

Ashutosh Kumar Vs. the State of Bihar and ors.

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Court : Patna

Decided On : May-20-2005

Judge : Chandramauli Kumar Prasad, J.

Acts : Bihar Nationalised Secondary School (Service Condition) Rules, 1983 - Rule 8(2); [Constitution of India](#) - Articles 14 and 16

Appeal No. : C.W.J.C. No. 6852 of 2003

Appellant : Ashutosh Kumar

Respondent : The State of Bihar and ors.

Disposition : Application dismissed

Prior history : Chandramauli Kumar Prasad, J. 1. This application has been filed for quashing the order as contained in memo dated 30th December, 2002, (Annexure-2), whereby the service of the petitioner has been terminated on the ground that he was illegally appointed. 2. According to the petitioner, a notice was published in the Notice Board inviting applications for appointment to the post of peon and in response thereto, he offered his candidature by submitting an application (Annexure-1) inter alia stati

Judgement :

Chandramauli Kumar Prasad, J.

1. This application has been filed for quashing the order as contained in memo dated 30th December, 2002, (Annexure-2), whereby the service of the petitioner has been terminated on the ground that he was illegally appointed.

2. According to the petitioner, a notice was published in the Notice Board inviting applications for appointment to the post of peon and in response thereto, he offered his candidature by submitting an application (Annexure-1) inter alia stating that he has been registered in Employment Exchange at Bhagalpur bearing Registration No. 7622 of 1986. Said application was addressed to the Headmaster of High School, Gouripur, hereinafter referred to as the school. The Headmaster of the School interestingly put a note on the application of the petitioner and recommended for his appointment on the ground that he has been found fit for appointment by the Selection Committee constituted at the school level. The District Education Officer, by letter dated 6th of April, 1990 (Annexure-3), accorded permission to the Headmaster of the School for appointment of the petitioner absolutely on temporary and ad hoc basis. In the light of the aforesaid permission, the Headmaster of the school by Office Order as contained in memo dated 6th of April, 1990 (Annexure-3), appointed the petitioner to the post of orderly peon on purely temporary basis.

3. According to the petitioner, in pursuance of the aforesaid order, he joined the school on 6.4.1990 and continued to work satisfactorily which would be evident from the certificate dated 25.7.2000 (Annexure-4) granted by the Incharge Headmaster. It seems that the District Education Officer had made several illegal appointments of orderly peons and clerks and when the said fact came to the notice of the State Government, the Director of Secondary Education-cum-Special Secretary, by communication dated 24.9.1997 (Annexure-5), directed the District Education Officer to terminate the services of such clerks and peons who have been illegally appointed, after giving show cause notices to them. In the light of the aforesaid order, the District Education Officer, by office Order dated 14th of May, 1997 (Annexure-6), terminated the service of six clerks and nine orderly peons including the petitioner.

4. Aggrieved by the same, petitioner preferred C.W.J.C. No. 11242 of 1999 Ashuthosh Kumar v. The State of Bihar and Ors., and this Court by order dated 11.2.2000 (Annexure-7), set aside the said order being in violation of the principle of natural justice but gave liberty to the State to pass fresh order in accordance with law after giving notice to the petitioner. Thereafter, a show cause notice was given to the petitioner by the District Education Officer by its letter dated 13.9.2002 (Annexure-8) inter alia stating that the petitioner has been appointed without following the procedure of appointment as contemplated in the Circulars of the Personnel and Administrative Reforms Department dated 3.12.1980 and 14.6.1981. It has been further stated that the petitioner was appointed without following the reservation policy. Petitioner was further asked to furnish the Newspaper in which the advertisement was published and the interview letter to satisfy that his appointment was made in conformity with Article 14 and 16 of the [Constitution of India](#).

5. Petitioner submitted his show cause and the District Education Officer considered the plea taken by the petitioner in the show cause and found that the petitioner was appointed without following the procedure prescribed in Circular dated 3.12.1980,. without advertisement. He also found that no Selection Committee was constituted for appointment nor reservation policy was followed. Accordingly, the District Education Officer found that the petitioner was appointed without following the procedure prescribed and hence, terminated the service of the petitioner by the impugned order as contained in memo dated 30.12.2002.

