

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1191 of 2016

In
Civil Writ Jurisdiction Case No.13336 of 2010

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Mithilesh Kumar Jha Son of late Ram Chandra Jha Resident of Mohalla-
Balbhadrapur Narta, Police Station- Balbhadrapur, District Darbhanga.

... .. Appellant

Versus

1. The State Of Bihar
2. The Director-in-Chief, Health Services Bihar, Patna.
3. The Additional Secretary, Health Department Govt. of Bihar Patna.
4. The Regional Deputy Director, Health Services, Bihar, Patna.
5. The Civil Surgeon-cum-Chief Medical Officer, Madhubani.
6. The Incharge Medical Officer, Sub Divisional Hospital Jhanjharpur,
Madhubani.

... .. Respondents

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Appearance :

For the Appellant	:	Mr. Rajendra Narayan, Sr. Adv. Mr. Kaushalesh Choudhary, Adv.
For the Respondents	:	Mr. Nadeem Seraj, GP5 Mr. Dharendra Kumar, AC to GP 5

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE ANIL KUMAR SINHA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 21-01-2020

This Letters Patent Appeal has been filed against the judgment and order dated 10.09.2014 passed by the learned single Judge in CWJC No. 13336 of 2010 whereby the writ petition filed by the appellant for quashing the order contained in Memo No. 532(4) dated 31.03.2010 issued by the Director-in-Chief, Health Services, Bihar, Patna whereby the order as contained in memo No. 22 dated 25.01.2008 passed by the Civil Surgeon-cum-Chief



Medical Officer, Madhubani (for short 'CMO, Madhubani') terminating the service of the appellant from the post of clerk was affirmed has been dismissed.

2. The matter at issue is simple. However, it has a long chequered history.

3. The case of the appellant is that an advertisement for appointment on posts of clerk was issued by the CMO, Madhubani in the daily newspaper 'Hindustan Times' on 14.09.1989. Since he fulfilled all the eligibility criteria, he applied for the aforesaid appointment. He appeared in the written test and was declared successful following which an interview was held and merit list was prepared and he was selected for the aforesaid post. Following his selection, an appointment letter was issued in his favour vide Memo No. 2905 dated 31.12.1989 by the CMO, Madhubani by which he was posted at the Additional Primary Health Centre, Mahrail, Andhrathari, Madhubani. He submitted his joining on 01.01.1990 at the place of posting. He was transferred to the Sub-Divisional Hospital, Jhanjharpur on 30.11.2004. Though he was regularly performing his duty and was granted the benefit of first accelerated career progression, a show cause notice was issued to him vide Memo No. 3261 dated 28.12.2007 by the CMO, Madhubani by which he was directed to provide certain documents



by 15.01.2008 to ascertain the legality of his appointment. He filed reply to the show cause on 08.01.2008 whereby he submitted that his appointment was in accordance with law and his matter of appointment should be considered sympathetically and he should be permitted to continue in service. However, ignoring his reply to the show cause notice, he has been removed from service vide Memo No. 227 dated 25.01.2008 issued by the CMO, Madhubani.

4. On the contrary, the contention of the respondents is that when the matter of illegal appointment of the appellant came to light, a show cause notice dated 28.12.2007 was issued to him by the then CMO, Madhubani for clarification on nine points. On his reply on 08.01.2008, the CMO, Madhubani decided to scrutinize the matter of appointment made on 01.01.1990 for which a Committee presided over by the CMO, Madhubani was constituted. The Committee scrutinized the matter on the basis of show cause reply and other materials available on record. After scrutiny, it found that the appointment of the appellant was illegal since no procedure for appointment was followed in his appointment. The Committee recommended for termination of his service and on that basis his service has been terminated by the CMO, Madhubani vide order dated 25.01.2008 with immediate effect on the following four grounds :-



- (i) The reservation policy was not followed;
- (ii) The interview was not held;
- (iii) The Selection Committee had not been constituted; and
- (iv) The Selection Committee did not recommend him for appointment.

