

(1989) 11 PAT CK 0007
In the Patna High Court
Case No : C.W.J.C. No. 7784 of 1988

Dr. Nityanand Singh

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 07-11-1989

Acts Referred:

Constitution of India, 1950 — Article 213

Citation : (1990) 1 BLJR 582 : (1990) 2 PLJR 79

Hon'ble Judges : N.P. Singh, J; N. Pandey, J

Bench : Division Bench

Judgement

N.P. Singh and N. Pandey, JJ.—This writ application had been filed on behalf of the petitioner challenging the validity of the practice of the State of Bihar in promulgating one Ordinance after another amending the different provisions of the Patna University Act, 1976 (hereinafter referred to as "the Act") especially Section 64 of the Act which fixes the age of retirement of the teaching and non-teaching employees of the University.

2. Section 64(a) of the Act was as follows:

64. Retirement from service.—(a) save as otherwise expressly provided in this Act the date of retirement of any teaching or non-teaching employee other than inferior servants of the University or any college, shall be the date on which he attains the age of 60 years:

Provided that such teachers who do not opt for the pay-scales revised with effect from the first day of January 1973, and such non-teaching employees, who are in the service of the University from a date prior to the commencement of this Act, shall retire after attaining the age of sixty-two years:

Provided further that no University shall extend the period of service or re-appoint any teaching or-non-teaching employee after his completing the age of 60 or 62 years as the case may be.

On a plain reading it appears that by Section 64(a) the date of retirement of any teaching or non-teaching employee other than inferior servants of the University and the College was fixed at 60 years with a proviso that such teachers who do not opt for the pay-scales revised with effect from the first day of January, 1973, and such non-teaching employees, who are in the service of the University from a date prior to the commencement of the Act, retire after attaining the age of sixty-two years.

3. By the Patna University (Second Amendment) Ordinance, 1986 (Bihar Ordinance No. 34 of 1986) several amendments were introduced in the Act. Section 3 of that Ordinance amended clause (a) of Section 64 aforesaid. The substituted Section 64(a) by the aforesaid Ordinance is as follows:

64(a) Save as otherwise expressly provided in this Act the date of retirement of a teaching employee of the University or of a college with effect from the 1st April, 1986 shall be the date on which he attains the age of 62 years. The date of retirement of non-teaching employee (other than inferior servants) shall be the date on which he attains the age of 60 years, but the date of retirement of such non-teaching employees who are in the service of the University prior to the commencement of this Act, shall be the date on which he attains the age of 62 years:

Provided that the University shall in no case, extend the period of service of any of the teaching or non-teaching employee or re-appoint him after he attains the age of 60 or 62 years as the case may be.

In view of the amendment introduced by the Ordinance aforesaid, the date of retirement of the teaching employees of the University or of a college with effect from 1st April, 1986 was raised to 62 years.

4. When Ordinance No. 34 of 1986 aforesaid lapsed Ordinance No. 20 of 1987 was promulgated. Clause (a) of Section 64 aforesaid, as introduced by the Ordinance No. 34 of 1986, was kept intact. After lapse of Ordinance No. 20 of 1987, yet another Ordinance in identical language of the earlier Ordinance was promulgated so far Section 64(a) is concerned. This was followed by Bihar Ordinance No. 11 of 1988 with identical provision so far age of retirement of teaching staff is concerned. After the lapse of that Ordinance, Bihar Ordinance No. 7 of 1989 was promulgated. Clause (a) of Section 64, as amended by earlier Ordinances was kept intact so far the age of retirement is concerned. The last Ordinance with identical Section 64(a) promulgated was Bihar Ordinance No. 17 of 1989.

5. While challenging the validity of the practice of promulgating successive Ordinances, reliance was placed on the well known judgment of the Supreme Court in the case of Dr. D.C. Wadhwa and Ors. v. State of Bihar and Ors. AIR 1987 SC 679, where it was held that re-promulgation of Ordinances by the Governor without getting them replaced by Acts amounts to a practice in violation of the constitutional Provisions. It was pointed out that power to

promulgate an Ordinance is to be exercised to meet an extraordinary situation and cannot be allowed to circumvent the other constitutional provisions.

6. Normally, in view of the question raised aforesaid, we would have examined this aspect of the matter, in detail. But, when the case was taken up for hearing, there was no dispute that even the last Ordinance, i.e., Ordinance No. 17 of 1989, which had been promulgated on 4th May, 1989, has ceased to operate, in view of Article 213(2)(a) of the Constitution. In other words, neither fresh Ordinance has been promulgated nor the provisions have been incorporated in the Act by any amending Act which has come into force. The effect will be that Section 64(a) which had been introduced in the Act by different Ordinances raising the age of retirement of teaching staff of the University from 60 to 62 years has lapsed and come to an end.

