

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.238 of 2013

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Ramanand Singh Son Of Late Janki Singh Resident Of Village And P.S.-
Panchgachiya, District- Saharsa At Present Residing In Village- Dasturpur, P.S.-
Chandi, District- Nalanda

.... Petitioner/s

Versus

1. The State Of Bihar Through The Principal Secretary, Department Of Health,
Govt. Of Bihar, Patna
2. Director In Chief, Health Services, Bihar, Patna
3. Regional Deputy Director, Health Services, Bhagalpur Division, Bhagalpur
4. Civil Surgeon Cum Chief Medical Officer, Jamui
5. In-charge Medical Officer, Primary Health Centre, Jhajha, Jamui

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Banwari Sharma, Adv.
Mr. Shiv Kumar, Adv.

For the Respondent/s : Mr. Devendra Kumar Sinha, AAG 2

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

CAV JUDGMENT

Date: 27-03-2015

Heard learned counsel for the parties.

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

“.... for quashing the order issued vide memo no. 317 dated 25.02.2003 under the signature of the Civil Surgeon cum-Chief Medical Officer, Jamui as contained in Annexure-12, whereby and whereunder the service of the petitioner has been terminated from 01.03.03 without any proper enquiry/proceeding in accordance with law. And further a writ in the nature of writ of mandamus for directing the respondent authorities to consider the case of the petitioner for regularisation as per the order dated 26.6.2006 passed in L.P.A. No. 946/03 and analogous cases by this Hon’ble Court as done in case of several similarly situated persons in light of paragraph-44 of the Judgment passed in case of the

Secretary, State of Karnataka vs. Uma Devi by the Constitution Bench of the Hon'ble Supreme Court".



3. Mr. Banwari Sharma, learned counsel for the petitioner, while assailing the aforementioned order, has primarily concentrated on the aspect that the appointment of the petitioner on the post of Basic Health Worker made way back on 25.01.1988 and thus he having been allowed to continue for a period of more than 15 years ought to have not been terminated on the ground that there were certain anomalies at the time of his initial appointment. Mr. Sharma, in this regard, has emphasized that the petitioner's repeated representation filed before the authorities for setting aside the order of termination of the petitioner dated 25.02.2003 has borne no fruitful result as a result whereof, this writ application has been filed.

4. The respondents also have filed their counter affidavit wherein it has been explained that the initial appointment of the petitioner was made by the Civil Surgeon on the post of Basic Health Worker whereas the power of appointment on the post of Basic Health Worker was vested only with the Director- in-Chief of the Health Services and that too in respect of the trained candidates. In the counter affidavit, it has also been explained that the petitioner was given ample opportunity to file supporting documents as with regard to his appointment vide show cause notice dated 13.12.2002,



30.01.2003 and 01.02.2003 but the petitioner could not lead satisfactory evidence, save and except, a letter of the Civil Surgeon – cum- Chief Medical Officer, Dumka dated 25.01.1988 in support of his appointment. The petitioner having failed to produce any evidence of the post being advertised and his appointment being made by the competent authority in the prescribed manner, therefore, cannot claim his appointment to be valid and legal so as to confer on him any right of continuance in service.

5. In the considered opinion of this Court, this writ application must fail on the ground of delay and laches alone inasmuch as the petitioner's appointment came to be cancelled on 25.02.2003 and this writ application has been filed almost after ten years on 04.01.2013 for setting aside such order. Mere filing of representation cannot be sufficient explanation for such inordinate delay in moving this Court.

6. By now it is also well settled that mere filing of representation and awaiting result of the same would not explain the delay and the writ application for the unexplained delay in moving court would be dismissed on the ground of delay and laches. Reference in this connection may be made to the judgment of the Apex Court in the case of *Karnataka Power Corpn. Ltd. through its Chairman & Managing Director & Anr. Vs. K. Thangappan & Anr.* reported

in **2006(4) SCC 322** wherein it was held as follows:-

"9. *It was stated in State of M.P. v. Nandlal Jaiswal [(1986) 4 SCC 566] that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weights with the High Court in deciding whether or not to exercise such jurisdiction.*"

7. The additional plea of the petitioner that since similarly situated persons had moved this Court and in their cases the issue relating to termination of services made in the Health Department was referred by this Court in the case of *State of Bihar Vs. Purendra Sulan Kit* reported in **2006(3)PLJR 386** to the Five Men Committee to be appointed by the Health Department and such Committee had submitted its report in the year 2009 whereafter a few



of them could get relief of reinstatement and, therefore, the case of the petitioner should be sent to the Committee is also not acceptable because the petitioner has come out to assail the impugned order of termination passed on 25.2.2003 by filing the present writ application on 4.1.2013. In this regard, it has to be kept in mind that somewhat in a similar situation, the Apex Court in the case of **Bhoop Singh Vs. Union of India** reported in **1992(3) SCC 137** had held as follows:-

"----- the question here is of interfering with the Tribunal's order since the Tribunal has refused relief on this ground. Unless it can be held that delay of several years in claiming the relief of reinstatement must be ignored simply because some others similarly dismissed had been reinstated as a result of their success in the petitions filed many years earlier, the Tribunal's order cannot be reversed in the present case."

