
(2003) 05 UK CK 0002

In the Uttarakhand High Court

Case No : Writ Petition No. 346 (M/S) 2003

Dr. Asha RaniVartak

APPELLANT

Vs

District Judge Nainital and Others

RESPONDENT

Date of Decision : 27-05-2003

Acts Referred:

Constitution of India, 1950 — Article 227
Specific Relief Act, 1963 — Section 38, 41

Citation : (2004) 1 UC 691

Hon'ble Judges : M.M. Ghildiyal, J

Bench : Single Bench

Advocate : Sharad Sharma, for the Appellant; S.P. Aggarwal, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble M.M. Ghildiyal, J.—The present writ petition under Article 227 of the Constitution of India has been filed against the order- dated 29-04-2003 passed by the Lower Appellate Court rejecting the interim injunction application of the Plaintiff/ Petitioner.

2. The facts of the case, in brief, are that the Petitioner was appointed on 28-07-1997 as a Resident Medical Officer, against the substantive vacancy, initially on probation for two years in the Birla Vidhya Mandir, which is a private educational institution and is Unaided. On completion of satisfactory probation period of two years, the services of the Petitioner were confirmed on September 30th, 1999. The work and conduct of the Petitioner was fully satisfactory without any complaint, notice, explanation-call or any adverse entry or disciplinary action.

3. The Petitioner was also provided an accommodation in the college campus. On 06.12.2002., all of a sudden, the Petitioner was terminated by stating that a number of complaints have been received in recent months from parents of the students about wrong diagnosis, in the result, the institution got a bad name and, as such, the Petitioner is being terminated with immediate effect. Feeling

aggrieved with the stigmatory termination letter dated 06/12/2002, the Petitioner filed a representation before the Chairperson of the Board of Governors of the Institution on 11/01/2003 but No. heed was paid to it. Consequently, she filed a suit for permanent injunction before learned Civil Judge (Jr. Div.), Nainital along with an application for temporary injunction. The temporary injunction was granted in favour of the Petitioner on 11/2/2003. Objection was filed by the institution and the learned Trial Court after hearing both the parties rejected the temporary injunction on 10/4/2003.

4. Aggrieved with the order, the Petitioner preferred Civil Appeal No. 1 of 2003. On 23/4/2003 the appeal was admitted and the status-quo order was passed. On 29/4/2003, the lower appellate court rejected the application for interim injunction. In the mean time, by order dated 18/4/2002 an order has been passed by the Institution to vacate the premises within the college campus, which was allotted to the Petitioner. The Petitioner/Appellant moved an application for stay of order dated 18/4/2002 also. The lower appellate Court, at the initial stage, permitted the Petitioner to continue to reside in the accommodation, which was allotted to her. However, on 29/4/ 2003, the lower appellate court rejected the application stating that since the interim injunction, as a whole, has been rejected the application has also become infructuous and, as such, is rejected. On 29/4/2003, the lower appellate court rejected the injunction application of the Petitioner, which is under challenge under Article-227 before this Hon''ble Court by means of this writ petition.

5. Heard Sri. Sharad Sharma learned Counsel for the Petitioner and Sri. S.P. Aggarwal learned Counsel for the Respondents.

6. Learned Counsel for the Petitioner has submitted that the Respondent's Institution is a private unaided educational Institution and according to rules known as Birla Vidhya Mandir, Nainital Service Rules, the appointments are made by the institution and employees are governed by the said Rules but in violation of the said Rules. The decision has been taken to terminate the services of the Petitioner though, the termination order is stigmatory in nature, No. procedure has been followed in accordance with the Rules. He has drawn my attention to Rule-41 of the aforesaid Rules. Rule-41 is in respect of dismissal or removal. Rule-41(1) provides that any employee who is charged with any misconduct, meriting, dismissal or removal shall be given a charge sheet therefore. Rule 41(2) provides for submission of charge sheet. Rule 41 Sub-Clause 1 & 2 of the aforesaid Rules is quoted below:

Rule 41(1): Any employee who is charged with any misconduct meriting dismissal or removal shall be given a charge sheet therefor. Rule 41(2): "The charge sheet will be served on the employee personally or by registered post on the address as recorded in the office in the event of the employee declining to accept the charge sheet or the same retaining undelivered to the addressee which shall be presumed that the notice was duly served.....

