
(1998) 04 PAT CK 0056
In the Patna High Court
Case No : C.W.J.C. No. 7878 of 1997

Dr. Ashok Kumar Sinha

APPELLANT

Vs

Patna University and Others

RESPONDENT

Date of Decision : 10-04-1998

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Citation : (1998) 2 BLJR 1445 : (1998) 2 PLJR 280

Hon'ble Judges : A.K. Ganguly, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—It is not in dispute that the petitioner is a confirmed teacher of Patna University (hereinafter called the said University). The petitioner was initially appointed as temporary Lecturer in English in the said University on 25.11.1966. Then on the recommendation of the Bihar Public Service Commission, the petitioner was issued an order of appointment to the said post which was approved by the Syndicate vide notification dated 16.7.1968. Such appointment letter of the petitioner was issued under the signature of the Registrar of the said University. Thereafter the services of the petitioner as Lecturer of the said University was confirmed and he was promoted to the post of Reader in English with effect from 14.11.1980 vide notification dated 29.9.1981. The petitioner was further promoted to the post of University Professor of English in the said University with effect from 5.8.1988 vide order dated 20.8.1988. Then the order of promotion of the petitioner was revised with retrospective effect from 1.2.1985 by an order dated 19.5.1989 issued under the signature of the Registrar of the said University. While the petitioner was working as a University Professor in the Post Graduate Department of English of the said University, he was offered the post of Professor in English in Samna University (hereinafter called the foreign University), Yemen, initially for a period of two years. As such the petitioner had to apply for leave in order to work in the said

foreign University and by an order dated 12.2.1993 issued under the signature of respondent No. 4, the Assistant Registrar of the said University, the petitioner was granted permission to leave the said University in anticipation of sanction of his leave with effect from 13.2.1993. The said order permitting the petitioner to proceed to join the said foreign University dated 12.2.1993 is at Annexure-1 to the writ petition. Thereafter leave was granted for two years by an order dated 27.4.1993. The said period of two years was to expire on 11.2.1995 if the period of two years is counted from 12.2.1993. Before the expiry of the said period of two years, on 13.7.1994, a letter was sent by the Dean, Faculty of Education, Sanna University, Hodeidah, Yemen to the Vice Chancellor of the said University requesting him to extend the leave of the petitioner for a further period of two years with effect from February, 1995. Thereafter the petitioner also, before 11.2.1995, applied for extension of leave for two years on 6.2.1995 but the authorities of the said University initially remained silent and after expiry of the said period of two years by an order dated 5.8.1995 rejected the petitioner's prayer for grant of leave for another period of two years from February, 1995 and asked the petitioner to join the post immediately and stated that failing which action to terminate the services of the petitioner from the said University shall be taken. The petitioner thereafter wrote further letter to the Registrar of the said University through the Head of the Post Graduate Department of English of the said University explaining his position and also explaining the fact that under the Statute of the said University, an employee can be on extraordinary leave without pay for five years at a stretch and before the petitioner could know the refusal by the University, he had already entered into a further contract with the foreign University and a breach of contract will tarnish the image of the said University abroad. As such a request was made to allow the petitioner to work upto the end of July, 1997. Thereafter comes the University letter dated 5.2.1996 rejecting the petitioner's application for grant of two years extraordinary leave and directing the petitioner to join the post within six weeks from the date of issue of letter dated 5.2.1996 and it was again reiterated in the said letter that failing which action to terminate the services of the petitioner from the said University shall be taken. The said letter dated 5.2.1996 has been disclosed by the learned Counsel for the University in the affidavit filed in this proceeding. Ultimately came the impugned order of the University dated 13.8.1996 whereby the petitioner was informed that as he did not join the said University service, despite request, his services from the said University was terminated with effect from the date the petitioner was away from the University i.e. 13.2.1993. Such order was passed by the Registrar of the said University on 13.8.1996. Therefore, the University authorities wanted to terminate the services of the petitioner with retrospective effect from 13.2.1993. In the meantime, the petitioner made another representation on 8.8.1997 for extension of his service and in answer to Clause 6(17) of the University Statute and Section 7(3)(b) of the University Act the petitioner's prayer was rejected and the services of the petitioner has been terminated. However, in the said letter dated 11.9.1997 the order of termination has been reiterated and it is stated that the said order of

termination comes into effect from 13.2.1993. This order dated 11.9.1997 has been disclosed with the application for amendment filed by the petitioner.

