

The State of Bihar and ors. Vs. Birendra Kumar Singh

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Court : Patna

Decided On : May-07-2004

Judge : Ravi S. Dhavan, C.J. and Navin Sinha, J.

Acts : Service Law

Appeal No. : LPA Nos. 1154 of 2003 and 235 of 2004

Appellant : The State of Bihar and ors. Ajay Kumar @ Ajay Sharma @ Ajay Kumar Sharma

Respondent : Birendra Kumar Singh The State of Bihar and ors.

Advocate for Def. : A.N. Singh, S.C. 8 and Ajatshatru, JC to SC 8 in LPA No. 235 of 2004

Advocate for Pet/Ap. : Ashok Kumar Chaudhary, G.P. VIII, Neeraj Kumar, Adv. in L.P.A. No. 1154 of 2003 and Ganesh Prasad Singh, Sr. Adv. and Sanjay Kumar, Adv.

Disposition : Appeal dismissed

Prior history : Ravi S. Dhavan, C.J. 1. Two cases engage the attention of this Court. One is a Letters Patent Appeal filed by the State of Bihar. This is Letters Patent Appeal No. 1154 of 2003 : State of Bihar and Ors. v. Birendra Kumar Singh. The other is a Letters Patent Appeal filed by one Ajay Kumar No. 235 of 2004 : Ajay Kumar alias Ajay Sharma alias Ajay Kumar Sharma v. The State of

Bihar and Ors.. The earlier appeal is by the employer. The subsequent one by the employee. 2. The aspects and circumstances

Judgement :

Ravi S. Dhavan, C.J.

1. Two cases engage the attention of this Court. One is a Letters Patent Appeal filed by the State of Bihar. This is Letters Patent Appeal No. 1154 of 2003 : State of Bihar and Ors. v. Birendra Kumar Singh. The other is a Letters Patent Appeal filed by one Ajay Kumar No. 235 of 2004 : Ajay Kumar alias Ajay Sharma alias Ajay Kumar Sharma v. The State of Bihar and Ors.. The earlier appeal is by the employer. The subsequent one by the employee.

2. The aspects and circumstances of these two cases are no different than those which have engaged the attention of this Court in many earlier decisions. Coincidentally, even the Supreme Court cases are in the context of Bihar.

3. There is an endless stream of cases which come to the Patna High Court when an appointment in public service is terminated. On a return being filed by a counter affidavit invariably the defence of the State is that the appointment had been made fraudulently. The learned Judges deciding these cases in the jurisdiction where the subject matters lie have taken an objective view that if the appointment be fraudulent, then, the person who is party to the fraud, that is, the receiver of the appointment and the giver of the appointment both must be held responsible. Thus, the Court has two appeals before it. One is an appeal by the State of Bihar as it does not like to take the responsibility to take action against its officers when they have indulged in arranging to grant illegal appointments. The other appeal is by an incumbent who would not like to lose his appointment on the ground that it is merely being alleged that it is fraudulent. This appellant contends that he never had any occasion to satisfy any authority that his appointment was, in fact, valid.

4. These are not the first cases this Court has engaged its attention to. There are other cases which have seen decision. There is a spate of petitions received by the High Court where promotions or time bound promotions are being recalled

after long years on the ground that they had been irregularly granted or fraudulently given. The theme is the same. One aspect is common that such action is being taken by the State or is being faced invariably by Class IV employees. Then these are matter relating to allegations of irregular, illegal or fraudulently granted promotions to Class III posts. Then all the cases pending at the Patna High Court ought to be put together, whether decided or pending, so as to perceive the serious aberration in the functioning of the State administration particularly matters relating to employment, public employment of Class IV and Class III employees. Does the administration of the State of Bihar as a generality make fraudulent appointments?

5. In the past the Patna High Court has had an onslaught of cases the species of which has been termed by lawyers and Judges alike as Naukri Scam. These were cases which arose within the Leprosy department, Malaria department, Tuberculosis department, other Health services departments and Education department.

