
(2012) 06 PAT CK 0015
In the Patna High Court
Case No : CWJC No. 2491 of 2006

Vansh Narayan Sharma and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 25-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 21, 309

Citation : (2012) 4 PLJR 118

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Advocate : Kumar Alok, Raj Kumar Singh, Rakesh Kumar, for the Appellant;
Piyush Lall for the Bank, for the Respondent

Judgement

S.N. Hussain, J.—This writ petition has been filed by the petitioners challenging office order contained in memo no. 3198 dated 20.8.2004, by which the Managing Director of the Bihar State Co-operative Land Development Bank Limited (hereinafter referred to as "the Bank" for the sake of brevity) rejected the claim of the petitioners for their regularization/absorption in the services of the Bank and removed them from their services as daily wagers. This writ petition has also been filed for directing respondent-authorities of the Bank to reinstate the petitioners with all service benefits and to consider their cases for regularization/absorption in view of order/judgment dated 16.1.2004 passed in L.P.A. No. 710 of 1995 and for other ancillary reliefs. Learned counsel for the petitioners stated that the aforesaid impugned order dated 20.8.2004 was passed against the eight petitioners and 28 others mainly on two grounds, namely, (i) their initial appointments were found to be illegal, and (ii) the weak financial condition of the institution, but both the aforesaid grounds are absolutely frivolous and misconceived and the petitioners have been removed only to punish them for approaching this Court earlier for the reliefs to which they were entitled, which would be apparent from the fact that before passing the impugned order dated 20.8.2004 respondent-authorities did not even care to serve a show cause notice upon the petitioners.

2. Learned counsel for the petitioners also submitted that the petitioners were appointed as per the exigency of work in the Bank as several new Branches of the Bank were opened in different parts of the State from 1976 to 1982. Since there was no specific statutory recruitment rules for appointment of Class-IV employees, on 8.1.1981 the Board of the Bank resolved to engage persons on ad-hoc/daily wage basis to meet the exigency of work in the Bank. It was further submitted that for the said purpose a Committee of Officers of the Bank was constituted, which appointed the petitioners after taking their interview and appointment letters were issued to them either by the Regional Manager or by the Managing Director of the Bank in different Branches as per the necessities.

3. Learned counsel for the petitioners further averred that similarly several other persons were also appointed on Class-IV posts in different Branches of the Bank in identical manner during that period and subsequently respondent-Bank started regularizing the services of such employees, but when the petitioners were not considered, they moved this Court by filing C.W.J.C. No. 50 of 1993. Finally the said writ petition was heard on 27.6.1995 (Annexure-6) by a Bench of this Court and after hearing learned counsel for the parties and considering their pleadings and materials allowed the writ petition and directed the authorities to regularize the services of the petitioners with utmost expedition and in any case, positively within a period of two months from the date of receipt of a copy of that judgment/order by completing all necessary formalities. In the said petition, the said Bench of this Court had held as follows:--

Learned counsel for the Bank as well as learned employee of the State ventured to submit that the very employment of the petitioners was made in illegal and irregular manner as is also evident from the finding of the enquiry report submitted by the High Level Committee.

I may mention here that nothing has been brought on the record to show that there is any finding to that effect. However, I fail to understand how such pleas are sustainable in the matter where employer is regularly taking work from such employees for the last ten to twenty years though on daily wages and specially when some of them have become ineligible for appointment in Government service. In my opinion, the illegality or irregularity in such appointments must be detected by the authorities concerned at the initial stage itself and within a reasonable time and not that after such employees have spent almost half of their best part of life, inasmuch as if such pleas are entertained at such belated stage then that may ruin the entire family and render all of a sudden all the members of the family to starve which cannot be permitted to be done by the State or its instrumentalities as that would be violative of Articles 14, 21 read with 43 of the Constitution of India.

4. Against the aforesaid order of a Single Judge of this Court, the Bank authorities filed L.P.A. No. 710 of 1995 and other analogous cases, which were disposed of vide order dated 16.1.2004 (Annexure-9) holding that the order, by which the learned Single Judge had directed to regularize the services, was not

according to law and hence the said order was modified to the extent that the case of the writ petitioners should be considered for regularization alongwith other cases in the light of the direction issued in other cases.

