
(2010) 02 PAT CK 0015
In the Patna High Court

The State of Bihar and Others

APPELLANT

Vs

Pramila Kumari and Others

RESPONDENT

Date of Decision : 08-02-2010

Acts Referred:

Citation : (2010) 02 PAT CK 0015

Final Decision : Dismissed

Judgement

Mihir Kumar Jha, J.

I.A. No. 4965/2009

1. Having heard Counsel for the parties as also upon taking into consideration the facts mentioned in this application the delay of 315 days in filing of this appeal is hereby condoned.

2. I.A. No. 4965 of 2009 is accordingly allowed.

L.P.A. No. 1017/2009

3. As we have condoned the delay, we are also inclined to finally dispose of the appeal on merit and accordingly we have heard Counsel for the parties at length at the stage of admission itself.

4. Counsel for the appellants has submitted that the learned Single Judge while allowing the writ petition has committed an error in ignoring the most important aspect that the respondents - writ petitioners had themselves accepted appointment as Nagar Sikshak under 2006 Rules and therefore, they could not have darning the benefits of post of teacher which was existing prior to the aforementioned rules. In this context pointed reference was made to a communication of the District Superintendent of Education, Nalanda contained in his letter No. 4582 dated 23.12.2006 and the reply submitted by the respondents-writ petitioners on 26.12.2006, vide Annexures "A" and "B" to the counter affidavit filed in the writ petition.

5. It has to be noted that the writ application in question was filed by the five respondent-writ petitioners for the following reliefs:

(i) By issue of an appropriate writ the respondents be commanded/directed to grant and allow the scale of Rs. 3050-75-4590/- to the untrained and Rs. 4500-100-5500/- to the trained petitioners which has been allowed to the candidates of other districts who had been declared successful with the petitioners and have been appointed in other district.

(ii) By issue of an appropriate writ the petitioners be treated to be in service since 12.10.2004 on which date candidates belonging to Sheikhpura District have been appointed though the result have been published together with the petitioners.

(iii) By issue of an appropriate writ the clause as mentioned in the appointment letter of the petitioners under Rule 2006 be declared illegal and void and the petitioners be deemed to have been appointed under the letter issued under Memo No. 1380 dated 26.6.2004.

6. From the pleadings in the writ application it is also apparent that all of them were initially appointed as Supervisors in Non-formal Education in between 1985 to 1988 and after continuing in service for a period of 7 to 10 years they were removed from service. Subsequently in terms of an order dated 20.7.2000 in M.J.C. No. 3442/1997 of this Court directing consideration of their case for appointment on the vacant posts of teachers, they had appeared in a limited competitive examination conducted by Bihar Public Service Commission (B.P.S.C.) which was exclusively confined to retrenched Supervisors of Non-Formal Education. Such examination for the post of Primary School teachers in terms of the Bihar Prathmic Niyukti Niyamawali and Sansodhan NiyamawaH, 1993 as amended by the Bihar Rajya Rajkiyakrit Prathmic Vidyalaya (Sansodhan) Niyukti Niyamawali, 2001 was conducted on 14.12.2003 and the B.P.S.C. by its letter dated 5.3.2004 on the basis of result of the examination had recommended names of 49 successful candidates from amongst 214 Supervisors, in which the respondent - writ petitioners were at Serial Nos. 9, 23, 37, 40 and 49 of the merit list.

7. Subsequently the State Government in Education Department on the basis of aforesaid recommendation of B.P.S.C. had directed the Collectors of various districts all over the State being the Chairman of District Education Establishment Committee and the appointing authority under the Rules to make appointment against existing vacancies on the post of Primary School teachers and in that process the Collector of Nalanda District was also directed to appoint five respondents - writ petitioners vide its letter dated 26.6.2004 but their appointment could not be made, whereas from the same merit list of 49 persons of B.P.S.C. appointment of one Surya Narain Singh, who was at serial No. 29 in the said merit list was made on the post of teacher in the pay scale of Rs. 3050-4590 vide an order dated 16.12.2005 by the Collector of Patna district.

Similarly in the district of Sheikhpura the District Superintendent of Education under the orders of Collector, Sheikhpura district had made appointment of one Jitendra Prasad on the post of Primary School teacher in the prescribed scale of pay of Rs. 3050-4590 by an order dated 12.10.2004 who too was at serial No. 46 in the merit list of 49 candidates of the B.P.S.C. It, however, appears that in case of five petitioners they were appointed by the orders dated 25th January, 2007 as Nagar Sikshak under Bihar Nagar Nikaya Prarambhik Sikshak (Niyojan Awan Sewa Sarta) Niyamawali, 2006 on a fixed salary in terms of a decision taken by the District Education Establishment Committee headed by the Collector of Nalanda district. Thus the respondent-writ petitioners in the connected writ petition had only, prayed before this Court that they too should be given same treatment as their counter parts of the same merit list of B.P.S.C. in the matter of grant of pay scale instead of fixed pay inasmuch as all of them were applicants for the post of teachers in existence prior to 2006 Rules for which the process of appointment in terms of direction of this Court had been undergone and completed by B.P.S.C. on 5.3.2004.

