

(1990) 03 OHC CK 0025

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1704 of 1982

Kalicharan Rath

APPELLANT

Vs

Orissa Sangeet Natak Academy and Another

RESPONDENT

Date of Decision : 16-03-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (1990) 70 CLT 92 : (1991) 1 LLJ 125

Hon'ble Judges : L. Rath, J;A.K. Padhi, J

Bench : Division Bench

Advocate : D.S. Misra, for the Appellant; K.K. Jena, for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—The petitioner has approached this Court assailing his reversion to the office of opposite party No. 1 as an L.D. Assistant while he was holding the post of the Administrative Officer of the Orissa Chhou Dance Training Centre at Baripada and instead giving of appointment to one Kasinath Batik in his place. The petitioner has claimed the reliefs of his appointment to the post of the Administrative Officer and to treat him as continuing in the post with all other benefits that go with it.

2. The facts briefly stated are that the Orissa Sangeet Natak Academy which is a Government sponsored organisation and is not disputed to be an instrumentality and agency of the State has a Chhou Dance Training Centre at Baripada. The post of the Administrative Officer of the Centre having fallen vacant, an advertisement was issued on 5th May 1979 inviting applications to fill up the post. In the advertisement the qualifications prescribed were (a) General educational qualification up to Intermediate in Arts, and (b) Degree in Music, Dance and Drama, and preference to be given to graduates with experience on the subject. Though twentyfive applications were received in pursuance of the advertisement, yet none were found suitable by the Selection Committee and thereafter one Ramesh Chandra Mohapatra, who was associated with Chhou

Dance at Mayurbhanj, was given temporary appointment for one year. After completion of one year, Shri Mohapatra expressed his inability to continue in the post due to his old age and other difficulties. Since the post needed to be filled up, a letter was addressed on 30th January 1981 by opposite party No. 1 to the Collector, Mayurbhanj to suggest a name or a panel of names for appointment to the post. The Collector forwarded a panel of three names with the name of one Kasinath Barik at the top on 13th March 1981. However, in the meantime the petitioner, who was holding the post of an L.D. Assistant in the Academy, put in an application offering his candidature for the post saying that he was qualified to hold the same. An order of appointment was issued in his favour on 18th April 1981 for a period of six months from the date he actually joined with the rider that his work would be reviewed after three months. The petitioner joined the post on 20th of April, 1981 and thereafter there were some notes put up by the office to review his performance at the end of three months, but no express review was made and his service was extended on 8th September 1981 for three months. Again the service was extended for further spells of three months on 21st January 1982 and 23rd April 1982. A meeting of the Executive Board of opposite party No. 1 was held on 13th July 1982 and continuance of the petitioner in the post was one of the matters in the agenda for discussion. Annexure-4 is the note on the agenda of the Secretary of the Academy wherein it was recorded that the petitioner was a B.Sc., LL.B. and that till then his performance had been satisfactory and that the Executive Board should decide as to whether his term of appointment should be extended and if not, what steps should be taken to fill up the post. Even though there was thus a recommendation in favour of the petitioner, yet suddenly he was directed on 2nd September 1982 to keep the records ready to hand over charge to Sri Kasinath Barik. He received the order of reversion on 15th September 1982 pursuant to which he handed over charge to Sri Barik on 1st October 1982 and joined in the head office as an L.D. Assistant on 11th October 1982. He was promoted as Junior Accountant on 21st September 1983. He was relieved from service on 23rd January 1987 with effect from 1st February 1987 while he was on long leave due to sickness.

3. The opposite parties filed a counter affidavit and since the petitioner filed an additional affidavit, the opposite parties have also filed another affidavit in counter. The stand taken in the counter affidavit is that the petitioner did not have the qualification as per the advertisement to hold the post and that he was never promoted to the post, but was only kept in temporary charge of it; that the matter of finalising the appointment to the post was before the Executive Board in its meeting on 28th December 1979 and in the agenda of the said meeting it was mentioned that the petitioner's performance was satisfactory; the Board had discussed the matter, considered the case of the petitioner, but found him unsuitable to hold the post and decided to appoint a person having knowledge in Chhou Dance. The appointment of Kasinath Barik as the Administrative Officer was also considered by the Board and decision was taken

to appoint him as the Administrative Officer since the Collector, Mayurbhanj who was the Chairman of the Mayurbhanj Chhou Nrutya Pratisthan had recommended his case.