5. A perusal of the record would reveal that against the termination order dated 25.01.2008 the appellant filed a writ petition vide CWJC No. 5473 of 2008 which was dismissed as withdrawn with liberty to move before the Director-in-Chief, Health Services, Bihar, Patna and the Director-in-Chief was directed to dispose of the matter on merit vide order dated 15.04.2008, which reads as under :-

“15.4.2008 Counsel for the petitioner after some arguments seeks permission to withdraw this writ application in order to move before the Director-in-Chief, Primary Health Services, Bihar against the impugned order of termination of his service passed by the Civil Surgeon, Madhubani.

This writ application is accordingly dismissed as withdrawn.

In view of the fact that the writ petition is pending before this Court, the Director-in-Chief, Primary Health Services, Bihar, Patna is directed to dispose of the matter on merit.”



6. Thereafter, the appellant filed his representation before the Director-in-Chief, Health Services, Bihar, Patna on 09.06.2008.

7. The Director-in-Chief, Health Services vide Memo No. 246 dated 24.02.2010 directed the appellant to appear before him on 10.03.2010 at 3:00 p.m. .

8. After giving the appellant an opportunity of hearing, the Director-in-Chief, Health Services vide order dated 31.03.2010 affirmed the order of termination passed by the CMO, Madhubani and rejected the representation of the appellant observing that on none of the grounds on which the order of termination was passed, he could give satisfactory explanation.

9. Being aggrieved by the aforesaid order dated 31.03.2010, the appellant preferred a writ petition before this Court vide CWJC No. 13336 of 2010 seeking the following reliefs:-

“(i) For quashing the order contained in Memo No. 532(4) dated 31/3/2010 issued under the signature of Respondent No.2 Director in Chief Health Services, Bihar, Patna whereby he has affirmed the order passed by Respondent No.5 Civil Surgeon cum Chief Medical Officer, Madhubani contained in Memo No. 227 dated 25/1/2008 by which petitioner



has been terminated from the post of clerk after continuous service of about 18 years.

(ii) For quashing the order contained in Memo No. 227 dated 25/1/2008 passed by the Respondent No.5 whereby the Services of the petitioner on the post of clerk in the Sub Divisional Hospital Jhanjharpur has been terminated after continuous service of 18 years on the ground that the Selection process was not followed at the time of his appointment.

(iii) For direction to the concerned authority to reinstate the petitioner on the post of clerk in Sub Divisional Hospital, Jhanjharpur Madhubani w.e.f. the date of termination i.e. 25/1/2008 with all consequential benefits and interest thereon.

(iv) For any other relief/reliefs to which the petitioner may be found entitled in the eye of law.”

10. The said writ petition was dismissed by the learned single Judge vide order dated 10.09.2014.

11. Being aggrieved by the order dated 10.09.2014 passed by the learned single Judge in CWJC No. 13336 of 2010, the appellant filed the present intra-court appeal on 19.05.2016 with I.A. No. 4495 of 2016 for condonation of delay of 284 days caused in filing the appeal.

12. A Division Bench of this Court [Coram : Ajay Kumar Tripathi and Rajeev Ranjan Prasad,JJ.] vide order dated



12.12.2017 dismissed the limitation petition finding the ground taken therein to be not cogent and valid. As a consequence thereof, the intra court appeal also stood dismissed.

13. Being aggrieved by the aforesaid order dated 12.12.2017 passed by the Division Bench, the appellant filed Special Leave to Appeal before the Supreme Court.

14. The Supreme Court vide order dated 18.07.2018 passed in Civil Appeal No. 8115 of 2018 arising out of SLP(C) No. 21465 of 2018, while granting leave, set aside the order dated 12.12.2017 passed by the Division Bench, condoned the delay caused in filing the present Letters Patent Appeal and remanded back the case before this Court for deciding the same in accordance with law on merits.

