

(1982) 04 PAT CK 0002

In the Patna High Court

Case No : C.W.J.C. No's. 537 and 566 of 1982

Dr. Shailendra Nath Srivastava and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 13-04-1982

Acts Referred:

Bihar Legislature (Members Salaries, Allowances and Pension) Act, 1960 — Section 8
Constitution of India, 1950 — Article 14, 19(1), 213
Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 6
Patna University (Amendment) Ordinance, 1982 — Section 2(2), 40
Patna University Act, 1976 — Section 2, 23(2), 65

Citation : AIR 1982 Patna 163 : (1982) PLJR 230

Hon'ble Judges : Sarwar Ali, Acting C.J.; U.C. Sharma, J

Bench : Division Bench

Advocate : Prabha Shankar Misra, Guru Sharan Sharma, Prabhakar Tekriwal, Dinendra Nath, Ashok Kumar Mallick, Vinod Kumar Kanth and Radha Raman, for the Appellant; K.P. Varma, General, R.B. Mahto, A.A.G. and A.B. Ojha, for the Respondent

Judgement

Sakwar Ali, Ag. C.J.

1. In these writ applications the constitutional validity of Section 40 of Patna University (Amendment) Ordinance, 1982 amending Section 65 of Patna University Act, 1976 and Ordinance 37 of 1982 are under challenge. In view of the change in law certain orders have been passed. They are also under challenge. Thus Annexures 3 and 4 to C.W.J.C. 537/82 and Annexure 1 to C.W. J.C. 566/82 are sought to be quashed. Both the petitioners are members of the State Legislature. Petitioner in C.W.J.C. 537/82 is also a member of the Syndicate and has been made in charge of N.S.S. Scheme. At the stage of admission we have heard the learned counsel for the parties at length. In my view, filing of Counter-affidavit on behalf of the respondents is not necessary. We are, therefore, proceeding to pass final order without adjourning the case for the purpose of enabling the respondent to file a counter-affidavit.

2. As it is well known in some of the States bicameral system of Legislature is in vogue. Bihar is one such State. There are two Houses of Legislature -- the Assembly and the Council. 1/12th of the members of the Council are to be elected by electorates consisting of persons who have been for at least three years engaged in teaching in educational institutions within the State, not lower than that of secondary school, as may be prescribed by or under any law made by the Parliament (Article 171 (3) (c) of the Constitution). It is not in dispute that at present both college teachers as well as teachers of secondary schools are eligible to be voters for teachers constituencies. But it is not only teachers, who may be elected from such constituencies. If a person is an elector for any Assembly Constituency in the State, he may be elected to fill a seat in the Legislative Council of a State subject, of course, to the other qualifications as laid down in the Constitution or the relevant law. It is not in dispute that teachers of University and at least one teacher of a secondary school are members of the Legislative Council at present.

3. Section 65 of the Patna University Act, 1976 (the Act) deals with "code of conduct". Clause (a) of Section 65 (prior to the present amendment) requires teachers to take prior approval of the University for the purpose of contesting an election as a candidate to the State Legislature or the Parliament or being nominated thereto. In the event of being a member of the State Legislature or the Parliament such teacher is enjoined to take leave due or extraordinary leave during the period of the sessions of the State Legislature or Parliament, If he is engaged in the work relating to such Legislature then also he has to take such leave for the period that he is so engaged. He has also to abide by the conditions and restrictions as prescribed in the statute.

4. Section 65 aforesaid has been amended by Section 49 of Patna University (Amendment) Ordinance 1982 (hereinafter referred to as the first Ordinance). The amended provision is as follows:--

"65. "Code of Conduct" (1) Code of Conduct for the employees of the University will be regulated by Statutes. (2) The post of teacher and a non-teacher of the University/college/institution, controlled by the University, will be normally a full time post, so long as it is not otherwise marked. Persons appointed to these posts have to comply with the works of teaching and other duties entrusted (to them) by the University/college/institution for the full term. If any teacher or employee of a University/ college/institution, controlled by the University accepts any elected or non-elected post of any institution or the membership thereof, which causes hindrance in teaching or in other works of the University, such a person shall have to obtain permission From the University/college/institution and to take leave without pay for a fixed period from his employers.