7. According to the learned Counsel for the Petitioner, Rule-41 of the aforesaid Rule has not been followed, as he was never served with the charge sheet. He has further drawn my attention to Rule 42 & 43. Rule 42 speaks that all employees will be governed by School Rules and Regulations enforced in time to time. Rule-43 gives territorial jurisdiction. Rule 42 & 43 run as under.

Rule 42: All employee will be governed by school rules and Regulations inforce from time to time. Rule 43: "Any dispute between the employee and the School Authorities shall fall within the jurisdiction of the Courts of Nainital.

8. Thus, according to Petitioner, the procedure was not followed by the Institution and by virtue of Rule-43, the Court at Nainital has jurisdiction to try the suit. He has further drawn my attention to the appointment letter. In clause-6 of the appointment letter dated 28-7-1997, it is stated that the services of the Petitioner will be governed in accordance with the Rules and Regulations of the school as are enforced from time to time. Clause-16 of the appointment order states that notice of one month on either side or salary, in lieu thereof, will be necessary in case of those who are on probation, and three months in case of permanent hands. As per Clause- 22 of the appointment letter, any dispute between the employer and the employee shall fall within the jurisdiction of Nainital Courts. He has placed reliance on the judgment Shri Kihota Hollohon Vs. Mr. Zachilhu and others, . Relying on the judgment in the case of Sri. Kihota Hollohan v. Mr. Zachilhu and Others reported in 1993 Supreme Court, the Petitioner has submitted that the Apex Court in respect of passing of interlocutory order has held that the purpose is to preserve in status-quo the rights of the parties so that the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. In Para-51, the Apex Court has held that the interlocutory orders in this case were necessarily justified so that No. landslide changes were allowed to occur rendering the proceedings ineffective and interlocutory. The Hon''ble Supreme Court has taken a view in special circumstances of the case. Whereas in the present case if the interlocutory order earlier passed, has been rejected, there will be No. landslide change. The Petitioner has been terminated from the service and in case, he succeeds, he will be reinstated with all full back wages and, as such, the Petitioner cannot get any benefit from the aforesaid judgment.

9. The Petitioner has further placed reliance on the judgment reported in 1983 U.P. Local Bodies and Educational Cases page-519 and 1996 ALR 99. In my opinion, in the facts and circumstances of these cases, the judgments cited by the Petitioner do not apply in the present case and the Petitioner cannot take any help from these authorities.

10. Learned Counsel for the Petitioner has submitted that the Petitioner's services were terminated on the ground that the Institution has received complaints against the Petitioner. However, before the learned Trial Court, the objection has been filed against the interim injunction by the Institution stating that since the post of Medical Officer has been abolished by the institution, the

Petitioner minted. The Resolution of the Board dated 18-4-2002 (to abolish the post) is malafide as the Petitioner was terminated vide order dated 6-12-2002. Though resolution to abolish the post was passed long back on 18-4-2002. Even after, termination of the Petitioner, the post has been re-advertised by the Institution and, as such, the resolution to abolish the post as well as order of termination is malafide.

11. He has further submitted that the Petitioner was initially allowed by the Lower Appellate Court to remain in possession of the residential accommodation, the Lower Appellate Court was not right in rejecting the application on 29-4-2003 during the pendency of appeal.

12. Sri S.P. Aggarwal has filed urgency application along with affidavit with a prayer to take up the matter. On the application, the date was fixed for today and both the parties are agreed to dispose the writ petition finally at the admission stage.

13. Sri. S.P. Aggarwal learned Counsel for the Respondent has stated that he does not want to file counter affidavit and he will rely only on the affidavit, which has been filed along with the urgency application.

14. The preliminary objection has been raised by Sri. S.P. Aggarwal that in view of Section 38 and Section 41 of the Specific Relief Act 1963 and U.P. amendment in CPC there is a blanket ban to grant injunction in such cases. In the U.P. Amendment by U.P. Act No. 57 of 1976, in Order-39 Rule-2 Sub Clause-2 a proviso was inserted and Clause -b of the proviso prohibits grant of any injunction in the case of transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service, order of taking charge from any employee including any employee of the Government order.