6. The High Court had to order an inquiry. The State administration would not inquire. The Vigilance department of the State failed to complete the inquiry. Then, the Central Bureau of Investigation (CBI) was called upon to investigate. The investigations did unravel and unearth a veritable scandal as if providing employment became a business with the Officers of the administration. These matters are on record. The off shoot considered by the Patna High Court, when the relief sought by delinquent officers in a writ petition was denied, went right up to the Supreme Court. The Supreme Court in no uncertain terms declared that such officers be prosecuted.

7. For a long time, this Court had been sending a very polite message to the State Government through its State Counsel holding briefs for these departments that the matter be looked into in objectivity and while the Court accepts that every fraudulent appointment must be wiped out from the file of the administration, it does need an inquiry. For instance, if it is alleged that a Chaprasi or a clerk was given an appointment which smacks of fraud and if this is proved that it is so, then appointment may be brought to an end. But, to make an allegation against a petty

government servant after more than a decade or two, to the effect, that his appointment was the result of fraud cannot be resorted to without an inquiry. Such an incumbent may be put under a notice to give him a fair opportunity to justify the appointment which he received. If he satisfies the administration that his appointment had been granted validly then that is the end of the matter. But, if he cannot and the State Government reaches a satisfaction, beyond reasonable doubt, that indeed the appointment had been granted illegally and was the result of collusion and fraud, then, the next inquiry has to be addressed to the officials who had made the appointment regardless of rank whether an Officer or a Minister. If it is an officer then he has to explain to his superiors and justify the appointment failing which he will also go out of service along with the incumbent who received it. Both will face prosecution for having indulged in fraud and arranging misappropriating of the tax payers money when an appointment otherwise ought to have been given to a person to whom it was rightfully due by a proper, valid and legal selection. But, appointments must not be terminated for the askance, on caprice and administrative spite. A mere lodging of a First Information Report against a petty Class IV or Class III employee will not put an end to an appointment. The officer who made it must be named and got rid of along with the illegally appointed person. All this will need an inquiry.

8. The matter in Letters Patent Appeal No. 1154 of 2003 : State of Bihar and Ors. v. Birendra Kumar Singh is one in which the Court had drawn the attention of the Chief Secretary, the Secretary, Secondary and Higher Education and the Law Secretary that this aspect of fraudulent appointments on which a learned Judge has rendered a judgment (dated 15.7.2003 in C.W.J.C. No. 4844 of 2003 : Birendra Kumar Singh v. The State of Bihar and Ors.) should be examined in the light of the judgment of the past cases which have been rendered either by the Patna High Court or by the Supreme Court and the State Government should inquire into fraudulent appointments already made by inquiring about both the incumbent who received and the officer who gave such an appointment. Then only will there be a crime to report by a First Information Report.

9. In the case of Birendra Kumar Singh v. The State of Bihar and Ors. out of which Letters Patent Appeal No. 1154 arises, the learned Judge in a well considered

order has noticed the case of the petitioner as well as the defence of the State and was not satisfied with the defence made by bald statements that Birendra Kumar Singh had been illegally appointed in 1988 and his appointment was being virtually terminated in December, 2002 by stopping his salary. In so far as the incumbent is concerned; he faced an action that he will not be paid his salary. Thus, the writ petition.

10. In its defence the State took a plea that the appointment had been made illegally and was the result of a fraud. The learned Judge inquired that if that was so why had the State not filed a First Information Report. He placed on record that no First Information Report was lodged and, thus, salary could not be stopped. The learned Judge was also not satisfied with the mundane reply of the administration that the matter is being inquired into and that an inquiry is in process and necessary directions are being issued to take legal action against (as in the present case) that teacher or Headmaster of the school who made an illegal or fraudulent appointment. The learned Judge was of the opinion that such an inquiry ought to have been made and concluded with speed and unless that was done termination of services cannot happen. The learned Judge also left the State free to take whatever legal action including filing of First Information Report or a criminal complaint but after prima facie being satisfied that the appointment was the result of fraud. It was also suggested that those who made it have to be inquired upon also. The learned Judge was of the opinion that salary could not be withheld until the inquiry stood concluded. While leaving the State free to make its inquiry, in absence of it the learned Judge directed that salary could not be withheld. The learned Judge directed, in effect, that salary be paid until action against the person who received the alleged illegal appointment as a teacher is determined after a full-fledged inquiry.

