

(2017) 01 PAT CK 0064

In the Patna High Court

Case No : 13559 of 2010

Dr. Arun Kumar Prasad

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 18-01-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs

Citation : (2017) 01 PAT CK 0064

Hon'ble Judges : Chakradhari?Sharan Singh

Bench : SINGLE BENCH

Advocate : Yugal Kishore, Sunil Kumar Singh

Judgement

1. By way of the present application, filed under Article 226 of the Constitution of India, the petitioner has sought for the following reliefs.:- (i) To issue writs in the nature of mandamus commanding upon the respondent authorities to produce the order of termination of the petitioner and then to quash the order of termination of the petitioner

(ii) To issue writs of certiorari for setting aside the order contained in Memo No. 29 (17) dated 10.02.2009 issued under the signature of Joint Secretary, Health, whereby the leave application of the petitioner has been rejected.

(iii) To direct the respondent authorities to accept joining of the petitioner and to pay to the petitioner current as well as arrears of the salary with all consequential benefits.

(iv) To grant any other relief(s) for which the petitioner may be found entitled to under the facts and circumstances of the case

2. It is the case of the petitioner that when he was posted as Assistant Professor, in Neuro Surgery Department, Patna Medical College and Hospital, Patna, the petitioner was selected by Mazambique Government, as a doctor on contract basis for certain period. It is his case that after his selection for appointment by

the Mazambique Government, he had submitted an application on 30.10.2004 for grant of permission to join under the Mozambique Government and to issue the No-Objection Certificate for the said purpose. The application, according to the petitioner, was endorsed on the same day. The said application was forwarded to the Secretary, Department of health, Medical Education, Family Welfare and Indigenous Medicines, Government of Bihar (respondent no. 2) on 04.11.2004. On 07.02.2005, the petitioner proceeded for Mazambique in anticipation of formal approval of his application and grant of No-Objection Certificate. By an order, dated 13.05.2005, the petitioner was placed under suspension on the allegation of unauthorized absence and leaving for a foreign country without permission. It is his further case that when he learnt about the said order of suspension, he came back to India and submitted his joining on 06.07.2005 in the Office of the Principal, Patna Medical College and Hospital, Patna, which was duly forwarded on 07.07.2005. He, thereafter, filed an application on 11.07.2005, before respondent no. 2 for grant of Ex-India leave for three years with effect from 16.07.2005, which was also duly forwarded on 11.07.2005.

3. A departmental proceeding was initiated against him with issuance of Memo No. 661 (17), dated 15.07.2005, which, according to the petitioner, was never communicated to him and he was totally unaware of the departmental proceeding. He is said to have learnt about the departmental proceeding through press communiqué, dated 14.01.2006, issued by the Department, whereby he was required to report before the Enquiry Officer within fifteen days. He is said to have made an application on 23.01.2006 before the Additional Secretary, Department of Health, Government of Bihar, with a request to allow him to report before the Enquiry Officer by the end of February. Through the letter, dated 06.03.2006, the petitioner drew attention of the respondent no. 2, stating that his earlier application, duly forwarded by order dated 04.11.2004 was still pending consideration. He requested for grant of approval for three years with effect from 06.02.2005. Through Memo No. 115 (17), dated 01.03.2007, a copy of the enquiry report was forwarded to the petitioner with a direction to reply to second show cause notice within fifteen days. He responded to the said communication by his letter, dated 16.04.2007, saying that he had not received any enquiry report and a copy of the enquiry report should be supplied to him. The petitioner made another application on 12.05.2008 for grant of leave for five years with effect from 06.02.2005. By communication, dated 10.02.2009, his application for leave was rejected. The petitioner thereafter returned from Mazambique on 06.01.2010 and on 21.01.2010, he submitted his joining before respondent no. 2 and made a detailed representation before the respondent no. 2 describing the circumstances under which he had proceeded to Mazambique. Subsequently, on 26.04.2010, the petitioner again made a request to furnish the memo of charge and enquiry report, so that he could submit his defence, but of no avail. According to him, he was not made aware, even of date/dates fixed in the departmental proceeding and the entire departmental proceeding was conducted ex-parte. He learnt through a press communiqué, published in Hindi

daily "Dainik Jagran", dated 06.05.2010, that he had been terminated from service with effect from February, 2005, on account of his unauthorized employment in a foreign country.

