

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13152 of 2015

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Sanjay Kumar Sharma, son of Sri Madan Sharma, resident of Village Barkhurdar Chak, P.S. Naubatpur, Dist. Patna.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Health Department, Bihar, Patna.
3. The Director-in-Chief, Health Services, Bihar, Patna.
4. The Regional Deputy Director, Health Service, Magadh Division, Gaya.
5. The Civil Surgeon-cum-Chief Medical Officer, Aurangabad.
6. The In-charge Medical Officer, Sadar Block Aurangabad.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prafull Chandra Jha, Adv.

For the Respondent/s : Mr. Ram Balak Mahto, AG

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA
ORAL ORDER

2 24-08-2015 Heard learned counsel for the parties as with regard to the following relief prayed in this writ application:-

“1(i) For directing the respondent authorities to reinstate the petitioner on the post of Male Planning Worker, Class-III, on the ground that the similar situated persons have been considered by this Hon’ble Court and by the High Level Committee and have been allowed to join and case of the present petitioner also comes in the category of irregular because the petitioner fulfills all the criteria which is necessary for irregular category.

(ii) For directing the respondent authorities to consider the case of the petitioner on the ground that the petitioner has discharged his duty more than 11 years on the post of Male Family Planning Worker, Class-III and juniors to the petitioner have been reinstated in this service.

(iii) *For directing the respondent authorities to take a decision in compliance of the order dated 17.05.2011 passed in L.P.A. No. 1646 of 2010 of this Hon'ble Court in terms of the case of State of Bihar & others Vs. Sohan Rai bearing L.P.A. No. 1623 of 2009 and other analogous case reported in 2010(3) PLJR 397."*

2. Mr. Prafull Chandra Jha, learned counsel for the petitioner, has submitted that the termination of the services of the petitioner is bad both on fact and in law and in fact the petitioner has been made out of service despite his succeeding in two writ applications before this Court.

3. Learned counsel for the State, on the other hand, has submitted that if the petitioner had not moved Justice Uday Sinha Commission appointed by this Court in terms of the order dated 17.5.2011 in LPA No. 1646 of 2010, he cannot be allowed to raise this issue now before this Court.

4. There are two aspects of the matter which would immediately meet the eyes of this Court. Firstly, the petitioner's appointment made on 24.7.1989 allegedly by the Regional Deputy Director of Health Services as a Male Family Planning Worker. From the aforesaid appointment letter, it is absolutely clear that cyclostyled type format of the appointment letter was prepared which does not even give any inkling of the post of the Male

Family Planning Worker to have been ever advertised in the newspaper much less followed by selection in the prescribed manner. In fact, there is also no averment to this effect in the writ application.

5. Secondly as a matter of fact, the post of Male Family Planning Worker, being a district cadre post, its appointing authority was the Civil Surgeon but, somehow, the Regional Deputy Director of Health, who was never authorized to make such appointment, had made an out and out illegal appointment of the petitioner.

6. Such illegal appointment of the petitioner in fact also become manifest from his transfer order issued within a period of two months. Let it be in this regard noted that there was no post of Male Family Planning Worker in the office of Regional Deputy Director of Health Services, Magadh Division and, therefore, the petitioner was edged out after a period of two months for his being posted in Sadar Block, Aurangabad on the said post of Male Family Planning Worker. This was in fact the similar type of illegal appointment as resorted to the famous Mr. Mallik who used to appoint the people in Tuberculosis establishment of Health Department by way of issuance of transfer order. As a matter of fact, such transfer order clearly goes to show that the petitioner

was said to be kept waiting for posting in the office of the Regional Deputy Director of Health, Gaya.

7. Though the petitioner has not enclosed the order of termination of service dated 28.6.2003 passed by the Civil Surgeon cum Chief Medical Officer, Aurangabad but, then, this Court can take judicial notice of the fact that a large number of illegal appointments having been discovered in the health department, all of them were sought to be removed in between the year 2002 to 2003 and, therefore, the petitioner also was removed from the service. As a matter of fact, when the petitioner's writ application assailing order of termination dated 28.6.2003 was allowed by the learned Single Judge by a common judgment dated 8.9.2003 in the case of *Sitendra Kumar Singh with analogous cases Vs. State of Bihar & Ors.* reported in 2003(4)PLJR 282, the same was interfered by the Division Bench in the case of *State of Bihar Vs. Purendra Sulan Kit* reported in 2006(3)PLJR 386 wherein, with the consent of the parties, 819 writ applications and the letters patent appeals were disposed of, one of which was that of the petitioner. The Division Bench in the operative portion of the order had held as follows:-