"-----No attempt has been made by the petitioner to explain why he chose to be silent for so long, if he too was interested in being reinstated and had not abandoned his claim, if any. If the petitioner's contention is upheld that lapse of any length of time is of no consequence in the present case, it would mean that any such police constable can choose to wait even till he attains the age of superannuation and then assail the termination of his service and claim monetary benefits for the entire period on the same ground. That would be a startling proposition. In our opinion, this cannot be the true import of Article 14 or the requirement of the principle of non-discrimination embodied therein, which is the foundation of petitioner's case."

8. That apart, from reading of the impugned order, it would be clear that none of the requirement of the procedural rules

was followed in the initial appointment of the petitioner, inasmuch as, the post was not advertised in the newspaper and no selection process was undergone and even the Government policy of reservation was not followed. Thus, the petitioner cannot be heard to say that such illegal appointment could have been allowed to continue. To that extent, it would be also necessary to quote the impugned order of termination dated 25.02.2003, relevant portion whereof reads as follows:

“कार्यालय: असैनिक शल्य चिकित्सक सह-मुख्य चिकित्सा पदाधिकारी,

जमुई

संख्या / दिनांक /

प्रेषित,

श्री रामानन्द सिंह बु0स्वा0 कार्यकर्ता

प्राथमिक स्वास्थ्य केन्द्र, झांझा

विषय:- 14.1980 से फर्जी/अवैध रूप से नियुक्ति के आरोप में सेवा समाप्ति के संबंध में।

उपरोक्त विषय पर इस कार्यालय के ज्ञापांक 202 दिनांक 13.12.04 ज्ञापांक 108(1) दिनपांक 30.1.03 एवं ज्ञापांक 187 दिनांक 10.2.03 के द्वारा नियुक्ति के संबंध में कारण-पृच्छा की मांग की गई थी के आलोक में आपके द्वारा जो साक्ष्य उपलब्ध कराया गया है के अवलोकन से आपकी नियुक्ति नैसर्गिक न्याय के तहत नहीं की गई क्योंकि-

1- नियुक्ति हेतु विज्ञापन नहीं निकाया गया।

2- अन्तर्वीक्षा निर्मंत्रण-पत्र नहीं दिया गया।

3- नियुक्ति के लिए गठित चयन समिति का गठन एवं कार्यवाही निधि सम्मत नहीं की गई।?

आरक्षण निति का अनुपालन के क्रम में रोस्टर क्लीयरेंस नहीं किया गया।

अतः भारतीय संविधान के मौलिक अधिकार सम्बन्धी
अनुच्छेद-16 का उल्लंघन है जिस कारण आपकी सेवा दिनांक 01.03.
03 से समाप्त की जाती है।

ह0/- 25.2.2003

असैनिक शल्य चिकित्सक सह-

मुख्य चिकित्सा पदाधिकारी

ज्ञापांक 317 / जमुई, दिनांक 25/2/2003"

(Underlining for emphasis)

9. There is no denial to this fact in the writ application that mandate of Article 14 of the Constitution of India by way of issuance of advertisement in newspaper and selection process as also observance of the reservation policy at the time of initial appointment of the petitioner was not followed. Mere allowing continuation in service by itself to an appointment which is in teeth of Article 14 cannot be a ground to perpetuate such illegality. This aspect of the matter has also been decided by the Apex Court in the case of *State of Bihar v. Upendra Narayan Singh & Ors.* reported in 2009 (5) SCC 65 wherein it was held as follows:-

"59. At the hearing of this appeal, we asked the learned Senior Counsel appearing for the respondents to show that before appointing his clients on ad hoc basis, the then Regional Director, Gaya had issued an advertisement and/or sent requisition to the employment exchange and made selection after considering competing claims of the eligible candidates but he could not draw our attention to any document from which it could be inferred that the respondents were appointed after advertising the posts

or by adopting some other method which could enable other eligible persons to at least apply for being considered for appointment. He, however, submitted that issue relating to legality of the initial appointments of the respondents has become purely academic and this Court need not go into the same because their services had been regularized by the competent authority in 1992.

