

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.626 of 1999

Sanjay Kumar Singh, Son of Sri Damodar Singh, Vilalge- Baraon, P.S.- Nokha,
District- Rohtas at present in Mohalla Chandmari of Motihari, District- East
Champaran.

.... Petitioner/s

Versus

1. The State of Bihar through the Secretary, Department of Secondary, Primary and Adult Education, Govt. of Bihar, Patna.
2. Director Secondary Education, Department of Education, Government of Bihar.
3. Regional Deputy Director of Education, Muzaffarpur
4. District Education Officer, Muzaffarpur
5. District Inspectress of Schools, Muzaffarpur.

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. Rajendra Prasad Singh, Sr. Advocate.
Mr. Umeshwar Prasad Singh, Advocate.

For the Respondent/s : Mr. Anshuman Singh, GP-24
Mr. Siddhartha Shankar Pandey, Advocate.
Mr. Sriram Krishna, Advocate.
Mr. Rajeev Shekhar, Advocate.

CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

ORAL JUDGMENT

Date: 04-08-2015

Heard learned counsel for the parties.

2. The prayer of the petitioner in this writ application reads as follows:

"1. That this writ application is for quashing letter no. 1041 dated 16.09.1998 of Director Secondary Education contained in Annexure-2 and order no. 743 dated 15.10.1998 of Regional Deputy Director of Education, Muzaffarpur contained in Annexure-2(1) and for issuance of an appropriate writ, order or direction to the Respondent no. 1, 2 and 3 commanding upon them to reinstate the petitioner on the post of clerk with effect from the date of termination of his service."

3. Mr. Rajendra Prasad Singh, learned senior counsel appearing on behalf of the petitioner, has made two fold submission. Firstly, according to him,



now that the petitioner has continued in service from 1991 onwards for a period over 24 years, this Court should not allow the respondents to give effect to the impugned order which was passed on 15.10.1998 terminating the services of the petitioner. He has also submitted that termination of the petitioner would cause discrimination among same set of people and, in fact, many of the juniors who were appointed in a similar alleged illegal manner and when they have been allowed to continue in service, the petitioner's services, which has continued, of course, under the impugned order of this Court should not be now allowed to be dispensed with by giving effect to the impugned order.

4. Learned counsel for the respondents on the other hand, has submitted that the appointment of the petitioner was made *de hors* with the provisions under the rules governing the appointment of the post of Clerk in the ministerial office of the Education Department and that such appointment was made even without publication of the vacancy by way of advertisement in the newspaper much less undergoing the process of selection. He has also submitted that on noticing this illegal appointment of the petitioner, the Regional Deputy Director of Education, being the appointing authority, had himself issued a show cause notice and when the petitioner took a plea on his show cause reply that the decision should be taken not by the Regional Deputy Director of Education himself but after obtaining the order of Director, Secondary Education, the matter was referred to the Director, Secondary Education, who, after examining the materials on record, had passed the impugned order holding that if the appointment of the petitioner was made in violation of the departmental rules, without undergoing the provisions of advertisement, reservation and selection to the duly constituent university, such appointment of the petitioner should be terminated. As a matter of fact, the Director, in his said order, had also clarified

that if there was any other person alike the petitioner working on the post of Clerk and if their appointments were also vitiated in the flaw manner, as in the case of the petitioner, their services should also be dispensed with after undergoing the prescribed procedure.

5. Learned counsel for the State points out that after examining the aforementioned order of Director, Secondary Education and also after considering the show cause reply of the petitioner to the show cause notice, the services of the petitioner were terminated on 15.10.1998, which also was acted upon and/or remain enforced for a period almost four years before it got stayed by an order of this Court dated 25.09.2003.

6. Learned counsel for the State, therefore, submits that it is not that the respondents had allowed him to continue in service rather he was continued on the basis of interim order passed by this Court and, therefore, until the issue will be finally decided on merit the lis can not have to be settled between both the parties.

7. The first and foremost question would be as to whether the appointment of the petitioner was valid when it was made on 04.04.1991. That order of appointment of the petitioner reads as follows:

“क्षेत्रीय जिला उप निदेशक, तिरहुत प्रमंडल, मुजफ्फरपुर का कार्यालय
कार्यालय आदेश

श्री संजय कुमार सिंह ग्राम— वरोस विक्रमगंज जिला रोहतास जो किसी सेवा में नहीं है को अवर प्रमंडल शिक्षा पदाधिकारी, सिकहरन पश्चिम चंपारण कार्यालय में लिपिक के रिक्त पद पर वेतनमान 1200—30—1800 में राज्य सरकार द्वारा समय समय पर स्वीकृत कर अन्य भत्ते के साथ योगदान की तिथि से पूर्णतः अस्थायी रूप से नियुक्त करते हुए पदस्थापित किया जाता है।