Permission will not be granted to a teacher and an employee of the University/ college/institution for undertaking any private business, enterprise, tuition or other work which in the opinion of the University/college/institution, is not in the interest of his appointment. A teacher/employee who proceed on extra ordinary

leave, will not be entitled to receive pay or allowance from the fund of the University/college/institution and will be/will not be entitled to earn increase in pay in accordance with the decision taken by the University, keeping in view the nature of the accepted service. Such extraordinary leave can be sanctioned by the University/college/ institution and such leave will be regulated by Statutes.

Provided that in case, a teacher/an employee of the University/college/ institution, is elected to the legislature of the State or of the Centre, then keeping in view his responsibility, his representative character, and his reputation in public life, he will be deemed to be on special leave without pay from the date he takes oath of the office for the full term of his membership of the State and the Central legislature. The special leave will be regulated by Statutes. Full security will be given to the interest of teachers and employees, who proceed on special leave, so that they will continue to earn increase in pay, promotion, seniority in service etc. On completion of the term of membership of the legislature they will be entitled to resume their posts in the University/college/ institution according to their position."

5. After the hearing of the case was "concluded and judgment was reserved there has been further amendment of Section 65 of the Act by Ordinance 37 of 1982. This Ordinance provides in Section 2 (1) that in the amended Section 65 of the Act the words elected after the words members of Legislative Council should be deleted. The effect is that now the provision applies both to the elected and nominated members. The other amendment brought about is as follows :--

"(2) The following proviso shall be added after the proviso to Section 65 of the aforesaid Act :

Provided that in the case of such teacher/employees of the University/college/ institution who has become member of the State/Central legislature the first proviso shall be deemed to have come into force on 23rd Jan. 1982 the date on which Patna University (Amendment) Ordinance 1982 (Ordinance No. 19, 1982) was promulgated." (Translations made in the office of the High Court)

It would thus be seen that if a teacher/employee of the University/college/ institution, to whom the provision of the first Ordinance applies, is elected to a Legislature, he is deemed to be on special leave for such period as he continues to be a member of such a legislature. In all other respects the interests of the teacher are fully safeguarded. These amending provisions are under challenge.

6. It was contended that Section 40 of the first Ordinance is in conflict with Article 171(3)(c) of the Constitution of India read with Section 27 (5) (b) of the Representation of the People Act, 1950. The argument was developed thus. It was pointed out that Article 171(3)(c) of the Constitution permits representation from teachers' constituency in Legislative Council. An elector to the teacher's constituency is :

(b) every person who is ordinarily resident in a teachers' constituency, and has,

within the six years immediately before the qualifying date for a total period of at least three years, been engaged in any of the educational institutions specified under Clause (b) of Sub-section (3) by the State Govt. concerned..."

A teacher, it was contended, who is on "special leave" for over three years, shall not become eligible to be included as a voter for the teachers constituency. The reason, it was urged, is that a teacher on special leave cannot be said to be engaged in teaching. The amended provision, therefore, takes away a right conferred under the Representation of the People Act. It was, therefore, ultra vires and beyond the legislative competence of the State Legislature. The relevant entry relating to election to legislatures is Entry No. 72 of List I of the Seventh Schedule of the Constitution. The State legislature cannot legislate or encroach on this field. But this is what has been done by the impugned provisions.