4. In the back ground of above facts, the reliefs, as mentioned at the very beginning, are being sought. It is the case of the petitioner that the decision to terminate his services is apparently in violation of principles of natural justice inasmuch as neither any enquiry report was made available to him nor he had been given adequate opportunity to defend himself.

5. By filing I. A. No. 1243 of 2011, the petitioner has sought to challenge Memo No. 949, dated 04.11.2010, issued by the Department, whereby punishment of termination from service has been imposed upon the petitioner with effect from 07.02.2005.

6. Considering the fact that the relief, which is being sought by way of amendment is integrally connected to the relief sought for in the main application. I. A. No. 1243 of 2011 has been allowed and the petitioner has, accordingly, been permitted to challenge the order, dated 04.11.2010, which has been brought on record by way of Annexure-17 to I. A. No. 1243 of 2011.

7. It transpires from the said order, dated 04.11.2010, that the Bihar Public Service Commission has concurred with the proposal of the Department to terminate the services of the petitioner.

8. The State of Bihar has filed a counter affidavit, stating therein that the petitioner left for foreign country for employment without obtaining prior permission from the competent authority and when it came to knowledge of the competent authority, the petitioner was placed under suspension. A departmental proceeding was initiated against him with the issuance of memo of charge on 13.7.2005 itself. Since the petitioner was abroad and no notice could be served upon him, a notice was published in Hindi daily newspaper "Aaj", on 2.1.2006, asking the petitioner to participate in the departmental proceeding within a fortnight. The wife of the petitioner thereafter submitted a request on 18.01.2006 for grant of one month's time to appear before the Enquiry Officer. Despite ample opportunity given to the petitioner, the petitioner chose not to appear before the Enquiry Officer in the departmental proceeding and accordingly the Enquiry Officer submitted his report on 25.09.2006, holding the charge against the petitioner to be proved. Subsequent to submission of the enquiry report, a second show cause notice was served upon the petitioner through letter, dated 01.03.2007. Responding to the second show cause notice, the petitioner submitted a letter, dated 16.04.2007, saying that enquiry report was not annexed with the second show cause notice. It has been stated in paragraph 17 of the counter affidavit that through letter, dated 13.06.2007, the petitioner had been supplied the copy of the enquiry report of the departmental proceeding. The said letter has been brought on record by way of Annexure-L to the counter affidavit. The petitioner did not submit any reply to the second show

cause notice. A press notice was accordingly published on 30.01.2008, asking the petitioner to submit his reply to the second show cause notice within three weeks from the said publication, failing which it would be presumed that he did not have to say anything in that regard. Since the petitioner did not respond, a proposal was made to dismiss the petitioner from service. After concurrence having been given by the Bihar Public Service Commission and after following the prescribed procedure, vide a resolution, dated 04.11.2010, the services of the petitioner came to be terminated.

9. What is evident from above is that before the petitioner left his place of job as an Assistant Professor in the Department of Neuro Surgery, Patna Medical College and Hospital, Patna, no permission was granted to him by the competent authority nor any leave was sanctioned at any point of time. No "No-Objection Certificate" was issued by the competent authority.

10. Mr. Yugal Kishore, learned Senior Counsel, appearing on behalf of the petitioner, has submitted that the very fact that no objection was given on issuance of passport on 18.08.2000 implies that no objection was given for going to a foreign country. The submission deserves to be rejected at the very threshold. There is no pleading in the application that for going to Mazambique, upon his selection, the petitioner had applied for issuance of "No-Objection Certificate" nor any "No-Objection Certificate" was ever issued.