2. इनकी सेवा बिना किसी पूर्व सूचना के किसी समय समाप्त किया जा सकता है।

3. योगदान के समय इन्हें असैनिक शल्य चिकित्सक का प्रमाण पत्र प्रस्तुत करना अनिवार्य होगा तथा इनका मूल प्रमाण पत्र देखकर योगदान करायेंगे।

ह0/— मदनलाल रजक,
क्षेत्रीय शिक्षा उप निदेशक,
तिरहुत प्रमंडल, मुजफ्फरपुर।

ज्ञापांक संख्या 61 – 62

मुजफ्फरपुर, दिनांक 4 अप्रेल 1991”

8. From a bare reading of the appointment letter of the petitioner it becomes very clear that it was a single handedly decision taken by Mr. Madanlal Rajak, the then Regional Deputy Director of Education, Tirhut Division, Muzaffarpur, who had appointed the petitioner on the post of Clerk. The contents of appointment letter is again an evidence of the fact that neither any advertisement was issued nor any selection process was undergone nor any panel was prepared nor even the Government rules of reservation were given effect to and the petitioner came to be appointed.

9. Let it be noted that Mr. Madanlal Rajak was not the monarch of what he had surveyed in capacity of Regional Deputy Director of Education, Tirhut Division Muzaffarpur inasmuch as he too was bound by statutory 1974 Rules which clearly provide not only the power of appointment to be vested in a committee consisting of the Regional Deputy Director of Education and three senior most District Education Officer but also such appointment to be made from open market after following the procedure of appointment. Such procedure of appointment can not be undertaken without issuance of an advertisement in newspaper followed by selection and thereafter taking a decision for appointment by the Committee and not by the Regional Deputy Director of Education himself.

10. In the appointment letter of the petitioner, there is however nothing to show that any of the provision of 1974 Rules were followed. Let it be kept in mind that the petitioner's appointment as a Clerk in the office of Sub Divisional Education Officer, Sheikhpura, was made by the Regional Deputy Director of Education in purported exercise of his power vested in him under Ministerial Service Cadre Recruitment Promotion and Transfer Rules-1974 (hereinafter referred to as the Rules) also lay down the norms of appointment in

the ministerial service and the subordinate offices of the Education Department. Rule-6, lays down that appointment was to be made only in the combined cadre of lower division and upper division of the ministerial Service and Rule-7 vests the power of appointment and promotion in the ministerial service to a committee constituted by the State Government consisting of the family members namely, RDDE, seniormost member of the Government teachers training college and three seniormost D.E.O of the Division. Rule-6, 7 and 8 being relevant for the purposes of this case is quoted hereinbelow:-

“Direct appointment shall be made only in the combined cadre of lower division and upper division of the ministerial service. The selection grade posts shall be filled in by promotion from the upper division posts on the basis of seniority and efficiency.

7. For consideration of matters relating to appointment and promotion to each of the cadres of ministerial service, a committee shall be constituted by the State Government consisting of the following members:

(a) Central Cadre:-

(1) Director (Secondary Education), Bihar, or an officer of the Directorate to be nominated by him.

(2) Inspectress of Schools, Bihar

(3) Secretary, Basic Education Board.

(4) Director, State Council of Educational Research and Training (SCERT)

(5) Superintendent of Libraries, Bihar.

(b) Divisional Cadre-Patna Division:-

(1) Regional Joint/Deputy Director of Education, Patna Division, Patna *Chairman*

(2) Principal Badshah Nawab Razvi Training College, Gulzarbagh, Patna *Member*

(3) Three Senior most District Education Officers of the Division *Members*

(c) Divisional Cadre-Tirhut Division

(1) Regional Joint/Deputy Director of Education, Tirhut Division *Chairman*

(2) Senior most Principal of Government Teachers Training Colleges of the Division *Member*

(3) Three Senior most District Education Officers of the Division *Members*

(d) Divisional Cadre-Bhagalpur Division,

(1) Regional Joint/Deputy Director of Education Bhagalpur Division Bhagalpur *Chairman*

(2) Senior most Principal of Government Teachers' Training College in the Division *Member*

(3) Senior most three District Education officers *Members*

Of the Division

(e) Divisional Cadre-Chhotanagpur Division

(1) Regional Joint/Deputy Director of Education *Chairman*

(2) Principal Government Teachers' Training College, Ranchi *Member*

(3) Three Senior most District Education Officers of the division *Members*

8. Direct Appointment to the permanent or temporary posts shall be done on the recommendation of the committee constituted under rule 7 as per procedure and standard prescribed by the State Government from time to time. The head of offices under the cadre who are authorized to make appointment to ministerial posts shall do so from the recommended list. Those office head who are not authorized to make appointment, the controlling officer of the cadre shall directly make appointment. Against permanent posts appointment shall be made on probation and the duration of probation shall generally be of two years. The panel for direct appointment shall be valid for one year."

