

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.283 of 2016
IN
Civil Writ Jurisdiction Case No. 3197 of 2012

- =====
1. The State of Bihar through, the Director-in-Chief, Health Service, Bihar, Patna
 2. The Director-in-Chief, Health Service, Bihar, Patna
 3. The Civil Surgeon-cum-Chief Medical Officer, Bhojpur (Arrah)
 4. The Incharge Medical Officer, Primary Health Centre, Koilwar, Bhojpur (Arrah)

.... Appellants

Versus

Raghunath Prasad Singh, aged about 48 years, son of late Kamta Prasad Singh,
resident of village Tarwan, P.S. Ayarkhota, Dehrin-on-sona, District Rohtas

.... Respondents

with

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Letters Patent Appeal No. 681 of 2015
IN
Civil Writ Jurisdiction Case No. 2256 of 2012

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1. State Of Bihar, through the Director-in-Chief, Health Service, Bihar, Patna
2. The Director-in-Chief, Health Service, Bihar, Patna
3. The Civil Surgeon-cum-Chief Medical Officer, Bhojpur (Arrah)
4. The Incharge Medical Officer, Referral Hospital Shahpur, District Bhojpur (Arrah)

.... Appellants

Versus

Ganpati Prasad Sahu, son of late Yamuna Prasad Sahu, resident of Brahampur,
District Bhojpur (Arrah)

.... Respondent

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Appearance :

(In LPA No.283 of 2016)

For the Appellant/s : Mr. Shashi Shekhar Tiwary, AC to AAG-15

For the Respondent/s : Mr. Ajoy Kumar Chakraborty, Adv.

(In LPA No.681 of 2015)

For the Appellant/s : Mr. Shashi Shekhar Tiwary, AC to AAG-15

For the Respondent/s : Mr. Ajoy Kumar Chakraborty, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN

SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date: 27-06-2018



We have heard Mr. Shashi Shekhar Tiwary, learned AC to AAG-15, for the appellants and Mr. Ajoy Kumar Chakraborty, learned counsel for the respondents- writ petitioners in each of the two appeals.

While L.P.A.No. 283/2016 arises from a judgment and order dated 8.5.2012 of a learned Single Judge of this Court passed in C.W.J.C.No. 3197/2012, which writ petition was disposed of in terms of a judgment and order passed in C.W.J.C.No. 2256/2012 (Ganpati Prasad Sahu v. the State of Bihar & ors.), the second appeal arises from the judgment and order dated 8.5.2012 passed in the case of Ganpati Prasad Sahu (supra).

By the judgment and order impugned in these two appeals the writ petitioners have been allowed 50% of back wages consequent upon their reinstatement vide order bearing Memo No. 1117 dated 20.9.2007, a copy of which is enclosed at Annexure 4 to C.W.J.C.No. 3197/2012.

For the sake of convenience we shall be referring to the pleadings as occurring in L.P.A.No. 283/2016 and the connected writ petition, since the cause of action and the orders relied upon are common in each of the two writ petitions. The judgment and order of the learned Single Judge passed in the case of Ganpati Prasad Sahu (supra), which has been followed in the case of Raghunath Prasad



Singh, would confirm that the learned Single Judge was not satisfied by the reasons assigned by the respondents to deny the arrears of salary to the petitioners for the period of termination, inter alia, taking note of the fact that even if some irregularity in following statutory procedure would exist in the appointment of these petitioners, there was no illegality in the appointment and which relevant fact had led to reinstatement of these petitioners. It is taking note of these circumstances that the learned Single Judge was persuaded to hold the two petitioners entitled for 50% of the basic salary for the period of termination. The pleadings on record would confirm that some steps were taken by the respondents to implement the order passed by the learned Single Judge in the two writ petitions and which led to issuance of an order bearing Memo No. 1697 dated 23.7.2012 of the Civil Surgeon cum Chief Medical Officer, the order bearing Memo No. 1678 dated 29.8.2012 and the order bearing Memo No. 2380 dated 27.12.2012, enclosed at Annexures 'B series' to the counter affidavit filed by the respondents- writ petitioners in L.P.A.No. 283/2016. The pleadings on record of the Letters Patent Appeal would also confirm that in between this period a connected matter reached the Full Bench of this Court relatable to a claim for back wages arising from the same order of reinstatement which is the foundation from the claims raised herein bearing C.W.J.C.No. 2842/2012 (Malti



Kumari v. the State of Bihar & ors.).

