

(1989) 04 PAT CK 0048

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 6689 of 1988

Udai Kumar Sharma

APPELLANT

Vs

Registrar, Co-operative Societies, Bihar and others

RESPONDENT

Date of Decision : 06-04-1989

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226, 227

Citation : (1989) PLJR 952

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : L.K. Bajla, for the Appellant; K.P. Singh and Ishwari Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—In this writ petition, the petitioner has sought for issuance of an appropriate writ directing the respondents to allow the petitioner to continue to work as before as a clerk in the office of the Assistant Registrar, Co-operative Societies, Danapur Circle, Danapur. The facts of the case lie in a very narrow compass. The petitioner was allegedly appointed as an Assistant on the 19th December, 1977, on a temporary basis. He was subsequently retrenched. Thereafter, allegedly, vacancies for the posts of Assistant occurred and the petitioner allegedly held all the necessary qualifications and he applied therefor. The said application was forwarded by the respondent no. 4 as contained in Annexure-1 to the writ application. The petitioner was allegedly thereafter appointed to work as an Assistant by the Assistant Registrar, Co-operative Societies on the 23rd November, 1978, who also sought for approval from the higher authorities in respect of appointment of the petitioner. A copy of the order dated the 23rd November, 1987, which allegedly evidences appointment of the petitioner is contained in Annexure-2 to the writ application. The petition joined the said post on the 24th November, 1978; the joining report being contained in Annexure-3 to the writ application.

2. According to the petitioner, the Joint Registrar, however, did not take any action with regard to the recommendation of the Assistant Registrar, Danapur Circle, as contained in his letter dated the 23rd November, 1978 (Annexure-1). He wrote another letter to the Joint Registrar on the 3rd January, 1979. A copy of the said letter is marked as Annexure-5 to the writ petition. A reminder was also sent on the 20th March, 1979, by a letter as contained in Annexure-6 to the writ application. According to the petitioner, on and from 24th November, 1978, he had not been paid any salary whatsoever. In this situation, the petitioner's wife submitted a representation to the Chief Minister on the 20th August, 1980, which is contained in Annexure-7 to the writ application. Thereafter, the Joint Registrar, Co-operative Societies, allegedly asked for a report about the regularisation of the appointment of the petitioner. The petitioner has alleged that despite the direction by the Chief Minister, the officers of the Department were not taking any action and in such a situation the Minister Incharge of the Department upon the representation made to the Chief Minister by the petitioner's wife, as mentioned hereinbefore, directed that the petitioner should be allowed to continue to work by an order dated the 3rd July 1981 and as contained in Annexure-9 to the writ application. It was further directed therein that the petitioner should be paid his salary from the 24th November, 1978, till date. According to the petitioner, even the said order was not complied with and thereafter a Committee consisting of the Registrar, Co-operative Societies, the Joint Registrar and the Special Secretary of the Co-operative Department, was constituted which Committee examined the entire matter and submitted its report to the then Minister Incharge. In the said report it was inter alia, pointed out that the petitioner marked his attendance and, as such, the subsequent deletion of his attendance from the attendance register was improper. In the said report it was also pointed out that the Joint Registrar of the Patna Division was guilty of not disposing of the said matter and keeping the same unnecessarily pending. Thereafter, the Minister Incharge directed that the petitioner's appointment with retrospective effect be considered. A copy of the report along with the order of the Minister is contained in Annexure-10 to the writ application.

3. As the said matter still remained pending, the Minister Incharge again directed by an order dated the 21st April, 1982, that his earlier order be complied with. In the said order, the Minister Incharge also expressed displeasure in regard to the disobedience of the order. The petitioner thereafter moved this Court by filing an application under Articles 226 and 227 of the Constitution which was registered as C.W.J.C. No. 3971 of 1985 but a Bench of this Court permitted the petitioner to withdraw this application to move the Minister concerned in that regard.

4. The petitioner thereafter made a representation to the Minister Incharge in September, 1983, which was not disposed of. Thereafter, the petitioner filed a petition before the Bihar State Administrative Tribunal, which was registered as Service Case No. 77 of 1986. By an order dated the 1st July, 1986, the Tribunal permitted the petitioner to withdraw the said application allegedly on the ground that the representation filed by the petitioner before the Minister Incharge having

not been disposed of he should again move the Minister concerned. According to the petitioner, a report was called for from Shri K.C. Mishra, Joint Registrar, and the petitioner met him personally on several occasions but despite the same he did not send any report, although several reminders had been sent to the said authority by the concerned officers.

5. In this case, a counter-affidavit has been filed on behalf of the State wherein, inter-alia, it has been asserted as follows :--

4. That with regard to the statements made in paragraphs nos. 2 and 3 of the writ petition are denied. The petitioner was never appointed to any Government post. Since the writ petitioner was never appointed to a Government post, the question of his having been a retrenched employee does not arise at all."

5. That, with regard to the statements made in paragraph no. 4 of the writ petition, it is stated that from Annexure-I to the writ petition it is quite clear that he was not a retrenched employee nor he was appointed to any post under the Government. Since the petitioner was not appointed to Government Service the question of his joining in any capacity as a Government servant does not arise. So far Annexure-3 is concerned it is submitted that the petitioner's father was Head Clerk in the office of the Assistant Registrar, Cooperative Societies, Danapur Circle, and he manufactured certain documents to suit the claim of his son. Subsequent letter no. 26 dated 7.1.1981 itself speaks about the fake claim of the petitioner. From this letter, it would appear that the writ petitioner was never appointed as clerk in Danapur Circle nor he joined any Government post.