11. If in the background of the aforementioned Rules the letter of appointment of the petitioner is examined, it becomes very clear that the RDDE, Muzaffarpur had single handedly appointed the petitioner without following the procedure laid down in the Rules. It is here that the respondents have categorically come out to make a statement on the basis of their official records that the appointment of the petitioner was made de hors of the provisions made in 1974 Rules and to that extent paragraph 7 , 8 and 9 being relevant are quoted herein below:

"7. That with regard to the statement made in paragraph no. 4 of the writ application, it is humbly submitted that it is very much clear that the petitioner has not been appointed properly as per norms and procedure laid down by the Education Department for appointment. Therefore, the appointment of the petitioner has been cancelled and under the circumstances the petitioner's claim regarding obtaining the appointment by the competent authority is not a ground of continuing in service when the appointment was illegal and beyond the rules. Therefore, the claim of the petitioner mentioned in para-4 is not tenable.

8. That, with regard to the statement made in paragraph no. 5 of

the writ application it is submitted that no interview has been taken nor any merit list or panel list has been prepared in this case. Therefore, the claim of the petitioner is fit to be quashed.

9. That with regard to the statements made in paragraphs no. 6 of the writ application, it is submitted that the facts mentioned in para 6 is beyond the fact on the ground that no such screening and interview and suitability test and such type of action was observed in this case."

12. In fact, the same fact has also been again reiterated when supplementary counter affidavit was sought to be filed in compliance of this Court's order dated 24.07.2003 and the respondents in this regard have again clarified their stand in paragraph nos. 3, 4, 5, 6 and 7, which for the sake of clarity and convenience is again quoted herein below:

"3. That, in addition to the facts which had been stated in the earlier counter affidavit which in brief were to the effect that appointment of the petitioner on the post of Clerk by the then R.D.D.E. Tirhut Division had been made in complete violation of the procedure as laid down by the Personnel & Administrative Reforms Department vide letter no. 16440 dated 3.12.80 as the appointment in question had been made without advertisement without interview and without preparation of panel. It is further humbly submitted that the petitioner was initially appointed as Clerk vide order dated 4.4.91 (Annexure-1) and was posted in the office of S.D.O. Sikharana.

4. That, it is the admitted position that for appointment on Class III and IV posts in the Muffasil Offices of the Education Department specific rule had been enacted which is ministerial staff service condition Rule 1974. Clause 8 of the 1974 Rules, specifically provides that appointment will be made in accordance with the procedure as laid down by the State on time to time basis after approval by the committee constituted under the rule.

5. That the deponent humbly states and submits that the Personnel & Administrative Department had vide letter no. 16440 dated 3.12.80 laid down procedure for appointment on

class III posts. The said procedure provides for advertisement, interview, preparation of pane and roaster clearance but so far the appointment of the petitioner is concerned, it is stated that the same had been made in complete violation of the aforesaid procedure.

6. That, the deponent further states that from bare perusal of the order of appointment (Annexure-1) itself, it will be manifest that no procedure whatsoever had been adopted in the case of the petitioner. The order of appointment does not refer to have adopted any procedure in the case of the petitioner. The contention made by the petitioner that he had participated in the interview is completely a unfounded one as nothing evidentiary has been brought on record in support of the said contention.

7. That it will be relevant to submit at this stage that under rule 1974 the authority competent to appoint on class-III is the Divisional Establishment Committee and not the R.D.D.E. whereas in the present case the appointment had been made by the then R.D.D.E. Thus it is the admitted position that no procedure of appointment whatsoever, had been adopted in the case of the petitioners. The appointment in question is ab initio void, and hence had rightly been terminated through the impugned order."

13. It is very significant to note here that the petitioner has filed his reply to the counter affidavit wherein he does not controvert the fact with regard to post being not advertised in the newspaper or the roster clearance obtained for his appointment and all that he says that it was the job of the respondents and for that the petitioner cannot be blamed. To that extent, the relevant statement of the petitioner in para-2 of the rejoinder affidavit, reads as follows:

"2.The petitioner reiterates that he was appointed on duly created vacant post after interview and due scrutiny of his educational qualifications and otherwise suitability and eligibilities. Whether roster clearance was done and whether vacancy was advertised in the News Papers was not known to the petitioner. He learnt about the vacancy and applied to the then



Regional Director who was the Appointing authority. He interviewed the petitioner, examined his qualification and eligibility papers and only after he issued appointment letter, the petitioner joined his post. So far as the appointment of the petitioner being made on the recommendation of the Divisional Establishment Committee is concerned whether the prior recommendation of the Divisional Establishment Committee was obtained or not was not known to the petitioner but the Divisional Establishment Committee later approved the appointment of the petitioner by subsequently approving his gradation list and transferring him from the office of Sub-Divisional Education Officer, Sikrahna (Motihari) to the office of Inspector of Schools, Motihari."

