

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1659 of 2013

In
Civil Writ Jurisdiction Case No.9406 of 2006

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1. The State of Bihar
 2. The Director, Primary Education Department, Government of Bihar, Patna
 3. The Regional Deputy Director of Education, Tirhut Division, Muzaffarpur, District - Muzaffarpur
 4. The District Education Officer, Sitamarhi

... .. Appellant/s

Versus

Prafulla Kumar Chaudhary, Son of Sri Jagannath Prasad Chaudhary, Resident of Village- Thumma, P.S. - Runni Saidpur, District – Sitamarhi (wrongly described as District Samastipur in the impugned order)

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Alok Ranjan, AC to AAG-5
For the Respondent/s : Mr. Niranjan Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ARUN KUMAR JHA)

Date : 17-03-2023

Heard learned counsel for the appellants and learned counsel for the respondent.

2. The present L.P.A. is directed against the order dated 17.05.2011 passed in CWJC No. 9406 of 2006 by the learned Single Judge of this Court whereby and whereunder the civil writ petition filed by the respondent has been disposed of in the terms mentioned therein.

3. Initially, in the writ petition, the petitioner-



respondent herein had sought “for issuance of an appropriate writ (s), order (s), direction (s) to quash the letter no. 247 dated 10th April, 2006 of respondent no.3 contained in Annexure-23 whereby and whereunder the petitioner has been asked show-cause about genuineness of his appointment and further to direct and command the respondent authorities to pay salary to the petitioner from June 2004 to January 2006 and further to grant any other relief (s) for which the petitioner may be found entitled to”.

Thereafter, the petitioner has filed an interlocutory application bearing I.A. No.3728 of 2006 for amendment in the writ petition by adding following relief in para 1 of the instant writ petition :

“For quashing the office Order contained in Memo No.506 dated 19th August, 2006 issued by the respondent no.3 whereby and whereunder the petitioner has been dismissed from service from the date of issue of this order and further to direct and command the respondents authorities to reinstate the petitioner on his respective post with all service benefits and further to grant any other consequential/appropriate relief (s) for which the petitioner may be found entitled to”.



4. Brief facts of the case are that the writ petitioner-respondent herein was appointed on 26.06.1995 as an Assistant Teacher in matric untrained scale by the Regional Deputy Director of Education, Tirhut Division, Muzaffarpur on the recommendation made by the Divisional Establishment Committee. The appellants noticed illegalities in the appointment of the respondent, proceeded to issue show-cause notice on 10.04.2006 and thereafter, proceeded to terminate the services of the respondent vide Memo No.506 dated 19.08.2006. Feeling aggrieved and dissatisfied with the order of termination, the respondent preferred CWJC No.9406 of 2006. Vide order dated 17.05.2011, the learned Single Judge disposed of the writ petition holding that the petitioner would be held to be in service with all consequential benefits. Thus, the appellants have filed the present LPA challenging the said order.

5. The learned counsel for the appellants-State of Bihar submitted that the order of the appointment of the respondent was illegal. Earlier in Tirhut Division, illegal appointments had been made on large scale by the then In-charge Regional Deputy Director of Education, namely Mr. Bhola Ram, who was substantially posted as District Education Officer, Muzaffarpur and for a short period, i.e., one and half month, he had been



Incharge Regional Deputy Director of Education, Tirhut Division. The said In-charge Regional Deputy Director of Education, Tirhut Division was never formally notified as full-fledged Regional Deputy Director of Education, Tirhut Division by the State Government. But by violating all the norms and prescribed Rules of the Government employment as well as procedure of valid appointment Mr. Bhola Ram made illegal appointments on large scale on different posts. The instant case of illegal appointment is also one amongst the other illegal appointments. The learned counsel further submitted that the complete records of the appointments (except the dispatch register) made during the tenure of Mr. Bhola Ram are not available in the office of Regional Deputy Director of Education, Tirhut Division and this fact was earlier brought to the notice of the Hon'ble Single Judge. The learned counsel further submitted that the minimum qualification for appointment to the post of Assistant Teacher in Government Basic School is Matric Trained as per the statutory Rules framed in exercise of power under the provision of Article 309 of the Constitution of India which was issued vide Government Circular/Notification No. 2749 dated 11.11.1975. The learned counsel further submitted that the settled legal position is that



