

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16036 of 2011

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1. Sachchidanand S/O Late Baikunth Singh R/O Village- Terhari, P.S.- Naubatpur, District-Patna
 2. Ram Sidhi Maharaj S/O Late Kinkar Maharaj R/O Village - Bela, P.S.- Naubatpur, District- Patna
 3. Vijay Bhushan Prasad S/O Sri Ramautar Sharma R/O Mohalla- Math Lakshmanpur Guljarbagh, P.S.- Alamganj, District- Patna
 4. Lalan Singh S/O Late Ram Chandra Singh R/O Village-Kamta, Police Station - Hilsa, District- Nalanda
 5. Sahja Nand Kumar S/O Late Chandrika Singh R/O Village- Goay, Police Station- Naubatpur, District- Patna
 6. Dasu Chaudhary S/O Sri Hira Chaudhary R/O Village- Motipur, Police Station - Naubatpur, District- Patna

... .. Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Department of Health, Government of Bihar, Patna
2. The Principal Secretary Department of Health, Government of Bihar, Patna
3. The Director-In-Chief, Health Services, Government of Bihar, Patna
4. The Regional Deputy Director, Health Services, Patna Division, Patna

... .. Respondents

Appearance :

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

For the Respondent/s : Mr. Indeshwari Prasad Mandal, AC to GA-3

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

7 13-02-2023 At the outset, learned counsel for the petitioners submits that during pendency of this writ application petitioner no. 3 has died, therefore, this application shall not be pressed on behalf of petitioner no. 3.

2. Heard learned counsel for the petitioner nos. 1, 2, 4, 5 and 6 and Mr. Indeshwari Prasad Mandal, learned AC to GA-3 for the State.

3. This writ application has been filed for issuance of



writ in the nature of Certiorari to quash and cancel the order dated 15.02.2011 (Annexure '21') passed by the learned Chairman of One Man Enquiry Committee whereby and whereunder the case of the petitioners being Case No. 135 of 2010 has been rejected by treating the same similar to that of the case of Jwala Prasad (Case No. 64/2010) which was rejected earlier.

Submissions of the Petitioners

4. Learned counsel for the petitioners submits that the petitioners were appointed as vaccinators. They had undergone a training pursuant to an application submitted by them in terms of the notice inviting application pasted on the notice board of Primary Health Centre. The said notice was pasted on the notice board under signature of the then Regional Deputy Director, Patna Division, Patna. The case of the petitioners is that they had entered into service after completing all the required formalities, however, they have been terminated from service after a long time on the ground that their appointment was illegal and that it was a backdoor appointment without following the established procedure.

5. Learned counsel submits that the case of the petitioners was also examined by the Five Members Committee but the petitioners were not that fortunate like 91 persons whose cases were treated as one of irregular appointment and were



allowed to continue. Learned counsel submits that once again after several rounds of litigation when the matter reached to the One Man Committee, in absence of any notice no one appeared on behalf of the petitioners before the Committee. The Committee, however, thought it just and proper to dispose of their case by rejecting the application on similar grounds as had been done in the case of Jwala Prasad.

6. Learned counsel submits that so far as the judgment of One Man Committee in the case of Jwala Prasad is concerned, the same has been set aside by a learned Co-ordinate Bench of this Court in CWJC No. 19790 of 2010. A copy of which is available on the record as Annexure '33' to the petitioners' reply to the counter affidavit on behalf of respondent no. 4. Learned counsel, therefore, submits that the impugned order is also liable to be set aside on this ground alone.

7. Alternatively, it has been argued that the case of the petitioners is similarly situated to those 91 persons in whose cases also the appointment procedures were not followed but the Five Members Committee gave remarks that those were cases of irregular appointments. Much emphasis has been given on this that the cases of those 91 persons cannot be said to be different from the case of the petitioners.