14. If this is the case of the petitioner, nothing more remains to be now decided inasmuch as, there is no escape from arriving at an irresistible conclusion that the appointment of the petitioner was a rank illegal appointment and in teeth of statutory rules of 1974 Rules and was made by the authority, who has not been empowered to make such appointment because the power of selection and appointment for the post of Clerk, being the part of ministerial office under 1974 Rules, was vested with the Committee and not in the Regional Deputy Director of Education alone. The very fact that the Regional Deputy Director of Education allegedly did everything, namely, called the petitioner for his interview, examined his educational qualification and issued the appointment letter, will go to show that a personal favour was bestowed to the petitioner by the aforesaid Regional Deputy Director of Education Mr. Madanlal Rajak.

15. As with regard to the aforesaid nature of illegal appointment, the issue was directly gone into by the Apex Court in the case of ***State of Bihar vs. Upendra Narain Singh*** reported in (2009) 5 SCC 65 wherein it was held as follows:

44. The scenario is worst when it comes to appointment

to lower strata of the civil services. Those who have been bestowed with the power to make appointment on Class III and Class IV posts have by and large misused and abused the same by violating relevant rules and instructions and have indulged in favouritism and nepotism with impunity resulting in total negation of the equality clause enshrined in Article 16 of the Constitution.

45. Thousands of cases have been filed in the courts by aggrieved persons with the complaints that appointment to Class III and Class IV posts have been made without issuing any advertisement or sending requisition to the employment exchange as per the requirement of the 1959 Act and those who have links with the party in power or political leaders or who could pull strings in the power corridors get the cake of employment. Cases have also been filed with the complaints that recruitment to the higher strata of civil services made by the Public Service Commissions have been affected by the virus of spoils system in different dimensions and selections have been made for considerations other than merit.

46. Unfortunately, some orders passed by the courts have also contributed to the spread of spoils system in this country. The judgments of 1980s and early 1990s show that this Court gave expanded meaning to the equality clause enshrined in Articles 14 and 16 and issued directions for treating temporary/ad hoc/daily-wage employees on a par with regular employees in the matter of payment of salaries, etc. The schemes framed by the Governments and public bodies for regularisation of illegally appointed temporary/ad hoc/daily-wage/casual employees got approval of the courts. In some cases, the courts also directed the State and its instrumentalities/agencies to frame schemes for regularisation of the services of such employees.

16. Having thus explained in nature of enormous cause of illegal appointment and particularly in the State of Bihar, the Apex Court had ultimately

held as follows:

65. *In view of the above discussion, we hold that the initial appointments of the respondents were made in gross violation of the doctrine of equality enshrined in Articles 14 and 16 and the provisions of the 1959 Act and the learned Single Judge gravely erred by directing their reinstatement with consequential benefits.*

17. The same view was reiterated by the Apex Court in the case of ***State of Orissa & Anr. Vs. Mamta Mohanty*** reported in **2011(3) SSC 436**:-

35. *At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: *Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors.*, [1992] INSC 36; AIR 1992 SC 789; *State of Haryana & Ors. v. Piara Singh & Ors.*, AIR 1992 SC 2130; *Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors.*, (1996) 6 SCC 216; *Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors.*, AIR 1998 SC 331; *Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors.*, AIR 2005 SC 2103; *National Fertilizers Ltd. & Ors. v. Somvir Singh*, AIR 2006 SC 2319; *Telecom District Manager & Ors. v. Keshab Deb*, (2008) 8 SCC 402; *State of Bihar v. Upendra Narayan Singh & Ors.*, (2009) 5 SCC 65; and *State of Madhya Pradesh & Anr. v. Mohd. Ibrahim*, (2009) 15 SCC 214).*

36.. *Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered.*

A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.”

18. Thus, on the basis of the aforementioned discussion as also the law settled by the Apex Court in the case of **Upendra Narayan Singh (supra)** and **Mamta Mohanty (supra)**, this Court will have no difficulty in believing the appointment of the petitioner was *de hors* of the rules and without following the mandate of Article 14 and 16 of the Constitution of India, is void *ab initio* and the same cannot be protected on any ground whatsoever much less on the ground of petitioner continuing in service on account of interim order passed on 25.09.2003.

19. As a matter of fact, submission of Mr. Rajendra Prasad Singh, learned senior counsel, that since, the petitioner has been allowed to continue in service on account of interim order, this Court should now treat that the appointment of the petitioner has been validated on account of experience acquired by him can also not be allowed in view of what was said by the Apex Court in the case of Mamta Mohanty (supra):-

37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide: Upen Chandra Gogoi v. State of Assam & Ors., AIR 1998 SC 1289; Mangal Prasad Tamoli (Dead) by L.Rs. v. Narvadeshwar Mishra (Dead) by L.Rs. & Ors., AIR 2005 SC 1964; and Ritesh Tewari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823).

38. The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. (Vide Dr. M.S. Patil v. Gulbarga University & Ors., AIR 2010 SC 3783)."