2. From the aforesaid narration of facts, which are not much in dispute, the following position emerges:

(a) The petitioner is a confirmed teacher of the said University.

(b) The petitioner on taking up assignment in the foreign University, initially applied for two years leave and two years extraordinary leave was granted.

(c) The petitioner thereafter made requests for extension of extraordinary leave but the said prayer was rejected twice by the said University and ultimately the services of the petitioner was terminated as the petitioner did not join for duty which he was asked to do by the letters issued by the said University in which they turned down the prayer of the petitioner.

3. Apart from that the petitioner also averred in paragraph 15 onwards of the writ petition that he made a prayer for allowing him voluntary retirement from any appropriate date which the University authorities may find suitable and the petitioner further stated that similarly situated persons, namely, Dr. Vijay Pratap Singh and Dr. Janardan Prasad Singh, who were both University Professors in English in the said University and who also went to work in the said foreign University where the petitioner went but their prayer for voluntary retirement was granted by the said University. The petitioner has stated in paragraph 8 of the writ petition that he did not receive the impugned order of the University dated 5.2.1996 by which his prayer for leave was refused. The petitioner has also stated that the impugned order of termination dated 13.8.1996 was also not received by the petitioner while the petitioner was working in the said foreign University but the petitioner has come to know of the same on his going to the office of the said University and the petitioner has collected a copy thereof.

4. Learned Counsel for the said University authorities has contested the case of the petitioner and from the counter affidavit filed on behalf of the University, it appears that the aforesaid facts which have been stated in the writ petition have not been very much disputed and it has been stated in the counter affidavit that the University authorities did not grant extension of leave to the petitioner as the teaching was being hampered for shortage of teachers in English and the University asked the petitioner to join his post in Patna University and the petitioner was also informed that failing which action to terminate the services of the petitioner from the said University shall be taken and as the petitioner did not join or report for duty in the said University, the University authorities after, waiting for six months from the date by which he was asked to join the duty, terminated his services by letter dated 13.8.1996 from the date when the petitioner proceeded on leave. In so far as the petitioner's prayer for voluntary retirement is concerned, it has been stated that the petitioner never applied for voluntary retirement when he was on leave and since the cases to be the employee of the said University with effect from 13.2.1993, such prayer of

voluntary retirement to the petitioner cannot be considered. It has been further stated that since there is no charges against the petitioner, there is no question of holding a departmental enquiry. With regard to the impugned order of termination, it has been stated in paragraph 8 of the counter affidavit of the said University that the said order of termination was passed by the Vice-Chancellor on the direction of the Syndicate that the same was communicated to the petitioner by the Registrar of the said University. The two Illustrations which the petitioner cited in his writ petition, namely, about Prof. Dr. Vijay Pratap Singh and Dr. Janardan Prasad Singh, those cases have been dealt with in paragraph 10 of the counter affidavit and virtually from statements made in paragraph 10 of the counter affidavit it appears that the petitioner's case as made out in paragraphs 22 to 24 of the writ petition has been virtually accepted. In paragraphs 22 to 24 of the writ petition the petitioner stated that these two persons, namely, Dr. Vijay Pratap Singh and Dr. Janardan Prasad Singh, both University Professors in English and both of whom had joined the said foreign University were granted the benefit of voluntary retirement after joining the University after five years of leave and in case of Dr. Janardan Prasad Singh, he also remained on leave for more than two years and he was also given the benefit of voluntary retirement but in the case of the petitioner he has been sought to be punished with the order of termination of service. Thus he has been given a discriminatory treatment which is violative of Article 14 of the Constitution of India.

5. In the context of the aforesaid factual admission the following questions arise for consideration of the Court:

- (a) Whether the order of termination can be given effect to retrospectively?
- (b) Whether the order of termination because of its retrospective effect was totally bad in law?
- (c) Whether the order of termination is otherwise bad in law?
- (d) Whether the said University has treated the petitioner in a discriminatory manner with reference to two other Professors of the said University, particulars of which have been given in paragraphs 22 to 24 of the writ petition?

