
(2001) 05 PAT CK 0020

In the Patna High Court

Case No : L.P.A. Nos. 240 and 247 of 2001

The Bihar State Housing Board and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 14-05-2001

Acts Referred:

Citation : (2001) 05 PAT CK 0020

Final Decision : Allowed

Judgement

1. These two appeals under Clause 10 of the Letters Patent of the Patna High Court arise out of a common judgment dated 31-1-2001, passed by a learned Single Judge of this Court, whereby he has allowed the two writ petitions before him and has directed the authorities to regularise the services of the petitioners by completing the formalities, if any, within two weeks of the receipt/production of a copy of the judgment.

2. L.P.A. No. 240 of 2001 is in respect of C.W.J.C. No. 11952 of 1999, wherein six petitioners joined together and prayed for quashing of item No. 20 of the resolution of the Bihar State Housing Board (hereinafter referred to as "the Board") passed in its 187th meeting held on 27-9-1999 (Annexure-5 to C.W.J.C. No. 10596 of 1999), which is to the effect that the work from the petitioners may be taken on contract basis w.e.f. 1-11-1999 as per the need. It was further prayed for a direction to the respondents-appellants to regularise the services of the petitioners-respondents again the vacant sanctioned posts on which they have been working for the last 10 years or so without break. The writ petitioners (respondent Nos. 3 to 8 herein) were appointed by the Managing Director of the Board u/s 16(iii)(a) of the Bihar State Housing Board Act, 1982 (hereinafter referred to as "the Act") for a period of three months on 4-7-1989, 4-7-1989, 28-11-1990 and 5-10-1989 respectively. They have been working continuously ever since then without break. The writ petitioners further asserted that they have been working against permanent, vacant sanctioned posts and their jobs are of perennial nature. They have been working on Class III

posts like Legal Assistants, typists, etc.

3. L.P.A. No. 240 of 2001 arises from C.W.J.C. No. 10596 of 1999, wherein four petitioners joined together with same or similar pleas. The petitioners were initially appointed in the same manner for a period of three months between 1989 to 1991 and have been continuously working ever since then without break. They were similarly appointed in terms of Section 16(iii)(a) of the Act.

4. Has common cause in both the writ petitions is that the Board at its 171st meeting held on 27-7-1996 noticed that 18 daily rated employees are engaged in imphorof causes of the Board and their sudden removal will result in vacuum which will lead to difficulty in disposal of day-to-day work. It was, therefore, resolved on 27-7-1996 (Annexure-4 to C.W.J.C. No. 10596 of 1999) that steps may be taken for their regularisation in accordance with the procedure prescribed by the State Government so that they are no longer on the rolls of the daily wage workers after September 1996. The writ petitioners complained before the learned Single Judge that instead of implementing this resolution, the Board completely changed its stand and resolved at its 187th meeting held on 27-9-1999 (Annexure-5 to C.W.J.C. No. 10596 of 1999), vide item No. 20, that the 17 daily-rated workers be paid their wages up to October 1999 on the basis of the work done by them and, if necessary, may be engaged on contract basis w.e.f. November 1999. This resolution has been assailed in both the writ petitions with the prayer to quash the same and to regularise their services against the vacant sanctioned posts.

5..Both the writ petitions have been allowed by the aforesaid judgment, and item No. 20 of the resolution relating to the daily-rated workers passed at the 187th meeting dated 27-9-1999 (Annexure-5 to C.W.J.C. No. 10596 of 1999) has been set aside, and the authorities have been directed to take steps for regularisation. The learned Single Judge has observed that the Board has raised a vague plea of financial incapability about which nothing in support thereof has been brought on record. The plea of acute financial crisis is malafide to defeat the claim of the writ petitioners for regularisation after they have rendered ten years or more of service and they have now become over-age employment elsewhere. He has also rejected the Board's contention that continuance of the writ petitioners beyond the very initial period of three months is in the teeth of the provisions of Section 16(iii)(a) of the Act. If the daily-rated workers have worked for a fairly long spell and the work subsists, then the authorities are bound to consider their cases for regularisation. Hence, the appeals at the instance of the Board.

6. Learned Counsel for the appellant-Board has submitted in support of the appeal that a daily-rated employee has no legal right to be regularised, nor a writ of mandamus is possible because, in his submission, continuance of daily-rated employee as such depends on a host of factors, and their regularisation in its turn also depends on a number of factors. He has relied on the judgments of the Supreme Court reported in *Jatinder Kumar and Others Vs. State of Punjab and Others*, , and *State of Punjab and others Vs. Surinder Kumar and others*, . He

next submitted that the Board is in acute financial crisis, and the Board is finding it extremely difficult to pay wages to the existing employees, let alone the question of taking the additional burden of regularisation of the services of daily-rated employees. In fact, many of the daily-rated employees can be retrenched. He next contended that continuance of the writ petitioners beyond the initial period of three months is in the teeth of the provisions of Section 16(iii)(a) of the Act.

7. Learned Counsel for the respondents (the writ petitioners) has contended that the issue relating to financial stringency has been adequately dealt with by the learned Single Judge and has been rejected. He next contended that permanent posts have been sanctioned before the writ petitioners started working. They have been allowed to continue for so long and the work manifestly persists. He next submitted that it is incorrect to state that their continuance beyond the initial period of three months is in the teeth of the provisions of Section 16(iii)(a) of the Act which is clearly negated by the Board's aforesaid resolution dated 27-9-1999. He lastly submitted that the parameters for regularisation of such employees has been clearly spelt out by the Supreme Court in its judgments reported in *Raj Narain Prasad and Others Vs. State of U.P. and Others*, *Hindustan Machine Tools and Others Vs. M. Rangareddy and Others*, and *Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others*, .

