

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5419 of 2011

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Makeshwar Rai Son Of Late Triveni Rai Resident Of Village - Mishraulia Chowk,
P.O. & P.S. Motipur, District Muzaffarpur, Presently Working As Lab Boy - Cum -
Night Guard In Nationalized High School, Motipur, District - Muzaffarpur

.... Petitioner/s

Versus

1. The State Of Bihar
2. The Principal Secretary, Human Resources Development Department,
Government of Bihar, Patna
3. The Director Secondary Education Government of Bihar, Patna
4. The Regional Deputy Director of Education Tirhut Division, Muzaffarpur
5. The District Education Officer, Muzaffarpur

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Shashi Bhushan Kumar –Manglam, Adv
For the Respondent/s : Mr. Mrinal Kumar Tiwary, Adv.

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL JUDGMENT
Date: 08-04-2017

Heard Mr. S.B.K. Manglam, learned counsel for the
petitioner and Mr. Mrinal Kumar Tiwary, learned counsel for the
respondents.

The present application has been filed for issuance of
appropriate writ in the nature of mandamus commanding the
respondent authorities to regularize the services of the petitioner on
the post of Lab Boy-cum-Night Guard in Nationalized High School,
Motipur from the date of his initial appointment and further to give
direction for payment of salary of the said post.

It is submitted by the learned counsel for the petitioner



that the Managing Committee of the Nationalized High School, Motipur recommended the name of the petitioner for being appointed as a Lab Boy in the school to the District Education Officer, Muzaffarpur (respondent no.5). Consequently, respondent no.5 vide memo no. 967-68 dated 1st of February, 1991 intimated the Principal of the Government High School, Motipur that the appointment of the petitioner being made in the laboratory on 01.02.1991 has been approved. The petitioner will be entitled for an honorarium of Rs. 100/- per month. Subsequently, in pursuance to the above letter of the District Education Officer, Muzaffarpur as contained in Annexure-1, the petitioner was appointed as laboratory boy and consequently letter was issued by the School on 08.09.1991 as contained in Annexure-2. The petitioner was working since 08.09.1991 as lab boy of the school and was being paid an honorarium of Rs. 100/- per month, which was subsequently enhanced to Rs. 200/- per month. Subsequently, Sub-Divisional Education Officer, Muzaffarpur, West vide letter dated 11.09.2001, as contained in Annexure-3, directed the In-Charge Headmaster of the School for appropriate recommendation for increase of the payment so that it should be referred to the higher authorities.

Subsequently, the then District Education Officer, Muzaffarpur vide letter no. 178 dated 24.01.1994 recommended to the



Director, Secondary Education for regularization of the service of the petitioner. On 25.02.1997 vide letter no. 15, the Headmaster of the school transmitted all the details including the payment being made to the petitioner to Director, Secondary Education and vide Letter No.97 of 2009 dated on 17.11.2009 to Sub-divisional Education Officer, Muzaffarpur, West but even then the services of the petitioner were not regularized in spite of the fact that he had put in about 20 years of service.

It is further submitted that in view of the continuous service having been rendered by him, the petitioner deserves to be regularized as his services are required in the school.

Mr. M. K. Tiwary, learned counsel appearing for the respondents submits that the petitioner was neither appointed on sanctioned post nor any approval was given by the department for such appointment nor the then Headmaster or District Education Officer had any authority to give any approval of such appointment. Moreover, the payments were made to the petitioner from the student's fund and no grant was sanctioned or released by the Government in this regard. It has further been submitted that the petitioner is not working since 01.04.2011.

Considering the rival submissions of the parties and perusing the documents on record, this is not in dispute that there is



nothing on record that the petitioner was appointed on any sanctioned post nor any advertisement was made nor the Headmaster or the District Education Officer had any authority to make such appointment.

It is well settled law that the appointment made without any advertisement cannot be treated as legal and valid appointment. In the present case, admittedly the appointment was made suo motu by the Managing Committee of the school. Any such appointment made on the basis of an application, without any advertisement has been deprecated by the Apex Court in the case of **National Fertilizers Ltd. and Ors Vs. Somvir Singh** reported in **(2006) 5 SCC 493**.