the candidates who are Matric Trained could only be appointed as Assistant Teacher in the Basic Schools. But contrary to that, the writ petitioner (respondent herein) was untrained at the time of illegal appointment. Learned counsel further submitted that it is well settled law that an executive order cannot override the statutory rule. During the course of examination of validity and genuineness of writ petitioner's (respondent herein) appointment, it was detected that the petitioner was untrained in spite of that he was illegally appointed which violates the aforementioned Rule. As such, the alleged appointment was *void ab initio*. Learned counsel further submitted that the writ petitioner (respondent herein) was given adequate opportunity of hearing vide letter No. 943 dated 24.5.2003 but he failed to prove his case by documentary evidence. Learned counsel further submitted that it was also detected that in the matter of writ petitioner's (respondent herein) appointment, neither any advertisement was made nor any panel was prepared. Upon verification of the dispatch register, it has also been found that the letter calling for interview 39 (गै) dated 06.06.1995 and the letter of appointment bearing Memo No. 209 (गै) dated 26.06.1995 were not issued from the office of Regional Deputy Director of Education, Tirhut Division. Learned counsel further



submitted that the writ petitioner's (respondent herein) contention about publication of advertisement in May 1995 for the purpose of appointment is a vague and sweeping statement as no evidence has been brought on record to show that any advertisement or panel was prepared. Learned counsel further submitted that appointment of the writ petitioner (respondent herein) was also not made against the sanctioned post and the last regular appointment on the post of Assistant Teacher in Basic Schools from general category in Tirhut Division had been made in the year 1990 from the prepared panel of trained teachers. So the contention of making appointment in May, 1995 is itself contrary, vague and vitiated in absence of documentary evidence. Learned counsel further submitted that appointment, in question, had been made by an authority who was never competent to make such appointments. Learned counsel further submitted that in so far as Basic Schools are concerned only trained teachers are appointed in such schools and the resolution of the Government as contained in Memo No. 116 dated 5.3.1991 (Annexure-1 to the writ application) relates only to appointment of teachers in Primary and Secondary Schools and not Basic Schools. The cadre of teachers of basic schools of the State is different being a divisional level cadre of which the



Regional Deputy Director of Education concerned is the Appointing Authority upon recommendation of appointment by the Divisional Level Establishment Committee. The Elementary Schools cadre is a District Level Cadre. The learned counsel lastly submitted that the learned Single Judge while passing the impugned order has committed error and, as such, interference of this Court in the impugned order of learned Single Judge is called for.

6. *Per contra*, the learned counsel for the respondent submitted that the respondent was appointed pursuant to an advertisement issued in May, 1995 and not 1990. His date of appointment is 26.06.1995. The learned counsel further submitted that though the Circular of the State Government of the year 1977 provided for appointment of trained teacher only, in 1991 there being shortage of teachers, the State Government revised its policy. It provided that untrained teachers also be appointed and upon their appointments, they would be sent for training at government expenses. The learned counsel further submitted that the requirement of appointment of trained teachers thus stood abolished. The petitioner was therefore rightly appointed as untrained teachers and, in fact, thereafter he was sent for training, which he completed. The learned counsel



further submitted that a mere reference to respondent's appointment letter would show that its memo number is 209 (गोपनी), dated 26.6.1995. This itself shows that this letter was issued through confidential dispatch register. (गोपनी) refers to Gopniya (Confidential). The order itself shows that the petitioner was being shown the normal dispatch register and not the confidential dispatch register. In the termination order, it is not stated that whether the respondent's interview letter sent on 6.6.1995 was also forged or fictitious. It does not say that what was the consequence of the said selection process and whether the respondent figured in the said selection process. Merely on this suspicion the very credential of respondent's appointment cannot be doubted.

7. Having considered the materials available on record and further considering the rival submission, the core question for consideration is as to whether the respondent's appointment could be held to be legal or not.

8. From the records, it appears that on 03.11.2022, this Court has passed the following order :

“Learned counsel for the respondent is hereby directed to produce material to show that his participation in the process of selection and appointment to the post of Assistant Teacher is



pursuant to an advertisement followed by selection process and his name is reflected in the select list. All these necessary documents be placed on record so as to entertain that his selection and appointment is in accordance with law.

Relist this matter on 01.12.2022”.

Thereafter, on 01.12.2022, this Court has passed the following order :

“The matter is of the year 2013.

Learned counsel for the respondent seeks time to comply the order dated 03.11.2022. If the counsel for respondent- Prafulla Kumar Chaudhary fails to comply the order dated 03.11.2022, we have to draw inference that in the absence of process of selection and appointment, he has been appointed to the post of Assistant Teacher.

Relist this matter on 05.01.2023”.

