
(2008) 08 PAT CK 0095
In the Patna High Court
Case No : CWJC No. 16629 of 2004

Vijoy Bahadur Sharma

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2008) 4 PLJR 547

Hon'ble Judges : Mihir Kr. Jha, J

Bench : Single Bench

Advocate : Amresh Kumar Singh, for the Appellant;

Final Decision : Dismissed

Judgement

Mihir Kumar Jha, J.—Heard counsel for the parties. In this writ application the petitioner has assailed the order dated 27.6.2000 passed by the Director, Secondary Education, Government of Bihar, Patna whereby and whereunder his services have been terminated on the ground that his appointment was illegal.

2. The facts which are not in dispute is that the petitioner was appointed on a post of Clerk in +2 Secondary School by an order dated 3rd May, 1989 by the District Education Officer, Begusarai pursuant to direction of the Deputy Director of Education in his letter dated 2.5.1989. The petitioner claims that thereafter he had been continued in service and his name was included in the Gradation List of the Clerks of High Schools of the District of Begusarai dated 22.3.1994 and that for almost for a period of five years there was no impediment in his functioning but his payment of salary was suddenly stopped from the month of September, 1995 under order of the District Education Officer, Begusarai dated 20.9.1995 on the ground of some illegality in his appointment. The petitioner has stated that when his salary was not paid for more than 3 years he had filed C.W.J.C. No. 11338 of 1998 and during pendency of this writ application, his payment of salary was made from January, 1999 onwards, as is recorded in the order dated 19.11.1999 disposing of the writ application of the petitioner, being C.W.J.C. No.

1138 of 1998. It is however, the case of the petitioner that soon after, releasing payment of salary from the month of January, 1999 an enquiry was undertaken by the Director, Secondary Education with regard to the validity of his appointment and he was asked to file his show cause under the order of the Director, Secondary Education contained in Memo No. 1595 dated 21.7.1999. The petitioner claims that he had appeared before the Director, Secondary Education and has filed his show cause reply taking a plea that his appointment was wholly legal and justified and need no interference. The impugned order, however, was passed by the Director, Secondary Education on 27.6.2000 holding that the appointment of the petitioner was illegal and as such his services were to be terminated from the date of the order i.e. 27.6.2000.

3. Counsel for the petitioner has submitted that the aforesaid order of the Director, Secondary Education dated 27.6.2000 is unsustainable because the petitioner was working as a sanctioned post and that after continuing in service for more than 11 years he could not have been removed from service by holding that there were some flaw in the initial appointment of the petitioner.

4. In this context, he has relied on the orders of this Court dated 18.7.2003 in C.W.J.C. No. 111 of 2001 Abhay Kumar vs. The State of Bihar & Ors. and the order dated 10.3.2004 in L.P.A. No. 328 of 2004 Ed.-Reported in 2004(3) PLJR 173 in the case of State of Bihar & Ors. vs. Abhay Kumar. Counsel for the petitioner has also referred to an order dated 17.5.2004 in C.W.J.C. No. 13961 of 2003, 11313 of 2003 & 14462 of 2003 in the case of Ram Jeevan Kumar vs. State of Bihar, Subodh Kumar Singh vs. State and Ors., Mithilesh Kumar Mishra vs. State of Bihar & Ors. and the order dated 28.11.2006 in L.P.A. No. 481 of 2005, L.P.A. No. 484 of 2005, L.P.A. No. 494 of 2005 State of Bihar vs. Subodh Kumar Singh, L.P.A. No. 484 of 2005, The State of Bihar & Ors. vs. Ram Jeevan Kumar, and L.P.A. No. 494 of 2005, The State of Bihar & Ors. vs. Mithilesh Kumar Mishra. On the strength of all these orders, the counsel for the petitioner has submitted that when similarly situated Class-III and Class-IV employees of Begusarai District were removed from service on the ground that their initial appointment was bad, this Court had interfered by setting aside the impugned order which has been affirmed by this Court in the appeal filed by the State of Bihar as also by dismissal of the SLP in SLP No. 27412 of 2004 by the Apex Court vide order dated 27.3.2006. The counsel for the petitioner, therefore has submitted that the case of the petitioner being identical, he should also be given the same relief and this Court should quash the impugned order of termination for reinstatement of service of the petitioner.

