
(2004) 11 PAT CK 0010
In the Patna High Court
Case No : CWJC No. 9932 of 1999

Vishwanath Kumar

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 25-11-2004

Acts Referred:

Citation : (2005) 1 PLJR 143

Hon'ble Judges : Chandramauli Kr. Prasad, J

Bench : Single Bench

Advocate : Santosh Kumar Sinha, for the Appellant;

Final Decision : Dismissed

Judgement

Chandramauli Kr. Prasad, J.—This application has been filed for issuance of a writ in the nature of mandamus commanding the respondents to pay to the petitioner salary from 13.4.1993 till the termination of his service i.e. 30.12.1999. Short facts giving rise to the present application are that by order dated 28.12.1991 (Annexure-T) petitioner was engaged to perform the function of a Clerk on daily wages. Thereafter by order dated 8.4.1993 (Annexure-2) passed by the Civil Surgeon-cum-Chief Medical Officer, service of the petitioner was regularised in the scale of pay of Rs. 1200-1800 and in pursuance thereof it seems that he had joined as such on 13.4.1993. It is the grievance of the petitioner that since his joining as Clerk on regular scale of pay on 13.4.1993 and till the date of termination of his service, no remuneration has been paid to him. It is further stand of the petitioner that another person appointed in the same manner as that of the petitioner has been paid the remuneration.

2. Counter affidavit has been filed on behalf of respondent No. 2 in which it has been stated that petitioner's appointment was absolutely illegal. It has been pointed out that Class III employee is to be appointed on the recommendation of the Bihar Public Service Commission and hence the Civil Surgeon who had passed the order for regularisation of the service of the petitioner was not

competent to regularise the petitioner's service without the recommendation of the Commission.

3. Mr. Santosh Kumar Sinha, appearing on behalf of the petitioner submits that the petitioner having worked as Clerk, he is entitled for payment of the salary for the period aforesaid. He also contends that on 8.7.1993 the date on which the Civil Surgeon certified for payment of the salary to the petitioner he was competent to make appointment on a Class III post. J.C. to G.P. VIM however contends that the Civil Surgeon regularised the service of the petitioner by order dated 8.4.1993 and on that date he was not competent to make appointment to a Class III post and hence the appointment of the petitioner being absolutely illegal, he is not entitled for any emolument. In support of his submission he has placed reliance on an unreported Division Bench decision of this court in LPA No. 41 of 2002 dated 31.1.2002 (The State of Bihar & Ors. vs. Rakesh Kumar) and my attention has been drawn to the following passage from the said judgment:-

"The payment of salary to an employee depends upon his appointment to a post. If the appointment is legal and valid then he is entitled to salary. If the appointment is not according to law and has been done by authority not competent to appoint, then no direction can be given by this Court as that will amount to direction for payment of salary not entered into service according to law. In this case, according to the appellants-State, the appointment of the respondent is illegal. In such a situation we are of the view that first this question is to be decided and if it is found that the appointment of respondent is legal and valid, then the question for payment of salary will arise."

4. Reliance has also been placed on a decision of the Supreme Court in the case of R. Vishwanatha Pillai Vs. State of Kerala and Others, and my attention has been drawn to the following passage from paragraph 19 of the judgment, which reads as follows:-

".....The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal....."

5. Having appreciated the rival contention, I do not find substance in the submission of Mr. Sinha. The Civil Surgeon had passed the order for regularisation of the service of the petitioner to a Class III post by order dated 8.4.1993. Undisputedly the aforesaid order of regularisation has not been passed on the recommendation of the Bihar Public Service Commission, hereinafter referred to as the Commission. According to the decision of the State Government appointment on a Class III post on the said date was to be made on the recommendation of the Commission. Thus the date on which the petitioner was appointed by the Civil Surgeon, he was not competent to make appointment and certification of the said order later on by him on 8.7.1993 shall not validate petitioner's regularisation in service. Once it is held so the appointment of the petitioner is absolutely illegal and made by an incompetent person, the natural corollary of the same would be that he shall not be entitled for payment of

salary. The Division Bench of this Court in the case of Rakesh Kumar (supra) had in categorical term held that public servant is entitled for payment of salary only when it is found that his appointment is legal and valid and if it is found that the appointment is illegal and by the incompetent person, the relief sought for payment of salary cannot be granted. In the result, I do not find any merit in this application and it is dismissed accordingly but without any order as to cost.