The judgment and order of the Full Bench of this Court dated 15.4.2013 passed in the case of Malti Kumari (supra) has been placed on record by the appellants through I.A.No. 1073/2016 in L.P.A.No. 283/2016 and Mr. Tiwary, learned counsel appearing for the State, has submitted that the claim for back wages arising from the reinstatement order dated 20.9.2007 was also the subject matter of the Full Bench judgment and the Full Bench taking note of the arguments of the parties as well as the case laws on the issue has found no infirmity in the order of reinstatement dated 20.9.2007 in so far as it denies back wages to the employees for the period of termination on the principles of 'no work no pay'.

It is the submission of Mr. Tiwary that this judgment was passed on 15.4.2013 and even if on principle a decision was taken by the respondent State to implement the judgment and order of the learned Single Judge which is subject matter of the two intra-Court appeals, in view of the legal position settled by the Full Bench in upholding the decision of the State to deny back wages to reinstated employees on the principle of 'no work no pay', immediate action was taken by the Director-in-Chief, Health Services, to issue orders for stoppage of payment of arrears of salary to the petitioners herein and in case payments had been made, for recovery thereof. He relies



upon the directions issued by the Director-in-Chief, Health Services, as contained in the letter dated 14.1.2015 and 1.4.2015 at Annexures 2 series in I.A.No. 1073/2016 in support of his submission.

It is not in dispute that though orders for payment of back wages had been earlier issued but the same has not been released to the petitioners. According to Mr. Tiwary, besides position settled by the Full Bench in the case of Malti Kumari (supra), which according to learned counsel for the appellants, would squarely apply to the case of the respondents- writ petitioners herein, an issue of excessive delay by the writ petitioners in raising their claim, is also a relevant consideration for denial thereof. It is submitted that this relevant aspect of the matter unfortunately escaped the notice of the learned Single Judge and does admit that even the appellants- respondents were not vigilant to raise such issue. Nonetheless it is his submission that once the respondents- writ petitioners had accepted the appointment on the terms present in the reinstatement order dated 20.9.2007 they cannot be permitted to raise issue of back wages after a lapse of five years, which was much present in the order itself.

The arguments of Mr. Tiwary is contested by Mr. Chakraborty, learned counsel for the respondent- writ petitioners by submitting that once a discretion has been exercised by the Writ Court to allow 50% back wages to the two petitioners after taking note of



the entire circumstances of the case, which is founded on sound reasons, it requires no interference. In an effort to distinguish the case of the two writ petitioners from that of Malti Kumari (supra) which was the subject matter of the Full Bench judgment, he submits that while the case of Malti Kumari (supra) was a case of regularization, that of the two petitioners is a case of appointment and even if two different kind of cases were considered by the same Committee so constituted under the orders of the Division Bench of this Court, yet the matter would have to be considered on the facts accompanying respective cases. He submits that it is in the process of implementation that the orders have already been issued for payment of back wages by the Civil Surgeon but on a misconception that taking note of the Full Bench judgment, the payment has been stopped.

We have considered the rival submissions advanced by the learned counsel for the parties and have perused the records.