11. This matter should have been left as it was on the order of the learned Judge. He had left the State free to take any action it had desired. It was not appropriate for the State to have filed this Letters Patent Appeal. The State was not restrained in carrying out an inquiry as also criminal action, except that it ought to be both against those who made the appointment as also those who permitted such a fraudulent appointment to be made. Appropriately, a criminal action against both

was recommended. The decision of the learned Judge reflects a very fair procedure consistent with the principle of natural justice and rule of law that before taking any action against persons who may be proceeded against or visited with a penalty, those persons are, at least, entitled to participate in an inquiry and offer their explanations. Why is the State shy by not taking action suggested by the learned Judge? The Court will leave this question unanswered as it will be dealt with by looking into certain cases which deal with similar subjects decided by the Patna High Court and by the Supreme Court.

12. The next matter is an appeal which has been filed by the incumbent who received an appointment and was being terminated out of it. This is the case of a person who had received a Class IV appointment as a bull attendant. It relates to the department of Animal Husbandry. The appointment was made in 1990. All of a sudden the State realised in 1998 after eight years that his services should be dismissed. The reliefs sought were of reinstatement and consequential unpaid salary. The petitioner Ajay Kumar had an appointment on a Class IV post, as a bull attendant. It was alleged that the appointment was illegal. The petitioner contended that his appointment had been made on a Class IV post and he was entitled to regularisation against the sanctioned Class IV post of a bull attendant. He contends that he had been posted, transferred and deputed at different places in Bihar and at the time when his services were being terminated he was working on a post of peon with the Veterinary Officer, Mahandia within Jehanabad district. He had not received his salary since December, 1994 and when he made a demand of it, three years subsequent to the demand, an inquiry was set up by the Deputy Collector only to tell him that his appointment was irregular. It was terminated cryptically. The petitioner says that he had never been given a chance to explain that his appointment was valid.

13. The petitioner was not alone in such appointments as a bull attendant. Fifty nine others had also received similar appointments. If they all had been posted in the same district, then, the Court could have drawn a presumption that there is something odd about the appointments but these sixty persons were recruited and assigned to different districts.

14. Was it a case of one illegal appointment or many? On this the defence taken in the counter affidavit filed by one 'Dr, Rakesh Nandan Singh, leave Reserved Officer, Animal Husbandry department, Government of Bihar' was very unsatisfactory and shabby. All that it says is that orders had been issued under the signature of the Secretary, Animal Husbandry department directing all the field officers of the Animal Husbandry department not to make appointments on Class III and Class IV posts and despite this appointments had been made. The Court is confining this matter to Class IV posts as was the subject matter of the writ petition.

15. The show cause which was referred to is virtually answering the defence explanation. While the incumbents were told that their appointments were irregular or illegal or beyond sanctioned strength, the incumbent cannot answer the statistics whether their appointments were against the sanctioned strength or had been made irregularly or illegally. It appears that these appointments had been regularised as the counter affidavit says 'his regularisation in Class IV (sic) post is fictitious and illegal.' It cannot be fictitious because the State had granted it. The regularisation was the result of a State action. The counter affidavit takes up a defence that 'no proper procedure was followed for the selection of candidates and as stated above the order of termination was issued after examining to show cause in the light of the government circular. Entire appointments were made in irregular manner without affording opportunities to other eligible candidates. All such appointments were made through back door method.'