5. Counsel for the petitioner in this regard has also referred to the pleadings in paragraph No. 17 of the writ application by raising a plea of discrimination that a similarly situated person like the petitioner namely, Surendra Kumar Rai, was still continuing in service without being subjected to an order of termination.

6. This writ application was filed on 24.12.2004 and the counter affidavit was not filed in the next three years and as such this Court by order dated 28.3.2008 had

directed the counsel for the State to file a counter affidavit within a period of two weeks but the counter affidavit was not filed and as such the parties were heard and the order was reserved.

7. Counsel for the State while raising a preliminary objection to the effect that the writ application, being wholly belated by a period of more than four years had submitted the appointment of the petitioner is ranked illegal inasmuch as he was appointed by an authority who had no power to do so and further that such appointment of the petitioner was made without following the mandate of Article 14 of the Constitution of India inasmuch as there was no advertisement for the post of Clerk and the petitioner in fact was appointed through backdoor. In this context, it was also emphasized by the counsel appearing on behalf of the State that the prescribed procedure laid down by the Government for appointment of clerk as laid down in the Rules and Circulars of the Government were not at all followed and in fact the writ petitioner was appointed without clearance of roster and/or preparation of panel and that too by the District Education Officer who had never been vested power to make appointment on the post of clerk in a High School.

8. Reference in this connection was made by the counsel for the State on , 1983 in which the power of appointment on the post of Clerk is vested in the Director, Secondary Education. The counsel for the State had also contended that as a matter of fact these very findings with regard to the illegalities on the appointment of the petitioner were found by the Director, Secondary Education in the impugned order and the petitioner had not controverted anyone of them in the writ application.

9. Counsel for the State had also stated that the individual orders referred to and relied by the counsel for the petitioner were not applicable to the facts of the present case and in any event they could not have any precedential value after the judgment of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, . Counsel for the State had also submitted that the case of Surendra Kumar Rai referred to by way of plea of discrimination could not be a ground for reinstatement of the petitioner specially when the petitioner had not even produced the order of appointment of Surendra Kumar Rai. He, however, has submitted that if the State would find the appointment of the Surendra Kumar Rai to be similar as that of the petitioner, steps would be taken to hold enquiry against him for passing of an appropriate order.

10. In reply, the counsel for the petitioner had tried to explain that true it is that the petitioner was terminated from service by order dated 27.6.2000, but then he could file this writ application on 24.12.2004 when he had found that the persons similarly situated like him who were also removed from service had been directed to be reinstated in service under the orders of this Court as mentioned above. He had also explained that as a matter of fact after he came to know of such orders of reinstatement of the similarly situated persons, he had filed a representation on 15.12.2004 seeking his reinstatement but when the same was

not considered he had filed the present writ application.

11. Upon consideration of the materials on the record and in the light of the rival contentions of the parties, this Court would first deal with the preliminary objection of the issue with regard to delay and laches on the part of the petitioner in moving this Court against the order of his termination from service. There is no denial to the fact that the services of the petitioner came to an end by the impugned order dated 27.6.2000 and after 4 and 1/2 years the petitioner has filed the present writ application. There is absolutely no explanation in the writ application for such delay of more than four years and only ground that his writ application seeking similar treatment on the basis of order of this Court in the case of Abhay Kumar and Ors. should be allowed, is only to be noticed for its being rejected. True it is that there is no period of limitation fixed for filing of a writ application but when an order of termination is passed and is served on an incumbent, he must approach this Court within a reasonable time. A period of 4 and 1/2 years can in no event be a reasonable period and in that view of the matter, this Court would hold that the writ application is fit to be dismissed on the ground of unexplained delay in filing of the writ application. Reference in this connection may be made to the judgment of Apex Court in the case of Bhoop Singh Vs. Union of India and others, , where it was held that:-

.....No attempt has been made by the petitioner to explain why he chose to be silent for so long, if he too was interested in being reinstated and had not abandoned his claim, if any. If the petitioner's contention is upheld that lapse of any length of time is of no consequence in the present case, it would mean that any such police constable can choose to wait even till he attains the age of superannuation and then assail the termination of his service and claim monetary benefits for the entire period on the same ground. That would be a startling proposition. In our opinion, this cannot be the true import of Article 14 or the requirement of the principle of nondiscrimination embodied therein, which is the foundation of petitioner's case.....

