
(2011) 07 PAT CK 0066

In the Patna High Court

Case No : LPA No. 931 of 2011 in CWJC No. 13550 of 2010

Sunaina Devi

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Citation : (2011) 07 PAT CK 0066

Final Decision : Dismissed

Judgement

R.M. Doshit, C.J.

(Order Dt. 30.6.2011)

1. This appeal under Clause 10 of the Letters Patent is preferred by the writ Petitioner against the order dated 11th April, 2011 made by the learned Single Judge in above CWJC No. 13550 of 2010.

2. The matter at issue is whether the Appellant, by virtue of her appointment as a sweeper made by the Civil Surgeon-cum-Chief Medical Officer, Vaishali on 20th April, 1987, has a right to continue in service and whether the termination of her service by order dated 28th February, 2003 on account of her appointment being illegal is sustainable or not.

3. Under order dated 20th February, 1987 made by the Civil Surgeon-cum-Chief Medical Officer, Vaishali, the Petitioner was appointed as a sweeper in the pay scale of Rs. 350-425 with admissible allowances and was posted at Primary Health Centre, Sahdei Bujurg. The said appointment was made pursuant to the application made by the Appellant on 25th November, 1982.

4. It appears that at the relevant time several such appointments were made by the Civil Surgeon. All such appointments were under scrutiny by the State Government. To facilitate such enquiry under order dated 8th February, 2003, the Petitioner was called upon to produce various documents, such as appointment letter, interview call letter, credentials, transfer and confirmation

order, etc.

5. Pursuant to the scrutiny of the documents, the appointment of the Appellant was found to be illegally made without following the due process. Consequently by order dated 28th February, 2003 the Petitioner's service was terminated. The said order was challenged before this Court under Article 226 of the Constitution in CWJC No. 3226 of 2003.

6. The learned Single Judge of this Court (Coram: Narayan Roy, J.) by common judgment dated 8th September, 2003 Sitendra Kumar Singh Vs. State of Bihar and Others allowed the said and the other writ petitions and directed the State Government to reinstate the writ Petitioners in service. The said judgment was challenged by the State Government before the Division Bench of this Court in LPA No. 946 of 2003 and other appeals. The said appeals were decided by common judgment dated 26th June, 2006 The State of Bihar and Others Vs. Purendra Sulan Kit and Others etc. etc., . The Bench relied upon the judgment of the Hon'ble Supreme Court in the matter of Secretary, State of Karnataka v. Uma Devi & Ors. [2006 (2) PLJR (SC) 363] and with consensus of the learned Advocates disposed of the appeals "with a direction to the authorities of the Health Department, Government of Bihar to reconsider the cases of all the affected employees with a view to find out on the basis of relevant facts and law as settled by the Constitution Bench in the case of Secretary, State of Karnataka v. Uma Devi & Ors. (supra) as to which of such affected employees are fit for regularization in terms of the judgment, particularly in terms of paragraph 44 of the judgment". In other words the Bench confirmed the finding of illegal appointment. Remand was for limited purpose to ascertain whether any of the said employees could be given the benefit of regularization in service as observed by the Hon'ble Supreme Court in case of Uma Devi (supra). The said judgment was not carried further and attained finality.

7. In view of the aforesaid direction, the matters were reconsidered by the State Government by appointing a Committee of five persons especially for that purpose. While considering the cases, the said Committee examined each case to answer (i) whether the appointment was made on a sanctioned and vacant post; (ii) whether the appointment was made by the competent authority; (iii) whether on the date of appointment, the concerned employee was eligible for such appointment; (iv) whether such employee had served continuously for ten years; and (v) whether there was any order made by any court in respect of such employees.

8. Having examined each such appointment, the committee found that 358 appointments were made on the basis of forged documents; 228 appointments were illegal and 91 appointments were irregular. With respect to the present Appellant, the Committee opined that her appointment was illegal as her appointment was not made on a sanctioned post (Item No. 163 of the Annexure to the Report of the said Committee). The said report was challenged by several employees of the Health Department whose service was held by the Committee

to be illegal.

9. The Appellant feeling aggrieved by the said report, filed CWJC No. 2373 of 2008. The said petition and the other petitions filed to challenge the finding of the said Committee were decided by the learned Single Judge of this Court by a common judgment dated 6th October, 2009 *Om Prakash Vs. The State of Bihar and Others*, . The learned Single Judge was pleased to allow the writ petitions; to quash the enquiry report and to quash the order of termination made against each Petitioner. The learned Single Judge was pleased to hold that the report of the Committee constituted by the State Government was not sustainable. The order of termination of service could not have been made on the finding recorded by the said Committee. The dispute raised by the writ Petitioners was in respect of the genuineness of their appointment. They did not admit that their service was irregular nor they were seeking regularization in service. The parameters provided in the case of *Uma Devi (supra)* did not have application. The said judgment was challenged by the State Government before the Division Bench in LPA No. 1624 of 2009 and the analogous appeals.

(Order Dt. 1.7.2011)

10. The Bench (Coram: Dipak Misra, CJ & Mihir Kumar Jha, J.) by the judgment and order dated 11th February, 2010 [2010 (2) PLJR 397] allowed the appeals preferred by the State Government. The Bench set aside the directions issued by the learned Single Judge; appointed a Committee comprising Mr. Justice Uday Sinha (Retd.) to adjudicate upon the legality of the appointment and continuance of each writ Petitioner. The Bench also issued detailed directions for functioning of the said Committee.

