between the Bihar State Universities and Colleges Employees Federation and the State Government on 26.4.1989 the terms and conditions of which are incorporated in Government's letter dated 1st May 1989 notwithstanding the directions issued by the University in its letter dated 9th March, 1991. It is made clear that the Respondents are free to terminate the services of those who are not absorbed in accordance with the staffing pattern and other conditions contained in the agreement. The Ranchi University will take immediate steps to determine the staffing pattern and other details in accordance with the agreement and forward the list within two months to the State Government and the latter will consider the same and issue orders within one month thereafter. This order would apply only to the Petitioners.

The writ petition is disposed of according

10. It has been stated that when the Petitioners requested for payment of their salary, the Finance Office of the Bhagalpur university by a letter dated 30th June, 1992, which is contained in Annexure-12 to the writ petition, recommended therefore wherein also their respective dates of appointment have been specified.

It has been stated that the impugned order dated 21.9.1993 as contained in Annexure-14 to the writ application are couched in general words and pursuant thereto no specific order has been passed. By reason of the said order, the

services of such persons had been directed to be terminated in relation thereof the approval of the University had not been obtained and which have been made in violation of the provisions of Section 35 of the Bihar State University Act.

11. The contention of the Petitioners is that both the aforementioned grounds are non-existent inasmuch as the Petitioners have duly been appointed in terms of the power delegated to the Principal by the Bhagalpur University and in any event, in terms of the aforementioned resolution dated 10.5.1991 as contained in Annexure-1 to the writ application the State Government must be held to have granted its sanction with regard to the said post.

12. It has been submitted that the stand taken in the counter affidavit to the effect that the Petitioners were not appointed prior to 10.5.1986 is not correct.

13. In this connection our attention has been drawn to paragraphs 6,7,8 and 9 to the reply of the Petitioner to the counter affidavit filed on behalf of the Respondents.

14. It has further been submitted that on the ground of alleged irregular appointment the Principal of the college was although suspended and a disciplinary proceeding was initiated against him, however he was exonerated from charge No. 19 which was the relevant charge.

15. It has further been submitted that the stand of the Respondents to the effect that in the year 1990 when the said college became a constituent unit of the University, the 1977 resolution was repealed must be held to be wholly irrelevant inasmuch as the directive of the University applies to its constituent units also.

16. Mr. B.K. Jha, the learned Counsel appearing on behalf of the Respondent, on the other hand, submitted that the appointment of the Petitioner are nullities being in contravention of Section 35 of the Bihar State University Act.

Our attention has been drawn to paragraph 5 of the counter affidavit which reads thus:

(a) That the letter No. SKU/VC/ Res./57/93 dated 21-09-93 of the Officer on special duty-I (Respondent No. 7) directing the professor-in-charge, Madhupur College, Madhupur to terminate the services of the Petitioners (Nos. 1 to 6) was issued after thorough examination of their appointments made illegally and without authority on unsanctioned posts by the then Principal Madhupur College, Madhupur.

(b) That Petitioners were appointed by the then Principal, Madhupur College, Madhupur contrary to the provisions contained in Section 10 (6) of the Bihar State Universities Act, 1976 and Article (6) of the Service Statutes. "The Vice-Chancellor shall subject to the provisions of this Act, the Statutes and the Ordinances have power to make appointment to posts within the sanctioned grades and scales of pay and within the sanctioned strength of Ministerial staff and other servants of the University not being teachers and officers of the

University and have control and full disciplinary power over such staff and servants."

(c) That under the provisions of Bihar State Universities Act as amended up to date the Principal of any constituent college is not empowered to make appointment on class III and class IV posts.

(d) That the Petitioners were appointed illegally on unsanctioned posts by the Principal, Madhupur College, Madhupur in contravention of Section 35 of the Bihar Act 23 of 1976 and the same were never approved by the Vice-Chancellor, Bhagalpur University.

(e) That it is well settled provision of law that illegal appointment confers no legal right on the appointee and continuation of such appointees are without sanctioned law entails no consequential right to salary.

