(2000) 04 PAT CK 0116

In the Patna High Court

Case No : C.W.J.C. No. 11407 of 1996

Dr. Mishri Lal Jha @ Dr. M.L. Jha — APPELLANT

Vs

State of Bihar and Others — RESPONDENT

Date of Decision : 07-04-2000

Acts Referred:

Bihar Private Educational Institutions (Taking over) Act, 1987 — Section 11(1), 6, 6(2), 6(3), 6(4)
Economic Development and Social Change Institute Rules, 1990 — Rule 11

Citation : (2001) 1 PLJR 355

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

Bench : Single Bench

Advocate : Mihir Kumar Jha and Namrata Mishra, for the Appellant; Rajeshwar Prasad Singh, Dilip Kumar for State and Ganga Prasad Roy, for Institute, for the Respondent

Judgement

A.K. Ganguly, J.—The dispute in this case is over the entitlement to retirement benefit of the Petitioner and also for quashing the order dated 15.10.1996 whereby the Petitioner''s claim for payment of post retirement benefit has been rejected by the Joint Secretary, Education Department, Government of Bihar, Patna.

2. The relevant facts of the case are noted below:

The Petitioner claims that he is a Post Graduate in Psychology from Agra University and has also got Ph.D. Degree from the same University. He was appointed to the post of Reader in Lalit Narayan Mishra Institute of Economic Development and Social Change (hereinafter called the said Institute) vide Institute''s letter No. 954/79 dated 21st September, 1979. Prior to such appointment the Petitioner was in the service of the Government of U.P. and was working there as an Assistant Registrar in Allahabad University. The Petitioner''s case is that he was deputed to the said Institute by the Government of Uttar Pradesh for a period of one year by an order dated 31st October, 1979. It appears that this was done pursuant to the application of the Petitioner for the post of Reader of the said Institute for which interview was held on 1.9.1979. The Petitioner was informed by the said letter, issued by the Director of the said. Institute that the Petitioner will be on probation for one year and will be confirmed on the basis of his performance and conduct in the probationary period. In the said letter it was stated that during the period of probation the Petitioner will be entitled to 10 per cent of basic pay as employee''s contribution to Provident Fund in addition to his own contribution of a similar amount and the provident fund will be governed according to the Statutes'' of the Institute. The Petitioner''s case is that pursuant to the said offer of appointment he joined the post of Reader of the said Institute on 5.11.1979. The Petitioner has, however, stated that the period of deputation of the Petitioner was extended by the Government of Uttar Pradesh for one year in the year 1980 and again it was extended for one year in the year 1981 and his. lien was retained in Allahabad University under the Government of Uttar Pradesh till 4.11.1982 but as the Petitioner continued in the service of the said Institute, the authorities of the said Institute by an order dated 37.10.1982 confirmed the service of the Petitioner as Reader in the said Institute with effect from 5.11.1980 and his lien as Assistant Registrar was terminated with effect from that date.

3. Then came an Ordinance in the year 1986 to take over the management and control of the said Institute with effect from 19th April, 1986. It is not in dispute that the said Ordinance has become an Act known as the Bihar Private Educational Institutions (Taking over) Act, 1987 (hereinafter called the said Act). Thereafter the Petitioner was served with a letter dated 13.9.1990 to the effect that he will reach the age of superannuation with effect from 1st September, 1990 but the Petitioner was requested to continue teaching in the said Institute on purely temporary basis on the basis of the Petitioner''s last pay drawn till an alternative arrangement is made. Ultimately the services of the Petitioner came to an end by Annexure-9 vide office order dated 1.12.1990. Therefore, the Petitioner has continued i.e. the service of the said Institute till the forenoon of 1.12.1990.

4. Reference in this connection may be made to the gazette notification dated 13.11.1990. The said gazette notification would show that under rule making power of Sub-section (1) of Section 11 of the said Act rules were framed and those rules were called Lalit Narayan Mishra Economic Development and Social Change Institute Rules, 1990. Under Rule 11 of the said rules it has been provided that all the Officers/employees of the said Institute will become the State Government Employees u/s 6 of the said Act and their salary, allowances and all other conditions of service shall be governed as State Government employees.