11. The aforesaid Committee has examined each case individually on its own merits. In respect of the Appellant the said Committee has made report on 23rd June, 2010. The said Committee has recorded a finding that the appointment of the Appellant was illegal as the same was made without following the due recruitment process and that the selection was not made by properly constituted Selection Committee. The said Committee found that the appointment of the Appellant had been made in total disregard of the rules and that it was difficult to sustain her appointment. As to the applicability of the above referred judgment in the matter of *Uma Devi (supra)*, the said Committee held that the Appellant did not gain any advantage from the said judgment. The aforesaid report of the Committee was the subject matter of challenge by the Appellant in above CWJC No. 13550/2010. In view of the aforesaid finding, the learned Single Judge has dismissed the writ petition. Therefore, the present appeal.

12. Learned Advocate Mr. Banwari Sharma has appeared for the Appellant. He has strongly relied upon the judgment in the matter of *Uma Devi (supra)*, particularly paragraph 44 thereof. He has submitted that the judgment of the Division Bench [2010 (2) PUR 397] is the subject matter of challenge before the Hon"ble Supreme Court. The Hon"ble Supreme Court is seized of the matter. It

appears that one of the aggrieved employees has preferred appeal before the Hon''ble Supreme Court. In a petition for Special Leave to Appeal (Civil) No. 17688 of 2010, the Hon''ble Supreme Court has made order "Issue notice to show cause why the matter should not be remanded for consideration of the LPA on merits".

13. Let it be noted that the present Appellant did not challenge the order in appeal and she did submit to the authority of the Committee appointed by the Bench. In our opinion, it is not open to the Appellant to challenge the constitution of the Committee by the Bench.

14. Reliance is placed on a common judgment and order dated 29th March, 2011 passed by this Court (Coram: Justice T. Meena Kumari & Justice Dr. Ravi Ranjan) in LPA No. 230/2011 and others preferred by the State of Bihar against the judgment of the learned Single Judge Om Prakash Vs. The State of Bihar and Others, By the said judgment the Bench of this Court has dismissed the appeals preferred by the State of Bihar. It has been held that the concerned employees were entitled to the benefit of regularization as laid down in the case of Uma Devi (supra) and in the case of State of Karnataka and Others Vs. M.L. Kesari and Others,

15. Reliance is also placed upon unreported judgment dated 6th April, 2010 of the Division Bench (Coram: Dipak Misra, CJ & Mihir Kumar Jha, J.) passed in LPA No. 1492 of 2009 and other appeals. In the said matter, the question was of termination of the service of teachers in the project schools who had continued for a period of over 15 years. The Bench directed to re-examine the claim for recognition/absorption made by the writ Petitioners keeping in view the detailed directions issued therein. It was further directed "Such of the Respondent writ Petitioner, whose appointment was against unsanctioned post and/or who did not possess the requisite qualification and/ or whose appointment was neither made by the concerned Regional Deputy Director of Education nor by the District Education Officer, would not be entitled for reinstatement in service much less for payment of any back wages as directed by the learned Single Judge."

16. Learned Standing Counsel Mr. Kundan Bahadur Singh has appeared for the Respondent State of Bihar. He has contested the appeal.

17. We are unable to agree with the learned Advocate Mr. Sharma. Let it be noted that it is apparent that there was a large scale illegal/irregular appointments made in the Health Department of the State of Bihar. The State Government constituted a five-Persons Committee especially to record finding in respect of each such appointment. The said Committee having examined each case keeping in view the observations made by the Hon''ble Supreme Court in the matter of Uma Devi (supra) classified the appointments as illegal or irregular appointments. Amongst the illegal appointments, a further classification was made-the appointments made de hors the rules and the appointments made on the basis of forged documents. In respect of the present Appellant, the said

Committee found that her appointment was not made on a sanctioned post. Independent of the said report or the said finding, the Committee constituted by this Court has also opined that the appointment of the Appellant was totally illegal. The said Committee also examined the applicability of the observations made by the Hon''ble Supreme Court in the matter of Uma Devi (supra). It cannot be gainsaid that before both the Committees the Appellant had been given opportunity to defend her appointment as being legal and proper. There is no material on record or not even an allegation that the impugned finding recorded by the Committee is erroneous. On the contrary the appointment letter itself is indicative that the said order was made for the asking. The only argument advanced is on the basis of continuous service and the observations made by the Hon''ble Supreme Court in the matter of Uma Devi (supra) followed in the case of M.L. Kesari (supra).

18. As recorded hereinabove, both the aforesaid Committees did examine the applicability of the observations made by the Hon''ble Supreme Court in the matter of Uma Devi (supra) and held that the same shall not apply to the case of the Appellant.

19. We have once again examined the applicability of the said observations in the case of the Appellant. In the matter of Uma Devi (supra), the Court recommended regularization of the services of the employees appointed irregularly, who had served continuously for more than ten years. The emphasis was on "irregular appointment" and on "illegal appointment". The Court observed, "There may be cases where irregular appointments (not illegal appointments) and of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals." Thus, in our view, the illegal appointments are totally excluded from sympathetic consideration. The Appellant's appointment having been found to be totally illegal, she cannot be given the benefit of the above observation.

20. No other contention is raised before us.

21. The appeal is dismissed in limine.