12. this Court, however, would not leave the matter over there inasmuch as in the impugned order the Director, Secondary Education has given reasons for holding the appointment of the petitioner to be rank illegal. Those reasons have not been controverted at all by the petitioner in the writ application and thus stands admitted by him. The Director, Secondary Education has held that the petitioner was appointed by an authority who had no jurisdiction to make such an appointment. The petitioner has placed nothing on record to show that the District Education Officer could not have made appointment of a Clerk in a +2 Secondary School. As a matter of fact, from Annexure-1 the order of the Deputy Director of Education, it becomes clear that out of blue the name of the petitioner was picked up who had on his own received some application of the petitioner and gone to issue a direction that the petitioner should be appointed on the post of B.P. High School, Begusarai by way of an ad hoc arrangement till the regular appointment was made on the said post of the clerk. The first

question would arise whether the Deputy Director of Secondary Education on his own was authorized under any rule or circular to give such a direction for appointment of the petitioner. There is absolutely no explanation by the petitioner in his writ application to this effect. The Rules also do not permit the Deputy Director, Secondary Education to give such a direction to District, Education Officer to make appointment on the post of clerk in High School. Consequently, it must be held that the very basis on which the appointment of the petitioner was made by the District Education Officer, Begusarai, namely, the direction of the Deputy Director of Secondary Education vide his letter dated 2.5.1989 was itself illegal. It is really surprising that the Deputy Director of Secondary Education could come to know of a vacant post in a High School in the District of Begusarai, could identify such vacancy in B.P. High School, Begusarai and could also collect an application of the petitioner for issuing his direction to make appointment of the petitioner on the post of Clerk in the said High School. From Annexure-1, therefore, the letter of the Deputy Director of Secondary Education, it is clear that the entry of the petitioner in the service was made through backdoor. It is still more astonishing to note that on the next day of the said letter of the Deputy Director of Second Education, the District Education Officer had gone to issue the order of appointment of the petitioner solely by taking a ground that he was asked to do so by an order of the Deputy Director of the Secondary Education. Thus the manner in which the petitioner was appointed under the concerted design and efforts of the Deputy Director of Secondary Education and District Education Officer, Begusarai leave nothing more for being determined that the appointment of the petitioner was made through backdoor and without following the norms of appointment in Government service.

13. It was in this background that the petitioner could also not contend that the procedure of appointment namely issuance of advertisement for inviting application from the illegible persons, obtaining roster clearance from the Government and undergoing selection process by holding written test and interview, preparation of panel etc. were not followed. In such view of the matter, this Court would not find any flaw in the reasons assigned in the impugned order for holding appointment of the petitioner to be rank illegal and in fact in teeth of the mandates of Article 14 of the Constitution of India. As a matter of fact, the petitioner has also not sought to assail any of the findings recorded in the impugned order and as such it must be held that the appointment of the petitioner was rank illegal.

14. Reliance placed by the petitioner on different orders of this Court specially on the case of Abhay Kumar in C.W.J.C. No. 111 of 2001 is also misplaced inasmuch as it is clear from the order (Annexure-7) that the Abhay Kumar was appointed as an orderly peon and therefore, the petitioner who was appointed on the post of Clerk cannot get any benefit of the case of Abhay Kumar. Moreover, in the case of Abhay Kumar, it appears that his appointment was made under the orders of Director, Secondary Education dated 4.9.1998 unlike in the case of the petitioner whose appointment was made on the orders of Deputy Director of Secondary

