
(2010) 07 PAT CK 0096

In the Patna High Court

Case No : Letters Patent Appeal No. 838 of 2006

The State of Bihar

APPELLANT

Vs

Shri Lakshmi Naryan Prasad

RESPONDENT

Date of Decision : 20-07-2010

Acts Referred:

Citation : (2010) 07 PAT CK 0096

Final Decision : Allowed

Judgement

Shiva Kirti Singh and Birendra Prasad Verma, JJ.—Heard learned Counsel for the appellants and learned Counsel for the respondent.

2. State of Bihar and its concerned officials have preferred this appeal under Clause 10 of the Letters Patent of this Court to assail the order dated 23.1.2006 whereby writ petition preferred by the sole respondent bearing C.W.J.C. No. 6390 of 2004 was allowed and the Secretary Road Construction Department was directed to regularize the services of the writ petitioner and give him all consequential benefits accordingly.

3. From the order under appeal it transpires that the writ petitioner was appointed as Assistant Engineer on ad-hoc basis in June 1987 while awaiting the out come of his having applied for such post in the Bihar Engineering Service Class-II under Road Construction and Building Construction Department under advertisement No. 93/85. Admittedly he was selected and on 14.11.1987 he was offered appointment on the post of Assistant Engineer but not in the Road Construction Department or Building Construction Department but in Water Resources Department. Writ petitioner protested by filing representation and opted to continue to work as ad-hoc Assistant Engineer in the Road Construction Department. His name was also included in a provisional gradation list of Assistant Engineer of Road Construction/Building Construction Department in the year 1989. Subsequently his name was not included in the final gradation list. There is no dispute that the writ petitioner is still working in that capacity and is being paid wages accordingly.

4. It is not clear as to why the respondent petitioner waited till the year 2004 to prefer writ petition in question which has been allowed by the order under appeal but from the order of the learned Single Judge it is apparent that heavy reliance was placed upon judgment of this Court in the case of *Daya Shankar Mishra Vs. The State of Bihar and Others*, The learned Single Judge after noticing that judgment of the year 1987 found that as per the said judgment the respondent cannot discriminate and the petitioner of that case was found entitled for appointment to the post of Assistant Engineer in the Road/Building Construction Department for which he was applicant and when person below him had been offered appointment in that department. But after noticing the ratio of said judgment the learned Single Judge chose to allow the writ petition on a simple ground that admittedly the authorities had permitted the respondent- writ petitioner to continue as ad-hoc Assistant Engineer in Road / Building Construction Department for almost 19 years and, therefore, they were obliged to adjust him in the said department so as not to deny him regularity of service and other benefits on account of such long service. The learned Single Judge held that the advertisement No. 93/85 was for appointment of Assistant Engineer in Bihar Engineering Service Class-II under Road Construction/Building Construction Department and not for all departments as was wrongly contended on behalf of the State. The writ court further relied upon Division Bench Judgment of this Court in the case of *The Bihar State Co-operative Land Development Bank Ltd. and Another Vs. Anil Kumar Singh and Others* in support of the proposition that if a competent authority appoints some body on ad-hoc basis or daily wages basis against clear vacancy and continues him for a long period and if service of such person is required, then such person can be regularized because his appointment itself cannot be said to be bad.

5. Learned Counsel for the appellant has assailed the order under appeal mainly on the ground that by now law is well settled that long continuation in service by itself cannot be a ground for regularization unless it is found that the entry into the service was in a proper manner after under going proper selection and does not suffer from any constitutional invalidity on the ground of Articles 14 and 16 of the Constitution of India. For this proposition he placed reliance upon judgment of a Constitution Bench of the Supreme Court in the case of *Secretary, State of Karnataka and Others Vs. Umadevi and Others*,

6. In reply learned Counsel for the respondent- petitioner has submitted that the writ petitioner had not claimed mere regularization as ad-hoc Assistant Engineer rather he had based his case on the judgment of this Court in the case of *Daya Shankar Mishra (Supra)* which dealt with the issue as to whether the authorities of the State can discriminate one applicant vis-a vis another in the matter of appointment to the Road/Building Construction Department by denying such appointment in that department to a senior while offering appointment to a junior in the select list. According to the learned Counsel for the respondent-writ petitioner the ratio of the aforesaid judgment is applicable to the case of the respondent because in the writ petition there was clear averment in paragraph

17 that one Chote Lal Pal belonging to B.C. category was at serial No. 1916 of merit list and was given appointment as Assistant Engineer in Road Construction Department whereas the writ petitioner who was also a candidate of B.C. category and was at serial No. 1804 was denied his preference for the said department.

7. Learned Counsel for the State could not point out any material to deny the aforesaid averment and sought to explain verbally that said appointment of a person lower in the merit list was probably on account of judgment and order of this Court. He further submitted that the case of Daya Shankar Mishra (Supra) was a case where the petitioner Daya Shankar Mishra had moved this Court in the year 1987 itself against discrimination, after joining Public Health Engineering Department where he was appointed and hence the case of the respondent petitioner deserves to be treated differently, particularly on account of delay in moving this Court through a writ petition filed in the year 2004.

8. On the other hand learned Counsel for the respondent writ petitioner replied that the delay was not fatal because it did not create any third party interest and the said authorities never disturbed the writ petitioner by stopping his functioning as Assistant Engineer in the Road Construction Department. But when he found that similar case of Daya Shankar Mishra had been allowed by the High Court and still the authorities had not granted relief to him then he ultimately filed the writ petition in the year 2004 to claim the parity. In order to explain the delay, learned Counsel for the respondent-petitioner further relied upon a Division Bench judgment of this Court in the case of Syed Jamil Ashgar v. The State of Bihar and Ors. In that case the writ petition bearing C.W.J.C. No. 6409 of 2000 was allowed by a Division Bench of this Court on 10th September 2008 in practically identical factual situation. On the point of delay, in that case the Division bench observed that the delay had occurred on account of the conduct of the respondents themselves. The relevant paragraph of that judgment may conveniently be quoted hereinafter to show that the facts were identical and this Court was not impressed by the ground of delay and allowed a similar claim after considering the matter on merits:

True it is that the petitioner has chosen to file the writ application belatedly, but that had occurred on account of the conduct of the respondents themselves. It is not in dispute that prior to the recommendation made by the Commission; petitioner was working as Assistant Engineer on ad-hoc basis. It is further not in dispute that person below in the merit list has been appointed as Assistant Engineer in the Road Construction Department. Petitioner filed representation for his continuance in the Road Construction Department and although no order was passed on the said application, but he was allowed to continue and draw salary in the Road Construction Department. In the provisional gradation list published in the year 1989 his name has been incorporated. In case we dismiss the writ application on the ground of delay as urged by the respondents, petitioner shall be rendered jobless, notwithstanding the fact that his name finds place in the

recommendation made by the Commission and person junior to him has been appointed as Assistant Engineer in regular basis.

9. On considering the rival submissions and the relevant facts we find that the respondent -petitioner has made out a case that person junior to him in the merit list was offered appointment as Assistant Engineer in the Road Construction Department and his representation had merit but has been kept pending in-spite of principle of law having been clarified by this Court in the case of Daya Shankar Mishra (Supra). We find that the writ petition of the respondent-petitioner deserved to be allowed even on merits in the light of views taken by Division bench of this Court subsequently in the case of Syed Jamil Ashgar (Supra). Hence we find no merit in this appeal and it is accordingly dismissed. There shall be no order as to costs. In the light of the views taken by us, the respondent-writ petitioner will be entitled to appropriate reliefs as allowed in the similar case of Syed Jamil Ashgar (Supra).