

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.588 of 2018

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1. Kamlesh Kumar, Son of Shri Ratan Kumar, Resident of 3/A, Aakriti Pranjal Apartment, Lane No. 15, S.K. Puram, R.P.S. More, Arya Samaj Mandir Road, Danapur, P.S.-Danapur, District-Patna.
 2. Pankaj Kumar, Son of Shri Chandra Kumar, Resident of Village+ Post-Rajpur, P.S.-Madhepura, District-Mahepura
 3. Sultan Shahid Shah, Son of Syed Mohammad Shah, Resident of Shah Residence, Dr. Mahmood Shah Lane, Dariyapur Gola, P.O.- Bankipore, P.S.-Pirbahore, District-Patna.
 4. Niyaz Ahmad, Son of Aash Ahmad, resident of New Millat Colony, Sector-03, Phulwari Sharif, P.O.+ P.S.-Phulwarisharif, District-Patna.
 5. Dr. Syed Nazre Ali, Son of Syed Ali Nawab, resident of Fauzdari Kuan, Magalpura, Patna City, District-Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Education Department, Bihar, Patna.
2. The Chancellor of Universities of Bihar, Raj Bhawan, Patna
3. Maulana Mazharul Haque Arabic & Persian University, Patna through its Registrar.
4. The Vice Chancellor, Maulana Mazharul Haque Arabic & Persian University, Patna.
5. The Registrar, Maulana Mazharul Haque Arabic & Persian University, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Abhinav Srivastava Mr. Raushan
For the Respondent/s	:	Mr. Pramod Kumar Singh, AC to SC16
For the University	:	Mr. Rashid Izhar
For the Intervenor	:	Mr. Raj Sekhar Sah

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL ORDER



4 30-03-2018 Heard Mr. Abhinav Srivastava, learned counsel for the petitioners, the learned counsel appearing for the State, the learned counsel appearing for the Maulana Mazharul Haque Arabic & Persian University and the learned counsel appearing on behalf of the Intervenor.

On 16.02.2018 after hearing the learned counsel for the parties at length, the Court has passed the following orders:-

“Heard Mr. Abhinav Srivastava, learned counsel for the petitioners, the learned counsel appearing for the State and the learned counsel appearing for the Maulana Mazharul Haque Arabic & Persian University.

Many fold issues are involved in the writ application including creation of promotional post without creation of feeder post. From the averments made in the writ application and the submission advanced on behalf of the counsel appearing on behalf of the University it is manifest that the post of Section Officer has been sanctioned and the post of Section Officer is promotion post, but, they have not created the feeder post from where promotion can be granted to the post of Section Officer, such scheme appears to be most irrational.

The second limb of argument with reference to the controversy in the present writ application is that the petitioners have been appointed after following the due process, including advertisement and recommendation of the selection committee and, as such, termination of the petitioners without compliance of the principle of natural justice is nullity in the eye of law. If the petitioners have been appointed after following the selection process, after due advertisement by the competent authority, then, the minimum



compliance of natural justice is that at least then they should, hence, been heard before taking any adverse decision.

The other issues involved in the present writ application is whether the University in the compelling circumstance is authorized to make appointment against the post of Section Officer having regard to the necessity as in the absence clerical cadre function of the University is impossible. Applying the principle of necessity the respondents have appointed these petitioners notwithstanding the fact that the post of Section Officer was sanctioned and not the post of Assistant, but, in order to carry out the day -to-day business of the University they appointed the petitioners as Assistant against the sanctioned post of Section Officer as Assistant.

The aforesaid issues are issues of seminal importance and, as such, the Court directs the University, State as well as the Office of the Chancellor to file specific affidavit so that the writ Court may finally adjudicate the issues raised in the present writ application.

Four weeks time is granted to the respondents to file counter affidavit.

Put up on 26th March, 2018, within top ten cases.

It is made clear that if no counter affidavit is filed by the respondents, the Court will proceed and decide in the absence of counter affidavit or if the counter affidavit is found to be evasive and cryptic, then, the Court will decide on the basis of the principle laid down by the Apex Court in the case of **Naseem Bano Vrs. State of U.P. reported in A.I.R. 1993 SC, 2592.**”

The respondents-University was granted opportunity to file counter affidavit. A counter affidavit has been filed in the



present application. In paragraph 5 of the counter affidavit, the following stands have been taken:-

“It may be mentioned here that a request was made from the affected staff in respect of this enquiry urging this Committee to give them chance to participate in the enquiry for placing their viewpoints. The Enquiry Committee found that the period for concluding the enquiry is limited in nature. Besides that a large number of allegations in the matter or irregularities. On the aspects mentioned above, including the alleged violation of Act/Statute/relevant provisions have been levelled by the same complainants. It appears that on the basis of a number of allegations of repeated nature and other circumstances before the Hon’ble Chancellor, the present enquiry has been caused to be made. In respect of this plea made by some complainants, it may be said that since repeatedly they had put forth their case by sending memorandum and the Hon’ble Chancellor has also been pleased to obtain replies from the authorities, further chance to these complainants in presenting their case before this Enquiry Committee will entail loss of time, delay and such an exercise will be redundant. No prejudice is going to be caused to the complainants as this Enquiry Committee is making appraisal of all the circumstances including their exhaustive complaints before the Hon’ble Chancellor which have earlier been forwarded to this Committee.”