15. In order-39 Rule-2 a proviso has been inserted by the State Amendment which is quoted as under:

Provided that No. such injunction shall be granted:

(a) where No. perpetual injunction could be granted in view of the provisions of Section 38 and Section 41 of the Specific Relief Act, 1963 (Act 47 of 1963), or

(b) to stay the operation of an order for transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of, or taking charge from any employee including any employee of the Government, or

(c) to stay, any disciplinary proceeding pending or intended or, the effect of any adverse entry, against any employee of the Government, or

(d) to effect the internal management or affairs of, any educational institution including a University, or a society, or

(e) to restrain any election, or

(f) to restrain, any auction intended to be made for, the effect of any auction made, by the Government, or

(g) to stay the proceedings for the recovery of any dues recoverable as land revenue unless adequate security is furnished, or

(h) in any matter where a reference can be made to the Chancellor of a University under any enactment for the time being in force;

and any order for injunction granted in contravention of these provisions shall be void.

16. Section 38 and 41 of the Specific Relief Act, 1963 is reproduced as under:

Section 38: (1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the Plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions in Chapter II.

(3) When the Defendant invades or threatens to invade the Plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:

[a] where the defendant is trustee of the property for the Plaintiff, [b] where there exists No. standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

[c] where the invasion is such that compensation in money would not afford adequate relief;

[d] where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Section 41:

An injunction cannot be granted

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) to prevent to breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, any act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the Plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(i) when the conduct of the Plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the Plaintiff has No. personal interest in the matter."

17. It is a well settled law that No. interim order can be passed staying the termination order, during pendency of writ petition.

18. Learned Counsel for Respondent has submitted that the High Court too has No. jurisdiction to grant any injunction in view of the Clause-b of Proviso as inserted by U.P. Amendment Act 1976. He has placed reliance on Apex Court's decision in (2000) 10 SCC 311 wherein the Hon''ble Apex Court has held as under:

High Court erred in law in staying the order of termination as an interim measure in the pending writ petition. By such interim order if an employee is allowed to continue in services and then ultimately the writ petition is dismissed then it would tantamount to usurpation of public office without any right to the same.

19. Learned Counsel for the Respondent has further placed reliance in the case of Girdhari Lal v. Bhelupura Consumers Co-operative Society, Varanasi and Others reported in 1983 U.P. Local Bodies and Educational Cases page-373. In para-3 of the aforesaid judgment, the Court has held as under:

The learned Counsel for the Petitioner Sri. R.H. Zaidi has urged before me that the view taken by the lower appellate court suffers from an error of law apparent on the face of the record in as much as he having recorded a finding that the termination order was without jurisdiction, the bar as enacted by Amendment Act No. 57 of 1976 in Order 39, Rule 2. CPC would not operate. The precise argument of the learned Counsel for the Petitioner is that in case the order is without jurisdiction, the court will have a power to grant injunction order under 39, Rule 2 CPC even despite the amendment. I am unable to accept the aforesaid contention. Under Order 39, Rule 2, CPC as stood amended an ad interim injunction during the pendency of the suit could be granted if a party could establish a prima facie case, balance of convenience and irreparable injury in his favour. The amendment made by the State of U.P. specifies that in certain categories of cases No. injunction shall be granted. It is very pertinent to note that it has also been provided that an order granted in contravention of these provisions shall be void. Clause (b) of Order 39, Rule 2 (2), CPC prohibits

granting of injunction which may stay the operation of an order for transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of, or taking charge from, any employee including any employee of the Government. The Petitioner was challenging the order of termination of his services and was seeking an injunction, the object of which was to stay the operation of the termination order. The injunction in respect of such a matter was clearly barred by the amended provisions of the Act. In my opinion the court at the stage of granting an ad interim injunction will have No. jurisdiction to go into the merits in as much as the legislature has clearly prohibited that in such cases injunction shall not be granted. The question as to whether an order is without jurisdiction or within jurisdiction will, therefore, not arise. The bar in my opinion is a blanket bar. The legislature has provided that an injunction granted in contravention of these provisions shall be void. The view taken up by the lower appellate court in my opinion is in accordance with law.