11. In course of hearing of this matter, on 18.09.2014, Mr. Yugal Kishore, learned Senior Counsel for the petitioner, had submitted that the petitioner had left for the employment abroad with the approval of the State Government and that in support of this fact, he would be filing an affidavit. The petitioner was accordingly allowed to bring this fact by way of an affidavit. An affidavit has, thus, been filed. Following is the statement made in paragraph 4 of the said supplementary affidavit in support of the plea that approval of the employer was given for going abroad:- "4. That the petitioner for obtaining the passport to filed an application before the department of Health, Government of Bihar on that basis no objection certificate was granted on 18.08.2000 vide memo no.3/Poss-1- 2/2000- 571 (3)/.H.Patna. A Photo copy of letter dated 18.08.2000 is annexed herewith and is marked Annexure 16 to the main writ petition."

12. Annexure-16 to the said supplementary affidavit is a copy of the No-Objection Certificate, dated 18.08.2000, which reads thus: "Certified that Dr. Arun Kumar Prasad is a permanent employee of Bihar State, Health Services, Health Department, Government of Bihar from 17.2.90 up-to-date and is at present holding the post of R.S.O. Department of Neuro Surgery, Patna Medical College & Hospital, Patna. This Department has no objection to his acquiring Indian Passport. The undersigned is duly authorized to sign this No Objection Certificate. (Emphasis is added)

13. It is evident from the said "No-Objection Certificate" that no objection was given to the petitioner for acquiring Indian Passport and not for taking up

employment abroad. The plea taken in this regard by and on behalf of the petitioner is completely frivolous and is accordingly rejected.

14. Further, this Court desired to know from the petitioner as regards the details of his employment in the Mozambique Government. Accordingly, when the matter was taken up on 10.11.2014, following order was passed: "In the meanwhile, the petitioner will be required to give details of his employment abroad from 07.02.2005 till date. If no affidavit is filed by that date, the court will adjudicate upon the matter on the basis of materials there on record and will consider imposing cost on the petitioner. Learned senior counsel for the petitioner submits that the petitioner has again gone abroad and, in such circumstance, one of his family members may be allowed to swear affidavit on his behalf. Under the authority/instruction of the petitioner, one of his family members can swear affidavit in compliance of the present order."

15. Pursuant to the said order, a supplementary affidavit has been filed on behalf of the petitioner, sworn by his wife. Paragraphs 4, 5 and 6 of the said supplementary affidavit read thus: "4. That it is stated that the petitioner left the country to join in the Foreign Service/training under Mozambique government on 07.02.2005 and till January, 2010, he worked under the services of Mozambique government. 5. That the petitioner after termination from the service under Government of Bihar on 04.11.2010 again went to Saudi Arabia in the month of November, 2011 for his livelihood and thereafter he joined the service under Government of Saudi Arabia and still he is working there. 6. That it is proper to mention here that at several occasion in between 2005 to 2014, petitioner came to India and cooperated the disciplinary proceeding."

16. This is an admitted fact, as is evident from the above, that the petitioner had knowledge about the initiation of the departmental proceeding in which he did not participate. The report of the Enquiry Officer was made available to him and he was knowing that he had to file his reply to the second show cause notice, which he did not do intentionally.

17. Learned Senior Counsel appearing on behalf of the petitioner has relied on the decisions of this Court, rendered in the cases of Rajib Lochan Jha v. The State of Bihar and Others, reported in 2004 (4) PLJR 517 and Sudhanshu Shekhar Deo v. Union of India and Others, reported in 2014 (1) PLJR 297, in order to submit that the Enquiry Officer acted as a Prosecuting Officer and without any evidence having been produced before him by the Department, he submitted his report holding the petitioner guilty of the charge of unauthorized absence. He has accordingly submitted that any decision taken on the basis of such enquiry report cannot be sustained, being violative of the principles of nature justice and the termination order under challenge, therefore, deserves to be set aside.