15. In the aforesaid background of facts, the appeal is before us.

16. Mr. Rajendra Narain, learned senior advocate appearing for the appellant submitted that while passing the impugned order, the learned Single Judge did not consider the fact that the appellant was appointed on the vacant and sanctioned post of clerk. He failed to appreciate that the appointment was made by the competent authority. He also failed to consider the fact that after treating the appellant's appointment to be bonafide, he was



granted the benefit of accelerated career progression with effect from 09.08.1999 by the CMO, Madhubani. According to him, learned Single Judge ought to have held that without considering the appellant's show cause reply dated 08.01.2008 the order of dismissal dated 25.01.2008 was illegally passed by the CMO, Madhubani.

17. Mr. Rajendra Narain, learned senior advocate has further contended that the learned Single Judge erroneously came to the conclusion that the appointment letter issued by the appellant was forged one whereas the fact of the matter is that the CMO, Madhubani passed the order on the premise that the due procedure of appointment was not followed. He argued that in view of the long service, the appellant is entitled to be retained in service as observed by the Supreme Court in *State of Karnataka v. Umadevi*, since reported in (2006) 4 SCC 1.

18. Contesting the submissions made on behalf of the appellant, Mr. Nadim Seraj, learned Government Pleader No.5 appearing for the respondent State submitted that the Government of Bihar had issued instruction for appointment to Class III employees in Government service under its circular dated 3rd September, 1980. The said circular provides for procedure for constitution of Selection Committee, preparation of merit list, etc.



The circular had been issued to avoid discrimination in appointment of Class III posts in consonance with Articles 14 and 16 of the Constitution of India.

19. According to him, the appointment of the appellant was made in complete breach of the instruction of the State Government. Hence, his appointment to the post of clerk was void ab initio. The same was made by an authority not competent to do so.

20. He has further submitted that there is no material to suggest that while appointing the appellant any interview was held or that the Selection Committee was constituted or that the duly constituted Selection Committee ever recommended his case for appointment. He has argued that the ratio laid down by the Supreme Court in *Uma Devi* (Supra) goes against the case of the appellant. He has placed reliance on the Full Bench judgment of this Court in *Ram Sevak Yadav Vs. The State of Bihar*, since reported in *2013(1) PLJR 964* in order to substantiate his submission that the learned Single Judge has rightly dismissed the writ petition filed by the appellant and the order impugned does not call for any interference in the present appeal.

21. We have heard respective counsel for the parties and perused the materials on record.



22. It is an admitted position that at the relevant time when the appointment of the appellant was made, there was no statutory rule in terms of proviso to Article 309 of the Constitution of India for appointment to Class III posts. The matter of appointment was being regulated by the executive instructions.

23. It is also not disputed that circular no. 16440 dated 3rd December, 1980 was issued by the State Government laying down the procedure for appointment to Class III posts. The relevant clauses of the said circular for the purpose of determining the person competent to make appointment and the mode of appointment in respect of Class III posts read as under :-

“(b) The competent authority of Secretariat and attached offices, District Collector and equivalent Officer Incharge of divisional offices of other departments will collect the information from attached offices at the start of the year for the posts actually to be filled during the year and the information of vacancies. Suitable candidates will be selected from these applicants according to the vacancies and suitable persons will be allotted to various attached offices for appointment, as per requirement, from the common merit list. All the appointments will be made by the competent authority for their respective offices.

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(e)(i) One Selection Committee will be made for preparation of merit list in the Secretariat and attached



offices and the Head of attached establishment will be the Chairman of this Committee and any senior officer will be the Member of Committee, who is nominated by the Head of Establishment. Officer of Scheduled Caste/Scheduled Tribe available in the department will be the second member. In case no such officer is available, if the officer of that category is available in another department, then he will be included in the Committee and if even this is also not possible, then Joint/Dy. Secretary of the Personnel Department, who perform the works related to Scheduled Caste/Scheduled Tribe, will be appointed as a Member.

(ii) For preparation of merit list at District level, District Head of the attached Establishment will be the Chairman of selection committee constituted and any other senior officer of that Establishment, who is nominated by their District level Head, will be its member. Second Member will be the District Welfare Officer so that at the time of preparation of merit list of government orders regarding maintenance no violation is committed.