An order relating to payment of back wages lies at the discretion of the employer and in case a decision is taken thereon which is put to judicial review, the opinion formed by a Court exercising writ jurisdiction under Article 226 of the Constitution of India unless found perverse, normally the Division Bench exercising Letters Patent Jurisdiction may not interfere with the discretion so



exercised by the Writ Court. We were initially persuaded to abide by the view which stands long settled until our attention was drawn by Mr. Tiwary to the Full Bench opinion expressed in the case of Malti Kumari (supra). It is undisputed that by the same reinstatement order bearing Memo No. 1117 dated 20.9.2007, enclosed at Annexure 4 to the writ petition that the two writ petitioners as well as Malti Kumari, were reinstated on their respective posts. The opening paragraph of reinstatement order makes it clear that it is following the directions issued by the Division Bench in L.P.A. No. 946/2003 that a Committee was constituted and which Committee found the case of 91 employees fit for reinstatement which included the two writ petitioners herein as well as Malti Kumari (supra). The order in its concluding portion clearly stipulates denial of back wages for all the 91 reinstated employees on the principles of 'no work no pay'. However, the period they had been kept out of service was to be given continuity for the purpose of computation of post retiral benefits. It is undisputed that this order in so far as it denied back wages was questioned by the writ petitioners herein as well as Malti Kumari (supra) after a lapse of more than five years.

In our opinion, even if no limitation is prescribed for invoking the writ jurisdiction of a Court, yet it cannot be a luxury exercise at the sweet will of an aggrieved party. The extraordinary



jurisdiction vested in a Court exercising Writ Jurisdiction is to be invoked within a reasonable time. The order of reinstatement was passed on 20.9.2007 and it is after a lapse of five years period that the respondent- writ petitioners chose to file the writ petition, which delay certainly cannot be held reasonable.

Be that as it may, the two writ petitioners having moved this Court under Article 226 of the Constitution of India after a lapse of five years to seek back wages, surprisingly no issues were raised by the State on their laches and delay in seeking equitable remedy nor the attention of the learned Single Judge was drawn towards this relevant aspect of the matter which is a foundation for invoking jurisdiction under Article 226 of the Constitution of India.

As observed, no objections forthcoming on the issue of excessive delay, a possible opinion expressed by the learned Single Judge to grant 50% back wages with the State respondent taking appropriate steps towards its implementation, perhaps the outcome of this appeal would have been different but for the settlement of the legal position on the similar claim raised in the case of Malti Kumari (supra) by the Full Bench. In fact the Full Bench was constituted for expressing opinion on the issue taking note of divergent order passed by learned Judges exercising writ jurisdiction. We are persuaded to reproduce the relevant extract of the judgment passed by the Full



Bench on the issue of back wages which runs as follows:

“ We find considerable force in the submission on behalf of the State that the petitioner cannot blow hot and cold simultaneously. It is a settled principle of law that a person cannot retain the benefit of a part of the order and simultaneously challenge another part of the same order. Once the direction to be considered afresh for regularization was accepted and the subsequent order of regularization from September 2007 has not been challenged but accepted without demur by joining in September 2007 it is impermissible for her to question the very order for regularization by seeking salary for the period prior to regularization. The fact that the earlier period may have been counted by fiction for purposes of pension only cannot lay the foundation for a relief factually impossible. If regularization has been done subsequently and accepted the question of wrongly being denied the right to work for the interregnum period does not arise. The principle of ‘No work no pay’ therefore applies.

The principle of blowing hot and cold or approbate and reprobate was noticed in (1992) 4 SCC 683 (R.N.Gosain v. Yashpal Dhir) observing as follows:

“10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that is valid and then turn round and say it is void for the purpose of securing some other advantage”. [see Verschures



Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. Scrutton L.J.] According to Halsbury's Laws of England 4th Edn. Vol 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)'.

We further find considerable force in the submission of the respondents that the claim itself is highly belated if reinstatement was ordered and accepted in September 2007 there is no whisper of even a suggestion why the writ petition has been filed nearly five years later in February 2012. Arrears of salary and continued denial of salary are different issues in the former case principle of limitation will be attracted in the latter the right would accrue for every month of denial extending limitation accordingly. Arrear of salary constituting a money claim in the present case has become barred by limitation after three years in 2010 as held in (1978) 2 SCC 349 (N. M. Siddique v. Union of India) observing:

"13. It is indisputable that the proper article of the Limitation Act, 1908 to apply is Article 102. It prescribes a period of three years from the date when the wages accrue due....."

