

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9972 of 1995

-
1. Ashok Kumar, son of Ram Dhyani Rai, resident of village-Manjipur, P.S.- Fatuha, District- Patna.
 2. Birendra Kumar, son of Alakhdeo Yadav, resident of village-Gokulpur, P.O.-Fatehpur, District- Vaishali.

... .. Petitioners

Versus

1. The State of Bihar through the Secretary, Department of Labour, Employment and Training, Vikas Bhawan, Patna.
2. The Director, Employment and Training, Bihar, Patna.
3. Assistant Director (Employment), Employment Exchange, Saharsa.
4. The In-charge Deputy Director, Establishment, Directorate of Employment, Patna.
5. Employment Officer, Employment Information and Guidance Institution, Patna University, Patna.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Sadat Ali Khan, Advocate Mr. Md. Abu Haider, Advocate Mr. Md. Abu Shajar, Advocate
For the State	:	Mr. Anjani Kumar, A.A.G.-4 Mr. Brajesh Kumar, A.C. to A.A.G.-4

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT

Date : 20-04-2018

Heard learned counsel for the petitioners and
learned counsel for the State.

2. In the present case, the petitioners are challenging the letter of their respective termination dated 01.03.1995 (Annexure-13), by which the termination has been effected



retrospectively with effect from 27.09.1991 though the order has been passed by the Director, Employment Employment and Training, vide memo no.90 & 91 dated 01.03.1995.

3. Both the petitioners were appointed as Water Boy on daily wages basis vide letters dated 27.09.1991 and 28.09.1991 (Annexure-1 and 2) with effect from 01.10.1991 till further orders. Where-after, the Assistant Director (Employment), Additional Employment Exchange, Saharsa Camp, Patna, vide letter dated 27.12.1991 appointed the petitioner no.1 on temporary basis and posted at Additional Employment Exchange, Saharsa, and petitioner no.2 was also appointed vide letter dated 27.12.1991 and posted at District Employment Exchange, Madhepura and both the appointments were temporary in nature and they could have been terminated without notice. It appears that the letters were issued while camping at Patna by the Assistant Director (Employment), Employment Exchange, Saharsa, and they were posted accordingly. Office order no.89 dated 06.12.1991/30.12.1991 addressed to the petitioner no.1 and petitioner no.2, transferring them from their respective places, Saharsa and Madhepura and posted at Directorate of Employment, Bihar, Patna, and accordingly, both the petitioners gave their joining vide



letter dated 01.01.1992 to the Directorate of employment, Bihar, Patna. The petitioners were not getting the salary since January, 1990, hence, they approached this Court in C.W.J.C. No.11517 of 1992 and this Court vide order dated 04.04.1994 directed the respondents to issue show-cause and after receipt of the explanation pass the order in accordance with law.

4. It appears that the Assistant Director, Employment and Training, Bihar, Patna, who had issued the letter of appointment was called upon to show cause why and in what circumstances, he made the appointments, but it does not appear that what happened thereafter, but the Court has remanded back the matter for fresh consideration and accordingly, the petitioners were served letter nos.1297 and 1298 dated 27.06.1994, in which five grounds have been mentioned, pointing out that in what manner their appointments have illegally been made. In the first ground, it has been mentioned that both the petitioners have been illegally appointed by transfer showing the fictitious and imaginary vacancy; Second ground has been mentioned that without getting any roster clearance illegally appointment has been effected; Third ground has been mentioned that in the non-plan scheme without the approval of the Finance Department the



appointment has been made but as per the policy the appointment could be made only for six months. Fourth ground has been taken that both the appointments were made without prior approval of the Director and fifth ground has been mentioned that during 27.12.1991 to 30.12.1992 they had obtained the salary at two places i.e. the Directorate as daily wager and from the respective Additional Employment Exchange, Saharsa. Where-after, both the petitioners have filed their respective show-causes dated 11.07.1994 and 25.07.1994 (Annexures- 12 and 12(A)). Ultimately, the Director, has passed the final order dated 04.03.1995, recording the fact that after full consideration, it was found that appointments were made illegally and not in accordance with law and accordingly, termination order has been effected with effect from 27.12.1991 vide order dated 01.03.1995 (Annexures-13 and 14).

