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Court : Patna

Decided On : Mar-17-2005

Judge : Chandramauli Kumar Prasad, J.

Acts : Constitution on India - Articles 14, 16 and 226; Service Law

Appeal No. : C.W.J.C. Nos. 6354 of 2003, 5524, 6720, 7358, 7477, 7528, 7920, 9032, 9401 and 12038 of 2003 and 59

Appellant : Fuleshwar Kamath and ors.

Respondent : State of Bihar and ors.

Advocate for Def. : J.D. Singh, GP I, N.N. Jha, JC to GP I, C.K. P. Bhagat SC I and Alok Kumar, JC to SCI

Advocate for Pet/Ap. : Ganesh Prasad Singh, Sr. Adv., Uday Chand Prasad, Suraj Narayan Yadav, Binod Kumar Sinha and Chandra Bhushan Das, Advs.

Prior history : Chandramauli Kumar Prasad, J. 1. In all these writ applications common questions of law with little variation of fact arise and as such, they were heard together and are being disposed of by this common judgment. 2. Petitioners of all these writ applications were working either as Basic Health Worker, Family Planning workers, Jeep Drivers, Vaccinator, Dresser, Peon and Ward Attendants before their promotion as Clerks, a Class III post excepting Ranjit Kumar Sinha and Fuleshwar Kamat, petition

Judgement :

Chandramauli Kumar Prasad, J.

1. In all these writ applications common questions of law with little variation of fact arise and as such, they were heard together and are being disposed of by this common judgment.

2. Petitioners of all these writ applications were working either as Basic Health Worker, Family Planning workers, Jeep Drivers, Vaccinator, Dresser, Peon and Ward Attendants before their promotion as Clerks, a Class III post excepting Ranjit Kumar Sinha and Fuleshwar Kamat, petitioners of CWJC Nos. 9401 of 2003 and CWJC No. 6354 of 2003 who were promoted as Family Welfare Workers. According to the petitioners, the Civil Surgeon, Madhepura sought details from various Medical Officers of different Hospitals and Primary/Health Centres of such employees who can be promoted as Clerk. It is their assertion that in the light thereof, the Controlling Officer, where the petitioners were working, forwarded their names, although the details thereof have not been furnished. Ultimately, petitioners were promoted to the post of Clerk excepting Ranjit Kumar Sinha and Fuleshwar Kamat who were promoted as Family Welfare Workers. Undisputedly, these promotions were effected by the Civil Surgeon without placing their cases for promotion before the Establishment Committee constituted for the purpose and without its recommendation. The orders of promotions of these petitioners were issued in between 31st of August, 1992 to 10th of February, 1993 excepting petitioners Sudhir Prasad (CWJC No. 12038 of 2003), Deep Narain Mahto (CWJC No. 7528 of 2003) and Ranjit Kumar Sinha (CWJC No. 9401 of 2003) who were promoted on 23.6.1993, 3.12.1993, and 6.4.1994 respectively. After the promotion of these petitioners a meeting of the so called Establishment Committee consisting of Civil Surgeon-cum-Chief Medical Officer, Madhepura, Additional Chief Medical Officer, Deputy Superintendent Incharge, Sadar Hospital and Medical Officer of Kuamrkhand, a member of the Scheduled Caste, was held on 22.2.1993 in which the Civil Surgeon apprised the members about the dearth of the clerks in the hospitals on account of ban imposed by the State Government, which necessiated the petitioners promotion and the committee accorded approval to the promotions

given to the petitioners, excepting the three petitioners enumerated above.

3. Later on promotions granted to the petitioners were objected by the audit team. Accordingly, the Director-in-Chief, Health Services, by its communication dated 18.4.1998, wrote to the Civil Surgeon to cancel the promotion of the petitioners and to revert them to the original post. Some of the petitioners aggrieved by the same, preferred CWJG No. 4891 of 1998 (Arvind Kumar Yadav and Ors. v. The State of Bihar and Ors.), and CWJC No. 5985 of 1998 Purshottam Lal Das and Anr. v. The State of Bihar and Ors.... This Court, by a common order dated 25.11.1998, allowed the writ applications, quashed the order cancelling the promotion and reverting them to the original post, primarily on the ground that adequate opportunity to show cause was not given to the employees. While doing so it gave liberty to the State Government to issue an appropriate show cause notice and pass final order in accordance with law. Relevant portion of the said judgment reads as follows.

'It is well settled that when a show-cause notice is to be issued to a person for a proposed action, the authorities issuing the show-cause must keep an open mind and that openness must be reflected in the show-cause. But in the instant case, show cause does not conform to that requirement. The instant show cause shows that the decision for reversion has already been taken and the same is almost implemented. Therefore, the show cause has been issued only by way of an empty ritual. This constitutes a vital error in the procedure relating to the decision making process. As such, this Court interferes by quashing Annexure-5 as also the impugned order dated 29.9.1998.

