

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7787 of 2014

=====

Urmila Devi, wife of late Anil Kumar Singh, Resident of village and P.S.- Hilsa,
District- Nalanda

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Education Department,
Govt. of Bihar, Patna
2. Director, Secondary Education, Govt. of Bihar, Patna
3. Regional Deputy Director of Education, Patna Division, Patna
4. District Education Officer, Patna
5. Headmaster, Student's Scientific High School, Kadamkuan, Patna

.... Respondent/s

=====

Appearance :

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

For the Respondent/s : Mr. Amit Bhushan, AC to GP-17

=====

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

Date: 28-08-2018

Heard Mr. Banwari Sharma, learned counsel for the
petitioner and State.

2. The contention of Mr. Sharma in the present writ application is that after the order of this Court dated 07.07.2011 passed in C.W.J.C. No. 1851 of 2008 (Annexure-6), the Principal Secretary has passed the order as contained in Memo No. 325 dated 29.03.2012 (Annexure-8) but necessary enquiry in relation to the validity of the appointment of the husband of the petitioner was not looked into and as such the order as contained in Annexure-8 is bad and unsustainable. He referred to various orders passed in different proceeding including the order dated 12.07.2011 passed in L.P.A. No. 1741 of 2010, which is quoted below for ready reference:



This Letters Patent Appeal has been filed against the Judgment passed on 06.10.2009 by the learned Single Judge in C.W.J.C. No. 6683 of 2009, by which the learned Single Judge has set aside the termination order relying on the case of Secretary, State of Karnataka Vs. Uma Devi and Ors. reported in 2006(2)P.L.J.R.(SC)363, and considered by the Apex Court in the case of State of Karnataka & Ors Vs. M.L. Kesari & Ors. reported in (2010) 9 SCC 247. In paragraph 11 of the Judgment, the Apex Court has observed as follows:-

"The object behind the said direction in para 53 of Umadevi is two fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of court or tribunals, before the date of decision in Umadevi was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily wage/ ad hoc/ casual basis for long periods and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.04.2006 (the date of decision in



Umadevi) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Umadevi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above direction in Umadevi as a one time measure."

In view of the above law laid down, the order of termination of the petitioner is illegal. Admittedly, the petitioner has completed more than ten years of his service, as against the vacant post, appointed by the competent authority and was paid salary and was also given promotion after regularization of service and confirmation. His appointment cannot be said to be illegal, which differs from irregular appointment. The appointment of the petitioner also cannot be said to be irregular and as per law laid down in Uma Devi Case in para 53 and M.L. Keshri's case. The petitioner was fully entitled for regularization of his service, therefore, his termination is bad in law.

The learned Single Judge has rightly allowed the writ petition and set aside the termination order. The petitioner shall be reinstated forthwith and salary shall be paid month to month regularly and



arrears of salary shall be paid within four months.

We fully agree with the Judgment of the learned Single Judge. For the reasons recorded above, the appeal is devoid of merit.

Accordingly, this L.P.A. is dismissed.”

3. Learned counsel for the petitioner also refers to the judgment passed in L.P.A. No. 560 of 2010 dated 24.11.2017, which is quoted below for ready reference:

“Heard learned counsel for the parties.

Keeping in view the reasons which have already been pointed out by a Co-ordinate Bench of this Court on 29.3.2011 while deciding L.P.A. No.230 of 2011 and other cases, we dismiss this appeal in identical terms. The appellant State Government is free to proceed in the matter after conducting an enquiry as has been held by the Single Bench and affirmed by the Division Bench. All the directions issued in L.P.A. No.230 of 2011 on 29.03.2011 shall apply to the case of the present appellants also and the respondents will also be granted similar benefits.

With the aforesaid, all these appeals stand dismissed.”

4. He also refers to the judgment passed in L.P.A. No. 1871 of 2011 dated 12.09.2017, which is quoted below for ready reference:

“Seeking exception to an order dated 06.01.2011 passed by the learned Writ Court in C.W.J.C. No. 130 of 2006, this appeal has been



filed by the State Government under Clause 10 of the Letters Patent.

Respondent was appointed in Class-III post by the District Education Officer, Patna on 04.07.1983 and after he had worked for 22 years, a show-cause notice was issued to him in the year 2005 i.e. on 25.08.2005 indicating to him that his appointment is irregular and, therefore, his services were terminated.