20. As a matter of fact, this Court has accordingly looked into the records of this case from which it transpires that after the service of the petitioner was terminated on 15.10.1998, he had remained out of service for a period of almost five years before interim order was passed in this case on 25.09.2003, staying the operation of the termination of the service of the petitioner on 25.09.2003. As a matter of fact, this Court by an order dated 08.07.1999, had rejected the prayer of the petitioner for stay of the termination order, wherein, it was held as follows:-

"The petitioner seeks stay of the operation of the orders as contained in Annexures 2 and 2/1 by which his services have been terminated. Stay of such an order would amount to virtually allowing the writ petition as in such an event the petitioner will, become entitled to reinstatement. It is well settled that where grant of interim relief covers the main relief sought in the case, the Court should refrain from giving such relief, as an interim measure.

I.A. No. 8540/99 stands rejected."

21. After more than four years of rejection of the prayer of the interim order, this Court had gone to stay the order of termination of the petitioner on the ground that some other persons were allowed to be retained in service and the learned counsel for the State has not given answer to it. The order dated 25.09.2003, reads as follows:-

"It is most unfortunate that G.P. Mr. S.S. Naiyar Hussain does not find time to appear in the matter. The matter relates to services of the petitioner and others. The matter relates to the policy of the Government. When this Court wants to decide the question, the junior counsel of these seniors do not assist the Court properly. On 11.9.2003 this Court recorded certain proceedings wherein it was clearly mentioned that the letter/orders of the Director, Secondary Education dated 9.12.1998 has been quashed by this Court in C.W.J.C No. 5003 of 1999 and letters patent appeal against the same was dismissed. It was also reported to this Court that in L.P.A. No. 591 of 1997s a Division

bench of this Court on 18.8.2003 refused to interfere in the order passed by the learned Single Judge wherein the learned Single Judge has granted identical relief to the said petitioner as prayed by this petitioner.

When I asked Mr. Vishwambhar Prasad, Advocate, J.C to G.P. 2 to address about that earlier judgements and the letter patent judgement, he simply said that he does not know anything about those matters. He now says that instructions have been sent to the departmental officer but the said officer has not contacted him. No further counter affidavit has been filed not the junior counsel is in a position to assist this Court. Under these circumstances constrained with these telling circumstances, I hereby direct that the effect and operation of the order Annexure-2 and 2/1 shall remain suspended till final disposal of this matter.

Let a copy of this order be sent to Mr. S.S. Naiyar Hussain will be well advised that he does not send any junior counsel for this Court.

The petition is admitted for hearing."

22. This Court has accordingly, asked the learned counsel for the State to explain as to whether any other person like the petitioner was allowed to continue in service and he has submitted that in the supplementary counter affidavit filed on 28.08.2003, well before passing of the interim order dated 25.09.2003, it was categorically explained that no one either junior or alike to the petitioner was retained in service. As a matter of fact, the petitioner's had alleged discrimination in paragraph no. 3 of the supplementary affidavit by giving details of 28 persons, who were allegedly continuing in service. Paragraph no. 3 of the supplementary affidavit of the petitioner, reads as follows:-

"This supplementary affidavit is filed to substantiate the allegation of discrimination and the termination of the services of the petitioner on complete pick and choose basis and as a result of bias against him. The names, present place of posting and the date of appointments of persons who were appointed by the Regional Deputy Director of Education (respondent no. 3) in similar manner rather in some cases even without screening the educational qualifications and the availability of posts as also the law of reservation, are still working, where as the petitioner who was not only appointed after ediquate proper screening of his educational qualification, availability of posts, law of reservation and was later confirmed, has been singled out for termination of services on the ground of the appointment itself being irregular."

23. In reply to the aforementioned stand in paragraph no. 3 of the petitioner, respondent no. 3 had filed supplementary counter affidavit, on 28.08.2003, wherein, it was stated as follows:-

"3. That in addition to the facts which had been stated in the earlier counter affidavit which in brief were to the effect that appointment of the petitioner on the post of Clerk by the then R.D.D.E., Tirhut Division had been made in complete violation of the procedure as laid down by the Personnel & Administrative Reforms Department vide letter no. 16440 dated 3.12.80, as the appointment in question had been made without advertisement. Without interview and without preparation of panel, It is further humbly submitted that the petitioner was initially appointed as Clerk vide order dated 4.4.91s (Annexure-1) and was posted in the officer of S.D.O., Sikharana.

4. That it is the admitted position that for appointment on Class III and IV posts in the Muffasil Offices of the Education Department specific rule had been enacted which is ministerial staff service condition Rule 1974s. Clause 8 of the 1974 Rules specifically provides that appointment will be made in accordance with the procedure as laid down by the State on time to time basis after approval by the committee constituted under rule.

5. That the deponent humbly states and submits that the Personnel & Administrative Department had vide letter no.16440 dated 3.12.80 laid down procedure for appointment on class III posts. The said procedure provides for advertisement, interview, preparation of panel and roaster clearance but so far the appointment of the petitioner is concerned. It is stated that the same has been made in complete violation of the aforesaid procedure.

