

STATE OF JHARKHAND AND ORS.

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v.

MANSHU KUMBHKAR

SEPTEMBER 17, 2007

[DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

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Service Law—Termination of Service—On the ground that appointment was illegal and was made without following the procedure—High Court setting aside termination on the ground that termination of a similarly situated employee set aside in another case—On appeal, held: Order of High Court is not sustainable—Reliance on the case of another employee was misconceived as his termination was set aside on the ground of delay—The appointment having been proved illegal, the mistake committed in another case, cannot be perpetuated in the present case.

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Appointments were made to the post of Class III and IV by the Deputy Director of Education without following the norms fixed by administrative instructions. Respondent was one of the appointees. Respondent's case was that advertisement as well as interview letter was issued. The case of the State was that same were fabricated as there was no entry in the dispatch register for these two dates. The illegal appointments were cancelled by the State. Respondent filed Writ Petition, wherein High Court directed the respondent to make fresh representation before the Authority and directed the concerned authority to make an inquiry into the matter. After inquiry, it was found that all appointments were illegal. The services of the respondent as well as others were terminated. Respondent filed Writ Petition challenging the same. Single Judge of High Court set aside the termination on the ground that Division Bench of High Court in an LPA had set aside termination of a similarly situated employee 'S'. Division Bench of High Court confirmed the order of Single Judge. Hence the present appeal.

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Allowing the appeal, the Court

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HELD: 1. The order of the Single Judge, as maintained by the Division Bench of High Court cannot be sustained. Reliance by the High Court on the order passed in case of 'S' was thoroughly misconceived. LPA in his case

A was dismissed on the ground of delay. Even otherwise, merely because mistake had been committed in one case, there is no rational for perpetuating that mistake, even when the same is illegally impermissible. In terms of the executive instructions, specified procedure was to be adopted.

[Paras 11 and 8] [1076-E; 1072-F]

B 2. In the instant case, the norms have been fixed not by any Rule but by administrative instructions. There was no advertisement and there was not even any properly constituted committee to make the selection. The stand that letter of appointment as well as advertisement was issued clearly gets negated when the entries from the dispatch register are noted.

[Para 6] [1072-B, C]

C *Ashwani Kumar and Ors. v. State of Bihar and Ors.*, [1997] 2 SCC 1 and *Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors.*, [2006] 4 SCC 1, relied on.

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4310 of 2007.

From the Judgment and Order dated 10.01.2005 of the High Court of Jharkhand at Ranchi in LPA No. 861 of 2003.

B.B. Singh and Kumar Rajesh Singh for the Appellant.

E Ajit Kumar Sinha for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

F 2. Challenge in this appeal is to the order passed by a Division Bench of the Jharkhand High Court dismissing the Letters Patent Appeal filed by the appellant-State and its functionaries.

3. Background facts in a nutshell are as follows:

G One Miss Suraj Mani Khalko, a few days before her retirement made many appointments to the posts of Class III and Class IV employees without following the procedure of appointment stipulated by instruction dated 3.12.1980. No records were available in the office for such appointments, namely, advertisement, requisition to employment exchange, committee for preparing panel to be chaired by District Magistrate, with District Welfare