The learned Writ Court took note of various aspects of the matter and found that only because there were some irregularities in his appointment, after a period of 22 years the action taken is unsustainable and interfered with the order of termination.

In doing so, we are of the considered view that the learned Writ Court has not committed any error warranting reconsideration.

The Letters Patent Appeal is dismissed.”

5. Learned counsel for the petitioner also refers to the order passed in C.W.J.C. No. 130 of 2006 dated 06.01.2011, which is quoted below for ready reference:

The petitioner has challenged his termination as Class-III employee issued vide Memo No. 2681, dated 21.11.2005 as contained in Annexure 1.

The case of the petitioner is that petitioner was appointed as clerk, a Class-III post, on a temporary basis by the then District Education Officer, Patna, vide Memo no. 751, dated 04.07.1983 in the pay scale of Rs. 580- 860, as contained in Annexure 2,



in High School Tenari. Subsequently, vide Memo no. 7412 dated 08.08.1983 as contained in Annexure 2/A, the District Education Officer, Patna modified the earlier order and posted the petitioner in High School Fatuha, for the purpose of his absorption on the newly created post of clerk.

The petitioner was then posted in Daroga Prasad Rai High School, Saristabad, Gardanibagh, Patna, on the newly created post of Clerk. The District Education Officer, vide Memo no. 878, dated 15.07.1996 granted First Time Bound Promotion to the petitioner with effect from 12.08.1993, after his passing of the Noting and Drafting examination. After 22 years of petitioner's service, the District Education Officer, Patna issued a show cause notice (a vague show cause notice as contained as Annexure 4) vide Memo No. 1090, dated 25.08.2005 to the effect that it appeared to the authorities that the appointment of the petitioner was irregular, as the same had been made without following the procedure of appointment. Consequently, the petitioner submitted his show cause and ultimately Annexure 1 was issued by which the petitioner's service was terminated on the ground that the show cause was found to be unsatisfactory, as there has neither been any advertisement nor any provision of reservation was followed, nor the concurrence of the District Education Establishment Commitment was obtained.

It is contended by the learned counsel for the



petitioner that the show cause notice is vague and has been issued after twenty two years of his service and on the basis of the vague show-cause notice, the termination order was issued.

The Learned Counsel for the petitioner relied on the case of Prakash Chandra Sinha versus the State of Bihar, reported in PLJR 2010(2) 280 in which it has been held that in view of the principle laid down by the Constitution Bench of the Apex Court in the case of Secretary, State of Karnataka & Others vrs. Uma Devi, reported in 2006(4) SCC 1, the services of the petitioner is deemed to be regularized and the question of irregularity should have been raised at the initial stage of appointment and not after twenty two years of service.

A counter affidavit has been filed on behalf of the State taking the stand that the appointment was irregular as no advertisement was made and it is against the procedure of appointment as laid down by the Personnel & Administrative Reforms Department vide letter no. 16440, dated 03.12.1980 and the follow up Department Circular no. 17127 dated 12.06.1981 which required preparation of merit list after advertisement and roster clearance.

Considering the submission of the parties, I find that the appointment was made in the year 1983 by the District Education Officer and the counter affidavit does not reflect that the District Education Officer had no authority to appoint and after twenty two years of such appointment a vague show cause notice was issued vide Annexure 4. The counter



affidavit further does not reflect as to what action has been taken by the respondents against the authority, who made the irregular appointment or against the authorities who allowed the petitioner to continue for twenty two years in service. Since it is the case of the respondents that the appointment was irregular, this court finds no justification for termination of petitioner's service after twenty two years of uninterrupted service and allow the authority to reopen the question of irregularity in initial appointment after twenty two years, which is in complete derogation to the principle laid down in the case of Uma Devi (Supra). Reopening of question of initial appointment on the basis of irregularity in initial appointment after ten years of uninterrupted service has been deprecated by the Apex Court whereas in the present case the petitioner worked without any interruption for twenty two years and availed all the facilities of a regular employee. The principle of Uma Devi (Supra) has further been explained and reiterated by Apex Court in the case of State of Karnataka and Others versus M. L. Kesari and Others reported in 2010(9) SCC- 247. Paragraph 11 of the Judgment reads as.