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(3) It has come into the knowledge of government that appointments on category 3 posts are not being made according to the procedure prescribed in the above-said resolution. The act of working against the prescribed procedure clearly means the violation of government orders, which is a matter of regret. Therefore, it is expected that the appointments on category 3 posts are



made according to the procedure prescribed in the above-mentioned Resolution. It will be the responsibility of each appointing authority to ensure that the procedure with regard to appointment on category 3 posts is followed strictly. In case it is found that prescribed procedure has not been followed by the appointing authority with regard to appointment on category 3 posts, then Government will have to take necessary action against him. Inquiry will be conducted immediately on receiving the complaint that the officer has not followed the prescribed procedure and if the charge is found proved, the officer will be placed under suspension immediately and departmental action will be taken to remove him from services. Such incorrect appointments will be cancelled immediately.”

24. Clause (e)(i) of the aforesaid circular provides that one Selection Committee will be made for preparation of merit list in the Secretariat and attached offices and the Head of attached establishment will be the Chairman of this Committee and any senior officer will be the Member of Committee, who is nominated by the Head of Establishment. Officer of Scheduled Caste/Scheduled Tribe available in the department will be the second member. In case no such officer is available, if the officer of that category is available in another department, then he will be included in the Committee and if even this is also not possible, then Joint/Dy. Secretary of the Personnel Department, who



perform the works related to Scheduled Caste/Scheduled Tribe, will be appointed as a Member.

25. Similarly, sub-clause (ii) of the aforesaid clause (e) provides that for preparation of merit list at District level, District Head of the attached Establishment will be the Chairman of selection committee constituted and any other senior officer of that Establishment, who is nominated by their District level Head, will be its member. Second Member will be the District Welfare Officer so that at the time of preparation of merit list of government orders regarding maintenance no violation is committed.

26. As far as the case of the appellant is concerned, the controversy is whether he was legally and validly appointed or not.

27. The Director-in-Chief, Health Services, Bihar, Patna while passing his order dated 31.03.2010 after hearing the appellant, came to the categorical finding that while appointing the appellant the reservation policy was not followed by the CMO, Madhubani. He was of the view that the appellant was not appointed on the basis of any interview. He further came to the conclusion that the Selection Committee was not constituted and



there was also no recommendation of the Selection Committee for appointment of the appellant.

28. These were the four grounds on which the CMO, Madhubani had terminated the service of the appellant against which he had preferred a writ petition, which was dismissed as withdrawn after some arguments with liberty to the appellant to file representation before the Director-in-Chief, Health Services, Bihar, Patna. The Director-in-Chief has categorically held in his order dated 31.03.2010 that the appellant failed to explain and satisfy him on any of the four grounds for which he was dismissed from service.

29. The counter affidavit filed by the State in the appeal would demonstrate that on the issue of appointment on the non-gazetted post a report was submitted by the then CMO, Madhubani on 21.12.2013 to the Director-in-Chief, Health Services, Bihar, Patna in which it was specifically stated that although in the year 1989 an advertisement for appointment of five posts such as Clerk, Dresser, Pharmacist, Health Educator and Non-Medical Assistant was published, advertisement for conducting interview of Pharmacist and Dresser only was published in daily newspaper for which Selection Committee was constituted and process was finalized in accordance with law but



with regard to other posts neither interview was conducted nor Selection Committee was constituted and no record is available in the office with regard to other appointments. The above averments were made by the respondent Director-in-Chief, Health Services, Bihar, Patna in para 10.

30. The appellant has filed a rejoinder to the counter affidavit filed on behalf of the respondent no.2. In his rejoinder, he has vaguely stated that the averments made in para 10 are false and fabricated. He has failed to produce any document in order to show that any notice for holding interview for the post of clerk was ever published. He has also failed to produce any document to show that any Selection Committee was ever constituted for appointment to the post of clerk in the office of the CMO, Madhubani.

31. Apparently, the appointment of the appellant was made by the CMO, Madhubani without following the instructions issued by the State. Hence, the appointment of the appellant can not be said to be a valid appointment.

32. By now, it is well settled that if the initial appointment itself is illegal and void ab initio, the service cannot be regularized.