This Court makes it clear that this Court has not adjudicated on the merits of the case of either parties, and this order will not prevent the respondents if they are so advised, from issuing a proper show cause notice and give the petitioner at least two weeks time to give reply to the same and then come to a final order.'

4. In view of the liberty given to the State Government, show cause notices were given to the petitioner to which they replied and ultimately, by order as contained in memo No. 37 dated 7.6.2003 of the Civil Surgeon-cum-Chief Medical Officer, Madhepura, promotions of the petitioners have been rescinded and they have

been reverted to their original post. By the said order, excess payment made to the petitioners on account of their promotions have also been directed to be recovered. It is this order of the Civil Surgeon-cum-Chief Medical Officer, which has been impugned in all these writ applications.

5. According to the impugned order the promotions of the petitioners have been rescinded and the direction for recovery of the amount given on account of manifold illegalities. The illegalities are that the petitioners were promoted by the then Civil Surgeon without the recommendation of the Establishment Committee and the Establishment Committee which purportedly accorded approval to the promotions of the petitioners in the meeting held on 22.2.2003, did not had the nominee of the District Magistrate. The post on which the petitioners have been promoted is not in the channel of promotion and do not fall within the cadre. Further while effecting promotion, reservation policy was not taken into account and roster point not adhered to. It also stated that the promotions were made without any advertisement.

I have heard Mr. Ganesh Prasad Singh, Senior Advocate, Mr. Uday Chand Prasad. Mr. C.B. Das, in support of the writ applications, whereas the State is represented by Government Pleader No. 1 Standing Counsel No. 1 and their Junior Counsel.

Learned counsels representing the petitioners do not dispute that the Civil Surgeon had passed the order of promotion without the recommendation of the Establishment Committee. However, they contend that later on, the matter of promotion was placed before the Establishment Committee which accorded, approval to the promotion of the petitioners and as such, the defect, if any, in their promotions, have been cured and hence, the impugned order is fit to be quashed.

6. Learned counsels representing the State, however, contend that promotion effected illegally cannot be cured by according approval to the promotions and in any view of the matter, the Establishment Committee which accorded approval to the promotions of the petitioners, did not had the nominee of the District Magistrate which is necessary in view of the resolution of the State Government, They also point out that so far as the petitioners Sudhir Prasad, Deep Narain

Mahto and Ranjit Kumar Sinha who are petitioners in CWJC Nos. 12038 of 2003, 7528 of 2003 and 9401 of 2003 are concerned, no post-facto approval were given to their promotions.

7. Having appreciated the rival submission, I do not find any substance in the contention of the learned counsel for the petitioners. Undisputedly, petitioners were promoted by the then Civil Surgeon without the matter being, placed before the District Establishment Committee. Later on, the matter of promotion was placed before the Committee which did not had the nominee of the District Magistrate. According to the resolution of the State Government, the District Establishment Committee must have a nominee of the District Magistrate or the District Magistrate himself. Thus, the Committee which had accorded approval to the promotion of the petitioners, is not the Committee contemplated under law and in that view of the matter, post-facto approval of promotion of the petitioners by such a committee shall not legalise their promotions.

8. To put the record straight, Mr. Singh contended that although a nominee of the District Magistrate was present in the meeting of the Committee which was held on 22.2.1993, but he did not sign the proceeding book and as such, the reason assigned to support the impugned order is unfounded on fact.

9. I do not have the slightest hesitation in rejecting this submission of Mr. Singh. The resolution of the Committee taken in the meeting held on 22.2.1993 is on record. The names of the persons who had participated in the meeting have been mentioned but it does not contain any nominee of the District Magistrate. Had the nominee of the District Magistrate participated in the meeting, his name ought to have been shown in the proceeding book itself. One may conceive a nominee not signing the proceeding book but the very fact that the nominee of the District Magistrate has not been shown to have participated in the meeting, the plea taken by the petitioners that the said nominee did not sign the resolution is, absolutely unfounded on fact. So far as the case of Sudhir Prasad, Deep Narain Mahto and Ranjit Kumar Sinha are concerned, they stand on worse footing. Their promotions were not approved by the so called Establishment Committee in its meeting held on 22.2.1993.