6. Counter affidavit has been filed on behalf of respondent No. 4 in which it has been stated that the petitioner had entered in the service through the back-door and the grounds stated in the impugned order have been reiterated in the counter affidavit. The grounds of termination of the services of the petitioners are as follows :

- (1) Appointment has been made without the advertisement,
- (2) Applications were not invited for appointment,
- (3) Interview was not taken

(4) No Selection Committee was constituted,

(5) Reservation policy was not followed.

7. Mr. Ganesh Prasad Singh, Senior Advocate, appearing on behalf of the petitioner submits that the petitioner was a sole person who was appointed as an orderly peon and in that view of the matter, there was no requirement for advertisement inviting applications from eligible candidates. He further points out that notice was published in the Notice Board of the school which would be evident from the application filed by the petitioner and which has been forwarded by the Headmaster of the School to the District Education Officer recommending his name. He emphasises that in case, the number of vacancies is less than five, there is no requirement for advertisement in the Newspaper. In this connection he has referred to letter No. 1880 dated 21 st of June, 1966 of the Appointment Department of the Government of Bihar addressed to all the Secretaries and Head of the Departments.

8. Standing Counsel No. III, however, appearing on behalf of the respondent State contends that the alleged hanging of the notice in the Notice Board of the school does not conform to the requirement of Articles 14 and 16 of the [Constitution of India](#). He points out that the appointment of a Class IV post is governed by the Circular of the Personnel and Administrative Reforms Department dated 3rd of December, 1980 and the same does not dispense with the requirement of publication of the notice in the Newspaper, irrespective of the number of vacancies.

9. Having appreciated the rival submission, I do not find any substance in the submission of Mr. Singh on the letter dated 21st of June, 1996 relied on by him nowhere provides that in case of number of vacancies is less than five, no advertisement in the Newspaper is required to be made. The Personnel and Administrative Reforms Department of Government of Bihar had issued detailed Circular dated 3rd of December, 1980 for appointment to Class IV posts in mufassil offices. Clause 6 of the said circular provides for appointment to Class IV post through the Employment Exchange. It provides for wide publicity by the District Magistrate for inviting applications in which the registration number of the

Employment Exchange is to be given by the candidate. It further provides that if for any reason, the District Employment Officer does not forward the name of a particular candidate, the concerned candidate's candidature shall be considered by the District Magistrate on the basis of his registration number. It provided further that the names forwarded by the Employment Exchange shall be scrutinised by the District Magistrate. Clause 7 of the said Circular provides for the constitution of the Committee for preparing a panel for appointment. The Personnel and Administrative Reforms Department issued further Circular dated 15th of June, 1981 in which paragraph 6 of Clause (1) was added in Circular dated 3.12.1980 which gives liberty to the appointing authority for inviting applications through open advertisement with a rider that in such contingency, the candidate can directly apply to the appointing authority after giving registration number of the Employment Exchange. Clause 5 of letter dated 21st of June, 1966 relied by the petitioner reads as follows :

'5. When the number of vacancies, to be filled in the establishment is less than 5, the appointing authority, if so desires, may issue an advertisement in the newspaper at his cost, directing the intending candidates to send their application to the Employment Exchange concerned within a date to be prescribed in the advertisement. The notification of the vacancies together with a copy of the advertisement should, however, be sent to the Employment Exchange in the manner as prescribed in paragraph 3 above.'