8. In the counter affidavit that was filed, the appellants however had taken a plea that since the respondent - writ petitioners had given consent to accept the appointment as Nagar Sikshak, they could not claim benefit of the post of teachers in Primary School in a pay scale. The appellants had also explained that the appointment of the petitioners in terms of the recommendation of the B.P.S.C. dated 5.3.2004 could not be made on account of certain difficulties including announcement and holding of general elections. In the rejoinder to the counter affidavit the respondent - writ petitioners had however taken a stand that having waited for their appointment/absorption from 1995, when they were terminated after continuing in service from 7 to 10 years as Supervisor in Non-formal Education, they were offered the post of teachers in terms of recommendation of B.P.S.C. after a long period of time, they had no option but to accept the posts of teachers on fixed pay and thus they had joined the posts by keeping their rights reserved as with regard to claiming salary of the post of teachers of Primary School for which their entire process of selection was initiated undertaken and completed under 1993 Rules.

9. The learned Single Judge having taken the aforementioned aspects into consideration had allowed the writ petition by recording that there could be no justification treating the respondent - writ petitioners as appointees under 2006 Rules and they would be deemed to be the appointees under the 1993 Rules as existing on the date that recommendation came to be made on 6.6.2004 and their service conditions including payment of salary shall be regulated accordingly.

10. Before us also, the learned Counsel for the State pressing the appeal could not demonstrate that the Respondent writ petitioners were selected for the post of teachers under 2006 Rules and not under 1993 Rules. Thus the respondent - writ petitioners formed a separate class of retrenched Supervisor of Non-formal

Scheme who had continued in service for a period of 8 to 10 years and for them a special examination by amending the existing 1993 Rules in the year 2001 was conducted through the B.P.S.C. on 14.12.2003 in which all of them had become successful and recommended by B.P.S.C. on, 6.6.2004 in the merit list of 49 persons and as such they could not have been subjected to procedure or terms and conditions of the service of new Rules, namely, Bihar Nagar Nikaya Prarambhik Sikshak (Niyojan Awan Sewa Sarta) Niyamawali, 2006. The appellants before us have not been able to controvert that in other districts including that of Patna or Sheikhpura appointment of other similarly situated recommended candidates of the same merit list dated 6.6.2004 of B.P.S.C. alike the Respondent writ petitioners were made in the prescribed pay scale of the post of teachers i.e. Rs. 3050-4590 as specifically asserted in the writ petitioner and not denied by the respondents in their counter affidavit. Thus this Court must hold that the Appellants could not have taken advantage of their own lapse by not acting upon the recommendation of B.P.S.C. dated 6.6.2004 for a period over two years and giving appointment to them on the post of such teachers in fixed pay for which they were never recommended by B.P.S.C. Infact once the appellants admit that appointment of teachers on the basis of same recommendation of B.P.S.C. dated 6.6.2004 was acted upon in other districts including Patna and Sheikhpura in the prescribed pay scale of Rs. 3050-4590 there could not been varying terms of appointment for the same advertisement and the same selection process as well as same recommendation of the Bihar Public Service Commission in the case of Respondent writ petitioners.

11. By-now it is well settled that the rules of appointment would remain unaffected and any new rules/amended rules would not affect a candidate already selected and recommended for the post for which he had appeared in the selection process. Reference in this connection may usefully be made to the case of P. Mahendran and others Vs. State of Karnataka and others,

12. The only submission of the teamed Counsel for the appellants that since the respondent - writ petitioners had accepted the offer of appointment under new Rules, they will be deemed to have waived their rights either under the advertisement or recommendation made in their favour by B.P.S.C. is to be only noted for its being rejected. Such authoritarian approach of the Appellant State and its officials would only remind this Court of the celebrated judgment of the Apex Court in the case of Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr. reported in AIR 1986 S.C. 1571, wherein the bargaining power of the employer with regard to an unreasonable contract was deprecated in the following words:

Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth - century theories? Should the strong be permitted to push the weak to the wall?

Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equally before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.

13. More over when the fact that in other districts of the State, the persons of the same merit list of B.P.S.C. dated 6.6.2004 were appointed in the pay scale of Rs. 3050-4590 in terms of 1993 Rules as amended in 2001 including Surya Narayan Singh and Jitendra Prasad placed at serial No. 29 and 46 below the Respondent petitioners ranking at 9, 23, 27, 40 and 49 and have been continued in service, the appellant State being a model employer cannot be allowed to practice selective discrimination among the same set of persons.

14. In that view of the matter, we find no error in the order of the learned Single Judge and thus this appeal must be and is hereby dismissed. There would be,

however, no order as to costs.