16. It is not the job of this Court to find out about the bonafides of the appointments. Suffice it to say that this Court required the Law Secretary to file a report in this matter. The Law Secretary filed his report dated 15 March, 2004 and also filed a counter affidavit. The Law Secretary informs the Court that these appointments had been done by an Officer known as Dr. Darogi Razak. Sixty appointment letters were issued to sixty persons. The person who made these appointments, Dr. Darogi Razak, had made suspended. Rightly or wrongly whatever be the reason this officer who made the illegal appointments, did not see dismissal from service. Then, why should a Class IV employee be terminated from service, isolated from the person who made the appointment.

17. Once the State Government came to the conclusion that the appointments had been made illegally and the person who had made these illegal appointments was visited with a departmental action by suspension, then it was definitely becoming a case of a 'Naukri Scam'. The State Government cannot protect an Officer in taking up a defence that sanction is being sought to prosecute the Officer and on the other hand dismiss a Class IV employee. If it has led to this much on the surface that it was a matter of corruption and the State proposes to file criminal proceedings against the Officer as he has indulged himself in making public appointments on extraneous considerations then, why he is being retained in service? May be, this Officer may have filed a writ petition in the High Court and protected himself by an order of the Court. But was this entire story told by the State to the Court.

18. Now, how do matters stand for the State of Bihar in matters of illegal appointments. The administration in Bihar perhaps must be singled out in facing a critical analysis of the scams which have been generated in providing employment. There may be a reason for it. An economist may unravel why this happens. One logical reason is that nothing remains as trade, industry and commerce in the State to self generate the State's economy. What is left as business is to extract money at both ends; by the State and irregular extra-legal methods within the government. On whatever business and trade is left it is being taxed more and more. This discourages business and it winds up to open in other neighbouring States. The other is racketeering within the state administration. The Court mentions this as the Supreme Court noticed that in matters of public employment encouraged, within the State, irregular employment pockets have been set up. The Supreme Court noticed that a good deal of employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain back-door entries in public employment are in need of the particular job. The Supreme Court in the matter of Delhi Development Horticulture Employees' Union v. Delhi Administration, AIR 1992 SC 789 observed:

'Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common

practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal consideration including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more day are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such back- door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the Courts are of employment in Government Departments, Public Undertakings or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts.'

The Supreme Court has noticed that first there is an employment which is generated, then there is a break in service, then it is continued and this goes on and until somebody decides to put an end to an appointment known to exist for long years and it does become an employment generated through the back door as somebody is taken in and some one kept out.

19. Sanction of employment or sanction of an illegal plan for construction of a building are one and the same thing. If the allegation is corruption two people participated in the game. There is a matter of Dr. G.N. Khajuria and Ors. v. Delhi

Development Authority and Ors. AIR 1996 SC 253.' A conforming use of land as a residential colony was unsettled and allotted to a school. The Supreme Court felt that the delinquent had misused his power in making such an allotment and he should be suspended. The Supreme Court directed the authority to make an inquiry and submit a report.

20. The observation of the Supreme Court was:

'.....the Officer who had misused his power has also to be properly punished. Otherwise, what happens is that the officer, who made the hay when the sun shined, retains the hay, which tempts others to do the same. This really gives fillip to the commission of tainted acts, whereas the aim should be opposite.'

There is no difference in making an illegal plan to an illegally sanctioned building and illegal appointments. Both are corruption working within the same field.

21. The case of Narendra Kumar Asthana and Ors. v. State of Bihar and Ors., 1995 (2) PUR SC 58 the name of the parties bears out that the cases arise out of Bihar itself. This is a matter which arose out of a scandal on appointments made within the Tuberculosis department. The Supreme Court had directed that Officers who made massive illegal appointments be proceeded with even if they are to face a criminal trial.

22. The observations of the Supreme Court also amply imply that if the Officers have retired, consequences will visit them in retirement also.