7. Sri K. P. Verma, learned Advocate General appeared on behalf of the State. and Sri Ram Balak Mahto, learned Additional Advocate General appeared on behalf of the University. It was contended on behalf of the respondents that the expression "engaged in teaching" does not envisage actual teaching in classes. Referring to the dictionary meaning of the word "engage", it was pointed out that the word means "employed, occupied". Employ means "to make use of the service; to give employment to; to entrust with some duty or behest". The word employed means "engaged by employer". A person, it was urged, who is on special leave is also engaged by employer. While on leave he is in the employment of the employer. Thus giving the word its ordinary dictionary meaning, it was urged, a person on leave whether ordinary, extraordinary or special, is engaged in teaching, although he may not be actually taking classes in the educational institutions concerned. It was also pointed out that the word "occupy" means "to hold a position....." Thus the alternative meaning of the expression engage also supports the contention advanced. Reference in this connection was made to *Bennina (Mitcham) Ltd. v. Bijestra* 1946 KB 58 where it was observed the word engaged is deplorably ambiguous. "An employer engages a servant when he makes an agreement with him for his service. A workman is engaged on work when he is actually carrying it out. In fact, engage of a master has an entirely different meaning to engage in of a workman". It was the first meaning ascribed to the expression engaged, it was argued, which will be applicable in the instant case. Learned counsel for the petitioners referred to the decision of the Privy Council in *London and India Docks Company v. McDougall & Bonthron Ltd.* 1909 AC 25. But this decision, in my view, is in a different context dealing with meaning of the expressions "bona fide engaged in so discharging or receiving goods or ballast to or from on Board on any ship or vessel lying therein". It was, while interpreting the aforesaid expressions, that it was observed that a lighter could not be said to be engaged if she is in the dock when her presence is not reasonably necessary for the operations mentioned in the section. This decision, in my opinion, is of no help to the petitioners as the expression "engaged" has been interpreted in a completely different context I

need not, however, express any final opinion on the contention raised on behalf of the respondents, as in my view, the alternative argument is a complete answer to the contention raised on behalf of the petitioners.

8. It was contended on behalf of the respondents that the legislation in question is in pith and substance covered by Entry 25 of List III of the 7th Schedule of the Constitution, which is "Education, including technical education, medical education and Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour." Any incidental encroachment on the subject of "election" (which is a Union subject) cannot invalidate the legislation. It was also contended that, in fact, there is not even an incidental encroachment as the law does not deal, with the qualification of voters for teachers' constituency. In my view, the legislation being in pith and substance a law in relation to Education, even if there be encroachment on a subject covered by the Union List (about which I am not expressing any opinion), the impugned provision is free from constitutional vice. The theory of pith and substance in relation to legislations is well settled by numerous decisions of the Judicial Committee as also the Supreme Court. It would be sufficient for the present purposes to extract a few lines from the decision of the Privy Council in AIR 1947 60 (Privy Council) . In that case Bengal Money Lenders Act was challenged on the ground that it encroached on the Federal Legislative List of the Government of India Act 1935 relating to promissory note, Corporations and Banking (Items 28, 33 and 38 of the Federal Legislative List). Holding that the impugned legislation was in pith and substance in relation to money lending transaction, and was within the exclusive competence of the Provincial Legislature to legislate, Lord Porter, speaking for the Board said :

"Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found." It was further observed:--

"The extent of invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provisional matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content." Here the impugned provision is squarely covered by Item 25 of List III. It deals with the condition of service of a teacher/employee of the University and lays down under what circumstances he would be deemed to be on special leave. It need hardly be

emphasised that items of legislative list have to receive widest possible construction, as was observed in AIR 1941 16 (Federal Court) "each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it". I am, therefore, of the view that there is no lack of legislative competence on the grounds put forth on behalf of the petitioners in the two writ cases argued by Sri P. S. Mishra and Sri Radhu Raman.