5. Learned counsel for the petitioners claimed that other cases, in which directions had been issued by the High Court, were C.W.J.C. No. 1118 of 2001, C.W.J.C. No. 1120 of 2001, C.W.J.C. No. 1371 of 2001, C.W.J.C. No. 1634 of 2001, C.W.J.C. No. 2059 of 2001 and C.W.J.C. No. 3573 of 2001, which were filed by Class-IV employees of the Bank, who were appointed in the same manner as the petitioners were appointed. The said cases filed by Jagdish Prasad Yadav (in 1118) Beer Bahadur Singh (in 1120) Vyas Narayan Singh (in 1371) Uma Shankar Raj and Others (in 1634) Kapildeo Prasad (in 2059) Yogendra Singh (in 3573) Vs. The State of Bihar and Others, , allowing those writ petitions, quashing the impugned orders of termination of the petitioners' services and directing the respondents to treat the petitioners in continuous service with all consequential benefits. The said decision was arrived at by a Bench of this Court after coming to the following findings:--

19. In view of such settled law and the facts of this case it is found that petitioners entry into service on ad hoc/daily wage basis was as per provisions in the rule governing such temporary entry and by a competent authority. It is not the case of respondents that there were no vacancies. It is also not disputed that their services were continued from time to time. Their services were regularized when the Bank failed to fill up the vacancies in a regular manner. Hence, in such facts the contention of learned counsel for the respondents cannot be accepted that the regularization of petitioners services is of no consequence and should be ignored even after a lapse of long years.

20. On the basis of undisputed pleadings noticed earlier the petitioners have also succeeded in showing that some later appointed similarly situated employees of the Bank have been regularized in service on account of orders passed by this court in various writ petitions. For that reason also the petitioners deserve to be continued in service in view of Articles 14 and 16 of the Constitution of India. The respondents have not pleaded that action is being contemplated against such other employees and although the orders of this Court have not been produced but since regularization has been made on account of orders of this court hence it may not be open for the respondents to reopen the cases of those employees who were regularized in view of different orders of this Court.

6. Learned counsel for the petitioners argued that the authorities of the Bank acted in accordance with the said order and those employees were given full salaries and their age of superannuation was also extended from 58 years to 60 years and the said acts of the authorities were also affirmed by a Bench of this Court vide order dated 29.7.2009 passed in C.W.J.C. No. 7364 of 2009.

7. Learned counsel for the petitioners further claimed that in similar situation some other employees of the Bank, namely, Shailendra Kumar Singh and another

filed C.W.J.C. No. 2519 of 1990 against the Bank and its authorities and the said writ petition was disposed of by a Bench of this Court vide order dated 27.9.1995 (Annexure-11) directing the respondents to consider the cases of the petitioners for regularization when such vacant posts would be filled up and at the time of filling up the vacancies the cases of the petitioners alongwith other candidates should also be considered in accordance with law and while considering the cases of the petitioners due regard must be given to the experience gathered by the petitioners by working for so many years and till regularization their services would not be in any way interfered except on the ground of misconduct against the petitioners, which was to be proved in accordance with law. It was also claimed that in compliance of the said order, services of the petitioners of the aforesaid case were regularized by the respondents vide order dated 13.11.2000 (Annexure-12) and they are still working.

8. Learned counsel for the petitioners also submitted that the total strength of Peon in respondent-Bank in the State is 547 and that of Night Guard is 253 and hence the total strength throughout the State is 800, out of which 592 posts are already filled up and 208 posts of Class-IV workers are still vacant and the petitioners, who are only eight in number, can be very well regularized. Hence he stated that the claim of respondent-Bank, which has strength of 800 Class-IV employees, that it cannot employ these eight writ petitioners due to financial inability, is absolutely frivolous as there is no financial constraint in the Bank for these petitioners, specially when the Bank has itself regularized similarly situated employees and has issued advertisement in March-April, 2004 for making appointments of Class-IV employees, which also shows insufficiency of Class-IV employees in the Bank and its financial capability to employ them.

9. On the other hand learned counsel for respondent-Bank stated that petitioners no. 1 to 6 were appointed as Peons from 1979 to 1987, whereas, petitioners no. 7 and 8 were appointed as Night Guards in 1987 and 1986, whereafter, the petitioners alongwith others filed C.W.J.C. No. 50 of 1993 for regularization of their services and payment of salary and the said writ petition was allowed by a Bench of this Court on 27.6.1995 (Annexure-6). It was also stated that against the said order, respondent-Bank filed L.P.A. No. 710 of 1995, which was admitted on 28.8.1995 when the operation of the order in the writ case was stayed. On 16.1.2004 (Annexure-9), the said L.P.A. was finally disposed of with a direction to the Bank to consider the cases of the petitioners for their regularization.