9. In terms of the aforesaid order, the respondent has filed a supplementary counter affidavit on 09.01.2023 stating therein that the respondent was duly appointed as per recommendation of Divisional Establishment Committee on 26.06.1995 following the advertisement and selection along with one Mr. Pankaj Kumar. The appointment letter of the respondent and Mr. Pankaj Kumar are the same and similar and



were issued under the signature of Mr. Bholu Ram, the then Regional Deputy Director of Education, Tirhut, Muzaffarpur. The aforesaid Pankaj Kumar, who is working as Clerk in the office of Regional Deputy Director of Education, Tirhut Division, Muzaffarpur, is the custodian of file pertaining to the appointment of the respondent and himself. The copy of advertisement as well as selection list are within the custody of said Pankaj Kumar. It is stated by the respondent that he met Pankaj Kumar several times and asked him to provide the documents with regard to his selection process but all the time he was denied for the same.

10. Vide order dated 09.01.2023, this Court directed the concerned appellant to file personal affidavit that there was no advertisement in so far as selection and appointment of the respondent to the post of Teacher on 26.06.1995 was concerned. If the matter was still disputed, the Court might direct for vigilance enquiry.

11. In terms of aforesaid order dated 09.01.2023, 2nd supplementary affidavit on behalf of the Regional Deputy Director of Education, Tirhut Division, Muzaffarpur has been filed on 22.01.2023 wherein in para 7 it has been stated that the deponent was apprised that there is no such record including the



advertisement available in the office of Regional Deputy Director of Education, Tirhut Division, Muzaffarpur in respect of the selection process as well as in respect of appointment of the respondent.

12. It appears that appointment was made against the concerned Rules and it was not by any competent authority.

13. In the light of aforesaid discussions, it appears that in spite of direction contained in the order dated 03.11.2022, the respondent has failed to produce any material to show his participation in the process of selection and appointment to the post of Assistant Teacher pursuant to an advertisement followed by selection process and his name being reflected in the select list. From perusal of personal affidavit of the Regional Deputy Director of Education, Tirhut Division, Muzaffarpur, it appears that there is no such record including the advertisement available in the office of Regional Deputy Director of Education, Tirhut Division, Muzaffarpur in respect of the selection process as well as in respect of appointment of the respondent. Thus no material has been brought on record to show that any advertisement to the post of Assistant Teacher was made. Further the appellants have challenged the authenticity of the alleged appointment letter said to be issued to



the respondent and the Court accepts this contention of the appellants in the light of other facts and circumstances of the case. Hence, it could be safely concluded that there has not been any advertisement nor any select list or any authentic appointment letter in favour of the respondent. Therefore, this Court draws inference that in absence of process of selection and appointment, the respondent has been appointed to the post of Assistant Teacher. Moreover, if any such appointment was made, it was by an incompetent authority and against the existing Rules.

14. The Apex Court in the case of ***Renu and Ors. Vs. District and Sessions Judge, Tis Hazari Courts, Delhi and another***, reported in (2014) 14 SCC 50 held in paragraphs 6 to 14 & 16 as under :

“6. Article 14 of the Constitution provides for equality of opportunity. It forms the cornerstone of our Constitution.

7. In I.R. Coelho v. State of T.N. [(2007) 2 SCC 1 : AIR 2007 SC 861] , the doctrine of basic features has been explained by this Court as under : (SCC p. 108, para 141)

“141. The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Articles 14 and 19 which constitute the core values which if allowed to be



abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III.”

8. As Article 14 is an integral part of our system, each and every State action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained in view of the judgments rendered by this Court in Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386] , State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] , Prabhat Kumar Sharma v. State of U.P. [(1996) 10 SCC 62 : 1996 SCC (L&S) 1331] , J.A.S. Inter College v. State of U.P. [(1996) 10 SCC 71 : 1996 SCC (L&S) 1339] , M.P. Housing Board v. Manoj Shrivastava [(2006) 2 SCC 702 : 2006 SCC (L&S) 422] , M.P. State Agro Industries Development Corpn. Ltd. v. S.C. Pandey [(2006) 2 SCC 716 : 2006 SCC (L&S) 434] and State of M.P. v. Sandhya Tomar [(2013) 11 SCC 357] .