10. As stated earlier, promotions of the petitioners have been cancelled also on the ground that the post of clerk and Family Welfare Workers on which the petitioners were promoted, do not come in the channel of promotion of the petitioners and promotions have been effected beyond cadre. It is common ground that excepting the post of Peon, Labour, Ward Attendants held by petitioners Fuleshwar Kamat, Purshottam Lal and Sudhir Prasad, all the petitioners were holding a Class III post in a lower scale of pay as that of the Clerks. So far as the aforesaid petitioners are concerned, they were working as Peon, Labour and Ward Attendants which are Class IV posts.

11. Learned counsels for the petitioners, therefore, contend that although petitioners are stated to have been promoted but in fact, it is a case of appointment and for that, recommendation of the District Establishment Committee is not necessary and their promotions be treated as direct recruitment. In the case of the aforesaid employees who were holding the Class IV posts, it has also been contended that their promotions be also treated as a direct recruitment to a Class III posts.

12. Learned counsel representing the State entered a caveat and contend that there is nothing on the record to show that how the Civil Surgeon selected these petitioners. They point out that even if the plea of the petitioners is accepted, that it a case of direct recruitment, procedures in conformity with Articles 14 and 16 of the Constitution of India ought to have been followed. Undisputedly, petitioners got the higher position without following the procedures known to law either of direct recruitment or promotion and as such, even if they are considered to be direct recruitment, same can not be said to be legal, they contend.

13. Having considered the rival submission, I do not find any substance in the submission of the learned counsel for the petitioners. All the petitioners excepting three, were Class III employees and before promotions they were in a lower scale of pay. The post on which they were promoted, do not fall in the channel of promotion. Hence, the promotions were not possible to be given to them. No procedure for direct recruitment has been followed, hence, their promotions can not be held to be legal, even if it is assumed to be a case of direct recruitment.

14. As regards the Class IV employees, the State Government had provided quota at the time of recruitment to Class III posts. Such Class IV employees thus can be recruited as Class III employees hence, their promotions were absolutely illegal. It is worthwhile mentioning that no procedures known to law either for direct recruitment or promotion has been followed in their case also. There is no advertisement inviting applications from eligible persons and throwing all the procedure to wind. Hence, the plea of the petitioners that their promotion can be saved by treating the same to be direct recruitment, is not fit to be accepted.

15. It is relevant here to state that one of the grounds to annul the order of promotion and reversion is that the same has been done without following the reservation policy and roster point has not been adhered to. Either in the case of promotion or direct recruitment, the policy of the State Government of reservation has to be followed and petitioners have been promoted without adhering to a policy and as such, their promotions cannot be said to be legal.

16. Learned counsel for the petitioners contend that in view of the order of the Director-in-Chief of the Health Services, as contained in letter dated 25.6.1997, even in case of illegal appointment and promotion, the Civil Surgeon is not authorised to rescind the same but is only required to submit a report to the Health Department. They point out that the aforesaid direction still operates and as such, the impugned order passed by the Civil Surgeon on 7.6.2003, is completely without jurisdiction and that itself vitiates the impugned order. I do not find any substance in the submission of the learned counsel for the petitioners also.

17. As stated earlier, promotions of the petitioners were objected by the audit team. In the light thereof, the Director-in-chief by its letter dated 18.12.1997 addressed to the Civil Surgeon, directed for rescinding the promotions and reverting the petitioners to the original post. Said order was challenged before this Court, which quashed the order of reversion but gave liberty to the State Government to issue show cause notices and thereafter pass final order. In the light of the said order, show cause notices were given to the petitioners by the Civil Surgeon and on consideration thereof, the impugned order has been passed. In view of aforesaid, the impugned order cannot be said to have been passed by the

Civil Surgeon without any authority.

18. As usual, in order to save the promotions, petitioners invoke equity and contend that they were promoted as back as in the years 1992/93 and at such a distance of time, it shall be wholly unequitable to rescind their promotions and revert them to the original post. In support of the submission, reliance has been placed on a Division Bench decision of this Court in the case of the Bihar State Co-operative Land Development Bank Ltd. and Anr. v. The Administrator, Bihar State Co-operative Land Development Bank and Anr., 2003 (3) PLJR 77, and my attention has been drawn to para 18 of the judgment which reads as follows :

'18. The Supreme Court further observed that the initial entry if is against a available vacancy but it suffered from some flaw in procedural exercise though the appointing authority is competent to appoint and had otherwise followed the due procedure then in such a case the procedural flaw may be waived and the incumbent's services may be regularised.'

19. I am not at all impressed by this submission of the learned counsel. A person who has been promoted by throwing all the procedures to wind, can not take shelter behind equity. 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. Article 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. Having found that the petitioners promotions were illegal having been made after throwing all the procedures to wind, they can not be allowed to say that their promotions be saved by invoking equity, I can not 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 :

'33. xxx The equity is not a empty concept, the equity in fact tilts the balance when all other things are equal. The 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 unauthorised 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.'