8. Having considered the rival submissions, we with respect disagree with the order of the learned Single Judge. In view of the facts and circumstances attendant on this writ petition and for the reasons indicated hereinbelow, it is not possible for this Court to issue a mandamus to the State Government to regularise the services of the writ petitioners. The Supreme Court in its judgment reported in *State of Haryana and others Vs. Piara Singh and others etc. etc.*, , has observed that where Government orders for regularisation from time to time are issued on conditions which are not unreasonable, arbitrary or discretionary, Court should be cautious in issuing directions to the Government substituting its own conditions. Creation and abolition of posts and the discretion to fill up a regular post is the prerogative of the Government. The Court must while giving direction for regularisation, act with due care and caution. It must first ascertain the relevant facts, and must be cognisant of the several situations and eventuality that may arise on account of such directions. A practical and pragmatic view has to be taken, inasmuch as every such direction not only tells upon the public exchequer, but also has the effect of increasing the cadre strength of a particular service, class or category. The normal rule is regular recruitment through the prescribed agency, but exigency of administration may some time call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such ad hoc or temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidates. The appointment of the regularly-

selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee. Persons continuing in service over a number of years have a right to claim regularisation and the authorities are under obligation to consider their cases for regularisation in a fair manner, provided he is eligible and qualified according to the rules, service record is satisfactory, and his appointment does not run counter to the reservation policy of the State. The proper course would be that the authorities prepare a scheme, if one is not already in vogue, for regularisation of such employees consistent with its reservation policy. Further, more the Supreme Court as well as this Court has on a number of occasions held that in case such a scheme is prepared, then the daily wage or ad hoc employees shall compete with the outsiders and age bar shall not come in the way of the former. It has also been held by the Supreme Court as well as this Court that employment opportunities in this country is a national wealth, and every citizen should have unrestricted access to the same. Any appointment without advertisement and wide publicity and inconsistent with the rules is violative of the constitutional mandate.

9. The Supreme Court has also held that there should be a review of the cadre strength periodically. Such an exercise of review of the cadre strength becomes necessary because while on the one side the financial difficulties of the State have to be kept in view, on the other side welfare of the workmen who have served the State has to be balanced. Concern is also to be shown for those who have worked for a number of years and have become ineligible for any other employment anywhere. The Supreme Court in the case of Hindustan Machine Tools (supra) has held as follows in paragraph 8 of the judgment:

Tested on the touchstones of the principles laid down in the decisions noted above and keeping in mind the mandate of the Constitution under Articles 38(1), 39(e) and 43, we are of the considered view that the directions issued by the High Court to the appellants to frame a scheme for regularisation of services of the writ petitioners does not warrant interference. However, considering the submissions made by learned Counsel for the appellants that the Company is under financial constraints and has decided to reduce its work force, we would like to clarify that while framing the scheme, it would be open to the appellant-Company and the officers concerned to assess the requirement of regular work force in its different units, particularly the units in which the writ petitioners have been engaged over long periods and also the necessity for alleviation of the suffering to which the writ petitioners have been subjected to during all these years and fix the strength of work force so that the workers concerned are able to get the benefit of regular service within a reasonable time. It goes without saying that the absorption of the casual workers in regular service will be subject to the fulfilment of the conditions of eligibility qualifications with relaxation of the age prescribed under the rules.

It is thus manifest that the Supreme Court has placed sufficient emphasis on the financial condition of the employer while ordering for regularisation or preparing

a scheme at a particular time. The Court shall not bring about a situation that regularisation of its daily-rated, work charge, or casual employees will lead to its liquidation. Deployment of the work force, and engagement of employees are matters with which the Courts should be reluctant to interfere. In view of financial constraints, the Court should not order for regularisation of such daily-rated employees.

10. It is in the aforesaid back-ground that we proceed to deal with the facts of the present case. Learned Counsel for the appellants is right in his submission that no employee has a right to be regularised. The terms and conditions on which persons would be employed is primarily an administrative and managerial function and the writ Court should normally decline to issue a mandamus to the employer for regularisation of its daily-rated, casual or work-charged employees. After all the Courts shall not arrange the finances of the employer, nor can it save the employee when threatened with liquidation. The appellants have stated in paragraph 11 of the memo of appeal that on account of its crippled financial position, the Board has declined to fill up a number of vacant posts. The Board is running in losses ever since the year 1972, and its expenditure on establishment is more than the amount received by it as centage charge. The Board's income during the financial year 1999-2000 was Rs. 46.44 lakh, whereas the expenses during the same period has been to the tune of Rs. 762.80 lakh. In that view of the matter, we find no fault with the impugned order passed by the Board at its 187th meeting held on 27-9-1999, offering employment to the writ petitioners on contractual basis w.e.f. November 1999. In fact, the financial position presented before us makes out a case of retrenchment of the Board's employees, but we are glad to note that the Board has instead chosen to engage the writ petitioners on contractual basis. In such circumstances, this Court finds it nearly impossible to issue a writ of mandamus to the authorities to regularise the services of the writ petitioners. We, therefore, uphold the impugned order offering employment to the writ petitioners on contractual basis. Circumstances permitting, and after financial position of the Board improves, it may formulate a scheme for regularisation of the services of its employees of the category of the writ petitioners in accordance with law. Such a decision shall be preceded by determination of the cadre strength.

11. in the result, the appeals are allowed in the aforesaid manner, the judgment dated 31-1-2001, passed by the learned Single Judge in C.W.J.C. No. 10596 of 1999 and in C.W.J.C. No. 11952 of 1999, is hereby set aside. Item No. 20 of the Board's decision (Annexure-5 to C.W.J.C. No. 10596 of 1999), passed at its 187th meeting held on 27-9-1999, offering employment to the writ petitioners on contractual basis is hereby upheld.