9. In Excise Supt. v. K.B.N. Visweshwara Rao [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420] , a larger Bench of this Court reconsidered its



earlier judgment in Union of India v. N. Hargopal [(1987) 3 SCC 308 : 1987 SCC (L&S) 227 : (1987) 4 ATC 51 : AIR 1987 SC 1227] , wherein it had been held that insistence on recruitment through employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution. However, due to the possibility of non-sponsoring of names by the employment exchange, this Court held that any appointment even on temporary or ad hoc basis without inviting application is in violation of the said provisions of the Constitution and even if the names of candidates are requisitioned from employment exchange, in addition thereto, it is mandatory on the part of the employer to invite applications from all eligible candidates from open market as merely calling the names from the employment exchange does not meet the requirement of the said articles of the Constitution. The Court further observed : (K.B.N. Visweshwara Rao case [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420] , SCC p. 218 para 6)

“6. ... In addition, the appropriate department ... should call for the names by publication in the newspapers having wider circulation and also display on their office notice ... and employment news bulletins; and then consider the cases of all candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of



opportunity in the matter of employment would be available to all eligible candidates.”

(emphasis supplied)

10. *In Suresh Kumar v. State of Haryana [(2003) 10 SCC 276] this Court upheld the judgment of the Punjab and Haryana High Court wherein 1600 appointments made in the Police Department without advertisement stood quashed though the Punjab Police Rules, 1934 did not provide for such a course. The High Court reached the conclusion that process of selection stood vitiated because there was no advertisement and due publicity for inviting applications from the eligible candidates at large.*

11. *In UPSC v. Girish Jayanti Lal Vaghela [(2006) 2 SCC 482 : 2006 SCC (L&S) 339 : AIR 2006 SC 1165] this Court held : (SCC p. 490, para 12)*

“12. ... The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made ... Any regular appointment made on a post under the State or Union without issuing advertisement inviting



applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.”

12. The principles to be adopted in the matter of public appointments have been formulated by this Court in M.P. State Coop. Bank Ltd. v. Nanuram Yadav [(2007) 8 SCC 264 : (2007) 2 SCC (L&S) 883] as under : (SCC pp. 274-75, para 24)

*“(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.
(2) Regularisation cannot be a mode of appointment.*

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(4) Those who come by back door should go through that door.

(5) No regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention



of the statutory rules.

(6) The court should not exercise its jurisdiction on misplaced sympathy.

(7) If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside.”

13. A similar view has been reiterated by the Constitution Bench of this Court in State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753 : AIR 2006 SC 1806] , observing that any appointment made in violation of the statutory rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. “Adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment.” The Court further rejected the prayer that ad hoc appointees working for long be considered for regularisation as such a course only encourages the State to flout its own rules and would confer undue benefits on some at the cost of many waiting to compete.



14. In State of Orissa v. Mamata Mohanty [(2011) 3 SCC 436 : (2011) 2 SCC (L&S) 83] this Court dealt with the constitutional principle of providing equality of opportunity to all which mandatorily requires that vacancy must be notified in advance meaning thereby that information of the recruitment must be disseminated in a reasonable manner in public domain ensuring maximum participation of all eligible candidates, thereby the right of equal opportunity is effectuated. The Court held as under : (SCC p. 452, para 36)

“36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable



all eligible persons to compete on merit.”

16. Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others”.

15. Further, the Apex Court in the case of ***Nagendra Chandra and Ors. Vs. State of Jharkhand, reported in (2008) 1 SCC 798*** has held that the appointments made without any advertisement inviting application, such appointments not only amounted to infraction of Rule but also in violation of Articles 14 and 16 of the Constitution of India. The Court in such circumstances upheld the decision of the authorities of dispensing with the service of such persons.

16. The Apex Court in the case of ***State of Jharkhand***



and Ors. Vs. Manshu Kumbhkar, reported in (2007) 8 SCC 249 has refused to interfere with the cancellation of appointment where, upon examination of dispatch register it was found that no interview letter as claimed by the respondent of that case was ever dispatched.

17. In the light of discussion made hereinabove and under the facts and circumstances of the case, this Court has no hesitation in holding that the appellants have been able to make out a strong case in their favour and the appointment of the respondent to the post of Assistant Teacher is held to be illegal and, accordingly, the letter of appointment bearing Memo No. 209 (गौ) dated 26.06.1995 is set aside it being non-est. Thus, it is clear that the learned Single Judge erred in allowing the writ petition of the petitioner-respondent herein by quashing the office order dated 19.08.2006 of termination of the respondent and holding that the petitioner-respondent herein would be held to be in service with all consequential benefits and hence, the present L.P.A. deserves to be allowed and is accordingly allowed. The order of learned Single Judge dated 17.05.2011 passed in CWJC No.9406 of 2006, is set aside and the termination order dated 19.08.2006 is upheld.

18. In fact, it is a fit case for launching criminal



proceedings, however due to passage of time, we are not directing for initiation of criminal proceedings.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	A.F.R.
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