Thus, the circular dated 3rd of December, contemplates preparation of panel by the District Magistrate on the recommendation of the Selection Committee, the life of the panel being fixed for one year. Such a panel is to be prepared from amongst the candidates, whose names have been forwarded by the Employment Exchange but such candidates whose names have not been forwarded giving their registration numbers and the District Magistrate has been authorised to entertain such applications directly. By circular dated 15th of June, 1981 of the Personnel and Administrative Reforms Department, the appointing authority has been given discretion for appointment by inviting application from the open market. The aforesaid circular in no way dispenses with the requirement of advertisement in any contingency. Letter dated 21st of June, 1966, paragraph 5 where of has been

quoted in extenso in the preceding paragraphs of this judgment, provides that in case number of vacancies is less than five, the appointing authority may issue advertisement in the Newspaper at his own cost but does not dispense with the requirement of publication of advertisement in the Newspaper. Thus, all the circulars referred to above, in no way dispense with the requirement of publication of advertisement in the Newspaper. In my opinion, under the scheme, ordinarily, the advertisement is to be issued by the District Employment Officer but the appointing authority has also been conferred with the power to issue the advertisement inviting application from the open market.

10. It is trite that public employment is a public property and every citizen has a right to participate in the process of appointment and for that, the circular of the State Government provided for publication of the notice inviting application in the Newspaper. The circulars referred to above, in no way, dispense with the requirement of publication of advertisement in the Newspaper when the vacancy is less than five. Here, I would like to observe that the vacancy would not be considered to be only one when a single person is appointed in a school by an order but the appointment made through different orders are to be taken to calculate the number of vacancies. In the present case, not only the petitioner but other persons have been appointed by the then District Education Officer and as such, the vacancy cannot be said to be only one. Although I have held that no circular dispenses with the requirement of publication of notice in the Newspaper, when the vacancy is less than five but at the same time it cannot be said that the vacancy for appointment was only one.

11. Mr. Singh, alternatively submits that even if the appointment has been made without any advertisement in the newspaper, same would not vitiate the petitioner's appointment and in this connection a Division Bench decision of this Court in the case of *Jogindra Jha v. College Service Commissioner and Ors.*, 1983 (3) SLR 4 has been passed into service and my attention has been drawn to para 10 of the said judgment which read as follows :

'10. The purpose of the provision is to inform unemployed persons suitable for the post about the vacancy so that they may become candidate. It cannot be assumed

that on account of omission to notify, suitable candidates are bound to be left behind. In many cases, that might be the result, but not necessarily in every case. In cases where no such person is excluded from consideration on account of want of notification, there does not appear to be any valid reason for striking down the appointment as void merely for a technical omission. The attack to an appointment made in violation to Section 4(1) of the Act must be allowed only in such cases where the omission to notify has resulted in injustice. Unless it is shown that a qualified person suitable for consideration could not apply for appointment due to the omission and that he has a good case on merits to be considered for appointment, the appointment should not be disturbed.'

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12. I do not find any substance in this submission of the learned counsel. The requirement of publication of advertisement inviting applications for appointment flows from Articles 14 and 16 of the [Constitution of India](#) and in my opinion, any appointment made in violation thereof cannot be said to be legal. There may be a case in which the requirement enshrined in Articles 14 and 16 of the [Constitution of India](#) is substantially complied with, the appointment may be saved by invoking the theory of substantial compliance but in a case in which the appointment has been made throwing all the procedure to wind, without conforming to the requirement of the constitutional mandate under Articles 14 and 16 of the [Constitution of India](#), such appointment cannot be saved. Illegal appointment has become a menace to the State and it shall be well advised to emphatically assert that in no case, appointment to a regular post on a substantive basis can be made without advertisement in the Newspaper having wide circulation in the State and the local area where appointment is to be made. The requirement of publication of the notice in the Newspaper may be dispensed with only in a case in which the appointment is made as stop gap arrangement for a very small limited period and such appointment does not ripen into a regular or substantive appointment. The publication of the notice in the Notice Board for appointment to a post of substantive number or leading to appointment as such, cannot be countenanced on touch-stone of Articles 14 and 16 of the [Constitution of India](#).

13. Now, reverting to the decision of this Court in the case of Jogindra Jha (supra), person not appointed, challenged the appointment of another person. This Court finding that no person eligible for consideration was excluded, declined to set aside the appointment. Here, in the present case, the appointment has been found to be illegal by the employer itself and as such, this case does not in any way supports the case of the petitioner.