33. A Division Bench of this Court in the case of the *State of Bihar Vs. Madhu Kumari*, since reported in **2015(2) PLJR 378** in respect of illegal appointments held as under :-

“11. The Government of Bihar in its Administrative Reforms Department issued instructions for appointment to Class III service in the Government offices under its Circular No.16440 dated 3rd December 1980. The said Circular apply to Class III posts other than which are filled in by appointment of the candidates selected by Bihar Public Service Commission after a competitive examination and to the posts which were governed by the Government Resolution dated 28th January 1976. The said Circular sets out a detailed procedure for notifying the vacancies in Secretariat and its attached offices, District Magistrates and other Muffassil offices and for calling for applications, preparation of a common merit list and appointment from the said common merit list in order of merit. It also provides for procedure for constitution of selection committee, preparation of merit list and wait list, duration of the merit list/wait list.

12. A similar Circular No.16441 was issued on 3rd December 1980 for appointment to Class IV posts in the Muffassil offices of the Government.

13. Without entering into the details of the procedure etc. provided in the said Circulars, we may note that the said Circular had been issued to avoid



discrimination in appointment to Class III and Class IV posts in the Government offices and provides for generalized procedure in consonance with Articles 14 and 16 of the Constitution.

14. The Appeals are contested by the learned advocates appearing for the writ petitioners. We have heard learned counsels Mr. Basant Kumar Choudhary, Mr. K. N. Choubey, Mr. Yugal Kishore and learned advocates Mr. S. B. K. Manglam, Mr. Ashok Kumar Singh, Mr. Praful Chandra Jha, Mr. Shambhu Sharan Singh, Mr. Pramod Mishra, Mr. Vivek Prasad, Mr. Ajoy Kumar Chatraborty, Mr. Pramod Kumar Sinha, Mr. Sunil Kumar Verma.

15. The learned advocates have made submission on the facts of individual cases and contentions raised in the respective writ petitions. They have relied upon the judgment of this Court in the matter of **The State of Bihar & Ors. Vs. Binay Kumar Singh & Ors.** [2011 (3) PLJR 547] and the above referred order of the Hon'ble Supreme Court in appeals. The learned advocates have also relied upon the judgments of the Hon'ble Supreme Court in the matters of **Ashwani Kumar & Ors. Vs. State of Bihar & Ors.** [1997(1) PLJR (SC) 59]; of **State of Karnataka & Ors. Vs. C. Lalitha** [(2006) 2 SCC 747]; of **K. T. Veerappa and Ors. Vs. State of Karnataka and Ors.** [(2006) 9 SCC 406]; of **Government of Andhara Pradesh & Ors. Vs. K. Brahmanandam & Ors.** [(2008) 5 SCC 241]; of



Prakash Ratan Sinha Vs. State of Bihar & Ors. [2010 (1) PLJR (SC) 77]; of **Sant Lal Gupta and others Vs. Modern Cooperative Group Housing Society Limited and others** [(2010) 13 SCC 336]; of **Safiya Bee Vs. Mohd. Vajahath Hussain alias Fasi** [(2011) 2 SCC 94]; of **Union of India & Anr. Vs. Arulmozhi Iniarasu & Ors.** [2011 (4) PLJR (SC) 83]; and of **State of Rajasthan & Ors. Vs. Daya Lal & Ors.** [2011 (4) PLJR (SC) 90].

16. Learned advocates have submitted that the appointments of the writ petitioners were made under a Scheme introduced by the State Government in 1985. All appointments were made under the said Scheme. Even though the appointments may not have been made strictly in accordance with the rules/instructions or by due process, in absence of any action taken against the officers concerned, the employees could not have been targeted. Most of the writ petitioners have served for more than 10 years; some have completed 20 years of service. The service of the writ petitioners, therefore, ought to have been regularized. The learned advocates have also submitted that various benches have decided the writ petitions separately, not against all of them the State Government has preferred letters patent appeal. Many of the orders for reinstatement in service have been complied with by the State Government whereas in the present set of cases, the Appeals are preferred and thus the writ petitioners have been meted a discriminatory treatment.