6. In so far as the first question is concerned, learned Counsel for the University has fairly conceded that the order of termination cannot be given retrospective effect. Learned Counsel further submitted that even though the order cannot be given retrospective effect, the impugned order is valid prospectively and the order is capable of severance. She further elaborated her contention by saying that the retrospective part of the order may be quashed but since the impugned order is capable of severance, its prospective operation must be held to be good in law. Therefore, according to her the impugned order operates validly from the date of its issue i.e. 13.8.1996. In support of this contention learned Counsel for the said University has placed reliance on the judgment of the Supreme Court in the case of *R. Jeevaratnam Vs. The State of Madras*, . This Court on perusal of the ratio in the case of *Jeevaratnam* (supra) accepts the contention raised by the

learned Counsel for the said University that the impugned order of termination is capable of severance and being so served the Court may strike down its retrospective operation but may uphold the order prospectively from the date of its issue, if the order is otherwise valid.

7. Learned Counsel for the petitioner, however, controverted the said argument advanced by the learned Counsel for the respondents by referring to a decision of Calcutta High Court in the case of Sudhir Ranjan Halder Vs. State of West Bengal and Another, . Reliance was placed on paragraphs 24 and 25 of the said judgment of Calcutta High Court in Sudhir Ranjan (supra) but this Court is unable to appreciate the ratio of the said Judgment in Sudhir Ranjan (supra). The learned Judges of the Division Bench in Sudhir Ranjan (supra) refused to separate the retrospective operation of the impugned order from the prospective operation and held that since the Court of law has no power to make an order of dismissal on behalf of the executive authority, it may not be easy to draw a line between the retrospective and prospective part of the order. But the ratio of the said judgment in Sudhir Ranjan (supra) was considered by the Supreme Court in the case of R. Jeevaratnam (supra) and specific reference was made to the Division Bench judgment of Calcutta High Court and the said ratio of Calcutta High Court in Sudhir Ranjan (Supra) was dissented from. Therefore, this Court cannot rely on the said ratio of the Division Bench of Calcutta High Court in Sudhir Ranjan (supra). This Court, therefore, upholds the contention of the learned Counsel for the said University that (a) the impugned order is capable of severance and (b) the prospective operation of the impugned order is not vitiated because it was made retrospective. But the legality of the impugned order, even if the same is given a prospective operation, is certainly in dispute in this case.

8. The petitioner is un-disputedly a confirmed employee of the said University. The services of such employee cannot be normally got rid of except after following the entire gamut of procedure relating to submission of charge-sheet, holding of an enquiry and so on. In this aspect learned Counsel for the University has argued that there is no charge against the petitioner for holding an enquiry and there is no purpose in giving the petitioner any opportunity of hearing because the petitioner on his own showing has not reported for duty to the said University despite two letters written to him and in the said two letters the petitioner was told that if he does not join the duty, action will be taken to terminate his services. Therefore, by terminating his services no illegality has been committed.

9. This common sense approach of the learned Counsel for the University which is based on the common law doctrine of master and servants cannot be pressed into service here as the employer is the University which is undoubtedly an authority under Article 12 of the Constitution of India.

10. In a judgment concurring with the majority in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , at page 183. Justice K. Ramaswamy, as His. Lordship then was, posed a similar question in the following words:

But this common law principle could be applied to the employees appointed by a Statutory Corporation or authority or an instrumentality within the meaning of Article 12 of the Constitution is the square question.

The learned Judge then answered it affirmatively as follows:

It is well settled law by a bead roll of decisions of this Court that the Corporation or a Statutory Authority or an instrumentality or other authority under Article 12 of the Constitution is not free, like an ordinary master (a private employer), to terminate the services of its employees at its" whim or caprices or vagary. It is bound by the Act and the Regulation and the paramount law of the land, the Constitution.