8. Learned counsel has placed before this Court a copy



of the judgment of the learned Co-ordinate Bench of this Court rendered in CWJC No. 5631 of 2008 (Aspujan Singh versus State of Bihar and Others) and other analogous matters to submit that in those cases, the learned Co-ordinate Bench directed inter alia that if the Health Commissioner would find the case of the petitioners to be identical to any of those 91 already regularized by the Director-in-Chief by an order dated 10.09.2007 or any other similarly situated persons still continuing in service he would pass an order directing for similar regularization of service of one or more petitioners by taking into account that whatever illegality were found in the initial appointment of those 91 persons had stood condoned by the order of their regularization in service dated 10.09.2007 and thus is a benchmark binding on the Government in all similar cases.

9. Learned counsel submits that pursuant to the said direction of the learned Co-ordinate Bench of this Court those writ petitioners were treated similarly to those 91 persons and they have been appointed.

Submissions of the State

10. On the other hand, learned counsel for the State has contested this writ application. By filing a counter affidavit, it is submitted that the petitioners were appointed on the post of vaccinator without advertisement published in the newspaper.



There was no sanction post and even the roster clearance was not there from the competent authority. Neither any Selection Committee was constituted nor any appointment was done by the competent authority.

11. Learned counsel submits that earlier the appointment of the petitioners were also examined by the Five Members Committee which held that their appointments were illegal. It is further submitted that while hearing LPA No. 300 of 2010 in the case of **State of Bihar & Ors. vs. Sohan Roy and Ors.** reported in **(2010) 2 PLJR 397**, the matter was remitted to the Justice Uday Sinha, One Man Enquiry Committee to examine the legality and validity of their appointments and the said Committee has decided the case of the petitioners. Learned counsel for the State has relied upon the judgment of the Hon'ble Supreme Court in the case of **State of Bihar and Others versus Devendra Sharma** reported in **(2020) 15 SCC 466**. It is submitted that a large number of civil appeals arising out of the judgment and order of this Court were tagged with the case of **Devendra Sharma** (supra). The Hon'ble Supreme Court found that there were four categories of cases. The Hon'ble Apex Court examined the series of judgments rendered by this Court in the context of those categories of cases and finally allowed the appeal preferred by the State of Bihar.



12. Attention of this Court has been drawn towards the concluding paragraph of the judgment wherein the Hon'ble Supreme Court has observed that "it cannot be said that the appointment of the employees in the present set of appeals were irregular appointments. Such appointments are illegal appointment in terms of the ratio of the Supreme Court judgment in the case of **State of Karnataka v. Umadevi** reported in (2006) 4 SCC 1. As such appointments were made without any sanctioned post, without any advertisement giving opportunity to all eligible candidates to apply and seek public employment and without any method of recruitment. Such appointments were backdoor entries, an act of nepotism and favouritism and thus from any judicial standards cannot be said to be irregular appointments but are illegal appointments in wholly arbitrary process....."

Consideration

13. Having heard learned counsel for the petitioners and the State as also on perusal of the judgments placed before this Court, this Court finds that the first contention of learned counsel for the petitioners is that the petitioners should succeed in view of the setting aside of the order of the learned One Man Committee in the case of Jwala Prasad vide Annexure '33' to the petitioners' reply to the counter affidavit filed on behalf of respondent no. 4. This Court has, therefore, gone through the order passed by the



learned Co-ordinate Bench in the case of Jwala Prasad. It appears that at the time of disposing of the writ application being CWJC No. 19790 of 2010, the judgment of the Hon'ble Supreme Court in the case of **Devendra Sharma** (supra) had not come. The learned Co-ordinate Bench took note of the fact that the Five Members Enquiry report was signed by only three Members of the Committee and in a challenge to the same in CWJC No. 2182 of 2008, the writ application was allowed by the learned Single Judge on 06.10.2009 and on the appeal preferred by the State being LPA No. 1623 of 2009 and other analogous cases the matters were disposed of after constituting One Man Committee by Justice Uday Sinha (retired). The learned Co-ordinate Bench thereafter went into the order passed in LPA No. 1518 of 2010 and LPA No. 230 of 2011 and was of the view that the similar benefit be allowed to the litigants in similar cases in terms of the litigation policy of the State Government. This Court has privilege to go through the judgment of the Hon'ble Supreme Court in the case of **Devendra Sharma** (supra). The observations of the Hon'ble Supreme Court as regards the four categories of cases which have been found in the matter of appointment against class III and class IV posts in the Health Department in the Government of Bihar till 1990 or so are important to take note of.