".....The object behind the said direction in para 53 of Uma Devi is twofold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decision of Uma Devi was rendered, are considered for



regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad hoc/casual basis for long periods and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.04.2006 (the date of decision in Uma Devi) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Uma Devi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in Uma Devi as a one- time measure."

Hence, the order of termination, as contained in Annexure 1, is hereby quashed. The petitioner's service from the date of termination till the date of reinstatement will be considered in service for continuity and other consequential benefits. The authorities are directed to reinstate the petitioner forthwith and to make payment of all consequential



benefits within a period of four months of the receipt of the order.

Accordingly, the writ application is allowed.

6. The decision on which the learned counsel for the petitioner relied upon is of no help to the petitioner, as in the instant case the finding is of illegal appointment and not of mere irregularity.

7. Mr. Sharma relied upon the order contained in Annexure-11 dated 12.01.1984 to contend that in C.W.J.C. No. 4053 of 1983 is order on the validity of appointment of petitioner this submission is misconceived as would be evident from the order itself, which is quoted below:

“Having heard learned counsels appearing for the parties and appreciated the facts of the case, I am of the opinion that so long the petitioner’s contract of service subsists the petitioner is entitled to his emoluments and respondent no. 4 (Head Master of the School) has got no authority or business to withhold the emoluments of the petitioner. Nothing has been shown by respondent no.4 which shall justify his action of not preparing the pay bills of the petitioner. On the facts and in the circumstances of this case, I hereby direct respondent no.4 to ensure that the petitioner is paid all his arrear claims in accordance with law on or before 12th March, 1984 and his current salary in accordance with law until the contract of service of the petitioner is terminated or otherwise varied. In case respondent no.4 fails to carry out the order passed today, respondent no.3 shall withhold the



salary of respondent no.4 until the petitioner is paid his salary.”

8. Thus, the direction for payment was on the consideration that so long petitioner is working he is entitled to payment and there is no determination of the validity of appointment.

9. Learned counsel submits that in case of irregular appointment after 10 years of continuous service, the Apex Court has directed for one time consideration of case of those whose appointment was not illegal, but whose appointment is irregular for consideration of regular appointment, whereas in the case of illegal appointment, there is no indulgence for grant of regular appointment.

10. Learned counsel for the respondents submits that from Annexure-1, it would be evident that the appointment of the petitioner was illegal and irregular, as the appointment was made by the direction of the State Education Minister, but this aspect of the matter was not considered earlier by the respondents and as such the matter was remitted to the Principal Secretary vide order contained in Annexure-6 and the Principal Secretary has passed appropriate order in the light of Annexure-1 and held out that the appointment of the husband of the petitioner was illegal.

11. On perusal of Annexure-8, it appears that the Principal Secretary has examined the illegality of the appointment of the husband of the petitioner and referring to the order of appointment



has noted that no selection process was followed.

12. For ready reference, the order of appointment of husband of petitioner contained in Annexure-1 is reproduced herein below:

कार्यालय क्षेत्रीय उप शिक्षा निदेशक, पटना प्रमंडल, पटना।

कार्यालय आदेश

श्री अनिल कुमार सिंह पुत्र श्री यदुनन्दन प्रसाद, ग्राम— हिलसा उत्तरी कोईरीटोला, पोस्ट— हिलसा, जिला—नालंदा जिन्हें सरकारी सेवा में कोई मौखिक नियुक्ति प्राप्त नहीं है को राज्य सम्पोषित बालिका उच्च विद्यालय, विहारशरीफ, नालंदा में लिपिक के रिक्त पद पर वेतनमान 580-10-620-15-770 द0रो0 15-860 के प्रारंभिक वेतन एवं सरकार द्वारा समय समय पर स्वीकृत अन्य भत्तों के साथ के साथ योगदान की तिथि से नितानत अस्थायी रूप से अगले आदेश तक के लिए राज्य शिक्षा मंत्री, शिक्षा विभाग, के आदेशानुसार नियुक्त किया जाता हैं।

इनकी सेवा किसी भी समय बिना कोई पूर्व सूचना दिये एवं बिना करण बताये समाप्त की जा सकती है।