Approaching it from another angle the learned Judge further held at page 186 of the report as follows:

It is, thus, I hold that the employees of the corporations, statutory authority or instrumentality under Article 12 have statutory status as a member of its employees. The rights and obligations are governed by the relevant statutory provisions and the employer and employee and equally, bound by that statutory provisions.

So the power of the University and the right of the petitioner are circumscribed by and guided under the statutory provisions.

10. A perusal of the statutory provisions would show that the termination of service is governed by Statute 9 which is set out below:

9. (1) Subject to the provisions of the Act and terms and conditions of transfer of the Government servants concerned the service of a University servant may, be terminated by the Syndicate on one or more of the following grounds:

- (a) abolition of post;
- (b) reduction in establishment;
- (c) in consequence of a change in the nature of the duties of his office;
- (d) infirmity, either mental or physical, of permanent nature;
- (e) continued absence from duty for more than five years.

Apart from that this Court may have to refer to Statute 18 of the said Statute which relates to termination of temporary University Servants. The provisions of Statute 18 are also set out below:

18. The following procedure shall be followed in discharging a temporary University servant:

- (a) When the term of appointment of a temporary University servant provided for the termination of service, either party giving notice of a specified period, either party can serve such notice at any time, and the service should be considered to

have been terminated on expiry of the specified period of notice . The termination of service in such circumstances does not amount to "removal and dismissal" from service under the relevant Article of the Indian Constitution;

(b) When a temporary appointment expressly stated to be on a temporary basis is sanctioned to continue until further order and is subject to the condition that the service may be terminated at any time without notice, the termination of service does not amount to "removal or dismissal" from service and the service can be terminated at any time without notice;

(c) In case of a person who is appointed for a particular period and it is necessary to terminate his services before the expiry of that period, full departmental proceedings will not be necessary and it will be sufficient if an explanation is called for from the person concerned asking him to show cause why his services should not be terminated, and the explanation if any so submitted, is considered before any order is passed.

(d) In cases of persons not covered under Clauses (a), (b) and (c) above, full departmental proceedings will be necessary before the temporary service can be terminated;

(e) In all cases which are not covered by the foregoing provisions full departmental proceedings are necessary before temporary service can be terminated.

11. On a perusal of the aforesaid provisions, it appears that the services of the University Servants may be terminated by the Syndicate for continued absence of duty for more than five years, here it is an admitted position that on the date of passing of the termination order, if it is given a prospective operation, namely, 13.8.1996 the petitioner cannot be said to have absented from duty for more than five years, firstly because from 13.2.1993 the period of five years will not be reached by 13.8.1996. Apart from that upto 12.2.1995 the petitioner was granted leave by a University itself. Therefore, the petitioner sun-authorized leave prior to the date of termination was merely for one year and four months. Therefore Clause 9(e) of the Statute which provides for termination of service on account of continued absence from duty for more than five years has not been satisfied in this case. Apart from Clause 9 of the Statute, Clause 18 of the Statute which has been extracted above shows that even in the case of termination of temporary University Servants apart from the case covered under Clause (a), (b) and (c) of Statute 18, such temporary servants cannot be terminated without full departmental proceedings as would appear from perusal of Clause 18.(d) and 18(e) of the said Statute. It is an admitted position that the petitioner's case is not covered by Clause 18(a), (b) and (c) of the Statute, Therefore, the petitioner's case for termination can only be made under Clause (d) and (e) of Clause 18. of the Statute. Both Clauses (d) and (e) of Clause 18 of the Statute provide for holding of full departmental enquiry before terminating the services of even a temporary University servant. The petitioner being a

confirmed and permanent University servant cannot suffer a worse fate. This Court is of the view that since protection has been given to a temporary University servant against termination of service, namely, that such termination cannot be effected without full departmental proceeding, the petitioner is also entitled to the very protection being a permanent University servant and it is common ground that no attempt was made to hold any departmental proceeding against the petitioner before the order of termination was passed. The procedure for departmental proceeding is detailed in Clause 16 of the said Statute.