60. *In our opinion, there is no merit in the submission of the learned Senior Counsel. If the initial appointments of the respondents are found to be illegal per se, the direction given by the High Court for their reinstatement with consequential benefits cannot be approved by relying upon the so-called regularization of their services. Had the respondents been appointed by the competent authority after issuing an advertisement or sending requisition to the employment exchange so as to enable the latter to sponsor the names of eligible persons then they would have certainly produced the relevant documents before the High Court or at least before this Court. However, the fact of the matter is that none of the documents which could give a semblance of legitimacy to the appointments of the respondents was produced before the High Court and none has been produced before this Court."*

10. Yet again, the same view with regard to illegal appointment without advertisement and without also following the prescribed procedure was taken 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:-

"Appointment/employment without advertisement

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 Admn.* [(1992) 4 SCC 99], *State of Haryana v. Piara Singh* [(1992) 4 SCC 118, *Excise Supt. V. K.B.N. Vishweshwara Rao* [(1996) 6 SCC 216], *Arun Tewari v. Zila Mansavi Shikshak Sangh* [(1998) 2 SCC 332], *Binod Kumar Gupta v. Ram Ashray Mahoto* [(2005) 4 SCC 209], *National Fertilizers Ltd. v. Somvir Singh* [(2006) 5 SCC 493], *Deptt. Of Telecommunications v. Keshab Deb* [(2008) 8 SCC 402], *State of Bihar v. Upendra Narayan Singh* [(2009) 5 SCC 65 and *State of M.P. v. Mohd. Abraham*. [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 Article 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 with 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."

(Underlining for emphasis)

11. It has to be kept in mind that whatever was held in the case of *State of Bihar Vs. Purendra Sulan Kit* reported in 2006(3)PLJR 386 had ultimately led to reaffirmation of the order of termination of most of the employees of Health Department passed in the year 2003 whereafter even when a learned single Judge had allowed the writ application, the Division Bench in LPA No. 200 of 2010 (The State of Bihar Vs. Madhu Kumari) disposed of on 24.9.2014 had gone into the entire gamut in relation to these illegal appointments of Health Department and had held as follows:-

"The Government of Bihar in its Administrative Reforms Department issued instructions for appointment to Class III service in the Government offices under its Circular No.16440 dated 3rd December 1980. The said Circular apply to Class III posts other than which are filled in by appointment of the candidates selected by Bihar Public Service Commission after a competitive examination and to the posts which were governed by the Government Resolution dated 28th January 1976. The said Circular sets out a detailed procedure for notifying the vacancies in Secretariat and its attached offices, District Magistrates and other Muffassil offices and for calling for applications, preparation of a common merit list and appointment from the said common merit list in order of merit.

It also provides for procedure for constitution of selection committee, preparation of merit list and wait list, duration of the merit list/wait list.

A similar Circular No.16441 was issued on 3rd December 1980 for appointment to Class IV posts in the Muffassil offices of the Government.

Without entering into the details of the procedure etc. provided in the said Circulars, we may note that the said Circular had been issued to avoid discrimination in appointment to Class III and Class IV posts in the Government offices and provides for generalized procedure in consonance with Articles 14 and 16 of the Constitution.

The real controversy is whether the writ petitioners were legally and validly appointed. The repeated finding of the State Government is that many of the writ petitioners had secured employment by producing a fake or forged appointment letter or have been inducted in Government service surreptitiously by concerned Civil Surgeon-cum- Chief Medical Officer by issuing a posting order. It is not difficult to understand a well thought design to induct the individuals in Government service without recruitment at all. Not only there was no recruitment process or that Civil Surgeon-cum-Chief Medical Officer was not authorized to make appointment, the Civil Surgeon-cum- Chief Medical Officer straight away issued a posting order in favour of the concerned writ petitioner posting him/her in Primary Health Centre in remote areas. Surely, it would be difficult, if not impossible, to detect such illegality. The Court cannot be oblivious of the fact that the writ petitioners are the beneficiaries of the illegal orders made by the Civil Surgeon-cum- Chief Medical Officers. Once it is alleged that the appointment or induction of the writ petitioners was illegal, made on the basis of forged appointment order or on the basis of illegal posting orders



made by the Civil Surgeon-cum- Chief Medical Officer, the onus to prove otherwise shifts on the writ petitioners. The writ petitioners were given notice to establish the genuineness of their appointment and to show cause. None of the writ petitioners could establish the genuineness or legality of their appointment before the State Committee. Once it is found that the appointment of the writ petitioners was illegal, void-ab-initio, the challenge to the order of cancellation of appointment and discharge from service should necessarily fail. Not only the writ petitioners had failed to establish genuineness or legality of their appointment at first before the State Government and then before the State Committee, they have not produced any reliable material even before this Court on the basis of which this Court can hold otherwise. It is absolutely not the case of any of the petitioners that their appointment was made after due process of selection for public employment. In other words, the writ petitioners had not been sponsored by the Employment Exchange Office; nor had they applied pursuant to a public notice. None of the writ petitioners was subjected to a selection process. Although some of the writ petitioners have asserted that they were qualified for appointment to the post in question, in majority of the cases even such an assertion is absent. Irrefutably none of the appointments has been made after following the procedure set out in the aforesaid circulars dated 3rd December 1980. The laudable purpose for which the said circulars were issued is defeated.