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Officer and three officers of different district levels. According to the respondent advertisement was issued for Class III and Class IV employees on 4.6.1993 and on 12.7.1993 interview letters were issued. According to the appellants all these were signed by Miss Suraj Mani Khalko and were fabricated and forged documents and were never issued by the department which is manifest from the dispatch register. On 16.9.1993 the appointment letter was purportedly issued and the respondent claimed to have joined on 21.9.1993, but he was not paid his salary. A few days thereafter i.e. on 15.10.1993 illegal appointments made by Miss Suraj Mani Khalko were cancelled by the Government. The respondent filed a writ petition in the year 1995 before the Jharkhand High Court. The High Court dismissed the writ petition by its order dated 28.8.1995 with the direction to the respondent to file fresh representation with all materials i.e. letter of appointment etc. before the authority. Direction was also given to make payment of admitted dues since 21.9.1993 till date. The respondent did not file any representation as was directed by the High Court. On the basis of the direction given by the High Court in CWJC No.3878/1995, Deputy Commissioner was appointed to make an inquiry. By report dated 10.4.1997, the Deputy Commissioner found all the appointments to be illegal. By order dated 22.4.1997 the services of respondent, Sri Sanjay Kumar and three others were terminated by the District Education Officer. Respondent filed CWJC No.829/1998. Several terminated employees filed writ petitions which were dismissed by the High Court on the ground that the appointments were violative of Articles 14 and 16 of the Constitution of India, 1950 (in short 'the Constitution') as they had been made without following the requisite procedure. Learned Single Judge allowed the writ petition filed by the respondent on the ground that Sanjay Kumar had been appointed pursuant to the order passed by the High Court. The Letters Patent Appeal filed as aforesaid was dismissed.

4. Learned counsel for the appellants submitted that on the basis of the norms fixed for appointment, due procedure was not followed. Merely because somebody else had granted appointment, that cannot be a ground to claim that wrong should be perpetuated. On the basis of the norms fixed by the Department of Personnel and Administrative Reforms dated 3.12.1980, specific modalities were required to be followed. It is to be noted that in *Sanjay Kumar's* case LPA was dismissed on the ground of delay and, therefore, was not a precedent to be followed. Reference is made to the decision of this Court in *Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors.*, [2006] 4 SCC 1 to contend that the learned Single Judge could not have passed the order for regularization.

A 5. In response, learned counsel for the respondent stated that it is not a case of regularisation. There was an advertisement, there was a vacancy, panel of selection was duly constituted and, therefore, no interference is called for.

B 6. In the instant case, the norms have been fixed not by any Rule but by administrative instructions. As noted above, stand of the appellant is that respondent was not sponsored by the employment exchange. There was no advertisement and there was not even any properly constituted committee to make the selection. The stand that letter of appointment was issued clearly gets negated when the entries from the dispatch register are noted.

C According to the respondent interview letters were issued on 12.7.1993 and advertisement was issued on 4.6.1993. There is no entry in the dispatch register for these two dates. The details are annexed to P-9 to the rejoinder affidavit.

D 7. It is to be noted that by order dated 4.9.1996 in CWJC No. 3878/95 the High Court noted as follows:

E "A revealing fact has been disclosed that taking advantage of the orders passed by this Court, as mentioned in Annexures-5 to 8, this Respondent No. 4 is squandering the government money and getting the back dated appointment letter issued from regional Deputy Director of Education, North Chotanagpur Division, Hazaribagh, now retired without the knowledge of the District Establishment Committee, whose Chairman is Deputy Commissioner."

F 8. Reliance by the High Court on the order passed in *Sanjay Kumar's* case (supra) was thoroughly misconceived. It is to be noted that LPA was dismissed on the ground of delay. Even otherwise, merely because mistake had been committed in one case, there is no rational for perpetuating that mistake, even when the same is illegally impermissible. It is to be noted that in terms of the executive instructions, the following procedure was to be adopted:

G "6. On other category of class-4 posts the appointments will be made through District employment exchange as far as practicable from local areas. Because only one panel for the appointment of class-4 employees will be prepared for appointment at district level which will be effective for one year, the district officer will give extensive publicity to the advertisement calling for applications and examine the applications.