12. The learned Counsel for the said University has of course argued that no purpose will be served by giving the petitioner an opportunity of hearing inasmuch as the petitioner has admittedly not joined the University Service despite request by the University. This Court is unable to accept this contention for a variety of reasons. First of them is, that it is not merely depriving the petitioner of an opportunity of hearing. Here the services of the petitioner have been terminated on the alleged ground of absence from duty for a period which falls far short of the period mentioned in Clause 9(e) of the said Statute. So the impugned action is contrary to statutory provision. Apart from that, the petitioner as a permanent employee of the University is entitled to the benefit of procedural safeguards contemplated in a departmental enquiry. So it is deprivation of the petitioner's right protected under the law. This is done just on the assumption that the petitioner will not have any defence in such an enquiry. It is difficult for this Court to proceed on such a bald assumption. On the other hand, this Court is of the opinion that it is quite plausible that in a departmental proceeding the petitioner could have advanced many pleas in his defence and could have satisfied the University authorities about his rights to obtain further extraordinary leave given to him under the Statute as also about his difficulties in joining the services of the said University in the midst of contract with the foreign University and so on. Therefore, it cannot be said that in the facts of this case only one irresistible conclusion is possible. Taking all these facts into account this Court can not persuade itself not to accept the contentions of the learned Counsel for the University.

13. It may be true that the procedure for effective termination under the said Statute are very generous in favour of the employees of the University but since a procedure has been laid down by the said University, which is an authority under the Constitution, it must abide by the said procedure. Reference in this connection may be made to the famous observation of Justice Frankfurter in *Vitarellie v. Seaton* reported in 3 L. Ed. 2nd Edition page 1012. The learned Judge has put the proposition in the following words:

An executive agency must be rigorously held to the standards by which it professes its action to be judged.... Accordingly if dismissal from employment is based on a defined procedure, even though generous beyond the retirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved Rule of administrative law is now firmly established and, if I

may add, rightly so. He that takes the procedural sword shall perish with the sword.

14. Considering the provision of the Statute, this Court is tentatively of the view that the University authorities possibly did not contemplate the termination of its permanent employee and termination of only temporary servants was contemplated and for which the aforesaid generous procedure of Clause 18 of the said Statute was enacted. This Court is drawing this conclusion on the principle of "Expressio Unius est Exclusio Alterius". In respect of permanent University servants the prospect of termination is only contained in Clause 9 of the said Statute and it has already been discussed that Clause 9 is not attracted in this case. Therefore, for the reasons aforesaid this Court is of the opinion that the order of termination of services against the petitioner cannot be sustained.

15. So far as the question of discriminatory treatment is concerned, this Court is convinced from the pleadings between the parties that the case of such discrimination is made out inasmuch as it appears from the averments referred to above that the petitioner and two other teachers belonging to the department of English in the said University, all of them went on teaching assignment to all same foreign University and one of the Professors, referred to by the petitioner, namely, Dr. Vijay Pratap Singh remained on leave for five years and thereafter he was allowed to join the University and was given the benefit of voluntary retirement whereas the petitioner has not remained on leave for five years. Learned Counsel for the University stated that if those persons have been illegally given the benefit, the same cannot be given to the petitioner. This Court cannot accept this contention. As has already been discussed that under the relevant Statute the service of a permanent employee can be terminated only if he remains absent from duty for more than five years. Therefore, by giving those persons the chance to join the service after a period of five years, the University has not committed any illegality. The University has committed illegality in the case of the petitioner as would appear from the discussion made here-in-above. It is, therefore, clear that the equal protection contemplated under Article 14 of the Constitution has also been breached in this case by the University authorities by terminating the services of the petitioner while giving a different treatment to persons who are similarly placed. This Court, therefore, cannot persuade itself to uphold the order of termination even prospectively. The impugned order of termination is thus bound to be quashed.

16. It is, however, made clear that since the petitioner has applied for voluntary retirement, it is open to the respondent University to consider the said prayer of voluntary retirement made by the petitioner in accordance with law and on the same basis on which the prayer for voluntary retirement was considered by the said University in the case of Dr. Vijay Pratap Singh and Dr. Janardan Prasad Singh.

17. With this direction, this writ petition is allowed to the extent indicated above. The impugned order of termination against the petitioner Annexure-7 is hereby

quashed. There will be no order as to cost.