(Underlining for emphasis)

12. Thus, this Court now is not inclined to direct the respondents to examine the claim of the petitioner afresh when the issue relating to appointment of the Health Department has stood settled by the judgment of the Division Bench in the case of Madhu

Kumari (supra).

13. This Court is also not in a position to accept the submission of Mr. Sharma, learned counsel for the petitioner, that in some cases, this Court had earlier allowed similar claim alike that of the petitioner. This aspect of the matter in fact has also been answered by the Apex Court in the case of *State of Bihar Vs. Upendra Narayan Singh & Ors.* reported in (2009) 5 SCC 65 wherein it was 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.*

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 order - Chandigarh Administration and another v. Jagjit Singh and another [(1995) 1 SCC 745], Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and others [(1997) 1 SCC 35], Union of India [Railway Board] and others v. J.V. Subhaiah and others [(1996) 2 SCC 258], Gursharan Singh v. New Delhi Municipal Committee [(1996) 2 SCC 459], State of Haryana v. Ram Kumar Mann [(1997) 1 SCC 35], Faridabad CT Scan Centre v. D.G. Health Services*

and others [(1997) 7 SCC 752], Style (Dress Land) v. Union Territory, Chandigarh and another [(1999) 7 SCC 89] and State of Bihar and others v. Kameshwar Prasad Singh and another [(2000) 9 SCC94], Union of India and another v. International Trading Co. and another [(2003) 5 SCC 437] and Directorate of Film Festivals and others v. Gaurav Ashwin Jain and others [(2007) 4 SCC 737]."

14. In view of whatever has been held by the Apex Court in the case of Upendra Narayan Singh (supra) and specially in its paragraph no. 67, this Court is not inclined to follow the judgment of the Division Bench in the case of *The State of Bihar & Ors. Vs. Binay Kumar Singh* reported in 2011(3) PLJR 547 specially when the said judgment in the case of Binay Kumar Singh (supra) was based on an incorrect analysis of the judgment of the Apex Court in the case of *State of Karnataka & Ors. Vs. M.L. Kesari & Ors.* reported in (2010) 9 SCC 247. As a matter of fact, the Full Bench of this Court in the case of *Ram Sevak Yadav & Anr. Vs. The State of Bihar & Anr.* reported in 2013(1)PLJR 964 has clearly gone to hold that the judgment in the case of M.L. Kesari (supra) was to be read in the light of the law laid down by the Apex Court in the case of *Secretary, State of Karnataka & Ors. Vs. Uma Devi & Ors.* reported in 2006(4)SCC 1. Having regard to the law laid down by the Full Bench of this Court in the case of Ram Sevak Yadav (supra), the Division Bench of this Court in the case of Madhu Kumari (supra) had held the law laid down in the case of Binay

Kumar Singh (supra) as no longer a good law. The Division Bench in this regard had held as follows:-

"This brings us to the last question whether in view of their long service, the writ petitioners are entitled to regularization in service as observed by the Hon'ble Supreme Court in Uma Devi (3) (supra). This was the precise question which was referred to the Full Bench in the matter of Ram Sevak Yadav & Anr. (supra). The Full Bench of this Court has categorically held that the judgment in Uma Devi (supra), prohibits regularization of such appointments, the period of service being irrelevant; and that illegal appointment void ab-initio cannot be regularised under any circumstances. In view of the aforesaid decision of the Full Bench of this Court, the law laid down by the Division Bench of this Court in the matter of The State of Bihar & Ors. Vs. Binay Kumar Singh & Ors. [2011 (3) PLJR 547] is no longer a good law.

In the present case, the appointments of the writ petitioners have been repeatedly held to be non est or void ab-initio. The question of regularization of their service even by invoking paragraph 44 of the judgment in the matter of Uma Devi (3) (supra) shall not arise."

15. In the light of the aforesaid discussions, this writ application must fail primarily on the ground of unexplained delay and laches on the part of the petitioner in moving this Court after almost 10 years of the termination of his service and also on merit. Accordingly, this application is dismissed.

16. There would be, however, no order as to costs.

(Mihir Kumar Jha, J)

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