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Every applicant will quote his registration region/the district exchange. If due to any reason the District employment officer does not recommend his name then the Collector will admit his application on the ground of registration No. and will consider the application and the District Magistrate will as per necessity, examine the list as recommended by the Employment Exchange for appointment. A

7. For recruitment to such posts a committee will be formed to be chaired by the District Magistrates and members of such a committee will be district welfare officer, district employment officers and three senior officers of different district levels working department as nominated by the district magistrates and two officers from the department of district level developmental works. For appointment to the class-4 posts in every district a list of suitable candidates will be prepared finally by the said committee at the outset of the financial year by the month of May and appointments through year by the financial year would be made in all offices from this list. So far as the current financial year is concerned, if a list of suitable candidate has already been prepared in keeping with memo No.10747 dated 20th June in any district, then the recruitment in the current year should be made from the list but if there is no such list prepared in any district according to the above memo then such a list should be got prepared by aforesaid district levels committee by 31st December, 1980. District Magistrates are hereby requested that they should sent by 15th Feb., 1981 a detailed statement in the enclosed proforma about appointments made in every district level officers uptill 31st January, 1981 keeping in view the above procedure. The report regarding the appointment made from the list prepared for next financial year in accordance with the above procedure should be sent to the department of personnel till 15th July, 1981." B C D E F

9. In *Ashwani Kumar and Ors. v. State of Bihar and Ors.*, [1997] 2 SCC 1, it was noted in paras 13 and 14 as follows:

"13. So far as the question of confirmation of these employees whose entry itself was illegal and void, is concerned, it is to be noted that question of confirmation or regularisation of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on *ad hoc* basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised G H

A 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 circumstances there was no occasion to regularise them or to give them valid confirmation. The so-called exercise of confirming these employees, therefore, remained a nullity.

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C 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.

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E Zero multiplied by zero remains zero. Consequently no sustenance can be drawn by the appellants from these confirmation orders issued to them by Dr Mallick on the basis of the directions issued by the authorities concerned at the relevant time. It would amount to regularisation of back-door entries which were vitiated from the very inception.

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F Whether they are posts or vacancies they must be backed up by budgetary provisions so as to be included within the permissible infrastructure of the Scheme. Any posting which is *dehors* the budgetary grant and on a non-existing vacancy would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy.

G 14. In this connection it is pertinent to note that question of regularisation in any service including any government service may arise in two contingencies. Firstly, if on any available clear vacancies

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which are of a long duration appointments are made on *ad hoc* basis or daily-wage basis by a competent authority and are continued from time to time and if it is found that the incumbents concerned have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on *ad hoc* basis for a given substantial length of time to regularise them so that the employees concerned can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of a situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by a competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the incumbent concerned. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back-door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant would ever survive for consideration, however competent the recruiting agency may be. The appellants fall in this latter class of cases. They had no case for regularisation and whatever purported regularisation was effected in their favour remained an exercise in futility. The learned counsel for the appellants, therefore, could not justifiably fall back upon the orders of regularisation passed in their favour by Dr Mallick. Even otherwise for a regularising such employees well-established procedure had to be followed.

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Even this letter clearly indicates that the posts had to be filled up by following the prescribed procedure. Despite all these communications neither the initial appointments nor the confirmations were done by following the prescribed procedure. On the contrary all efforts were made to bypass the recruitment procedure known to law which resulted in clear violation of Articles 14 and 16(1) of the Constitution of India both at the initial stage as well as at the stage of confirmation of these illegal entrants. The so-called regularisations and confirmations could not be relied on as shields to cover up initial illegal and void actions or to perpetuate the corrupt methods by which these 6000 initial entrants were drafted in the Scheme by Dr Mallick. For all these reasons, therefore, it is not possible to agree with the contention of the learned counsel for the appellants that in any case the confirmations given to these employees gave them sufficient cloak of protection against future termination from services. On the contrary all the cobwebs created by Dr Mallick by bringing in this army of 6000 employees under the Scheme had got to be cleared lock, stock and barrel so that public confidence in Government administration would not get shattered and arbitrary actions would not get sanctified."

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10. This decision was noted in para 31 of *Uma Devi's* case (supra).

11. Above being the position, the order of the learned Single Judge, as maintained by the Division Bench cannot be sustained.

12. The appeal is allowed without any order as to costs.

K.K.T.

Appeal allowed.