14. Here I must answer an ancillary submission of Mr. Singh also. He submits that Rule 8 (2) of the Bihar Nationalised Secondary School (Service Condition) Rules, 1983, makes the Headmaster of the school as the appointing authority and in view of addition of paragraph 6(1) in the Circular, the Headmaster had the authority to make appointment. Hence the appointment of the petitioner made by the Headmaster is not illegal. I do not find any substance in the submission of Mr. Singh also.

15. True it is that Rule 8 (2) of the aforesaid Rule confers power on the Headmaster to make appointment to a Class IV post but such an appointment has to be made from the panel prepared in the light of the circular dated 3.12.1980. Thus the question as to who is the competent authority to appoint has no bearing at all as the petitioner's appointment has been found to be illegal on account of the fact that it has been made without following the procedure known to law.

16. While assailing the second ground of termination of service, Mr. Singh contends that the endorsement made on the application itself implies that 5 persons offered their candidatures and as such, it cannot be said that applications were not invited. It is common knowledge that in case, any advertisement for appointment is issued, applications are received in thousands and in the present case, the endorsement made by the Headmaster showing consideration of application by only five candidates which apparently seems to be a case of manipulation but even assuming to be true, will not lead to the conclusion that in fact applications were invited in proper manner.

17. Mr. Singh, contends that the petitioner was selected for appointment by the Selection Committee and that shall obviously mean that the petitioner besides other candidates was interviewed. There is nothing on the record to show that any

interview letter was issued to the petitioner. It seems that the Headmaster of the school was eager to recommend petitioner's appointment and the District Education Officer more eager to approve the appointment.

18. Mr. Singh states that the petitioner's appointment has been found to be illegal on the ground that no Selection Committee was constituted which in his submission is not correct. Interestingly, answer to all the illegalities, Mr. Singh find in the endorsement of the Headmaster. He points out that Headmaster has endorsed that the petitioner's candidature was considered oy a Selection Committee constituted as the school level. Mr. Singh points out that the reason given in the impugned order that no Selection Committee was constituted, is thus erroneous. I do not find any substance in this submission of Mr. Singh also. In my opinion, whenever provision for constituting a Selection Committee is made, that has to be constituted by the persons mentioned in the said decision. Here in the present case, Circular dated 3.12.1980 provides for constitution of the Selection Committee to be presided over by the District Magistrate as the Chairman besides the District Welfare Officer, the District Employment Officer and three senior officers to be nominated by the District Magistrate. Undisputedly, the case of the petitioner was not considered by a Committee so constituted and therefore, in my opinion, respondents are right in contending that for appointment of the petitioner no Selection Committee was constituted. In my opinion, consideration of the candidature by a Committee not provided by law is no consideration in the eye of law.

19. Appointment of the petitioner has also been found to be bad on account of the fact that the reservation policy was not followed. Mr. Singh contends that the petitioner cannot be held responsible for the same. I do not have the slightest hesitation in rejecting this submission to Mr. Singh. Any person getting benefits by illegal method, can be deprived of that benefit even if he has no role to play in that. Although to say that the petitioner has no role to play, is difficult to accept. Submitting application surreptitiously without any advertisement in Newspaper and offering candidature for appointment itself show that he has role in the whole exercise.

20. Mr. Singh lastly submits that the petitioner was appointed as back as in the year 1990 and at such a distance of time, his services ought not to have been terminated. In support of this submission, he has placed reliance on unreported decision of this Court dated 16.1.2002 passed in C.W.J.C. No. 12448 of 2001, Niranjan Prasad Singh v. The State of Bihar and Ors. and my attention has been drawn to the following passage from the said judgment:

'Whether the appointment was to be made under the provisions of the circular letter No. 16441, dated 3.12.1980 or by following the provisions contained in the rules referred to by Mr. Singh is not of much relevance in this case because admittedly the provisions of the rules were also not followed in making the appointment of the petitioner and Mr. Singh does not defend the position that the appointment of the petitioner was made without following any procedure known to law. But as stated above the appointment was made in the year 1983 and the respondent authorities were able to discover the irregularity in the appointment only after 18 years. In a number of decisions it is held that the passage of time plays a curative role unless the appointment suffers from some very basic and fundamental flaw, e.g. fraud or misrepresentation of facts, use of fake and forged documents, bribery etc. In this case there is nothing to indicate that the petitioner's appointment suffered from any such fundamental and fatal flaws as indicated above and all that is stated in the impugned order of removal is that the appointment was made without following the prescribed procedure. In my view, after 18 years the order of removal cannot be sustained on that ground.' My attention has been drawn to another unreported decision of this Court dated 4.9.2001 passed on C.W.J.C. No. 7293 of 2000, Ganpat Paswan and Ors. v. The State of Bihar and Ors., which reads as follows :

'It is not in dispute that the petitioners were initially engaged as daily wages and they continued as such for several years and thereafter they were regularised vide orders as contained in Annexure-4, series some time in the years 1985 and 1986 and they have worked on Class IV posts on regular basis and now they are being terminated after fifteen years vide order as contained in Annexure-C to the counter affidavit. In support of his submission, learned counsel for the State relied upon the case of Roshni Devi and Ors. v. State of Haryana and Ors., (1998) 8 Supreme

Court Cases, 59 and also in the case of Union of India and Ors. v. Kishorilal Bablani, AIR 1999 SC 517 and also relied upon an unreported judgment of this Court as contained in Annexure 10 of the writ application. It is almost settled by various decisions of this Court and also of the Apex Court that an employee who continued in service for a pretty long time without misrepresentation, they should not be terminated as the same would be opposed to the principles of equity.'

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21. It is pointed out that L.P.A. No. 1146 of 2001, State of Bihar and Ors. v. Ganpat Paswan, preferred against the aforesaid order, has been dismissed by the Division Bench of this Court by order dated 10.10.2001 in the following words :

'5. We are unable to agree with the aforesaid submission. The respondents were engaged on daily wages according to the need of the work. Thereafter, the authorities having considered the fact that they continued on daily wages for some time, took a decision to regularises their services and they regularised their and, thereafter, they continued for long fifteen years prior to the impugned termination of their services. Thus, an equity was created in favour of the petitioners and as such asking them to go out of their employment after such a long time would be unjust and improper. We fully agree with the view taken by the learned Single Judge.'

It is further pointed out that Special Leave to Appeal (Civil) No. 1844 of 2002, Ganpat Paswan v. State of Bihar and Ors. preferred against the aforesaid judgment has been dismissed by the Supreme Court by order dated 1.3.2002.

22. Another decision of this Court in the case of Sitendra Kumar Singh v. The State of Bihar and Ors., 2003 (4) PLJR 282 has been relied on and my attention has been drawn to para 22 of the judgment which reads as follows :

'22. Keeping in view the facts and the legal propositions, as noticed above in my opinion, the cases of the petitioners of all the categories, enumerated above should be considered equitably in view of their prolonged continuance in services and, therefore, it would be most appropriate, in the given fact and circumstances

of the case, to invoke equity in favour of the petitioners to save even invalid appointments and the action of the authorities are held that to be highly arbitrary, unreasonable and without jurisdiction.'

23. Reliance has also been placed on a decision of the this Court in the case of Akhilesh Kumar Sinha and Ors. v. State of Bihar and Ors., 2002 (1) BLJR 371 and my attention has been drawn to the following passage from the said judgment :

'7. It is almost settled that if an employee continued on a post for several years, his services should not be terminated. In this connection, reference may be made to the case of Roshni Devi and Ors. v. State of Haryana and Ors., : AIR 1998 SC3268 and also the case of Union of India and Ors..v. Kishorilal Bablani, : 1999(105)ELT546(SC) . In these cases, it appears that even though certain irregularities were found in appointment of the petitioners the authorities by now acquiesced in the infirmities and now appointment of the petitioners cannot be said to be violative of Articles 14 and 16 of the Constitution. Moreover, by now all the petitioners have become overage and in case orders of termination are not interfered with they will not get employment anywhere.'