The respondents-University have quoted the facts that the University has terminated the services of the petitioners in compliance of the order of the Hon’ble Chancellor. Hence, the termination of the services of the petitioners is presumably



under the dictate of the office of the Hon'ble Chancellor.

Paragraph-7 of the counter affidavit reads as follows:-

“ That the statement made in para 2 (v & vi) of the writ application refers to the power and jurisdiction of the present vice Chancellor as being in additional charge of this University for making such decision and issuing the termination order of the petitioners. In this regard it is humbly stated that the office order noted above has been issued to comply the order of the Hon'ble Chancellor, issued vide letters dated 25.11.2016, 12.06.2017 and 31.07.2017 of Governor's Secretariat Bihar Raj Bhawan Patna. Hence the termination of the service of the petitioners is only the compliance of the Hon'ble Chancellor's order and is not a decision of the vice Chancellor of this respondent University .”

It appears that the Hon'ble Chancellor constituted one man committee of Hon'ble Mr. Justice (Retd) Sadanand Mukherjee and inquiry report has been submitted by the Hon'ble Justice Sadanand Mukherjee to the Hon'ble Chancellor, which is enclosed in the counter affidavit at Annexure 3/3. The relevant parts of the report in paragraphs 84 to 87 are relevant for deciding this case and as such it is quoted below:-

“84. Before embarking upon Section 34 of the Bihar State Universities Act, 1976, which relates to maintaining the quota for



reservation according to the provisions of the Bihar Act 3, 1991, as amended from time to time, it is worthwhile to discuss the compliance or otherwise of Section 35 of the Bihar State Universities Act, 1976, as referred to above, which requires that no appointment on any post without the prior approval of the State Government shall be made, except of the Government Colleges and Minority Colleges as mentioned therein. In the representations the University authorities have consistently maintained that appointment has been made on the sanctioned posts with the approval of the State Government. This is an admitted fact that the Government of Bihar in its Department of Education vide Memo No. 15/M1-94/2013-1166, dated 20.06.2014, created 14 teaching posts and 54 non-teaching posts, and out of these non-teaching posts, 40 non-teaching employees were appointed. After finding some discrepancy in the Recruitment Notice dated 14.11.2014 in non-teaching posts in relation to advertised posts and sanctioned posts, the Committee, which has got limited time and limited scope, was constrained to offer an opportunity to the University regarding the discrepancy before jumping into any conclusion. This exercise was warranted to ensure fairness. Since this Committee has not made any full-fledged hearing obtaining such clarification in case of doubt appeared to be justified by the Committee. On comparison of the sanctioned posts of non-teaching Employees in the Recruitment Notice, the occurrence of 5 posts of Assistants in Advertisement No. 01-13/14 dated 14.11.2014 seems to be an aberration vis-a-vis Section 34 of the Bihar State Universities Act, 1976. It appears that the Vice-Chancellor vide letter No. F-288/10(P-I)VC-99/14/15, dated 02.01.2015



has made a request to the State Government to convert the promotional post to lower grade post and also to the post of Assistant, Stenographer, LDC and Auditor by earmarking the posts which according to university would have lessened the burden of the State Exchequer. Before that vide letter No.F-288/10 (Part-I) RE-242/14/15, dated 20.08.2014, a similar request was made. The Committee is given to understand that 75% of the total sanctioned posts should have been basic posts taking into consideration the void of staff in the University from the beginning. It appears that Contractual employees were running the work of the University. It appears that there is no reply from the State Government in the Department of Education nor ex post facto sanction was given for conversion or downgrading of the posts. This Committee, in view of the letter of the State Government dated 20th June, 2014, as referred to above, after comparing the sanctioned posts with the Recruitment Notice dated 14.11.2014, finds that five posts of Assistant has been inserted although there is no sanction by the State Government even presuming the existence of other posts as sanctioned. No doubt, two letters have been written to the State Government, but no such conversion has been sanctioned by the State Government.

85. It is established principle of law that the matter which should have been but has not been provided for in the Statute cannot be supplied by Courts as the same will be legislation and not construction of statute. Similarly the authority cannot add or deviate from the above principle. No Public functionary is expected to deviate from the above proposition. Hence, the Recruitment Notice to the above extent does not conform to the provision of Section 35 of



the Bihar State Universities Act, 1976.

86.Hence, there is violation of the provision of Section 35 of the Bihar State Universities Act, 1976, in parts as stated in the above paragraphs.