17. It has further been submitted that as would appear from the letter No. 165 of 1989 dated 20th January, 1989 issued by the Principal that the Petitioner Nos. 3 and 4 namely Uday Kumar Vidyarthi and Sri Jagarnath Pd. Gupta were appointed on daily wages in February, 1990, and Sri India Narayan Roy April and Nawal Prasad Choudhary in September, 1990. It has further been stated in however, from the statements contained in Annexure-5 to the counter affidavit, it would as pear that Shri Sukh Sagar Prasad was appointed prior to 17.5.1986, Sri Hari Kishor Rai was appointed on 8.2.1986, Sri Uday Kumar Vidyarthi on 29.1.1990), Sri "Jagaran Prasad Gupta on 16.2.1990 and Sri lad Narayan Ray on 4.4.1990.

18. It has been pointed out that the purported appointment letters dated 29.1.1986, 12.2.1986, 4.4.1986, 30.4.1986 in respect of the Petitioner Nos. 3,4,5, and 6 do not bear an memo number of the office.

19. It has also been pointed out that the purported joining reports of the Petitioner Nos. 3,5 and 6 dated 29.1.1986, 4.4.1986 are 30.4.1986 also do not show acceptance of the joining report by the then Principal of the college.

It has further been pointed out that the Petitioner No. 4 did not enclose any joint letter alongwith the writ petition.

20. It has further been pointed out the although by a letter dated 20th January, 1991 as contained in Annexure-X, the name of the Petitioner Nos. 1 and 2 were forwarded, as same does not disclose the names of Petitioner Nos. 3 to 6.

21. Our attention has also been drawn the statement which is contained in Annexure C to the counter affidavit wherein it stated that only Petitioner No. 7 was pointed in the year 1986.

22. The learned Counsel further pointed out that from perusal of paragraph 7 of resolution dated 10.5.1991 as contained Annexure-B itself, it would appear that the vices of all such persons who are appointed after 10.5.1986 were directed to be termination

It is stated that the University was published on 10.1.1992 and thus, it is not been by any agreement purported to have been entered into by the representative of nonteaching staff of the Bhagalpur University with the said University.

23. It was further pointed out that the recommendations of Bhagalpur University having been made after the creation of the said University, the same is unacceptable and in any event, alongwith the said recommendations the relevant records had not been sent. It has been stated that the letters of appointments issued in favour of the Petitioners are forged.

24. It has been stated that the recommendations of the Finance Officer of the Bhagalpur University as contained in Annexure-12 to the writ application are "illegal inasmuch as prior to the appointment of the Petitioner wither sanction of the State Government was obtained nor the staffing pattern was approved.

25. It has been submitted that payment of salary to the Petitioners have also been made without any permission of the University.

It has further been pointed out that the services of the Petitioners have been terminated by reason of the orders dated 23.9.1993 as contained in Annexure-D series and in view of the fact that the Petitioners have not questioned the said order of termination, no relief as prayed for can be granted.

26. In support of the contention that the appointment of the Petitioners having been made in contravention of the provision of Section 35 of the Act are nullities, the learned Counsel relied upon a decision of this Court in Manoj Prasad and Others Vs. Ranchi University and Others, ; Baleshwar Prasad v. State of Bihar and Ors. reported in 1985 BBCJ 438 , State of Punjab and others Vs. Surinder Kumar and others, and Vijay Kumar Vs. The State of Bihar and Others, .

27. In reply to the aforementioned submissions, it has been submitted on behalf of the Petitioner that when recommendations had been made by the University, the same would amount to approval.

It has been stated that interpolations have been made in Annexure-C to the counter-affidavit and in this connection our attention has been drawn to the chart which has been annexed to the reply of the counter-affidavit.

It was further submitted that prior to issuance of Annexure-14 neither any enquiry was held nor principles of natural justice were complied with and thus the impugned orders are nullities.

28. The only question, which, therefore, arises for consideration is as to whether the Petitioners were validly appointed.