24. I am not at all impressed by this submission of Mr. Singh and the decisions relied on in no way support the case of the petitioner. Here, in the present case, petitioner has been appointed by throwing all the procedures to wind in absolute breach of the circular of the State Government and in violation of the requirement of Articles 14 and 16 of the [Constitution of India](#). Equity is not an empty concept. In fact, it tilts the balance when all other things are equal. In my opinion, an employee appointed throwing all the procedure to wind and in breach of most sacred document i.e. Articles 14 and 16 of the [Constitution of India](#) cannot take shelter behind equity. In a case in which initial appointment is bad and stinking, having been effected in breach of all the rules and norms of recruitment, allowing such person to continue in service only on the ground that such person had continued in service for long time, would amount to giving premium to illegality and shall encourage corruption. I am firmly of the opinion that what is illegal and void, shall continue to be so and principle of equity cannot save such appointment. I would hasten to add, however, that in a case in which appointment is made broadly

following the law and procedure and deviation of insignificant nature, is found after long lapse, the Court may save such appointment by invoking equity apply the principle of substantial compliance. Having found that the petitioner's appointment was illegal having been made after throwing all the procedures to wind, his appointment cannot be saved by invoking equity. I cannot do better than to quote what a Division Bench of this Court had said in the case of *The State of Bihar and Ors. v. Prashant Kumar Sharma and Ors.*, 2003 (1) BLJR 601, which read as follows :

'33.....The equity is not a empty concept, the equity in fact tilts the balance when all other things are equal petitioners cannot be allowed to say that though their entry was illegal despite that they would hold the post. The petitioner's also cannot be allowed to say that though their entry was bad but was later on validated. We have already observed that what was illegal and void could not become legal and valid. In fact the equity must come against such employees who had enjoyed the illegal employment and received salary for long years though they had no right or authority to occupy the post/office or receive the salary simply because the doors were opened for them by some unauthorised officer by his unauthorised act. Can it be argued before a Court of law that stay for a long period though was unauthorised and illegal would create a right in favour of those who illegally entered in the office. In the field of service law the principle of adverse possession has no application. In a case of adverse possession if a person remains in authorised possession openly, publicly with hostility then he acquires right by prescription but the said principle cannot be applied to the service jurisprudence. If such persons whose initial appointments are bad are allowed to occupy the office and post simply because they continued to hold the same then it would be adding premium to an illegality.

What was illegal would continue to be illegal. What was void would continue to be void. Either of these cannot be legalised nor can the Court grant relief in favour of such persons applying the principles of equity. The equity bridges the gaps and not the voids. Under the service law, appointments are to be made following certain norms and principles. When a procedure is prescribed then the same is to be followed. If contrary to all these any one can be appointed then everyone must

be appointed. If everyone cannot be appointed then anyone, a blue eyed baby or chosen one, picked one, selected one or elected one by the concerned officer cannot be appointed. Principle of equity cannot run contrary to law and the right of equality enshrined under the [Constitution of India](#).'

25. To put the record straight, I may state that the claim made by the petitioner that he is serving for long years, also does not seem to be correct. The approval to his appointment was given by the District Education Officer on 6th of April, 1990 and when this fact came to the notice of the State Government his service was directed to be terminated after following the principle of natural justice by letter dated 21.4.1997 (Annexure-5), and in fact, his service was terminated by order dated 14.5.1997. However, the same was found to be bad by this Court on the ground of infraction of principle of natural justice and same was set aside but at the same time, respondents were given liberty to proceed against the petitioner. Thereafter, notice was given to the petitioner and ultimately, his services terminated by the impugned order. In such circumstances, it is wrong to say that the petitioner continued in service for long years. In my opinion, in a case in which long time is taken for terminating the services on account of obligation to follow the procedure. It cannot be used to balance equity.

In the result, I do not find any merit in this application and it is dismissed accordingly, but without any order as to cost.

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