87.It has already been pointed that “proviso” to Section 34 regarding compliance of the provision of Model Roster of 100 points has to be followed. It appears that in the “Recruitment Notice”, the quota for the respective posts have been given conforming to the percentage of reservation of different category. But it appears that a continuous list of 40 candidates have been annexed in the Annexure of the Representation of the Registrar and it is orally clarified with reference to the list differentiating the different of Development Officer, Assistant Registrar, Assistant, PA to VC, Programmer (Computer) Computer Technician, Computer Operator, Assistant Librarian, Cataloguer, Classifier, Auditor, Stenographer, Lower Division Clerk, etc. However, since the sanctioned post of Assistant is non-existent in the letter of sanction by the State Government, as stated in the foregoing paragraph, and despite two letters of the University, already referred to above, the State Government had not made any conversion of the post, the University has advertised the post which was not in compliance with Section 34 of the Bihar State Universities Act, 1976. It has already been opined that there is part compliance of Section 34 of the Bihar State Universities Act, 1976, likewise as a sequence there is also part compliance of Section 35 of the Bihar State Universities Act, 1976. Hence, this Committee is constrained to observe that there is part violation of Section 35 of the Bihar State Universities Act, 1976 as



resultant consequence of the part violation of Section 34 of the Bihar State Universities Act, 1976.”

From the inquiry report, it is evident that the Enquiry Committee finds that in the case of petitioners selection process has been done by the Selection Committee and there was no irregularity in the selection of the petitioners. The only objection was with reference to Sections 34 and 35 of the Bihar State Universities Act. The issue as to the non obstante clause contained in Section 35 of the Act for the subject matter of scrutiny by Full Bench of this Court in the case of ***Braj Kishore Singh Vs. State of Bihar reported in 1997 (1) PLJR 509***. The Full Bench of this Court with reference to the law laid down by the Apex Court in the case of DTC Majdoor Vs. Union of India AIR 1991 SC 101 has read down Section 35 to make it workable. The principle observed by the Full Bench in the matter of necessity in order to make the scheme of the act workable is applicable in the present case also. One cannot think of promotional post without there being a feeder post. This Court has discussed this subject in the order dated 16.02.2018 as indicated hereinabove. The Inquiry Committee constituted by the Hon'ble Chancellor has categorically submitted that there is no irregularity in the selection of the



petitioners and the selection was made in accordance with the provisions of the Bihar State Universities Act. The only point highlighted in the enquiry report is applicability of Sections 34 and 35 of the Bihar State Universities Act as mentioned above. The aforesaid objection is contrary to the decision of the binding precedent of Full Bench in ***Braj Kishore Singh's case (supra)*** where the Full Bench has considered this aspect of the matter and relying upon the judgment of the Apex Court read down in the scheme of Section 35 of the Bihar State Universities Act. The reasoning of the Full Bench is fully applicable in the present case. This Court is of the considered view that no University can work without support staff and without creating the Feeder posts of Assistant creation of post of promotional post of Section Officer was exercise without appreciation of mind. Creating of post of section Officer in the University may be oversight due to inadvertence.

Mr. Abhinav Srivastava, the learned counsel for the petitioners submits that the University has requested the State Government in this regard and the correspondence of the University contained in Annexure-4 is indicative of the fact that the post of Section Officer appears to be created due to oversight. The stand of the University as indicated in



Paragraph-5 of the counter affidavit is further indicative of the fact that the University maintained this stand throughout and requested the State Government to grant permission to appointment on the post of assistant by lowering down the post of Section Officer because the post of Section Officer is the promotional post and cannot work in absence of feeder / basic post.

The admitted factual position is that the University has made correspondence to the State Government for creating the post of Assistant and also requested to treat the post of Section Officer as Assistant for the purpose of allowing the University to appointment on the post sanctioned as Section Officer as Assistant so that the work of the University may wheel ahead.

Learned counsel appearing on behalf of the intervenor submits that the office of the Chancellor after due enquiry has directed for removal and thereafter, the same has been removed. This factual position is no more in dispute. The legal issue is whether the judgment of the Full Bench in ***Braj Kishore Singh Vs. State of Bihar (supra)*** in the present case is applicable or not.

In view of the judgment of the Full Bench in ***Braj Kishore Singh (supra)***, the Court is of the considered view that



the decision to terminate the petitioners is contrary to the judgment of the Full Bench in the case of ***Braj Kishore Singh Vs. State of Bihar (supra)*** and as such, this Court is not in a position to approve the action of the University to remove the petitioners on the dictate of the office of the Hon'ble Chancellor for more than one reason. Under the University Act, the Chancellor occupy the possession of the Appellate Authority against the decision of the University and it is now well settled that the original power cannot be exercised by the Appellate Authority. Secondly when the University has admitted in the counter affidavit that the University has simply obeyed the direction of the Hon'ble Chancellor and on the dictate of the Hon'ble Chancellor terminated the petitioners. The law in this regard is also well settled that the University, which has taken decision and has acted under the dictate of office of Hon'ble Chancellor. Such decision on the dictate of the office of the Hon'ble Chancellor is nullity, the reference in this regard may be made to the judgment of the Apex Court in *Purtabpur Co. Ltd. Vs. Cane Commissioner* AIR 1970 SC 1896.

For the aforesaid reason, the Court is of the view that the action of the university terminating the services of the



petitioners is arbitrary and contrary to the law Accordingly, the order of termination contained in Annexure-22 is quashed. The petitioners are deemed to have reinstated with all consequential benefits.

For the reasons indicated hereinabove, the application is allowed.

(Anil Kumar Upadhyay, J)

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