5. The Petitioner seems aggrieved by the letter when in answer to his application for payment of retirement benefit the authorities of the said Institute informed the Petitioner that even though the Petitioner worked in the said Institute upto

1.12.1990 he was not a Government employee but he was an employee of the said Institute. The Petitioner was also informed that he will not be given the benefit of leave encashment. It was also stated that even for payment of gratuity the Managing Committee''s approval is required but the Managing Committee has not taken any decision about the Petitioner. As such the Petitioner will not be granted any gratuity as the Governing Body has not taken any decision. The Petitioner has also drawn the attention of this Court to another order dated 11.8.1986 passed by the Joint Secretary to the Government of Bihar, Department of Education, Patna to the effect that the said Institute has been taken over by the Government on 19.4.1986 and as such it was decided that from the date of take over the teachers and non-teaching employees of the said Institute will be accorded with the same pay scale, dear-ness allowance and other benefits which are available to the teachers and non-teaching employees of other Universities but adhoc dearness allowance shall be payable to those employees who are not receiving the same only when it is available in the University.

6. In this case both the learned Counsel for the University and learned Counsel for the State have appeared and filed counter affidavit. In the counter affidavit filed by the said Institute the stand taken was that after examination of the case of the Petitioner by the department of Higher Education, it was decided that the Petitioner is not entitled to any pension, gratuity and leave encashment as would appear from Annexure-12. the stand taken is that the Petitioner was appointed as Reader on the basis of an interview held on 1.9.1979 in the said Institute. In the said appointment letter issued by the said Institute it was mentioned that the Petitioner will be entitled to 10% of basic pay as employees'' contribution to the Provident Fund in addition to the Institute''s own contribution of a similar amount. He has stated that in the said appointment letter there is no undertaking that the Petitioner will be entitled to pension, gratuity or any other post retirement benefits. It has been stated that the Petitioner completed 60 years of age on 24.8.1988. Thereafter he got extension for a period of one year. The said extension expired on 24.8.1989. Thereafter he was given further extension for a period of one year from 25.8.1989 to 24.8.1990 and the Petitioner retired from service of the said Institute with effect from the forenoon of 1.9.1990. It has been stated that the fact that the Petitioner retired from the services of the said Institute on 1.12.1990 is a mistake. It has further been stated that even though the Institute was taken over under the said Ordinance which later on became the Act, the services of the Petitioner were never scrutinized and as the Petitioner''s services were not screened, he cannot be allowed to become an employee of the State Government. It has been further stated that prior to the take over the service conditions of teaching and non-teaching staff of the Institute were governed under the provisions contained in the Memorandum of Association of the Institute known as Rules and Statutes and the said Memorandum of Association has made no provision for pension but there is a provision for gratuity. It has been stated that the Petitioner was paid the provident fund in full including the employer''s contribution with interest on

1.10.1991. It has been further stated that extension of service granted to the Petitioner was not approved by the State Government. It has been further stated that the Petitioner cannot get the benefit of gratuity as he has not completed 10 years of continuous service in the said Institute in view of the fact that the extension granted to him cannot be counted as Petitioner''s continuation in service.

7. In this case counter affidavit has also been filed by the learned Counsel for the State. In the said counter affidavit it has been stated that the screening committee for taking decision with regard to the services of employees of the Institute was constituted twice after the take over of the Institute by the State Government vide letter Nos. 120 and 121 both dated 18.1.1989 and the said screening committee has submitted report only with regard to two employees which does not include the case of the Petitioner. It has been further stated that if the Petitioner is considered to be a Government employee, he should have retired when he attained the age of 58 years i.e. on 24.8.1986 or immediately after take over of the Institute by the State Government but it appears that the Petitioner superannuated from service with effect from 1.12.1990 after enjoying extension of service.

8. Now the question is that after coming into effect of that Act and after take over of the said Institute what is the legal position in respect of the Petitioner''s services. u/s 6 of the said Act, from the date of take over all the staff of the Institution shall cease to be the employee of the Institution but they shall continue to serve the Institution on an ad hoc basis till a decision under Sub-sections (3) and (4) is taken by the State Government. Under Sub-section 3 of Section 6 of the said Act, the State Government is to take a decision on the basis of the report of a Committee in respect of each member of the teaching staff whether to absorb him in Government Service or whether to terminate his service or to allow him to continue on an ad hoc basis. It is an admitted position in the present case that no decision under Sub-section (3) of Section 6 of the said Act has been taken in respect of the Petitioner.

9. In this connection the Petitioner can legitimately say that for any non-action on the part of the Government, the Petitioner cannot be made to suffer. It is an admitted position even by the Respondents that the screening committee (sic) the Committee referred to under Sub-section (2) of Section 6 of the said Act did not scrutinize the Petitioner''s case. Therefore, learned Counsel for the Petitioner asserts that the services of the Petitioner after take over of the Institute by the Government should be construed as Government service and the further contention is that under the provisions of Rule 11 of the rules framed under the Act, the employees shall be deemed to be the employees of the State Government in the Education Department and about their employment and other condition of service, they will be governed under the rules and regulations framed by the State. Of course this is subject to exercise of power of the State Government u/s 6 of the said Act.