6. That the deponent further states that from bare perusal of the order of appointment (Annexure-1) itself, it will be manifest that no procedure whatsoever had been adopted in the case of the petitioner. The order of appointment does not refer to have adopted any procedure in the case of the petitioner. The contention made by the petitioner that he had participated in the interview is completely a unfounded one as nothing evidentiary has been brought on record in support of the said contention.

7. That it will be relevant to submit at this stage that under rule 1974 the authority competent to appoint on class III is the Divisional Establishment Committee and not the R.D.D.E. whereas in the present case the appointment had been made by the then R.D.D.E. Thus it is the admitted position that no procedure of appointment whatsoever, had been adopted in the case of the petitioners. The appointment in question is ab initio void, and hence had rightly been terminated through the impugned order.

8. That in reply to the contention made by the petitioner in the supplementary affidavit that he had been a victim of discrimination as many other similarly situated persons are still continuing in service, it is humbly stated that the said averment is outrightly as irresponsible and unfounded on which will be borne from the explanation which are being offered hereinafter. In fact a thorough exercise of weeding out the illegal appointee had been undertaken and as a result of which large number of illegal appointments have already been terminated however, the process of scrutiny and verification of appointments is still under process.

9. That the deponent humbly states that earlier, in the Education Officers of Tirhut Division, illegal appointment on large scale had been made on class III and IV posts, which were in complete violation of the prescribed procedure i.e. solely through back door methods. When the matter of such mass illegal appointees had come to the knowledge of the Department, the then Director Secondary Education vide letter no. 1445 dated 9.12.98 had directed the R.D.D.E., Tirhut Division to enquire into genuinity of such appointments. A list of 134 persons was endorsed with the aforesaid letters whose validity of appointment was to be verified (although in the said list of 134 persons, names of personnels working in the Establishment of D.S.E., Sitamarhi and of 28 compassionate appointees had wrongly been included). Through the said letter, the then R.D.D.E. was further directed that apart from the name mentioned in the said List if other cases of illegal appointment comes to his knowledge those cases should also be examined and verified. s

10. That accordingly verification and scrutiny of illegal appointments made earlier were undertaken. It was in this context that the then R.D.D.Es., vide letter no. 144 (Go.) dated 12.12.99 had directed all the D.E.O.S of the Tirhut Division to enquiry into the matter of illegal appointments.

11. That the deponent further humbly states that it was on account of the aforesaid thorough exercise that out of the aforementioned list dated 9.12.98 that uptill now. 58 cases of illegal appointments have been detected and accordingly after adopting the due procedure they have been terminated from service. It is humbly stated that beyond the said list, 18 cases of illegal appointments have further been detected and accordingly they have also been terminated from service. And the process of scrutiny and verification of appointments is still under process.

12. That thus it will be manifest that the allegation leveled by the petitioner that he had been terminated on pick and choose basis is outrightly a superfluous statement without any basis.

13. That the averments made by the petitioner in the supplementary affidavit, stating the names of 10+28 persons, with the allegation that the said persons had been similarly appointed as the petitioner and they are still continuing in service while he had been terminated, is equally an irresponsible and totally unfounded statements.

14. It is categorically stated that the said list of 10+28, also includes the names of persons who had been appointed on compassionate basis, also of those who had been appointed from the panel prepared in the year 1987 and also of persons who have already superannuated. Names of persons who had been appointed on compassionate basis figure at serial nos. 1, 4, 5, 7 and 11 of Annexure-16/1, further at Serial No. 16 and 22 of Annexure-16/1, names of Bhola Mahto and Bindeshwar Paswan figure who had already superannuated and at serial no. 4 of Annexure-16 name of one Sudhir Kumar figures, who was appointed as Assistant from the Divisional panel prepared in the year 1987. Thus from the aforesaid categorical statement it will be manifest that to that extent the assertions made by the petitioner is hollow and irresponsible one.

14. That the deponents humbly stated that the said list of 10+28 persons admittedly also includes names of certain persons, whose cases after proper verification and scrutiny had been found to be illegal and hence they had duly been terminated. However persons whose names figures at serial nos. 7 to 9 of Annexure-16 had challenged their order

of termination before this Hon'ble Court to the Department, it is only thereafter that they had been reinstated into service. Similarly persons whose name figures at Serial nos. 3, 8, 9, 10, 12, 13, 14, 15, 18, 20, 21, 25, 27 and 28 of Annexure-16/1 had been terminated and out of which persons whose names figure at Serial Nos. 9, 9, 10, 13, 15, 21 and 27 after getting relief from this Hon'ble Court had been reinstated back into service. Serial no. 24 of Annexure-16/1 of the supplementary affidavit namely Ramgarib Choudhary is not functioning.

It is further submitted that person whose names figures at serial nos. 1, 2, 3, 5 and 10 of Annexure-16 and serial nos. 2, 6, 17, 19 and 23/of Annexure-16/1 are already under process of verification of scrutiny as they have already been show caused and a final decision in this regard is expected to be taken very soon. It is further submitted that Shri Dineshwar Pathak whose name is appearing at serial no. 6 in Annexure-16 of the supplementary affidavit and the persons whose names appearing at serial nos. 3, 12, 14, 15, 18, 20, 25, 28 in Annexure-16/1 of the supplementary affidavit have already been discharged from service.