The Apex Court in the case of **Ashwani Kumar and Others Vs. State of Bihar and Others** reported in **(1997) 2 SCC 1** has clearly held that so far as question of confirmation of such employees whose entry itself was illegal and void, question of their confirmation or regularization does not arise. Paragraph no.13 reads as follows:-

“So far as the question of confirmation of these employees whose entry itself was illegal and void, is concerned. It is to be noted that question of confirmation of regularisation of an irregularly appointed candidate would arise if the concerned candidate is appointed in an irregular manner or on adhoc basis



against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non-existing vacancy would never service for consideration and even if such purposed regularisation or confirmation is given it would be an exercise in futility.”

The Constitution Bench in the case of **Secretary, State of Karnataka and Others Vs. Uma Devi (3) and Others** reported in **(2006) 4 SCC 1** has held that there is no fundamental right, in those, who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service as they cannot be said to be holders of a post. The Constitution Bench further deprecated the exercise of jurisdiction under Article 226 of the Constitution for issuing direction for absorption/regularization where the entry itself is bad. Such exercise of jurisdiction under Article 226 of the Constitution is permissible only where recruitment itself was made regularly and in terms of the constitutional scheme. The only exception carved out for regularization of an irregular appointment, is where the appointment of a duly qualified person is made on a duly sanctioned vacant post and the employee has continued to work for ten year or more but without the intervention of the orders of the courts or tribunals. But at the same time, the said exercise was directed to be made as one time



measure. Para 43 of the constitution Bench in Uma Devi (supra) which denies the right of automatic regularization to daily wage, casual and temporary employees, reads as follows:-

“43.Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and



in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.”

In the present case not only the entry of the petitioner was illegal but he is also not in the said employment since 2011. The question of such kind of regularization has been considered by Full Bench of this Court in the case of **Ram Sevak yadav Vs. State of Bihar** reported in **2013 (1) PLJR 964** in view of departure made with regard to illegal and irregular appointment in the case of **State of Karnataka and Others Vs. M.L. Kesari and Others** reported in **(2010) 9 SCC 247**, where it has been held that a person not appointed against the sanctioned post and not possessing the requisite qualification for the post is not entitled to be regularized even if he has worked for ten years. Paragraph no.33 of the judgment reads as



follows:-

“33. As we read the paragraph, in our humble opinion, and to the best of our appreciation and understanding, a person not appointed against a sanctioned post and not possessing the requisite qualification for the post is not entitled to regularization even if he has worked for over ten years. But a person possessing the requisite qualifications appointed against a sanctioned post and who has continued over ten years without aid of Court orders is eligible for regularization even if the appointment was made without the process of open competitive selection. The catena of decisions noticed by us of the Apex Court in no uncertain terms provide that if the appointment was in violation of Article 14 without advertisement and equal opportunity to all eligible for being considered, the question of regularization does not arise. Only if some rudimentary compliance even by registration with and calling of names from the employment exchange was followed, could regularization be considered if it was made against a sanctioned post. Mere appointment against a sanctioned post without furthermore shall not suffice. With all the humility at our command, again in our humble opinion a competitive selection even in such a case is the mandate of the constitution Bench at paragraph 43 extracted above.”

The Full Bench of this Court while answering to the seminal reference whether M.L. Kesari (supra) makes a departure



from the distinction between an illegal and irregular appointment for the purpose of regularization, as held in Uma Devi (supra), has laid down the parameters for regularization. Paragraph no.43 reads as follows:-

“43. We therefore sum up our conclusions and answer the reference as follows:-

(A) Uma Devi (supra) prohibits regularization of daily wage, casual, ad-hoc of service being irrelevant;

(B) An illegal appointment void ab initio made contrary to the mandate of Article 14 without open competitive selection cannot be regularized under any circumstances.

(C) Irregular appointments can be regularized if the appointment was made by an authority competent to do so, it was made on a vacant sanctioned post, in accordance with Article 14 of the Constitution with equal opportunity for participation to others eligible by competitive selection and the candidate possessed the eligibility qualifications for a regular appointment to the post.

(D) The appointment must not have been an individual favour doled out to the appointee alone and the person must have continued in service for over ten years without intervention of any court orders.”

Testing the case of the petitioner, on the basis of the principles laid down in Uma Devi (supra) and Ram Sewak Yadav (supra), this Court finds that the petitioner was neither appointed on a



sanctioned post, nor the process of appointment was a regular one or advertised. Hence, on any score the petitioner is not entitled to regularization.

In view of the above discussions, this Court finds no merit in the application.

Accordingly, the writ application is dismissed.

(Dinesh Kumar Singh, J)

Amrendra/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	
Transmission Date	