9. When this case was again heard for sometime in view of the amendment brought about by Ordinance 37 of 1982 learned counsel for the petitioners placed reliance on the decision in *State of Orissa Vs. M.A. Tulloch and Co.*, and contended that since the impugned provision was repugnant to the Central Legislation on the topic of election, which occupied the whole field, the impugned provision was unconstitutional and beyond legislative competence. In my view the decision in *Tulloch's* case has no application in the present circumstances. The Representation of the People Act deals with the subject of election. It may occupy the whole field so far as the election is concerned. But the terms and conditions of service of a teacher who has been elected to a legislature is not a matter which could be dealt with in the Representation of the People Act. Nor did the said legislation contemplate the exclusion of State Legislature from legislating in relation to teaching staff who become members of a legislature in respect of matters connected with their service as a teacher and other matters which come under the legislative entry "Education". There is no repugnancy, in the sense used in *Tulloch's* case, between the State legislation and the Central legislation. Learned Additional Advocate General relied on the decision in *A.S. Krishna Vs. State of Madras*, and contended that the question of repugnancy could only arise when, the two legislations were in the Concurrent List. Here one legislation was under List I while the Other under List III, which is a Concurrent List. Had both the legislations been on a subject in the Concurrent List, only then the question of repugnancy could be agitated. I do not propose to express any opinion on this aspect of the matter.

10. The next contention that was raised was that the impugned provision is discriminatory. It was said that the teachers of a University are deemed to be on special leave if they are members of a legislature, either State or Central, But similar is not the position with respect to teachers of secondary schools. On behalf of the respondents, it was contended that question of discrimination does not arise as the legislation does not deal with the teachers of secondary schools at all. It was further pointed out that the present position is that most of the schools have now been taken over by the Government. Teachers of such schools are disqualified from being member of a legislature as they hold office of profit under the State Government It was, however, conceded that there are still some proprietary and minority schools whose teachers are not so disqualified. In any event, I am of the view that University teachers constitute a class by themselves. Their conditions of service including the extraordinary leave or special leave need not be identical with those of teachers of secondary schools. The legislature in its

wisdom thought that imparters of higher education must devote themselves wholeheartedly to the cause of education. This would lead to the betterment of the teaching standards. If they choose to serve the people as their representative in the legislature, which they may as well do, then the call upon their time and energy as a legislator shall be such as to be an impediment in the discharge of their duties as imparters of higher education. The University teachers thus constitute a class by themselves. Among teachers of the University there is no discrimination. All are treated alike. The impugned provision cannot, therefore, in my view, be held to be discriminatory on the ground suggested by the petitioners.

11. The two contentions mentioned above constitute the main attack on the validity of the legislations. Some subsidiary points were also taken which may be noticed. It was contended that there is a conflict between Section 8 of the Bihar Legislature (Members Salary and Allowances) Act 1960 and the present legislation. Section 8 of the Act aforesaid provides that the grant of salary and allowances to the members shall not be a bar to their receiving other emoluments in a different capacity. But whether they are entitled to any emoluments either on the basis of a contract or a law is not dependant on this provision. I do not think that Section 8 becomes nugatory because special leave without pay is provided under a different legislation in specified contingencies.

12. It was contended that the impugned legislations constituted unreasonable restriction on the right of the petitioners to carry on the profession of teaching. The petitioners could not be forced to go on leave when they did not want so to do. For the reasons already discussed it is clear that the impugned legislation is for the betterment of the teaching standards in the University as already explained in paragraph 10 of this judgment. The provision is clearly reasonable.

13. It was next contended that the provision in question amounts to suspension of contract of service, and suspension is only possible under the relevant provision of the University Statute. I do not think that the legislative power to provide for the conditions under which special leave without pay would be applicable becomes nugatory because of some provisions of University Statutes relating to suspension of teachers. I am, therefore, of the view that the impugned provisions do not suffer from any legal or constitutional vice. They are held to be valid pieces of legislation within the legislative competence of the State Legislature and within the Ordinance making power of the Governor. The making of Ordinance, as is now well settled, is a legislative act. (See A.K. Roy and Others Vs. Union of India (UOI) and Others,).

14. Arguments were advanced when the case was originally heard on the meaning to be ascribed to Section 40 of the First Ordinance. I propose to deal with them, for if the contention of the respondents is accepted Ordinance 37 of 1982 becomes only by way of abundant caution and clarificatory in nature. The provision has been fully quoted. It says that a teacher etc. shall be deemed to be on special leave without pay from the date he takes oath to the post for the full

term of the membership of the State and Central legislature. Learned counsel for the petitioners contended that the provision is not retrospective in nature. It is only prospective: It applies to those who henceforth take oath of their office. It does not affect those who have taken oath prior to the present amendment. On behalf of the respondents it was contended that the amending Ordinance came into force on 23-1-1982. It, therefore, operates from the said date. Members of Legislature of defined category shall be deemed to be on leave without pay from the said date.