10. Learned counsel for the respondents submitted that in view of the aforesaid direction of the High Court, the matter was considered by the authorities on 20.8.2004 (Annexure-1) and the claims of the petitioners were rejected on the ground of weak financial position and excess staff in the Bank. It was also submitted that earlier on 9.11.2000 (Annexure-7), the authorities of the Bank passed an order disengaging all the daily wagers of the Bank and against the said order, several writ petitions bearing C.W.J.C. No. 8323 of 2001, C.W.J.C. No. 8354 of 2001, C.W.J.C. No. 8369 of 2001, C.W.J.C. No. 11746 of 2001 and

C.W.J.C. No. 771 of 2003 were filed by daily wagers including respondents no. 6, 2 and 5 and the said writ petitions were dismissed by a Bench of this Court vide common order dated 9.8.2003 (Annexure "D") with the following directions:--

As stated earlier, petitioners were working on the post of Peon. The total number of sanctioned strength of Peon are 587 and those posts are already filled. In that view of the matter, direction sought for is not fit to be granted. However, in case in future respondent-Bank takes steps for filling up the post, petitioners offer their candidature, their cases shall also be considered in accordance with law and age bar to the extent the petitioners have worked shall be condoned.

11. Learned counsel for the respondents averred that the petitioners and other daily wagers were disengaged on 9.11.2000 and they are not working after their removal and hence the prayer for regularization of the services of the petitioners is absolutely misconceived as they are terminated employees and their regularization cannot be made retrospectively rather it has to be made prospectively. He also elaborately averred regarding lack of finance and weak financial position of the Bank because of lack of recovery and over staffing, due to which the liability of the Bank and its loans had increased so much so that respondent-Bank is unable to repay the loans to the National Bank for Agriculture and Rural Development (hereinafter referred to as "the NABARD" for the sake of brevity). It was also argued that the authorities of the Bank constituted two Committees, one Revival Plan Committee and other Man Power Planning Committee and both the Committees gave their reports.

12. Learned counsel for the respondents claimed that as per the guidelines of the NABARD and the direction of the Registrar, Co-operative Societies, respondent-Bank had to reduce its establishment cost as the Bank was unable even to repay its loans to NABARD as well as to the State of Bihar. Furthermore, the Economic Policy and Economic Affairs Co-ordination Committee of the Cabinet in its meeting held on 28.9.2004 allowed the guarantee and financial assistance on the condition that the Bank would not increase its establishment cost and also that until the Bank repays its loan to the NABARD, the employees of the Bank would not be granted promotion.

13. Learned counsel for the respondents further claimed that any regularization of the petitioners was bound to increase establishment expenses, which had to be stopped in view of the aforesaid decisions and in those circumstances even the regularly appointed Peons were compulsorily retired by the Bank vide office order dated 5.6.2004 (Annexure "G") with effect from 30.9.2004 under the Service Regulation in view of the reports of the Man Power Planning Committee and the Revival Plan Committee. The said regularly appointed Peons, who had been compulsorily retired, challenged the said office order before this Court vide C.W.J.C. No. 8364 of 2004, C.W.J.C. No. 10002 of 2004, C.W.J.C. No. 10552 of 2004, C.W.J.C. No. 11468 of 2004 and C.W.J.C. No. 12237 of 2004, but the said writ petitions were dismissed by a Bench of this Court vide order dated 12.10.2004 (Annexure "H") after arriving at the following findings:--

The loss incurred to the Bank has been mentioned in the order impugned and in the counter affidavit also but the petitioners could not be able to show that there was no loss to the Bank. Moreover, the order impugned would not adversely affect the petitioners as they shall be entitled to get the consequential retirement benefits as mentioned in Rule 235.

14. Some of the regular employees of the Bank challenged the said order of the High Court before the Apex Court vide Civil Appeal No. 1468 of 2008 (Mundrika Dubey and Others vs. State of Bihar and Others), but the said appeal was dismissed by the Apex Court vide order dated 31.2.2008 reported in Mundrika Dubey and Others Vs. State of Bihar and Others, .