Section 35 of the Bihar State Universities Act, 1976 reads thus:

No post for appointment shall be created without the prior sanction of the State Government. -- Notwithstanding anything contained in this Act, no University or

any College affiliated to such a University, except such College --

(a) as is established, maintained or governed by the State Government; or

(b) as is established by a religious or linguistic minority;

(i) shall, after the commencement of this Act, create any teaching or non-teaching post involving financial liability without the prior approval of the State Government;

(ii) shall either increase the pay or allowance attached to any post, or sanction any new allowance:

Provided that the State Government may, by an order, revise the pay scale attached to such post or sanction any new allowance;

(iii) shall sanction any special pay or allowance or other remuneration of any kind including ex-gratia payment or any other benefit having financial implication to any person holding a teaching or non-teaching post;

(iv) shall incur expenditure of any kind on any development scheme without the prior approval of the State Government.

(2) Notwithstanding anything contained in this Act, no college other than one mentioned in Clauses (a) and (b) of Sub-section (1) shall, after the commencement of this Act, appoint any person on any post without the prior approval of the State Government.

From a bare perusal of the aforementioned provision, it is evident that same is mandatory in nature. It is further evident that it not only postulates grant of sanction for creation of posts but also mandates obtaining of prior approval of the State before an appointment is made.

Payment of salary to the teaching and non-teaching staff of the University and its constituent units is the sole responsibility of the State. The affiliated colleges including the minority institution also receive grant-in-aid from the State.

The provisions of Section 35 of the Act is regulatory in nature.

It is not and cannot be disputed that any appointment made in violation of the aforementioned provision would be a nullity. It is also clear that in terms of aforementioned Act, only the Vice-Chancellor of the University is the competent authority in the matter of appointment.

29. Recently a Division Bench of this Court in *Manoj Prasad and Others Vs. Ranchi University and Others*, held as follows:

Once it is held that the appointments were illegal and they stood terminated by separate orders issued in May, 1988, there is no question of payment of wages to the Petitioners. It is not disputed that from May, 1988 onwards till August, 1989, the Petitioners were not paid their wages from September, 1989 to January, 1991

the then Principal without any authority permitted them to work and paid them their wages despite the orders of termination of their services. That would not clothe the Petitioners with a right to continue to receive wages from the college. The claim of wages is dependent upon the subsistence of employer-employee relationship. If the services of the Petitioner stood terminated in May, 1988, and that order was never recalled, set aside or stayed by any competent authority, the Petitioners will not be justified in claiming wages because they ceased to be employees of the college. Their claim for wages has, therefore, (sic) merit.

We may only observe that this is not the solitary instance where such illegalities have been discovered. The educational system in this State is in a shambles and the whole system has come to a grinding halt for many reasons; one of them is the despite a ban imposed by law, the Principals of various colleges, and in some case governing bodies have been making illegalities appointments against unsanctioned posts for ulterior considerations. The fund granted to the colleges by the University is based upon the sanctioned posts. When that amount sought to be distributed amongst a learend number of employees, most of them illegalities appointed, it gives rise to resentment on the part of genuinely appointed teachers who are either not paid their salary in full, do not receive any salary at all for sever months. Any efforts to deal with such illegal appointments gives rise to lawlessness. The atmosphere in the Colleges is completely vitiated. Unless the State and the University authorities take firm action against state Principals and the members of the Governing body, the situation is not likely to improve.

30. *Vet Anr. Division Bench of the Court in Manoj Prasad and Others Vs. Ranchi University and Others*, and reiterated the said view.

It has further been held by the Supreme court of India in *State of Orissa and others Vs. Smt. Sukanti Mohapatra and others*, that if appointment made in contravention of mandatory provision is a nullity.

31. In *Baleshwar Prasad v. The State Bihar and Ors.* reported in 1985 Bihar Bar (sic)ncil Journal page-438 a Division Bench of (sic) Court relied upon an earlier decision of (sic) Court in *Amarendra Kumar Thakur v. the State of Bihar and Ors.* reported in 1984 PLJR 262 and has held that the provisions of Section 35 of the 1976 Act are mandatory.