15. The provision cannot be said to, be retrospective. Neither the language nor necessary intendment as revealed by the words used lead to an inference of retrospectively. The presumption that a legislation is prospective is therefore, applicable. The only question that needs to be considered further is as to whether it applies to those who take oath hereinafter, or it applies even to those who have taken oath earlier, but would be applicable from the date of the enactment of the Ordinance.

16. It is true that we have to interpret the law "according to the intent of persons that made it" (4 Co. Int. 330), But where the language is clear, specific and unambiguous, the intent is to be gathered from the language used. Here the words used in the legislation are not capable of two meanings. When it is said that the teacher-legislators shall be deemed to be on special leave from the date they take oath of their office, it is not open to the courts to substitute that date by the process of interpretation. The contention of the petitioners that the Act is not retrospective is accepted by the learned Advocate General appearing for the State. In this situation the law can operate only in relation to the oaths that are taken after the promulgation of the Ordinance.

17. What is suggested on behalf of the State amounts to addition of certain words to the section. If the intention was to apply the law even in respect of those who had taken oath earlier, and were members of legislature on the date of coming into operation of the Ordinance, we would expect that words "or the date of commencement of this Ordinance, whichever is later" or words to similar effect would have been there. I accept that under certain special circumstances it may be possible to even add to the words used in a legislation. but those are rare occasions. If the words are ambiguous or where two meanings are possible it would be legitimate, and indeed the correct method of interpretation, to prefer a meaning which is in accord with the statutory objective, justice and other relevant considerations. But here the words used are clear and the meaning is plain. There is no room for imagining anomaly or inventing fancied ambiguity in order to depart from the plain meaning of the words. I am, therefore, of the view that the language of Sec. 65 as amended by the first Ordinance is such as to be inapplicable to teachers who have taken oath on a date prior to the promulgation of the Ordinance.

18. This brings us to the consideration of Ordinance, 37 of 1982. It is now necessary to examine the true effect of Section 2 (2) of the said Ordinance. I

have already quoted the aforesaid provision. It states that for those who have already become members of the Legislature, the first proviso of the Ordinance shall be deemed to apply from 23-1-1982, the date of coming into force of the first Ordinance. Learned counsel for the respondents contended that the true meaning of the aforesaid provision is that in relation to the existing members of legislatures the provision in relation to special leave as enacted by the first Ordinance applies from the date of the promulgation of the said Ordinance i.e. 23-1-1982, and not the date on which they take oath. Learned counsel for the petitioners on the other hand contended that such is not the effect of the provision. It does not affect the earlier amendment which contemplated the grant of special leave from the date of taking an oath by the members of different legislatures. In my view, it is not possible to accept the contention of the petitioners. If what is contended by them is accepted, it means that the amendment was superfluous and of no effect. Such an intention cannot be attributed to a law making body. The contention of the learned counsel for the respondents is, therefore, more reasonable and consistent with the intention as revealed by the words used.

19. Learned counsel for the petitioners contended that the enactment of Ordinance 37 of 1982 was an abuse of power and was, therefore, unconstitutional. It was contended that in view of the decision in A.K. Roy and Others Vs. Union of India (UOI) and Others, it would be permissible for this Court to examine whether the Ordinance constituted an abuse of power. Learned Additional Advocate General rightly pointed out that the purpose of amendment was to deal with the suggested lacuna in the earlier ordinance. Indeed, the purpose of amendment in many cases is to remove the defect in law due to imperfect drafting. In my view, the contention is correct. Many a time the words used do not convey the intention of the legislature. In such a situation it is obvious that amendment of law is the only remedy. Here a controversy was raised by the petitioners themselves that the amending provision did not apply to teachers who have already taken oath, and would have application only to those who take oath hereinafter. If in that situation the law making body found that the words used were capable of two interpretations or that the words used did not give effect to the intention of the legislation, I do not think that an amendment of law could, even by a stretch of imagination, be characterised as abuse of power. The contention of the learned counsel for the petitioners is, therefore, unacceptable. It was next contended that the date, 23rd Jan. 1982, has been "picked out from the hat", and is therefore arbitrary. I do not find any merit in this contention. The reason why this date has been chosen is obvious. It is the date when the earlier ordinance came into force. There is nothing arbitrary in the choice of the date for applicability of the amended provision.