15. Learned counsel for the respondents argued that merely on the basis of advertisement of March-April 2010 (Annexure-13), it cannot be said that the financial position of the Bank has improved as in the said advertisement no regular post of Peon had been advertised, rather it was only for temporary and contractual appointments and the benefit of such advertisement might also go to the previous employees, if they fulfilled conditions. Hence, the claim of discrimination raised by the petitioners is also wrong.

16. Learned counsel for the respondents also relied upon a decision of the Apex Court in case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , which held that the employees engaged illegally cannot be adjusted. He referred to paragraphs no. 15, 16 and 17 of the said decision, which read as follows:--

15. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In State of Mysore and Another Vs. S.V. Narayanappa, , this Court stated that it was a misconception to consider that regularization meant permanence in R.N. Nanjundappa Vs. T. Thimmiah and Another, , this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated:-- (SCC pp. 416-17, para 26)

Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment, whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority, but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

16. In B.N. Nagarajan and Others Vs. State of Karnataka and Others, , this court

clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This court emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

17. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the Court, in appropriate cases, would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court, would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

17. Considering the averments made by learned counsel for the parties and the materials on record, it is not in dispute that the petitioners and others were appointed in the Bank as per the exigency of work therein as several new Branches were opened in different parts of the State. It is also not in dispute that since there was no specific statutory recruitment rules for appointment of Class-IV employees, the Board of the Bank resolved on 8.11.1981 to engage persons on ad hoc/daily wage basis for meeting the exigency of work in the Bank and for that purpose a Committee of Officers of the Bank was constituted, which appointed the petitioners after taking their interview and appointment letters were issued to them either by the Regional Manager or by the Managing Director of the Bank in different Branches as per the necessities. In the said circumstances, it is quite apparent that while making their appointments, no statutory rule or procedure was violated.

18. It is also not in dispute that when even after 10-20 years of continuous service on vacant posts, services of the petitioners were not regularized, whereas, services of other similarly situated Class-IV employees were regularized, the petitioners filed C.W.J.C. No. 50 of 1993, which was allowed by a Bench of this Court vide order dated 27.6.1995 (Annexure-6) directing the

authorities to regularize the services of the petitioners with utmost expedition. The said order was challenged by the authorities of the Bank in L.P.A. No. 710 of 1995 and other analogous cases, which were disposed of on 16.1.2004 (Annexure-9) by a Division Bench of this Court modifying the order of the learned Single Judge to the extent that the case of the writ petitioners should be considered for regularization alongwith other cases in the light of the directions issued in other cases.

19. In view of the aforesaid directions of the Division Bench of this Court, the authorities of the Bank considered the matter of the petitioners and others in detail and by the impugned order dated 20.8.2004 rejected the claim of the petitioners and terminated their services with effect from the date of the said order. In the said order, it has been specifically stated that till then the petitioners were working in the Bank. Hence the claim of the respondents that the services of the petitioners had been terminated in the year 2000 itself is absolutely wrong and misconceived.

20. From the aforesaid order of the Division Bench dated 16.1.2004 passed in L.P.A. No. 710 of 1995 and other analogous cases, it is quite apparent that the direction was given to the authorities to consider the case of the writ petitioners for regularization alongwith other cases in the light of the direction issued in other cases. Hence it was the duty of the authorities of the Bank to look into the decisions of the High Court in other similar cases before passing the impugned order, but they completely overlooked the decision of a Bench of this Court dated 7.5.2001 passed in the case of Jagdish Prasad Yadav (in 1118) Beer Bahadur Singh (in 1120) Vyas Narayan Singh (in 1371) Uma Shankar Raj and Others (in 1634) Kapildeo Prasad (in 2059) Yogendra Singh (in 3573) Vs. The State of Bihar and Others, , by which the writ petitions were allowed, the impugned orders of termination of services of the petitioners of those cases were quashed and the respondents were directed to treat the petitioners in continuous service with all consequential benefits. Reference in this regard may also be made to a decision of another Bench of this Court in case of Bihar Lohar (Scheduled Tribes) Utthan Mahasabha and Another Vs. The State of Bihar and Others, .

21. In the said case also, it was found that the petitioners' entry into the service of the Bank on ad hoc/daily wage basis was not against the provisions of the Rule governing such temporary entry and was by a competent authority and it was not the case of the respondents that there was no vacancy nor it was disputed that the services of the petitioners were continued from time to time. Hence it was held that in the said facts the contention of the respondents cannot be accepted that the claim for regularization of the petitioners' services is of no consequence and should be ignored even after a lapse of long years. In the said case, it was also found that some later appointed similarly situated employees of the Bank have been regularized in service on account of orders passed by the authorities or by the courts of law. The claim of the petitioners is exactly the same, which was involved in the aforesaid cases.