6. Mr. L.K. Bajla, learned counsel appearing on behalf of the petitioner submitted that the petitioner having been validly appointed he was entitled to his salary as no order of termination of his services has yet been passed. According to Mr. Bajla, the petitioner was appointed allegedly on the basis of a circular of the Government which provided for preference to the retrenched employee of the Cooperative Department. Mr. Bajla further contended that, in view of the aforementioned policy decision and further in view of the fact and as recorded in Annexures-10 and 11 to the effect that the petitioner joined the service on the 24 November, 1978 and had been working since then, there was no reason whatsoever as to why the petitioner's services should not be regularised and the respondents be directed to pay his salary.

7. Mr. Bajla, when questioned as to whether the petitioner was appointed in accordance with the procedures for appointment laid down by the State of Bihar, i.e., advertisement of the vacancies and calling for the names from the Employment Exchange and from consideration of the cases all other candidates along with the petitioner, could not point out that any such procedure was followed. Mr. Bajla when asked to produce the circular on the basis whereof the petitioner was entitled to preference even could not produce the same nor such a circular has been annexed to the writ petition.

8. Mr. Kamalapati Singh, on the other hand, drew my attention to the fact that

earlier the petitioner in line as of Annexure-1 itself was appointed in the Sahkarita Vikas Ewam Ekh Kray Vikray Sangh, Bihta, which is a Society registered under the Co-operative Societies Act and not a department of the State of Bihar. According to the learned Government Pleader, the petitioner was, thus, never appointed as a Government servant. In this connection, my attention was also drawn to the letter dated the 7th January, 1981, as contained in Annexure-A to the counter-affidavit. The said letter contains answers to certain questions put to the Assistant Registrar, Co-operative Societies by the Joint Registrar thereof. In answer to the question as to whether the petitioner was appointed on a vacant post or not, it was pointed out that the petitioner was not appointed on a vacant post but he was allowed to work in view of dearth of employees in the department. In answer to the question as to whether the petitioner was given any appointment letter, it was stated that there was only a letter dated the 23rd November, 1978, which cannot be termed as an appointment letter. In answer to the question as to under what circumstance the petitioner was appointed it was pointed out that he was not appointed by the addressee of the letter. In answer to the question as to whether in the appointment of the petitioner the requisite formalities were complied with or not, it was pointed out that the said question did not arise in view of the fact that the petitioner was not appointed by the addressee of the letter. In answer to the question as to whether the Assistant Registrar, Co-operative Societies, had any authority to appoint any body without the approval of the Joint Registrar, the answer was rendered in the negative. In answer to the question as to what work was done by the petitioner, it was stated that the petitioner had not been appointed but the order for his joining evidently was issued, although the petitioner's was not produced before him, the petitioner whose father was Head Assistant of the office took the joining report from him without obtaining his approval and allowed him to mark the attendance Register. It was further stated in answer to the question as to whether the petitioner had worked during that period, it was stated that the petitioner did not work even for a single day.

9. Evidently, thus, there appears to be a serious dispute with regard to the fact as to whether the petitioner was at all appointed or not. Such a disputed question of fact cannot be decided in an application under Articles 226 and 227 of the Constitution of India.

10. Further, the basis for petitioner's appointment appears to be that he was a retrenched employee of the Co-operative Department. As noticed hereinbefore, such a circular has not been produced by the petitioner. Assuming that there exists such a circular, it is evident that the petitioner had earlier been working in a Co-operative Society. A Co-operative Society registered under the Co-operative Societies Act is a juristic person. Such a society is not a department of the State nor is a State within the meaning of Article 12 of the Constitution. Even if the Society was a State within the meaning of Article 12 of the Constitution, it was merely an instrumentality or agency of the State.

11. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, it has been pointed out that by the expression instrumentality or agency of the State, it does not mean that there exists a relationship of Principal and Agent by and between the State and such body but it merely means that its action is State action. Thus, it is clear that even the foundational facts for appointment of the petitioner were not existing.

12. Even, according to the submission of Mr. Bajla the petitioner is entitled to preference being a retrenched employee which would mean that preference shall be given to such retrenched employee vis-a-vis other general candidate. From the facts of the case as noticed hereinbefore, it is evident that even the requisite formalities for appointment of a Government servant was not complied with. In terms of Article 16 of the Constitution every citizen of India, subject to the exception envisaged therein, is entitled to be considered for appointment. It is now well known that the State while offering appointment must give opportunity to all citizens who are qualified therefor. Any violation of such a rule would attract Article 16 of the Constitution. In certain circumstances, in terms of the policy decision of the State or by invoking the doctrine of distributive justice the members of the weaker section may be given preference but the same also must conform to the constitutional mandate contained in Articles 14 and 16 of the Constitution.

13. It is now well known that public employment is a property and thus, all the citizens must be given equal opportunity to be considered for appointment once he is eligible therefor. Any appointment which does not conform to the requirements of Articles 14 or 16 of the Constitution must thus be held to be wholly illegal.

14. Thus, assuming that the petitioner was also allowed to work by the Assistant Registrar, admittedly, the said officer having no jurisdiction whatsoever to offer any employment to the petitioner, the same is a nullity. There, cannot be any doubt that if the petitioner's so-called appointment was wholly illegal and without jurisdiction, the same being a nullity, the petitioner did not derive any legal right therefrom. Thus, the petitioner having apt derived right to be enforced in a court of law, evidently no writ of mandamus can be issued by this Court in his favour. In *Rita Mishra v. Director, Primary Education, Bihar* (1987 PLJR 1090 (F.B.)), this Court has held that in such a situation, a person will not be entitled even to his salary.

15. Judging the case, thus, from all its ramifications, I am of the view that the petitioner has no legal right to be enforced for the purpose of obtaining a writ of mandamus as against the respondents and, thus, I have no other option but to dismiss this application. In the result, this application is dismissed. However, in the circumstances of this case there will be no order as to costs.