7. On behalf of the petitioner it was pointed out that the State Government has issued a communication dated 6.9.1989 to different Vice-Chancellors of the Universities saying that although the Ordinance raising the age of retirement of the teaching staff of the University from 60 to 62 years has lapsed but till a final decision on the amendment of the Act is taken by the Governor of Bihar, the teaching staff of the University, who have attained 60 years of age, should not be made to retire. It was rightly urged on behalf of the petitioner that any executive decision taken by the State Government and communicated to the different Vice-Chancellors of the Universities cannot take the place of an Ordinance or an Act amending the original Section 64(a) of the Act by which the date of retirement of the teaching staff of the University had been fixed at 60 years. It is well-known that any statutory provision cannot be amended by any executive instructions. One Section 63(a) of the Act has fixed the age of retirement of the teaching staff of the University at 60 years, that can be amended either by an Ordinance promulgated in accordance with Article 213 of the Constitution or by an amendment introduced in the Act itself by an amending Act. At, in the instant case, there is no dispute that neither any Ordinance has been promulgated nor any Act has come into force amending Section 64(a) as it stood before the first Ordinance, i.e., Ordinance No. 34 of 1986, was promulgated, there is no escape from conclusion that after the lapse of last Ordinance, i.e., Ordinance, No. 17 of 1989, the temporary amendment introduced by the different Ordinance has come to an end. The learned Advocate General, who has appeared on behalf of the State, could not contest this legal position as such it does not need any detailed examination.

8. Now it has to be examined as to whether after lapse of the Ordinance which had amended Section 64(a) of the Act the original Section 64(a) of the Act shall revive. In this connection reference may be made to *Crazies on Statute Law*, 7th Edition, p. 419 where it has been pointed out as follows:

If an Act which repeals an earlier Act is itself only a temporary Act, the general rule is that the earlier Act is revived after the temporary Act is spent....

But there will be no revivor if it was clearly the intention of the Legislature to repeal the earlier Act absolutely.

9. In the case of *Stevenson v. Oliver* (1841) 151 ER 1024 it was pointed out as follows:

There is a difference between temporary statutes and statutes which are repealed, the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction.

From mere reference to the facts of the aforesaid case it shall appear that by a temporary statute it was provided that every person, who held a commission or warrant as surgeon or assistant-surgeon in His Majesty's navy or army, should be entitled to practice as an apothecary without having passed the usual examination. After the lapse of the temporary statute a question arose whether such persons who form a class to whom a benefit and a right to practice without having passed the usual examination had been given by the temporary statute in question could practice after the lapse of the statute. It was observed:

We must look at this act...and see whether the restriction in the 11th clause, that the provisions of the statute are only to last for a limited time, is applicable to this privilege, in question. It seems to me that the meaning of the Legislature was that all assistant-surgeons, who were such before the 1st of August, 1826, should be entitled to the same privileges of practicing as apothecaries, as if they had been in actual practice...and that their privilege as such was of an executor nature, capable of being carried into effect after August 1, 1826.

10. The same question was examined by the Supreme Court in the case of *State of Orissa Vs. Bhupendra Kumar Bose*, , was observed:

In our opinion, what the effect of the expiration of a temporary Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon their character whether the said right and liability are enduring or not.

It was also said-

Therefore, in considering the effect of the expiration of a temporary statute, it would be unsafe to lay down inflexible rule. If the right created by the statute is of an enduring character and has vested in the persons, that right cannot be taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and had been imposed upon a person, the imposition of the penalty would survive the expiration of the statute. That appears to be the true legal position in the matter.

In that case the Ordinance which fell for consideration clearly expressed an intention that in spite of the expiry of the ordinance the right created were to last

even thereafter and that is why it was held as follows:

Now, turning to the facts in the present case, the Ordinance purported to validate the elections to the Cuttack Municipality which had been declared to be invalid by the High Court by its earlier judgment so that as a result of the Ordinance, the elections to the Cuttack Municipality must be held to have been valid. Can it be said that the validation was intended to be temporary in character and was to last only during the life-time of the Ordinance? In our opinion, having regard to the object of the Ordinance and to the rights created by the validating provisions, it would be difficult to accept the contention that as soon as the Ordinance expired, the validity of the elections came to an end and their invalidity was revived. The rights created by this Ordinance are, in our opinion, very similar to the rights with which the court was dealing in the case of *Stevenson* and they must be held to endure and last even after the expiry of the Ordinance. The ordinance has in terms provided that the Order of the court declaring the elections to the Cuttack Municipality to be invalid shall be deemed to be and always to have been of no legal effect whatever and that the said elections are thereby validated. That being so, the said elections must be deemed to have been validly held under the Act and the life of the newly elected Municipality would be governed by the relevant provisions of the Act and would not come to an end as soon as the Ordinance expires.

11. From reference to the different Ordinances which have purported to amend Section 64(a) of the Act, it is apparent that it was never intended to introduce any permanent amendment in the main Act or to confer a benefit which was to last even after the expiry of such temporary legislation as was in the case of *The State of Orissa v. Bhupendra Kumar Bose and Ors.* (supra). It need not be pointed out that the normal rule is that a provision introduced in the Act by an Ordinance comes to an end with the lapse of the Ordinance unless the intention is clearly expressed in the Ordinance that the right conferred by the Ordinance amending the Act was to continue and last even after the expiry of the Ordinance. In the instant case if in Section 64(a), which was introduced by the Ordinance, it would have been clearly said that those teaching employees who were in the service of the University on 1st April, 1986, shall retire on attaining the age of 62 years, there was scope for argument that a benefit has been conferred by amending Ordinance on a class or group of employees which shall continue even after expiry of the Ordinance. But the language of amended Section 64(a) is not such. It simply says "the date of retirement of a teaching employee of the University or of a College with effect from 1st April, 1986 shall be the date on which he attains the age of 62 years". As such after lapse of the last Ordinance and in absence of any Act having come in force substituting the original Section 64(a) aforesaid the original Section 64(a) has revived and the teaching staff of the University shall retire after attaining the age of 60 years.

12. This writ application is, accordingly disposed of.