22. Furthermore some of the similarly situated employees (Shailendra Kumar Singh and Another) had earlier filed C.W.J.C. No. 2519 of 1990 against respondent-Bank and the said writ petition was disposed of vide order dated 27.9.1995 (Annexure-11) directing the respondents to consider the case of the petitioners for regularization when such vacant posts would be filled up and at the time of filling up the vacancies, the cases of the petitioners alongwith other candidates should also be considered in accordance with law and while considering the cases of the petitioners due regard must be given to the experience gathered by the petitioners by working for so many years and till regularization their services would not be in any way interfered except on the ground of misconduct against the petitioners, which was to be proved in accordance with law. In compliance of the said order, respondent-authorities of the Bank regularized the services of those petitioners on 13.11.2000 (Annexure-12) and the said employees are still working.

23. The respondents ignored the aforesaid directions issued in other cases, which were even complied by the respondents themselves nor did they offer any opportunity to the petitioners to place the orders of the courts of law before passing the impugned order as, admittedly, no notice was issued to the petitioners with respect to the same nor they were allowed to produce any material.

24. So far the grounds taken by the authorities for rejection of the petitioners' claim are concerned, they are mainly the weak financial position of the Bank and overstaffing. However, it is an admitted position that there are about 800 (547 Peons + 253 Night Guards) sanctioned posts of Class-IV employees in the Bank throughout the State of Bihar, out of which only 592 posts are filled up and 208 posts of Class-IV employees are still vacant. Hence, there is no question of any overstaffing. In the said circumstances, the case law relied upon by learned counsel for the respondents in case of *Mundrika Dubey and Others* (supra) is not applicable to the facts of the instant case.

25. So far the weak financial position of the Bank as claimed by its authorities is concerned, the documents produced by them in support of that claim merely show that in the years 2000-04, the financial position of the Bank was such that it could not repay the loans taken from other institutions, but the respondents have failed to show Bank's latest position with respect to the finances. However, it is not in dispute that the respondents themselves, thereafter, had regularized the services of some similarly situated employees and had also issued advertisement for making appointments of Class-IV employees, which clearly goes to show insufficiency of Class-IV employees in the Bank and its financial capability to recruit new employees.

26. So far the decision of the Apex Court relied upon by learned counsel for the respondents in case of *Secretary, State of Karnataka* (supra) is concerned, it is mainly meant for illegal appointees, whose continuance or regularization in service was also held to be illegal, but in the instant case the petitioners'

appointment is not in violation of any prescribed rule or procedure, rather they were appointed by competent authorities after following the due procedure. Furthermore, even for irregular appointments, the Supreme Court in the aforesaid case had made provisions for consideration of such employees if they are duly qualified and have been working on duly sanctioned vacant posts and had continued to work for ten years or more without the intervention of the Court or of the institution. Hence, the said case law does not come to help the respondents.

27. The said decision of the Apex Court has been fully considered and explained by another Bench of the Apex Court in case of State of Karnataka and Others Vs. M.L. Kesari and Others, holding that true effect of the said direction is that all persons, who had worked for more than ten years without the protection of any interim order of any Court or institution in vacant posts possessing requisite qualifications, are entitled to be considered for regularization. Other grounds would not disentitle such employees' right to be considered for their regularization in terms of the above directions.

28. In the aforesaid facts and circumstances of this case, it is quite apparent that the impugned order dated 20.8.2004 passed by the Managing Director of respondent-Bank is not only against the specific provisions of law in that regard as discussed above rather it is also violative of the directions issued by a Division Bench of this Court vide order dated 16.1.2004 (Annexure-9) passed in L.P.A. No. 710 of 1995 and other analogous cases, in compliance of which the said impugned order was passed without following the directions given therein and also without affording any opportunity to the petitioners to place their cases as well as the relevant provisions of law. Accordingly, this writ petition is allowed and the aforesaid impugned office order contained in memo no. 3198 dated 20.8.2004 (Annexure-1) issued by the Managing Director of the Bank is hereby quashed and respondent-authorities of the Bank are directed to take a fresh decision with respect to regularization/absorption of the services of the petitioners in accordance with the settled principles of law and the discussions made above.