15. That, thus from the aforesaid categorical details it will be again manifest that a thorough exercise of weeding but the illegal appointees without any discrimination is already under process, resulting into termination of service of large number of illegal appointees.

16. That with regard to the allegation made by the petitioner against Mr. Sabir and Kavindra Kumar Singh, it is submitted that Mr. Sabir is a compassionate appointment of Kavindra Kumar Singh is at Jamtara which is presently not within the jurisdiction of the State of Bihar.

17. That the answering deponent lastly submits that the department is totally geared upto to verify each case of appointment which is doubtful and in which there is slightest apprehension of illegality and in this exercise the authorities she had been responsible for such illegal appointments have also not been spared as in the present case the appointment of the petitioner had been made by the then R.D.D.E. Tirhut Divisions namely Mr. Madan Lal Rajak and it is on account of his such illegal involvements that criminal case has been lodged against him and which is still pending. Similarly other officials under whose patronages such illegal appointments had been made have equally been proceeded either Departmentally or through Criminal Cases.

18. That the statements made hereinabove well go to who that the appointment of the petitioner was outrightly illegal and hence had rightly been terminated from service through the impugned order and will equally go to show that there had been no discrimination in weeding out the illegal appointees."

24. If this Court had thereafter passed the aforementioned interim order on 25.09.2003, without taking into account that no one similarly situated alike the petitioner was continuing in service and such interim order cannot be made now the sole basis for allowing the petitioner to continue in service. It was this aspect of the matter, which was again considered at length by the Apex Court in

the case of Upendra Narayan Singh (supra):_

"66. The issue which remains to be considered is whether the Division Bench of the High Court was justified in refusing to examine legality and legitimacy of the initial appointments of the respondents only on the ground that the State had not challenged the dismissal of letters patent appeals filed in other cases. In our view, the approach adopted by the Division Bench was clearly erroneous.

67. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong orders- Chandigarh Admn. v. Jagjit Singh, reported in (1995) 1 SCC 745, Jaipur Development Authority v. Daulat Mal Jain, reported in (1997) 1 SCC 35, Union of India v. J.V. Subhaiah reported in (1996) 2 SCC 258, Gursharan Singh v. NDMC reported in (1996) 2 SCC 459, State of Haryana v. Ram Kumar Mann reported in (1997) 3 SCC 321, Faridabad CT Scan Centre v. D.G. Health Services, reported in (1997) 7 SCC 752, Style (Dress Land) v. UT, Chandigarh reported in (1999) 7 SCC 89, State of Bihar v. Kameshwar Prasad Singh, reported in (2000) 9 SCC 94, Union of India v. International Trading Co. reported in (2003) 5 SCC 437 and Directorate of Film Festivals v. Gaurav Ashwin Jain, reported in (2007) 4 SCC 737."

25. Thus, when the petitioner has miserably failed to answer the specific averment in the supplementary counter affidavit and has not been able to produce any document and that those 28 persons were also being retained, his plea of discrimination also falls flat on the ground. In any event, such illegality in the appointment as noticed in the case of the petitioner cannot be allowed to be perpetuated only because someone in the Education Department has been allowed to continue in service, in view of the aforesaid law laid down by the Apex Court in the case of Upendra Narayan Singh (supra). As a matter of fact, when the respondents have also successfully explained that no one like the petitioner has been retained in service, the plea of discrimination of the

petitioner cannot be even otherwise factually said to be correct. If some judicial order has been passed that also cannot be made precedent in view of the law laid down by the Apex Court in the case of Upendra Narayan Singh (supra).

26. As a matter of fact, as with regard to the claim of the petitioner for continuing in service on the basis of interim order which as noted above can never be used as a precedent and can also have no binding effect on the respondents. It is also well settled that where the Court passes any interim order which result in injustice to the opposite party itself creates doubt of the Court but at the time of passing of the final order to undo that injustice as far as it is within the power of the Court. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of **Prabodh Verma vs State of U.P. & Ors** reported in (1984) 4 SCC 251 and also to another judgment of the Apex Court in the case of **Commissioner of Income Tax, Madras vs Vinod Kumar Didwania** reported in AIR 1987 SC 1260, wherein, it was held that the petitioner cannot be allowed to retain the undue advantage of an interim order.