20. He has further placed reliance on the judgment in the case of Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others, , wherein the Apex Court in para-5 of the aforesaid judgment has held as under:

rights and obligations of an employee of a private institution are governed by the terms of the contract entered into between the parties. Where under these terms the principal's services were liable to be terminated on three months notice hall that he would be entitled to, even if the dismissal is wrongful, is a decree for damages and not an order of reinstatement or declaration that notwithstanding the termination of his services he continued to be in service.

21. Learned Counsel for the Respondent has further submitted that the post in which the Petitioner was working had been abolished by the Board of Governors vide order dated 18/4/2002 and in view of Constitution Bench decision of the Apex Court, in case of M. Ramanatha Pillai Vs. The State of Kerala and Another, , the Hon"ble Court has held in para-39 as under:

The right to hold a post comes to an end on the abolition of the posts which a Government servant holds. Therefore, a Government servant cannot complain of a violation of Article 19(1)(f) and Article 31 of the Constitution when the post is abolished.

22. The principle was also followed in the case of Notified Area Council, Pipili and Anr. v. Ghoo Mohammad, reported in 2001 (89) F.I.R. 362, wherein the Hon"ble Court has held as under:

The position is fairly well settled that continuance or abolition of post is within the power of the employer and any decision in that regard is not available to be interfered with by the court unless it is held to be vitiated by malafide or arbitrary.

23. Learned Counsel for the Respondent has further submitted that in any case,

the Petitioner has not even challenged the order of Board of Governors dated 18/04/2002 abolishing the post, which was being held by the Petitioner. He has further placed reliance on the judgment Integrated Rural Development. Agency v. Ram Pyare Pandey, reported in 1995 (2) SCC 495 wherein the Apex Court in para-6 has held as under:

.....A contract of employment cannot ordinarily be enforced by or against an employee. The remedy is to sue for damages. (See Section 14 read with Section 41 of the Specific Relief Act, see Indian Contract and Specific Relief Acts by Pollock and Mulla, 10th Edn., page 983). The grant of specific performance is purely discretionary and must be refused when not warranted by the ends of justice. Such relief can be granted only on sound legal principles. In the absence of any statutory requirement, courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer....

24. The Hon"ble Supreme Court in the case of State of Haryana v. Suman Dutta has laid down the principle that No. interim order can be passed against the order of termination because by such interim order if any employee is allowed to continue in service and then ultimately the writ petition is dismissed than it would tantamount to usurpation of public office without any right to the same.

25. Learned Counsel for the Respondent has further pleaded that the Respondent is a prestigious institution in which a large number of students from all over India are studying. The institution is situated at the hill top of Nainital City and is a residential school. It is necessary that a highly qualified doctor is available in the institution 24 hours to look after the children who are residing in the hostels leaving their parents far away. In case, a student is required immediate medical relief, it is the duty of the institution to provide the same at the earliest, which is possible only when the residential accommodation which was earlier allotted to the Petitioner, is available with the Institution, to provide the same to a qualified doctor so that he is available for the children 24 hours. He has further stated that order of Respondent directing the Petitioner to vacate the residential accommodation was also challenged by the Petitioner and an application for stay was also moved before the Lower Appellate Court which has been rejected by the Lower Appellate Court on 29/04/2003, the same has become final the said order has not been challenged by the Petitioner before this Hon"ble Court.

26. The appeal is pending before the Lower Appellate Court and it would not be proper to record any finding at this stage by the High Court which may prejudice the case of the parties. The Petitioner has prayed that he may be permitted to continue in the residential accommodation till the appeal is decided.

27. Learned Counsel for the Respondent has drawn my attention to the particulars of address of Petitioner, mentioned in the plaint, according to the Respondent, she is residing at Sarojini Nagar, New Delhi and the said address has been given in the plaint, itself. The accommodation is required to be occupied by a doctor, whose presence is necessary for 24 hours in the college

campus. The prayer of Petitioner cannot be accepted for the reasons recorded above.

28. For the reasons recorded, the Petitioner is not entitled to get any relief under Article 227 of the Constitution of India. However, since the appeal is pending before Lower Appellate Court, it would be proper to direct the Lower Appellate Court to decide the appeal itself within three months from the date the order is produced. The writ petition is dismissed. No. order as to costs.