32. In *Pramod Kumar and Others Vs. Bihar University and Others*, a Division Bench of this Court while considering a similar matter upon taking into consideration various decisions of this Court including a revision of mine in *Kamal Kumar Sinha v. Indra Gandhi Institute of Medical Sciences, (sic)kपुरा, Patna* reported in 1990 (2) PLJR be held as follows:

On the basis of different materials indicated above a question arises whether the claim of the Petitioners of CWJC. No. 4649 of 1991 for their regularisation in the collage is justified. According to Dr. Jha, as these Petitioners were not appointed in accordance with the statutory provision, they are not entitled for

regularisation. There is no dispute that the college in question was made constituent unit of the University in the year 1970. As per Section 10(6) of the Act as also from different provisions of the service statute of the University, the Vice-Chancellor of the University is only competent to appoint non-teaching staff in any of the constituent college. The engagement of the Petitioners were made by the Principal of the College some time between 26.8.1974 to 4.7.1986. Mr. Jha has rightly contended that in view__of the specific statutory provision for making appointment of non-teaching staff of the college in a particular manner, the State Government or its authority through executive actions cannot married the statutory provision. It is well settled that if a particular legislation provides to do a thing in a particular manner, the same cannot or altered or changed through an executive action. Therefore, since the appointment of non-teaching staff of the. colleges as indicated above was not made by a proper authority, it is not open on the basis of notification No. 894 dated 11.7.1989 issued by the department of Human Resources, Govt. of Bihar.

It has been observed by the Supreme court in the case reported in Delhi Development Horticulture Employees" Union Vs. Delhi Administration, Delhi and others, that when appointments are made in such illegal manner, court can take judicial notice of the fact that they have been made on extraneous considerations, including monetary consideration.

36. Recently in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., it was held:

Existence of Statutory Rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil post and fill them up according to executive instructions consistent with Articles 14 and 16 of the Constitution, it is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law. The Governor exercising the power under proviso to Section 125 (Article 309 of the Constitution of India) made the rules which do not expressly give the power to the State Government to make ad hoc appointments. No such rule has been brought to our notice. No express power was conferred and in fact cannot be conferred to relax the rules of recruitment. Having made the rules the executive cannot fall back upon its general power under Article 161 to regularise the ad hoc appointments under the Rules.

The Court proceeded to observe:

The rules prescribe direct recruitment/promotion by selection as the mode of recruitment which would be done only by PSC or promotion committee duly constituted and by no other body. Therefore, ad hoc employee should be replaced as expeditiously as possible by direct recruits. A little leeway to make

ad hoc appointment due to emergent exigencies, does not clothe the executive govt. with power to relax the recruitment or to regularise such appointment nor to claim such appointments to be regular or in accordance with rules. Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot coexist in the same sheath. The former is in negation of fair play. The latter are the product of order and regularity. Every eligible person not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitness for appointment assures fairness in selection and inhibits arbitrariness in appointments.

The Supreme Court further observed:

The selection by the Commission, however is only a recommendation of the commission and the final authority for appointment is the Government. Government cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against existing or anticipated vacancies, does not create a right to be appointed to the post which can be enforced by a mandamus.

The Supreme Court observed:

The rules or instructions should be in compliance with the requirements of Articles 14 and 16 of the Constitution. The procedure prescribed shall be just, fair and reasonable. Opportunity shall be given to eligible persons by inviting application through the public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment to a post or an office under the State. Therefore, it must be held that power of relaxation exercised by the Government in ultra vires of the Rules and the High Court is right in holding that Government cannot relax the rules of recruitment to be made by the PSC. Government have no power to make regular appointment under the Rules without selection by Public Service Commission u/s 133(1) read with Rule 5 and Schedule III of the Rules.

The next question is whether the direction given by the High Court to regularise the services of the Respondents is valid in law. It is true that the ad hoc appointees have been continuing from 1985 onwards but their appointments are de hors the Rules. Rules prescribe only two modes of recruitment, namely direct recruitment or promotion by selection. As regards the lecturers are concerned, it is only by direct recruitment. The mode of recruitment suggested by the High Court namely, regularisation by placing the service record of Respondents before the P.S.C and consideration thereof and P.S.C's recommendation in that behalf is only hybrid procedure not contemplated by the Rules. Moreover, when the rules prescribe direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in notified vacancies is

consistent with the right to apply for by, qualified and eligible personal and consideration of their claim to an office or post under the State is a guaranteed right given under Articles 14 and 16 of the Constitution. The direction, therefore, issued by the Division Bench, is in negation of Articles 14 and 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode of selection, as directed by the High Court, nor he made dared to disobey the Constitution and the law.