14. The Hon'ble Supreme Court had occasion to notice



the Hon'ble Division Bench judgment of this Court in the case of **State of Bihar and Ors. versus Binay Kumar Singh and Ors.** reported in **2011 (3) PLJR 547** and the Hon'ble Full Bench judgment in the case of **Ram Sevak Yadav versus The State of Bihar and Ors.** reported in **2013 SCC Online Pat 67 : 2013 (1) PLJR 694**. It was held that **Binay Kumar Singh** (supra) is contrary to the Hon'ble Full Bench judgment in the case of **Ram Sevak Yadav** (supra) wherein the Hon'ble Full Bench held in paragraphs '41' and '44' as under:-

“41. The public power to make appointment on public posts is conferred for public good. The power is given to the officer concerned by the Government in trust, that it shall be used and not abused. If the trust is belied, the protection conferred upon a government servant stands denuded. The answerability and accountability is then individual of the officer. The Government is duty-bound to take appropriate civil/criminal action against the officer. The illegality in the appointment is not a one way street. If there was someone willing to pay a price for the job, there was another waiting to take advantage of the same by fixing a price. It is not without reason that majority of such appointments relate to Class III and IV posts. The standard by which the Government professes to act is the same standard by which its actions shall be judged. Therefore whenever the Government terminates an appointment being illegal, it is the constitutional duty of the Government to simultaneously take action against the officials who belied the trust of the Government. Those who made hay while the sun shined must see the darker cloudy days also....

44. The petitioners were appointed in temporary capacity by a process contrary to Article 14 of the Constitution without competitive selection as an individual favour doled out to them. There is no



material to hold that they were appointed against vacant sanctioned post and possessed qualifications for the same. They were terminated before *Umadevi (3)*¹³ and have sought to retain their status by virtue of Court proceedings and are therefore not entitled to the benefits of para 53. The issue of any procedural irregularity for a finding of forged appointment is therefore irrelevant.”

15. The Hon’ble Supreme Court found that in the case of **The State of Bihar and Ors. versus P.S. Dhaka** reported in **(2014) SCC Online Patna 2636**, the Division Bench held as under:-

10. The Division Bench in its order dated 24-9-2014³, following the Full Bench judgment of that court, now subject-matter of challenge by the employees in these appeals, held as under : (*P.S. Dhaka case*³ , SCC OnLine Pat)

“...The State Government, pursuant to the aforesaid direction, in its wisdom, appears to have constituted a committee of five members. Ultimately, only three members sat in the enquiry; held the enquiry and made its report. We do not see any reason why the said report cannot be believed or should be held to be illegal or invalid. It is not in dispute that the State Committee did offer opportunity of representation and hearing to the affected employees. The principles of natural justice having being complied with, this Court ought not to have any reason to disbelieve or interfere with the finding recorded by the State Committee. It is noteworthy that the writ petitioners have not challenged the findings recorded by the State Committee or at least have not been able to establish that the respective finding is erroneous on the facts of the case. We have recorded the facts of one case just to bring home the nature of illegality committed by the Civil Surgeon-cum-Chief Medical Officer. As recorded hereinabove,

13. *State of Karnataka v. Umadevi (3)*, (2006) 4 SCC 1 : 2006 SCC (L&S) 753

3. *State of Bihar v. P.S. Dhaka*, 2014 SCC OnLine Pat 2636



in repeated enquiry made by the State Government all such appointments were found to be illegal, void ab-initio. Unless there is a strong evidence of such finding being wrong, this Court in exercise of power of judicial review shall not interfere with such finding.