18. The above submissions, advanced on behalf of the petitioner, are not at all convincing.

19. Rule 76 of the Bihar Service Code prohibits a Government servant from remaining absent from duty continuously for a period of five years even on leave. Even a leave for a continuous period of five years or more cannot be granted. What I notice in the present case is that it was unilateral decision of the petitioner to seek job in a foreign country. There is absolutely no material on record to show that he ever applied for any permission to apply for appointment under the Mojambique Government. He left his place of job without any permission from the competent authority on 07.02.2005. No leave was ever granted to the petitioner. It is the own pleading of the petitioner that he remained in service of Mojambique Government from 07.02.2005 till January, 2010. It is also evident that he has again gone to Saudi Arabia in the year 2011 for earning and is serving the Government of Saudi Arabia. On one hand, the petitioner has pleaded in his writ application that he was engaged by Mojambique Government on contract basis as the Mojambique Government needed some qualified doctors, on the other hand, in his application to the Principal Secretary, dated 21.01.2010 (Annexure-13), he has mentioned that he was selected by Mojambique Government for "fo"®"k çf"k{k.k" (special training). The fact that he left his place of job without permission and remained absent unauthorizedly is not in dispute. By taking a plea that the petitioner had sought for "No-Objection Certificate" to leave for a foreign country for engagement has been found to be false and misleading and it has been attempted to be conveyed through pleadings to the Court that the no-objection, which was granted for procuring Indian Passport, amounts to grant of permission to go to a foreign country for employment. The plea has no merit at all. The conduct of the petitioner is deprecable.

20. Further, the petitioner cannot be permitted to take plea of violation of principles of natural justice inasmuch as he himself, admittedly, did not reply to the second show cause notice, which was served on him along with the enquiry report. There is no explanation as to why he could not participate in the departmental proceeding since it cannot be said that he did not have any knowledge about the departmental proceeding. The petitioner was knowing about the initiation of the departmental proceeding in the year 2006 itself. He did not reply to the charge, which is apparent from his own pleadings.

21. Rules of natural justice are founded on principle of fairness, which can be available only to a party who acts bonafide and deserves to be treated fairly on that account. A party, who is not fair in his conduct, cannot plead violation of natural justice. The principles of natural justice cannot be stretched too far to mean that even in a situation where a party, despite having proper notice, elects not to participate in a quasi-judicial proceeding, can raise a plea that he was not given a fair opportunity of hearing. Further, in the present case, the petitioner has not been able to make out any case of any prejudice caused to him, the facts being not at all in dispute, as have been noted above.

22. The Supreme Court, in the case of Sohan Lal Gupta v. Asha Devi Gupta,

reported in (2003) 7 SCC 492, held, in paragraph 29, as follows: "29. The principles of natural justice, it is trite, cannot be put, in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby."

23. In any event, considering the conduct of the petitioner, which has been noticed above, I would have, otherwise, refused to exercise discretionary jurisdiction under Article 226 of the Constitution of India, which is founded on the doctrine of equity and fairness.

24. In Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another, reported in (2013) 1 SCC 1, the Supreme Court has ruled that unless a party is fair in his conduct, he cannot enjoy the advantage of procedural prescription under the rules of natural justice.

25. In such circumstances, I do not find any merit in the plea of the petitioner of violation of principles of natural justice. The charge framed against the petitioner remained uncontroverted before the Enquiry Officer. The petitioner cannot take this plea that he did not remain absent unauthorizedly. The decision, in the given facts and circumstances of the case, to terminate the services of the petitioner by the impugned resolution, issued under Memo No. 945 (17), dated 04.11.2010, requires no interference by this Court.

26. This application has no merit, which is accordingly dismissed.

27. In the facts and circumstances of the case, considering the conduct of the petitioner, I have thought it proper to impose cost of Rs. 20,000/-, which should be deposited in the account of Patna High Court Middle Income Group Legal Aid Society, within a period of three months from today.