Education who had no such power. It has to be kept in mind that while Director, Secondary Education is the head of the Department of the Secondary Schools, Deputy Director of Secondary Education enjoys no such power. Accordingly this Court would not find any reason for allowing this writ application on the ground of the order passed by this Court in the case of Abhay Kumar. The another order which has been relied by the petitioner in the case of Ram Kumar Singh in C.W.J.C. No. 6029 of 2003 also is in respect of an orderly peon as is apparent from the order itself where it has been stated that Ram Kumar Singh was appointed as orderly Peon on 8.2.1989. In fact, the case of Ram Kumar Singh was allowed on the basis of the judgment in the case of Abhay Kumar. The next order relied by the petitioner in the case of Ram Jeevan Kumar in C.W.J.C. No. 13961 of 2003, Ashok Kumar Singh and Anr. in C.W.J.C. No. 11313 of 2003 and Mithilesh Kumar Mishra in C.W.J.C. No. 14462 of 2003 would also be of no avail inasmuch as all these three writ applications were decided in the light of the case of Abhay Kumar by holding that there cases were identical. As has been held above the cases of Abhay Kumar being one of orderly Peon and appointed under the orders of Director, Secondary Education and not Deputy Director, Secondary Education being not similar to the case of the petitioner, he cannot get benefit of the aforesaid orders of this Court.

15. In the opinion of this Court, the counsel for the State has rightly relied on the Constitution Bench judgment of the Apex Court in the case of Uma Devi, (supra) wherein it has been held that such illegal appointments do not confer any right on the appointees and in such case of appointment made without following due process as per mandate of the Constitution and relevant rule for the appointment, the Court cannot direct for reinstatement. The Constitution Bench of the Apex Court in the judgment of Uma Devi (supra) while dealing the relevant aspect in paragraph Nos. 33, 39 and 54 has also clarified that any earlier order or the decision of the Apex Court or the High Court which run counter to the principle settled in the Uma Devi's case will stand denuded on their status as precedents.

16. Appointment without advertisement and undergoing selection process was also considered by this Court in the case of Amrendra Singh and Others Vs. The State of Bihar and Others, wherein it was held that if any appointment was made without following the mandate of Article 14 and the same was sought to be terminated, the Court would not protect such illegal appointees whose appointment was in teeth of Article 14 of the Constitution. As a matter of fact, this aspect of the matter was also considered in by a Division Bench of this Court in a recent judgment in the case of Hemkant Jha and Others etc. etc. Vs. The State of Bihar and Others wherein similar illegal appointments made in the Police Department without following the mandate of Article 14 wherein the decision to terminate the services of illegally appointed persons in Police Department was not interfered. Thus in view of the facts of this case, as also the law laid down by the Apex Court in Uma Devi (supra) and this Court in the case Amarendra Singh (supra) and Hemkant Jha (supra) it must be held that the appointment of the

petitioner was wholly illegal and has been rightly terminated.

17. this Court in fact would also not find any force in the plea of discrimination raised by the petitioner inasmuch as the petitioner has not discharged onus as with regard to the similarity between his case and the case of Surendra Kumar Rai. The submission contained in paragraph No. 17 of the writ application without there being any proof in form of the appointment letter of Surendra Kumar Rai as to whether he was appointed under the orders of Deputy Director of Secondary Education cannot be examined specially when Surendra Kumar Rai has also not been made party in this writ application. It is true that the counter affidavit denying the fact in paragraph No. 17 has not been filed, but then if the petitioner has himself not discharged the onus of proving his case to be similar of that of Surendra Kumar Rai, mere non-filing of the counter affidavit and not controverting the statement in paragraph 17 of the writ application cannot be a ground for allowing this application. this Court would, however, observe that the Director, Secondary Education will look into the appointment of Surendra Kumar Rai and in the case, he finds that the case of the petitioner is similar to that of Surendra Kumar Rai, he will definitely take appropriate steps also against Surendra Kumar Rai who is said to be working as a clerk in High School, Herba in the District of Begusarai.

18. Before parting with, this Court would also direct the State Government to take appropriate disciplinary measures against Sri Yogendra Kumar, the then Deputy Director of Secondary Education who had issued an unauthorized order for appointing the petitioner on an ad hoc basis till regular appointment on the post of Clerk in B.P. High School as well as against Paraspati Nath Singh, the then District Education Officer, Begusarai who had issued the order of appointment of the petitioner on 3rd of May, 1989. The Principal Secretary of the Education Department is accordingly directed to take immediate disciplinary actions against both the aforementioned officers in the light of the observations made by the Director, Secondary Education in the impugned order wherein he too has held that it was necessary for the Government to take appropriate legal and departmental actions against them for their acting wholly in an unauthorized manner in appointing the petitioner. Be that as it may, this Court does not find any merit in this writ application and the same is accordingly dismissed. There would be however no order as to cost.