In the present set of writ petitions, none of the writ petitioners has dislodged the finding of illegal appointment or has established that his or her appointment was legal and valid in all respects. In our view, the learned Single Judge has erred in totally discarding the report of the State Committee on the premise that only three members of the committee had conducted the enquiry and had submitted the report.

* * *

This brings us to the last question whether in view of their long service, the writ petitioners are entitled to regularisation in service as observed by the Hon'ble Supreme Court in *Umadevi (3)*¹³. This was the precise question which was referred to the Full Bench in the matter of *Ram Sevak Yadav*²⁰.

The Full Bench of this Court has categorically held that the judgment in *Umadevi (3)*¹³, prohibits regularisation of such appointments, the period of service being irrelevant; and that illegal appointment void ab initio cannot be regularised under any circumstances. In view of the aforesaid decision of the Full Bench of this Court, the law laid down by the Division Bench of this Court in the matter of *State of Bihar v. Binay Kumar Singh*¹⁴ is no longer a good law.

In the present case, the appointments of the writ petitioners have been repeatedly held to be non est or void ab initio. The question of regularisation of their service even by invoking para 44 of the judgment in the matter of *Umadevi (3)*¹³ shall not arise.”

13. *State of Karnataka v. Umadevi (3)*, (2006) 4 SCC 1 : 2006 SCC (L&S) 753

14. *State of Bihar v. Binay Kumar Singh*, 2011 SCC OnLine Pat 1132 : (2011) 3 PLJR 547

20. *Ram Sevak Yadav v. State of Bihar*, 2013 SCC OnLine Pat 67 : 2013 Lab IC 1607



16. Thereafter, the Hon'ble Supreme Court went into its own judgment in the case of **Ashwani Kumar and Ors. versus State of Bihar and Ors.** reported in (1997) 2 SCC 1 in which the Court had examined the issues and one of them was as to whether the appointments of Class III and Class IV employees on the Tuberculosis Eradication Scheme as a part of 20-Point Programme were legal and valid, whether the confirmation of these employees was legally justified. What was held in Paragraph '13' of the judgment in the case of **Ashwani Kumar** (supra) has been taken note of by the Hon'ble Supreme Court in the case of **Devendra Sharma** (supra) and the same is being reproduced hereunder:-

“13. In respect of second point, it was held that if the initial entry itself is unauthorised and that appointment is not against sanctioned vacancy, therefore, the question of regularising of services would never arise for consideration. This Court held as under : (*Ashwani Kumar case*¹¹, SCC pp. 17-18, para 13)

13. ... But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularisation or confirmation is given it would be an exercise in futility. It would amount to decorating a still-born baby. Under these

11. *Ashwani Kumar v. State of Bihar*, (1997) 2 SCC 1 : 1997 SCC (L&S) 267



circumstances there was no occasion to regularise them or to give them valid confirmation. ... As we have seen earlier when the initial appointments by Dr Mallick so far as these daily-wagers were concerned, were illegal there was no question of regularising such employees and no right accrued to them as they were not confirmed on available clear vacancies under the Scheme. It passes one's comprehension as to how against 2500 sanctioned vacancies confirmation could have been given to 6000 employees. The whole exercise remained in the realm of an unauthorised adventure. Nothing could come out of nothing. *Ex nihilo nihil fit*. Zero multiplied by zero remains zero.”

17. In the aforementioned background, the Hon’ble Supreme Court observed in Paragraphs ‘33’ to ‘36’ as under:-

“33. In *Ashwani Kumar*¹¹, this Court has dealt with the appointments made against Class III and IV category posts in the Health Department itself. The reasoning recorded therein is that the appointments have been proved to be made not against the sanctioned posts and in a manner, which is wholly arbitrary, capricious and, therefore, employees will not get any right to seek regularisation of their services.