20. On behalf of the petitioner in C. W. J. C. 537/1982 it was contended that on the basis of impugned orders the petitioner was being treated as having ceased to be a member of Syndicate and was also relieved of the charges of N.S.S. Scheme. This was impermissible even if the statutory provisions under challenge

were intra vires. So far as making the petitioner in charge of N. S. S. Scheme is concerned, it is accepted that he was made in charge by the Vice-Chancellor. The Vice-Chancellor could, therefore, issue the impugned direction that he would cease to be in charge of this scheme. One who appoints can also terminate the appointment. I do not find any legal infirmity or lack of power in the Vice-Chancellor so far this part of the order is concerned. Challenge to the other part of the annexure requires careful examination. Certain provisions of the Patna University Act will have to be considered in this context. Section 2 (o) of the Act defines lecturer to mean "a teacher of a college of the University possessing such qualification as may be prescribed by the Statutes". Teacher has been defined in Section 2 (r) as follows--

"A teacher includes Principal, University Professor, College Professor, Reader, Lecturer, Demonstrator and other persons imparting instruction in any department, or in any college or institute maintained by the University."

Section 23 of the Act lays down as to who shall be the members of the Syndicate. It states that two members shall be from such lecturers who have the teaching experience of at least ten years. They have to be elected in accordance with the system of proportional representation by means of single transferable vote. The proviso to Section 23 (2) is as follows :

"Provided that any member elected or nominated shall be deemed to vacate office with effect from the date on which he ceases to be a member of the body which had elected or nominated him."

It is on this proviso that reliance is placed by the learned counsel for the University for contending that the petitioners shall be deemed to vacate the membership of the Syndicate. But it has to be observed that the vacation from office can only take place where a person has ceased to be a member of the body which has elected him. The body electing the petitioner is of teachers. Learned counsel for the University had, therefore, contended that a person going on leave ceases to be a teacher. Reliance was placed on the definition of a teacher in Section 2 (r).

21. It was contended that a person cannot be said to be imparting instruction in any department or college if he is on forced leave. There are two answers to this contention. The first is that the definition of teacher in Section 2 (r) is an inclusive, and not exhaustive definition. Secondly, the ordinary meaning of the expression teacher, in the context of this Act, includes, in my opinion, a teacher who is on leave and during that period may not be engaged in any actual teaching work in an institution. If the argument of the learned counsel is accepted then a person who is on leave even for a day ceases to be a teacher. Such could not be the intention of the legislature. I am, therefore, of the view that a person does not cease to be a teacher within the meaning of the Act if he is on leave whether voluntarily or involuntarily. A teacher on leave does not cease to be a member of the body which elected him within the meaning of

Section 23 (2) of the Act. Such being the position even though the petitioner is an leave in view of the provision of the Ordinance, he does not cease to be a member of the Syndicate. Annexure-3 in so far as it suggests that the petitioner has ceased to be a member of the Syndicate, is therefore, invalid and cannot be given effect to.

22. In view of the discussion aforesaid I am of the view that there is no merit in C. W. J. C. 566 of 1982 and it is accordingly dismissed. In so far as C. W. J. C. 537 of 1982 is concerned, it is allowed only to this extent that the petitioner cannot be deemed to have ceased to be a member of the Syndicate. In the facts and circumstances of the case, there shall be no order as to costs.

U.C. Sharma, J.

23. I agree.