17. It would not be out of place to note here that three writ petitions in the same subject matter were referred by the learned single Judge to the Full Bench. The Full Bench has considered the reference and decided the writ petitions [**Ram Sevak Yadav & Anr. Vs. The State of Bihar & Ors.**] 2013 (1) PLJR 964. The Full Bench has considered the aforesaid history of the litigations and the judgments of the Hon'ble Supreme Court, more particularly the judgments in the matters of **Secretary, State of Karnataka & Ors. Vs. Uma Devi (3)**, [(2006) 4 SCC 1]; of **State of Karnataka Vs. M. L. Keshari** [(2010) 9 SCC 247]; of **A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam** [(2012) 6 4 SCC 430]; of **Sahara India Real Estate Corp. Ltd. Vs. Securities and Exchange Board of India** [(2013) 1 SCC 1]. Having considered the plethora of judgments on the issue, the Full Bench has summed up its decision in paragraph 43 of the judgment as under:-

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

(A) Uma Devi (supra) prohibits regularization of daily wage, casual, ad-hoc and temporary appointments, the period 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.”

(emphasis supplied)

34. The judgment of the Supreme Court in *Uma Devi* (Supra) and other cases have been considered by the Full Bench of this Court in *Ram Sewak Yadav* (Supra). The Full Bench in *Ram Sewak Yadav* (Supra) summed up its conclusion and answered the reference as noted hereinabove.

35. It is true that the learned Single Judge while dismissing the writ petition has held that the appointment of the appellant was found to be forged. The said observation of the



learned Single Judge is not correct. It is not even the case of the respondent State that the appointment letter was forged one rather the case of the respondent State is that the appointment of the appellant was void ab initio and was an illegal appointment as the same was made contrary to the executive instructions issued by the State in this regard.

36. However, the said observation by the learned Single Judge would be of no consequence as the real controversy is whether the appellant was legally and validly appointed or not.

37. We do find that the appointment of the appellant was not made in adherence to the executive instruction, which was operative in the matter of appointment to the Class III posts. Neither the reservation policy was followed nor any Selection Committee was constituted nor the Selection Committee had ever recommended the case of the appellant for appointment. There is also no evidence that any notice for interview was ever issued for appointment to Class III posts in the office of the CMO, Madhubani. The CMO, Madhubani was individually not authorized to make appointment and straightway issue a posting order.

38. We find that the appellant is the beneficiary of an illegal order made by the CMO, Madhubani. Since the induction



of the appellant itself was illegal and he continued on the post on the basis of illegal posting order made by the CMO, Madhubani, the onus to prove otherwise is on him. The appellant was given notice to establish the genuineness of his appointment and to show cause. He failed to establish the genuineness and legality of his appointment before the Director-in-Chief, Health Services, Bihar, Patna.

39. Once we find that the appointment of the appellant was illegal and void ab initio, the challenge to the order of termination is bound to fail.

40. In *Union of India Vs. Raghuwar Pal Singh*, since reported in *(2018) 15 SCC 463*, the Supreme Court was examining the case where the appointment letter came to be issued without approval of the competent authority then whether such appointment letter issued to the appellant would be a case of nullity or a mere irregularity. The Supreme Court held that in absence of prior approval of the competent authority, the Director Incharge could not have hastened issuance of the appointment letter. The act of commission and omission of the then Director Incharge would, therefore, suffer from the vice of lack of authority and nullity in law. The Supreme Court further held that if it is a case of nullity, affording opportunity to the incumbent



would be a mere formality and non grant of opportunity may not vitiate the final decision of termination of his services.

41. Keeping in mind, the discussions made above and the ratio laid down in *Union of India Vs. Raghuwar Pal Singh* (Supra) as also **Uma Devi** (Supra), we are of the opinion that the appointment of the appellant was an illegal appointment. Such appointment was a backdoor entry and an act of nepotism and favoritism.

42. In that view of the matter, we find no merit in this appeal. It is dismissed accordingly.

(Ashwani Kumar Singh, J)

Anil Kumar Sinha, J: I Agree.

(Anil Kumar Sinha, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	21.11.2019
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