34. In civil appeal arising out of SLP (Civil) No. 20033 of 2012, the respondent was appointed by Dr A.A. Mallick. Such appointments have been found to be illegal by this Court in *Ashwani Kumar*¹¹. We find that there is no reason to re-examine the appointments made by Dr A.A. Mallick. Such appointments have been adversely commented upon in *Ashwani Kumar case*¹¹. Therefore, no right will accrue in favour of the respondent. Consequently, the appeal arising out of SLP (Civil) No. 20033 of 2012 is allowed and the order passed by the High Court is set aside.

11. *Ashwani Kumar v. State of Bihar*, (1997) 2 SCC 1 : 1997 SCC (L&S) 267



35. Lastly, it is argued that employees have been working for many years, some for more than 25 years, therefore, humanitarian view should be taken to set aside the order of termination and regularise their services so as to make them entitled to pension and other retirement benefits.

36. We do not find any merit in the said argument. A Full Bench of the High Court in *Rita Mishra v. Director, Primary Education*²⁶ while dealing with appointment in the Education Department claiming salary despite the fact that letter of appointment was forged, fraudulent or illegal, declined such claim. It was held that the right to salary *stricto sensu* springs from a legal right to validly hold the post for which salary is claimed. It is a right consequential to a valid appointment to such post. Therefore, where the very root is non-existent, there cannot subsist a branch thereof in the shape of a claim to salary. The rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of the law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise.”

18. Ultimately, in its concluding Paragraphs ‘44’ and ‘45’, the Hon’ble Supreme Court observed as under:-

“**44.** In view of the aforesaid judgments, it cannot be said that the appointment of the employees in the present set of appeals were irregular appointments. Such appointments are illegal appointment in terms of the ratio of the Supreme Court judgment in *Umadevi (3)*¹³. As such appointments were made without any sanctioned post, without any advertisement giving opportunity to all eligible candidates to apply

26. *Rita Mishra v. Director, Primary Education*, 1987 SCC OnLine Pat 159 : AIR 1988 Pat 26 : 1988 Lab IC 907 : 1987 BBCJ 701

13. *State of Karnataka v. Umadevi (3)*, (2006) 4 SCC 1 : 2006 SCC (L&S) 753



and seek public employment and without any method of recruitment. Such appointments were back door entries, an act of nepotism and favouritism and thus from any judicial standards cannot be said to be irregular appointments but are illegal appointments in wholly arbitrary process.

45. In light of the above discussion, we find that the order dated 12-7-2011¹ or other similar orders passed by the High Court cannot be sustained in law and, thus, are set aside. The appeals filed by the State are allowed.”

19. In the aforementioned background, when this Court considers the case of the present petitioners, this Court has no iota of doubt that the petitioners having failed to dislodge the fact that they were appointed without any advertisement, sanction of post, roster clearance and their case being one under the categories noted in the case of **Ashwani Kumar** (supra), they cannot succeed on the solitary ground that in the case of Jwala Prasad, learned Coordinate Bench had set aside the order of the One Man Committee and had directed the respondents to consider the case of the petitioners and pass necessary consequential orders.

20. To this Court, it appears that issuing any such direction at this stage when the judgment of the Hon’ble Apex Court has already come in case of **Devendra Sharma** (supra),

1. *State of Bihar v. Devendra Sharma*, 2011 SCC OnLine Pat 1580



would be in the teeth of the judgment of the Hon'ble Apex Court. This Court would, therefore, reject the submissions of the petitioners.

21. In the aforementioned background, when this Court considers the submission of learned counsel for the petitioners that the other similarly situated persons have been granted benefit similar to those 91 persons whose cases were treated to be one of irregular appointment, this Court would come to a conclusion that the Court having found that the petitioners had entered into service through backdoor without following the established procedures for public employment, would not issue any Mandamus on the ground of negative equality.

22. This writ application is, therefore, dismissed.

(Rajeev Ranjan Prasad, J)

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