10. Even if this Court assumes that in the instant case, the Petitioner becomes a Government servant u/s 6 of the said Act and, therefore, gets the benefits of Rule 11 of the said rules, this Court is unable to grant relief of pension to the Petitioner for the reasons indicated below.

11. It is an admitted position that 10 years is the minimum qualifying service for getting pension under the Bihar Pension Rules. Every Government servant is governed by the said rules. If the Petitioner claims that he is a Government servant, his right to get pension will be governed under these rules. It is well known that right to pension is a statutory right. See D.V. Kapoor Vs. Union of India and others, . Therefore, the minimum qualifying service which is fixed for grant of pension is important. In the instant case even if it is assumed that the Petitioner becomes a Government servant in 1986, namely, from the date of take over of the said Institute under the said Ordinance in April, 1986, he does not earn 10 years of qualifying service as he admittedly retired after getting extension in the month of September, 1990. Therefore, he was merely for four years in Government service. On the basis of such service this Court cannot direct the grant of pension to the Petitioner. Almost a similar question came up before the Supreme Court in the case of State of Punjab and Ors. v. Dev Dutt Kaushal and Ors. reported in 1995 (4) S.C.C. 748. In that case the employee was working in a College in private management and the said service was not pensionable as in the instant case the services of the Petitioner in the said Institute was not pensionable but was subject to grant of provident fund. The same was also the position there. The Petitioner has admittedly received the provident fund. In that case also the private college was taken over and the minimum qualifying service for pension was 10 years. The question was whether for the purpose of computing the said qualifying service of 10 years, the services of the employee in private college could be counted. The Supreme Court answered in the negative and discussed the problem in the following words:

Now coming to the claim for pension, it may be noted that according to the Government rules, no lecturer is entitled to pension unless he puts in ten years'' service. There is no dispute about this position. There is equally no dispute that the Respondent had not served for ten years under the Government. The contention of the Respondent, however, is that the service rendered by him in the college while it was under the private management should also be counted and his pension fixed on that basis. We are again unable to appreciate this contention. As stated above, the Respondent was not entitled to any pension according to the service conditions obtaining in the private college. Had the College not been taken over by the Government and had he retired in the normal course, he would not have been entitled to any pension. He was entitled only to contributory provident fund. It is only under Government service that pension is provided for. But such pension is available only if an employee puts in ten years of service under the Government.

12. Following the said ratio, this Court cannot grant the claim of the Petitioner to

be paid pension and leave encashment inasmuch as the same was not part of the service condition of the Petitioner while he was appointed as a Reader in the said Institute as would appear from Annexure-A to the counter affidavit.

13. The submission of the learned Counsel for the Petitioner that the Petitioner must be given the retirement benefit in terms of Annexure-4 and he should be paid the same benefit which was available, to the employees of the University also, cannot be accepted in view of the face that the said order passed by the Joint Secretary to the Government of Binar only relates to pay, dearness allowance and other benefits but in the said letter there is no mention of retirement benefit. In absence of any mention of retirement benefit, it is not possible for this Court to read into the said letter any stipulation that the Petitioner should be paid the retirement benefit similar to those which are paid to University teachers. From the entire tenor of Annexure-4 it is clear that the same relates to payment of salary, dearness allowance etc.

14. Therefore, considering the Case from various angles, this Court does not find any reason to interfere with annexure-12 save and except on the question of payment of gratuity. Paragraph 4 of Annexure-12, the order dated 15.10.1996, acknowledges that there is provision for grant of gratuity to the employee of the said Institute. But it could not be done in the case of the Petitioner as in his case the Managing Committee has not taken any decision.

15. After the take over there does not exist any Managing Committee of the said Institute as the said Institute completely vested in the State Government. So the Petitioner''s services in the said Institute from 1979, prior to take over, and after take over should be considered for the purpose of grant of gratuity. It is clear from the two extensions granted to the Petitioner that the Petitioner''s service was satisfactory. Therefore the entire service period of the Petitioner right from the date of his appointment in the said Institute in September, 1979 till his superannuation in September, 1990 should be counted for the purpose of grant of gratuity on the basis of last pay drawn. Such payment of gratuity should be made to the Petitioner within a period of two months from today. If it is not so paid, the Respondents authorities will have to pay the same along with interest at the rate of 12% per annum to be calculated from the date of expiry of the said period of two months till the actual payment.

16. This writ petition is thus disposed of with the above observation/direction. There will be no order as to cost.