23. Then, in the matter of Bimal Kishore Rai v. The State of Bihar and Ors., 1995 (2) PLJR 573, the High Court held that when an appointment itself was illegal, the appointee will be presumed to be in *pan delicto* and cannot claim any sympathy by claiming to be blameless. This decision is to be read with the decision of the Supreme Court that the person who received the appointment and the Officer who gave it both are to be proceeded with.

24. When this Court considers these two Letters Patent Appeals, and other matters which it had dealt with previously, it is showing its concern about fraud and collusion in public employment in Bihar. Fraud in making the appointments should

be followed by an action against the receiver and the giver both. If fraud and racketeering in making a grey market business out of doling out State jobs has ingrained itself within the government administration, then, the defence taken by the State in its litigation is an abettor's brief. In such cases the affidavit should be filed by the Secretary to the Minister, Department concerned. Otherwise, such callously, carelessly and lightly handled litigation is generating yet another business where it pays to arrange a circumstance so as not to take a stand. But, what this Court had seen in 2003 and 2004 the Patna High Court had already said so in 1995. In re. Bimal Kishore Rai (Supra) the Division Bench observed and directed that:

'In each and every case where an appointment is said to have been illegally made, in the sense that the rules governing the appointment have not been followed, and the appointment is made by flouting the law in such a manner that the motive of the appointing authority becomes suspect, simultaneously with the cancellation of such illegal appointment, action must be initiated against the appointing authority, and in appropriate case they should be immediately suspended pending departmental proceeding. If such action is not taken, Courts will doubt the genuineness of the reasons shown by the Government for cancellation of such appointment circumstances which give rise to a suspicion that the appointment was made on extraneous consideration including money.'

Perhaps these are matters which the State cannot handle as it does not have the determination to do so. If the decision of the Supreme Court and the earlier decision of the Patna High Court are to be read together then this matter of 'Naukri Scam' is still on. These are many dockets pending at the Patna High Court. The High Court is not meant to wash the dirty linen of those who have received fraudulent appointments or of the Officers who made the appointments. These are not to be sorted out at the High Court. The Court can look into selective cases, one or two or three. Not a virus like disease to eliminate a naukri scam, the stream of which is endless. Perhaps it is for this reason that the State Government finds it convenient not to examine such matters through the Bihar Administrative Services Tribunal which it set up by an Act of the legislature. This presents a sorry state of affairs that working institutions set up by the legislature are being permitted to

gather dust by vested interests.

25. In so far as the matter of State of Bihar v. Birendra Kumar Singh is concerned that is of an Assistant teacher in a Secondary School. No interference is called for by this Court as the learned Judge has sufficiently provided opportunities and latitudes for the State of Bihar to take action. Merely filing a First Information Report to generate and manufacture a plea and will not do. If the teacher has to go then person who made his appointment has also to go with him. The State of Bihar is avoiding its responsibility and public accountability in not taking action against the person who made the illegal appointment.

26. This Letters Patent Appeal No. 1154 of 2003 is dismissed.

27. In so far as the Letters Patent Appeal filed by Ajay Kumar is concerned, equity is not in favour of any one. This is a case where an officer has made a fraudulent appointment, of the petitioner as a bull attendant, as also fifty nine others. The Court cannot give a direction that both may continue. If a Class IV employee will go the officer who made the appointment will also go simultaneously.

28. The modality provided is that before a person is terminated from his services he should be given adequate opportunity. It should be followed by a proper inquiry, as far as possible beyond reasonable doubt and on being satisfied that fraud may have occurred by collusion in arranging such an appointment, consequential administrative action must visit the colluders simultaneously. This also gives an impression to the Court that the scam known as 'Naukri Scam' is being generated as a repeat performance of the past. It appears that there is an engineered plan, in effect, to kick out as many as possible so that there is a next phase to recruit as many numbers through the back door. Each matter will have to be inquired into and both the giver and the receiver be proceeded against departmentally as also the criminal action against both simultaneously.

29. The Letters Patent Appeals are dismissed.

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