If the normal remedy under the ordinary laws of the land has become barred by limitation reason cannot be had to the extra ordinary jurisdiction.

Even if relief by payment of salary for the period in question has been granted to others, the plea of parity can have no application as the questions presently being considered by us do not appear to have been raised or considered earlier in any of the orders relied upon.



Those orders do not constitute precedent and there is no ratio in the same.

CWJC No. 14720 of 2009 relied upon by the respondents was dismissed as “a mischievous kind of writ application” with no principles discussed. In (Om Prakash) (supra) the facts were substantially different. The five man committee had denied regularization which was challenged in CWJC No. 2256 of 2012 invoking principles of equity. 50% of arrears was directed to be paid for the period in question in LPA No. 230 of 2011 and analogous cases the issue again was of challenge to the five man committee report denying regularization after reconsideration.

In CWJC No. 11015 of 2012 relied upon by the petitioner, a discordant note was struck, but on principles of judicial decorum and propriety the Single Judge followed earlier co-ordinate Bench decisions observing:

“Even while the Court finds substance in the objection on behalf of the State, considering that similar orders have been given in the recent past, judicial propriety restrains the Court from rejecting the writ application on grounds of delay.”

It was also noticed that none of the earlier Bench orders had noticed the observations in paragraph 23 of Sitendra Kumar Singh (supra) holding as follows:

“23. However, the petitioners will not be entitled for their salary/ remuneration for the period that they have not actually worked.”

The changed trend of judicial view that back wages



were not to be automatically granted as a matter of course was also noticed referring to (2010) 2 SCC 70 (Reetu Marbles v. Prabhakant Shukla) in conclusion it was observed as follows:

“If the petitioners were denied back wages for the period from termination till reinstatement and the appeal was a continuation of the original proceeding ... full effect has to be given including paragraph 23 of the judgment. These aspects do not appear to have been raised in the earlier orders relied upon by the petitioner.

Be that as it may, if others similarly situated have moved this court in 2012 for arrears of salary with regard to the same period and directions have been given for payment of 50% of the basic salary judicial propriety requires this Court to follow the same.”

The judicial decorum requires to follow a Bench of co-ordinate jurisdiction is the occasion for the present reference.

We therefore are of the opinion for the reasons discussed that the claim of salary for the period prior to regularization merits no consideration. The order dated 20.9.2007 to the extent calls for no interference.”

The learned Judges forming the Full Bench having noted different orders passed by the Writ Court(s) including the one passed in the case of Ganpati Prasad Sahu, has upheld the decision of the Committee to deny salary to the reinstated employees for the period of their termination. Considering that the Full Bench was constituted to resolve the issue in view of divergent orders being passed by the Writ Court(s) on the issue of back wages, that the legal position has been



settled by the Full Bench in consideration of reinstatement order bearing Memo No. 1117 dated 20.9.2007 which is also subject matter of the present challenge, we are bound by the opinion so expressed by the Full Bench to uphold the decision of the five member Committee in denying back wages to the writ petitioners for the period of termination even while giving them continuity of service for the purpose of computation of post retiral benefits.

In view of the legal position so settled by the Full Bench, the judgment and order of the learned Single Judge put to question in the two writ petitions cannot be sustained and is accordingly set aside. Consequentially C.W.J.C.No. 3197/2012 and 2256/2012 are dismissed. The two Letters Patent Appeals are accordingly allowed in terms of the judgment and order passed by the Full Bench in the case of Malti Kumari (supra). No order as to costs.

(Jyoti Saran, J)

(Chakradhari Sharan Singh, J)

Surendra/-

AFR/NAFR	AFR
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