27. This aspect of the matter with regard to the petitioner availing the benefit of interim order of stay of this Court after remaining out of service for a period of more than four years and working for the last ten years or so in view of the interim order passed in the year 2004 can also be answered in view of the law laid down by the Apex Court in the case of **Ouseph Mathai & ors. v. M. Abdul Khadir**, reported in (2002)1 PLJR 147 (S.C.) , wherein it was held that stay granted by the Court does not confer a right upon a party and it is granted always subject to the final result of the matter in the court and at the risks and costs of the party obtaining the stay. The Apex Court in this regard has also clarified that after dismissal of the lis, the party concerned is relegated to the position which existed prior to filing of the petition in the court which had

granted the stay and as such, grant of stay does not automatically amount to extension of a statutory protection. In this regard the Apex Court has held as follows”

“13. Learned counsel appearing for the respondents- tenants submitted that as there was a stay regarding dispossession of the tenants, the tenants were justified in depositing the rent within one month after the dismissal of their petition under Article 227 of the Constitution of India. It is settled position of law that stay granted by the court does not confer a right upon a party and it is granted always subject to the final result of the matter in the court and at the risks and costs of the party obtaining the stay. After the dismissal, of the lis, the party concerned is relegated to the position which existed prior to the filing of the petition in the court which had granted the stay. Grant of stay does not automatically amount to extension of a statutory protection.”

28. Yet again the same principle was reiterated by the Apex Court in the case of ***State of West Bengal & ors. v. Banibrata Ghosh & ors.***, reported in ***AIR 2009 SC 1845***, with more emphasis and a further clarification that the mere pendency of the writ petition with an order of stay cannot be viewed against the State Government, which could not be said to be responsible for such long pendency of the matter before the court and eventually could not have been viewed in favour of the writ petitioner. The plea of compassion was also rejected by the Apex Court and to that extent the law laid down by the Apex Court in this regard reads as follows:

“15. We also do not understand, as to how, the Division Bench could be impressed by the fact that the interim order was not appealed against by the State Government. It is to be understood that an interim order does not decide the fate of the parties to the litigation finally, it is always subject to and merges with the final order passed in the proceedings. The non-filing of the appeal which seems to have impressed the Division Bench, according to us, is of no consequence.

16. The Division Bench also seems to have been impressed by the fact that the learned single Judge dismissed the petition in 2003, though the appointment was made way back in 1993. The mere pendency of the Writ Petition cannot be viewed against the State Government, which could not be said to be responsible for such long pendency and that could not be viewed in

favour of the original Writ Petitioner (respondent herein). That logic of the Division Bench is completely faulty. We are also no less surprised by the direction of the Division bench that since the respondent no.1 herein was not allowed to remain in service pursuant to the impugned order of the learned single Judge, he should be paid 50% of the back wages for the period for which the respondent was out of service. Such could never have been the course taken in view of the settled principle of "no work no pay". Again, the order of the learned single Judge was a perfectly justified order, who had viewed the whole controversy in details. We are convinced that the impugned judgment of the Division Bench wholly lacks merit and would have to be set aside and the judgment of the learned single Judge would have to be restored. We order accordingly.

17. Shri Ghosh, learned Senior counsel, appearing for the respondents, at this stage, says that we should take a compassionate view of the matter, since as a result of this judgment, the respondent would be thrown in the State of unemployment. We are afraid, we cannot show any such misplaced sympathy, which was shown by the Division Bench. We are told at the Bar that this Court had issued directions to make the payment of salaries and some payments have been made to the respondent. We direct that such payments shall not be recovered from the respondent. Considering that the Writ Petition remained pending for 10 years and thereby the respondent might now have become barred by age for fresh employment, we recommend that the Government may consider the condonation of the age bar if any, on the part of the respondent. We accordingly set aside the judgment of the Division Bench and restore that of the learned Single Judge and allow the appeal but without any orders as to costs."

29. Following the ratio laid down by the Apex Court in the case of Banibrata Ghosh (supra) this Court is also of the view that the petitioner shall not be made liable to refund the amount of salary which was paid to him during continuation of his service on account of the interim order passed by this Court.

30. Reliance placed by Mr. Singh, learned senior counsel, on the judgment of the Apex Court in the case of *Rajpal vs. the State of Hariyana* reported in (1996) 7 SCC 381, seems to be wholly misplaced. Firstly, no law was laid down in that order of the Apex Court which more or less is an order

under Article 142 of the Constitution of India having no binding precedent. Secondly, that case was of regularization of service.

31. Here, in the present case the petitioner/s appointment has been terminated, and this Court has to examine whether the termination order of the petitioner is valid and in accordance with law and for the reasons recorded earlier in this judgment there can be no escape from the irresistible conclusion that the petitioner’s appointment itself was out and out illegal.

32. Thus, for the reasons indicated above, this writ application must fail and is accordingly dismissed with only clarification that the dismissal of this writ application will not lead to any adverse financial consequence for the petitioner and the respondents would not be entitled to recover any salary paid to the petitioner on account of continuation in service on the basis of the interim order passed by this Court on 25.09.2003, which however gets now automatically vacated on account of dismissal of this writ application.

33. Let a copy of this order be sent to the Regional Deputy Director of Education, Muzaffarpur, the respondent no.3.

(Mihir Kumar Jha, J)

Sujit/Ranjan-

U			
---	--	--	--