“6. After marathon arguments, fortunately the differences on issues of law were greatly reconciled because the parties by consensus



agreed that in view of overall factual profile of these cases the recent judgment of the Constitution Bench of the Supreme Court in the case of Secretary, State of Karnataka & Ors. Vs. Uma Devi & Ors., reported in 2006(2) PLJR (SC)363 shall govern the cases of the affected employees and the legal issues shall be treated to have been settled by the law declared by the Constitution Bench in the aforesaid judgment. In view of such consensus on the part of lawyers appearing for the affected employees and the counsel for the State, the task of deciding these Letters Patent Appeals and writ petitions has become considerably easy because the learned counsel for the affected employees accepted that the Letters Patent Appeals as well as the Writ petitions be disposed of with a direction to the Government of Bihar in the Department of Health to scrutinize the cases of the affected employees afresh on the basis of relevant materials and in view of law declared by the aforesaid Constitution Bench judgment so as to find out the cases of those affected employees which can be termed only as irregular appointments and not illegal appointments and then take steps to regularize the services of such irregularly appointed employees as a one time measure in accordance with the aforesaid judgment and particularly, in accordance with the observations and directions given by the Apex Court in paragraph 44 of the said judgment.”

8. When the matter, relating to the petitioner, was examined by the Five Men Committee constituted by the State Government, the appointment of the petitioner was declared to be illegal with



the remark that neither the post was sanctioned nor the Regional Deputy Director of Health was competent to make such appointment. The petitioner, however, was again able to get an order from this Court dated 13.11.2009 for his reinstatement only on the ground that the Five Men Committee did not give individual hearing. Such view taken by the learned Single Judge while allowing the writ application of the petitioner and other in CWJC No. 12575 of 2009, was again challenged before the Division Bench in the case of *The State of Bihar & Ors. Vs. Sohan Roy* reported in *2010(2)PLJR 397* and the Division Bench had constituted One Man Enquiry Commission headed by Hon'ble Justice Uday Sinha, a retired Judge of this Court to examine the validity and correctness of the appointment of the petitioner and others and regularization of his service in accordance with law.

09. Consequently the appeal of the State of Bihar against the judgment of the Single Judge in the case of the petitioner on 13.11.2009 in CWJC No. 12575 of 2009 was also disposed of in terms of the order of the Division Bench in the case of Sohan Roy (supra) by an order dated 17.5.2011 in L.P.A. No. 1646 of 2010 (Annexure-6) wherein it was specifically mentioned that direction given in the order passed by the learned Single Judge against which the appeal was preferred would stand nullified. Thus the



order of reinstatement of the petitioner in service as directed by the learned Single Judge has already stood annulled by the aforesaid order of division bench dated 17.5.2011 and though the petitioner was given liberty to appear before the Hon'ble justice Uday Sinha but it appears that the petitioner did not choose to do so.

10. Mr. Jha in fact has come out to say that by the time he had approached Justice Uday Sinha Commission but its working was already over. This Court however is not at all satisfied with such explanation given by Mr. Jha because Justice Uday Sinha Commission functioned till May, 2012 and, therefore, if the petitioner did not comply the order of the Division Bench dated 17.5.2011 and did not appear before the Justice Uday Sinha Commission, he also cannot make a premium of his own lapses and laches by moving this Court on 21.8.2015 by filing this writ application. The net result, therefore, would be that the petitioner's two orders in the two writ applications stands nullified by the two Division Bench judgment and, therefore, the petitioner cannot claim his reinstatement after 12 years of his remaining out of service.

11. As a matter of fact, this Court itself has gone into the whole gamut in the appointment of the petitioner and found that



the appointment of the petitioner was not only made by the incompetent authority but also without following the mandate of Article 14 and 16 of the Constitution of India. Such appointment, therefore, has to be directed to be void ab initio as was held by the Apex Court in the case of *State of Orissa & Anr. Vs. Mamata Mohanty* reported in **2011(3) SCC 436** wherein it was held as follows:-

“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, 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.**, 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."*

12. Thus, when the petitioner does not claim that the appointment was made by following the mandate of Article 14 and 16 nor has adduced any evidence of issuance of advertisement in the newspaper followed by selection as also not able to assail the reasons given by the Five Men Committee either with regard to there being no sanctioned post available for appointment on the

post of Male Family Planning Worker in the office of the Regional Deputy Director of Health, Magadh Division, Gaya, also can not be held to be bad. Infact there will noting left for this Court but to hold that the termination of the services of the petitioner made some twelve years earlier way back in the year 2003 would now require no interference from this Court.

13. Thus, for the reasons indicated above, this application must fail and is, accordingly, dismissed.

(Mihir Kumar Jha, J)

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