5. Learned counsel for the petitioners submits that the order of termination is illegal on two grounds; First it has been given in retrospectivity, another ground has been mentioned that the order does not disclose any reason, save and except, the statement of application of mind as no reason has been assigned which is a living link between the judgment maker and the judgment, merely recording the statement *ipsi dixit* that he has



examined all facts and circumstances, cannot be said to a reason or cannot be said to be the application of mind unless the order itself reflects the reason for arriving to such conclusion especially in a circumstance, when the petitioners have filed their explanation, giving details of the fact how the appointment of the petitioners were not made illegal, rather it is in accordance with law.

6. Whereas, learned Additional Advocate General, has submitted that at the initial stage the appointment of the petitioners were on daily wages basis and later on, the Assistant Director, posted at Saharsa, appointed these persons mentioning therein that the names were sponsored by the Employment Exchange, Patna, following procedure, appointments were made. He further submits that how there can be an appointment at Patna by an Officer who was an Assistant Director, posted at Saharsa. Further he has submitted that the letter dated 06.12.1991/30.12.1991 itself reflects that before their appointment the persons were transferred from Madhepura and Saharsa and posted at Patna Employment Exchange, itself shows that the manner and method applied for the illegal appointment of these petitioners. Further, he submitted that as there was no advertisement and no proper selection was made,



so the appointment is vitiated and that too without the approval of the Director. He has put an emphasis that this nature of appointment can be classified as a void appointment and it will not carry any legal weight on account of manner the appointment has been made. He further stated that in the Government when a file is generated on a particular matter it travels to different levels and ultimately it comes to the highest level and on the basis of the noting given by the juniors the decision making authority examines the same and takes decision and passes the order.

7. Having considered the rival contentions of the parties, one thing is very peculiar and clear that the person was posted at Saharsa has appointed the persons at Patna, mentioning that the camp at Patna and it does not show as to whether the Employment Exchange, Patna, has sent their names or the Saharsa Employment Exchange has sent the names but he has mentioned that following all procedure the appointment has been made. So from which employment exchange the names have been sent is completely silent. But, one thing is very clear that it does not appear from the record or from the counter affidavit, what action has been taken against the authority who had engaged these persons. Further in the supplementary



affidavit, the petitioners have stated in paragraph no.5 that in similar manner the others were also appointed and posted at Daltenganj, has given the names having not been denied by the State.

8. Though the State has pointed out that both are the two different and distinct transactions, but both are related to different type of posts one for the fourth grade i.e. peon and another is for the third grade i.e. clerk and this Court is not in a position to verify that same in what manner the appointment were made of those persons mentioned in the supplementary affidavit. In the counter affidavit filed by the State in paragraph nos. 6 and 8 it has been explained that what are the lacunas, illegality have been committed in the matter of appointment of these petitioners. It is well known principle of law that lacuna cannot be filled up by filing a counter affidavit. Reliance can be placed to the decision of the Hon'ble Supreme Court rendered in the case of *Mohinder Singh Gill and Anr. vs. The Section Election Commission*, reported in *1978 A.I.R. 861*, there the Hon'ble Supreme Court has held that the illegality in the order cannot be cured by filling affidavit. However, in the present case, the letters itself does not speak the details about the manner the appointments are illegal, which is completely silent,



save and except, that he has written down that he has examined all records and found the appointment to be illegal, which cannot be said to be a reason inasmuch as sufficient reason for passing the order especially when the matter was remanded back and that too the order giving a retrospective effect of the termination order i.e. from the date the petitioners were appointment.

9. In such view of the matter, the orders of termination containing memo nos. 3024/94-90 and 3024/94-21, dated 01.03.1995, both relates to the present petitioners, are set aside. The matter is remanded back to the Director, Employment and Training, Bihar, Patna, to consider the case of the petitioners afresh and take a fresh decision in accordance with law. While taking a decision, he will also consider the fact as to whether any person who was appointed in the manner in which the petitioners have been appointed, was taken back in service or not?. As this Court is remanding back the matter for passing fresh order, any payment will be made after final decision taken by the authority. All the exercise should be completed by the Director, Employment and Training, Bihar, Patna, within a period of three months from the date of receipt/production of a copy of this order.



10. With the aforesaid observations and directions, this writ petition is allowed to the aforesaid extent.

(Shivaji Pandey, J)

pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
Uploading Date	28.04.2018
Transmission Date	N/A.