37. The Court noticed that in certain cases the Supreme Court may exercise its power under Article 142 of the Constitution. It was held that such direction cannot take place the law of the land as envisaged under Article 141 thereof.

38. Further in *State of Punjab and others Vs. Surinder Kumar and others*, it has been held: there is still a reason why the High Court cannot be equated with the Supreme Court. The Constitution has, by Article 142 empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matter pending before it" which authority the High Court does not enjoy. The jurisdiction of the High Court, while dealing with a writ petition, circumscribed by the limitations discussed and declared by the Judicial decisions and it cannot transgress the limits on the basis of whims or subjective sense of justice varying from judge to judge."

39. In this case, the Respondents have separately stated that Petitioner's name were included as appointees of the governing body of the college by adopting a back door method. In fact they are not appointed pursuant to any process of selection nor were they appointed in sanctioned posts. Even the Three Men Committee as also the Vigilance department had not included their names as employees working in the said college as non-caching staff.

40. The Vigilance Department in its report has further found that a great deal of enging has been done by the Governing body of the college taking advantage of the (sic) that the proceeding book and other documents maintained by the college have not immediately been seized by the University upon taking over of the college which paved the way the governing body to make manipulations and bungling in inserting the name of various persons as appointees of the college.

41. It is, therefore, evident that there exists a bonafide and serious doubt as to whether the Petitioners had been working in the said colleges or not. Such a disputed question of fact cannot be determined by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

42. In C.W.J.C. No. 7033 of 1992 disposed of on 14.2.1994, a Division Bench of this Court has clearly held that in absence of any provision in the Statute, appointment by way of regularisation is not permissible. Similar view appears to have been taken by a Bench comprising of Hon'ble the Chief Justice and the Hon'ble Mr. Justice N.P. Singh (as his Lordship then was) in C.W.J.C. No. 5765 of 1984.

43. We are further of the opinion that this Court cannot direct the State of Bihar to accord sanction. We, are however, of the view that the State of Bihar as also the concerned Universities would implement its own policy decision and thus it, is not necessary to issue a specific writ in this regard. As and when posts are sanctioned on the basis of staffing pattern or otherwise the appointments should be made strictly in accordance with the provisions of Bihar State Universities Act and the Statutes framed thereunder by the Respondent-University as also upon compliance of the provisions of Articles 14 and 16 of the Constitution of India.

44. In a number of matters before us we have come across cases where appointments have been made by the Governing Body of the College hurriedly upon throwing all norms to the winds after having come to learn the decision of State of Bihar to take over the management of the College.

45. The State of Bihar had directed its Vigilance Department to make an enquiry in this regard and we are informed that the report of the Vigilance Department has been submitted. It is an accepted position that the Vigilance Department has also enquired into the matter and its report is pending consideration of the State Government.

We therefore, hope that an early decision in this regard shall be taken by the State of Bihar.

46. Keeping in view the facts and circumstances of the case we think that the interest of justice will be sub-served if the State Government is directed to pass a final order in this regard within six weeks from the date of production/receipt of a copy of this order whereafter the University may make necessary scrutinies in relation to the cases of the Petitioners and pass an appropriate order with regard thereto within two months thereafter.

In the event it is found that the Petitioners have fulfilled the conditions for their absorption in the University Services in a vacant sanctioned post, it goes without saying that the Petitioners would be paid their due salaries.

47. However, in the event if it is found that the Petitioners have not fulfilled the said conditions but in fact they have worked, in our opinion, the said University should consider the desirability of paying their salaries at the minimum scale of pay applicable to the Petitioners, but the same shall not exceed the period of three years from the date of filing of the writ application. However, henceforth no work should be taken from them unless appointments are made afresh in accordance with law.

The State and the University shall also be entitled to recover the entire amount from the erring officers whosoever he or they may be including the Principal of the college concerned.

48. The application is disposed of with the aforementioned observations and directions. But in the facts and circumstances of the case, there will be no order as to costs.

Shashank Kumar Singh, J.

49. I agree.