20. Now I revert to the decision of this Court in the case of Bihar State Cooperative Land Development Bank Ltd. (supra), in which procedural flaw was waived in

which the appointing authority followed the due procedure. In the present case, promotions have been made after throwing all the procedure to wind. Hence, the judgment in no way supports the case of the petitioners.

21. As stated earlier, while rescinding the promotion and reverting the petitioners to the original post, the excess amount paid to them on account of their illegal promotions is also sought to be recovered. It is contended by the learned counsel for the petitioners that in the absence of fraud or representation by them, excess amount paid to them is not fit to be recovered. Accepting this plea of the petitioners, in my opinion, would be nothing but a misplaced sympathy. A Full Bench of this Court had the occasion to consider this question more than a decade ago in the case of Rita Mishra and Ors. v. Director, Primary Education, Bihar and Ors., : AIR1988 Pat26 , in which it has been held that an appointment, flagrantly contrary to statutory requirements is non est and cannot be validated on any theory of factum valet. In case the appointment is illegal, no consequential right to salary would arise. Relevant portion of the judgment reads as follows :

'18. xxx. If it is once held that the very threshold stage of appointment is illegal then there is in the eye of law no appointment to the post or entry into the public service. The doorstands barred and slammed in the face of such an intruder. It was contended forcefully their where the procedural requirements of selection and appointment are statutory and have not been complied with at all there is no appointment in the eye of law. Consequently, no right of salary strict sensu can be arise before the very threshold stage is tainted with illegality. The learned Advocate General was thus right in the firm stand he took that where the original appointment is void ab initio then no question of salary for the post accruing therefrom can possibly arise.' xxx xxx xxx xx

22. A Division Bench of this Court considered this question in L.P.A. No. 41 of 2002, The State of Bihar and Ors. v. Ramesh Kumar), disposed of on 31.1.2002 in which it has been observed as follows :

'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.'

A Division Bench of this Court in the case of Vijay Kumar Singh and Ors. v. The State of Bihar and Ors. 2002 (3) PLJR 808 : 2002 (2) BLJR 1512, dealt with the question of recovery of the amount in the following words :

'29. The question in the present case is as to whether the direction for recovery of excess payment made to the employees is valid or not. No doubt, there is no fraud or misrepresentation on the part of the appellants, but the fact remains that this is not a case of only few teachers having been given the benefit. This is a case of interpretation of policy involving several crores of rupees. Large number of assistant teachers of the nationalised schools have been wrongly given benefit of additional increment though they are not entitled as admittedly they were not carrying the duties and responsibilities of greater importance than those attached to the post held by them. The huge amount of public money of a poor State has been paid to them by wrong understanding of the provision of law by the Education Department as well as by the Drawing and Disbursing Officer of the School. When there is a question of involvement of public Interest in a case like this, balance has to be struck off between the private interest and public interest. The balance lies in favour of public interest. The sympathy and benevolence has no doubt some role to play while exercising the powers under Article 226 of the Constitution of India, but discretion cannot be exercised at the cost of public interest.'

23. Further the Supreme Court in the case of R. Vishwanatha Pillai and Ors. v. The State of Kerala and Ors., 2004 (2) PLJR 106 SC, observed that the right of pension and monetary benefits can only be given when the appointment is valid and legal. In the said case in paragraph 19 it has been observed as follows :

'19. xxx The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for Scheduled Caste thus depriving the genuine Scheduled Caste of appointment to that post does not deserve any sympathy or indulgence of this Court.'

I had the occasion to consider this question in CWJC No. 9932 of 1999 Vishwanath Kumar v. The State of Bihar and Ors., disposed of on 25.11.2004 in which I have held as follows :

'Once it is held so the appointment of the petitioners 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.'

I had also considered this question in the case of Arvind Kumar and Ors. v. The State of Bihar and Ors., 2003 (2) PLJR 599, wherein I held as follows :

'52. True it is that recovery of salary paid to an individual employee in excess without misrepresentation may not be allowed to be recovered but distinction has to be made between individual cases and group of employees. Here individuals have not been chosen but a group of employees have been asked to refund the excess salary paid to them. In such a situation, I am of the opinion that the excess payment made even without misrepresentation and fraud can be recovered.'

xxx xxx xxx

24. Having found that the petitioners were promoted by throwing all the procedures to wind, they were not entitled to receive remuneration of the promoted post and hence, the impugned order directing for its recovery can not be faulted. In

the result, I do not find any merit in this applications and they are dismissed accordingly. In the facts and circumstances of the ease, there shall be no order as to cost.

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