ह0/- एम0 रहमान
क्षेत्रीय उप शिक्षा निदेशक,
पटना प्रमंडल, पटना।

13. Mr. Sharma, learned counsel for the petitioner submits that the husband of the petitioner was not given opportunity of hearing before passing the order as contained in Annexure-8. The issue as to violation of principles of natural justice has been examined by the Apex Court in different context and has held out that compliance of natural justice straight jacket formula. The judgment of



the Apex Court in the case of **Canara Bank Vs. V. K. Awasthi**, reported in **(2005) 6 SCC 321** is settled on the point that principles of natural justice is not required to be adhered, if it is a case of useless formality. Para 17 and 18 of the aforesaid judgment is quoted herein below for ready reference in view of manifest illegality in the appointment of the husband of the petitioner as per Annexure-1:

17. What is known as “useless formality theory” has received consideration of this Court in *M.C. Mehta v. Union of India*, [1999] 6 SCC 237. It was observed as under:

"22. Before we go into the final aspect of this contention, we would like to state that case relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed (See *Malloch v. Aberdeen Corpn.*, [1971] 2 All ER 1278, (per Lord Reid and Lord Wilberforce), *Glynn v. Keele University*, [1971] 2 All ER 89; *Cinnamond v. British Airports Authority*, [1980] 2 All ER 368 (CA) and other cases where such a view has been held. The latest addition to this view is *R. v. Ealing Magistrates. Court, ex p. Fannaran* (1996) 8 Admn. LR 351, (See de Smith, Suppl. P.89 (1998) where Staughton, L.J. held that there must be „demonstrable beyond doubt“ that the result would have been different.



Lord Woolf in *Lloyd v. McMohan*, [1987] 1 All ER 1118, has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in *McCarthy v. Grant*, (1959 NZLR 1014) however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is „real likelihood- not certainty- of prejudice.“ On the other hand, Garner *Administrative Law* (8th Edn. 1996. pp.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from *Ridge v. Baldwin*, (1964) AC 40: [1963] 2 All ER 66, Megarry, J. in *John v. Rees*, [1969] 2 All ER 274 stating that there are always „open and shut cases“ and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J has said that the ‘useless formality theory’ is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that „convenience and justice are often not on speaking terms“. More recently, Lord Bingham has deprecated the „useless formality theory“ in *R. v. Chief Constable of the Thames Valley Police Forces, ex p. Cotton* (1990 IRLR 344) by giving six reasons (see also his article ‘Should Public Law Remedies be Discretionary?’ 1991 PL. p.64). A detailed and emphatic criticism of the ‘useless formality theory’ has been made much earlier in ‘Natural Justice, Substance or Shadow’ by Prof. D.H. Clark of Canada (see 1975 PL. pp.27-63) contending that *Malloch* (supra) and *Glynn* (supra) were wrongly decided. Foulkes (*Administrative Law*, 8th Edn. 1996, p.323), Craig (*Administrative Law*, 3rd Edn. P.596) and others say that the court



cannot prejudice what is to be decided by the decision-making authority. De Smith (5th Edn. 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (Administrative Law, 5th Edn. 1994, pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in *State Bank of Patiala v. S.K. Sharma*, [1996] 3 SCC 364 and *Rajendra Singh v. State of M.P.*, [1996] 5 SCC 460 that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

23. We do not propose to express any opinion on the correctness or otherwise of the 'useless formality theory' and leave the matter for decision



in an appropriate case, inasmuch as the case before us, '*admitted and indisputable*' facts show that grant of a writ will be in vain as pointed by Chinnappa Reddy, J."

(emphasis in original)

18. As was observed by this Court we need not to go into "useless formality theory" in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellant unless failure of justice is occasioned or that it would not be in public interest to do so in particular case, this Court may refuse to grant relief to the concerned employee. (see Gadde Venkateswara Rao v. Govt. of A.P. and Ors., AIR (1966) SC 828). It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. (See Charan Lal Sahu v. Union of India etc., AIR (1990) SC 1480."

14. In view of the above, the Court does not find any merit in the writ application and it is accordingly dismissed.

(Anil Kumar Upadhyay, J)

Uday/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	11.09.2018
Transmission Date	