4. On a petition filed by the petitioner, by order dated 29th January 1990 we had directed production of the file relating to appointment to the post, Mr. R.K. Jena, the learned counsel appearing for opposite party No. 1, has produced the file. A perusal of the same shows the facts stated in the counter affidavit to be not at all substantiated. On 28th December 1979 there could not have been any meeting relating to appointment of the petitioner or his continuance in the post since his very application for the post was made on 10th April 1981 and he was appointed for the . first time on 18th April 1981. The meeting of the Executive Board was held on 13th July 1982 and it is only in respect of such meeting that the note of the Secretary saying of the satisfactory performance of duties by the petitioner was put up. The resolution book was also produced which contains the resolution of 13th July 1982. The only resolution passed that day in respect of the topic was to vest the President with the authority to, decide regarding extension of service of the petitioner in the Training Centre. There was absolutely no discussion regarding the merits and demerits of the petitioner's performance nor any conclusion was reached that he was unsuitable for the post and no decision was also taken to appoint any suitable person having knowledge and experience of Chhou Dance. Also no decision was taken by the Board for appointment of Kasinath, Barik or whether such appointment should be made since the Collector of Mayurbhanj, who was the Chairman of the Centre, had recommended his name. While such was the position, yet it is seen from the file that an order was passed by the President on 27th August 1982 directing appointment of Kasinath Barik for one year in accordance with the decision of the Executive Board on 13th July 1982 and that the petitioner should be reverted to his former post.

5. The narration of facts as above would show that the decision to appoint Shri Barik in place of the petitioner and to revert back the latter to his former post was taken by the President without any authority of the Board. But yet the direction was purported to be issued in pursuance of the decision of the Board though in fact no such decision of the Board was in existence. As a matter of fact, besides the noting of the Secretary expressing his satisfaction on the petitioner's performance, a fact which has been acknowledged in the very counter affidavit filed by opposite party No. 1 in para-12 thereof, there was nothing adverse against the petitioner. So far as the petitioner not satisfying the requirements of the advertisement is concerned, it is candidly conceded that Shri Barik also did not answer the requirements of the advertisement. At any rate, the advertisement having been issued in 1979, and the petitioner having been appointed in 1982, it was obviously with the knowledge that suitable persons answering the requirements in the advertisement were not available. As it is, if it was the intention of the opposite parties to appoint somebody having the qualification of Degree in Dance, Drama and Music or having knowledge of Chhou Dance, the obvious step would have been to fill up the post through issue of a

fresh advertisement for the purpose. But in absence of that, there was little to choose between the petitioner and Shri Barik except the fact that while the petitioner was an in-service candidate, had been continuing in the post and his performance had been found to be satisfactory, Shri Barik was a person who had been recommended by the Collector.

6. The learned counsel for the parties have also produced before us the Constitution of the Academy which in Clause 5(iii) defines the powers : and functions of the Executive Board. Clause 7(i) prescribes the functions of the President. Under the respective clauses, the Executive Board is authorised to exercise, inter alia, the executive authority of the Academy, to be responsible for the supervision and control of the work of the Academy and its office, and has the power to prescribe the terms and conditions of service in all posts under the control of the Academy. The President is to exercise such powers as may be delegated to him by the Executive Board by resolution and the exercise of powers by him is subject to the further condition that actions taken by him are reported in the next meeting of the Executive Board for ratification. Such provisions make it abundantly clear that the executive power vests in the Executive Board only, and the President can exercise only such powers as are delegated to him by the Executive Board but however such exercise of power by him is also subject to ratification by the Board. It has not been pleaded in the counter affidavits that the President had been delegated with the function of making appointment to the post of Administrative Officer and as a matter of fact the very pleading therein is that the matter of appointment to the post was considered by the Executive Board, which shows that more probably such function had not been delegated. While no such delegation to the President regarding appointment to the post is forthcoming, it is also seen that in the meeting of the Executive Board held on 4th November 1982 an independent decision was taken by the Board to appoint Shri Kasinath Barik for one year and to revert the petitioner to the head office. Such resolution of the Executive Board would rather show that there was no delegation of the power to the President earlier.

7. As the order of the President of 27th August 1982 or the resolution of the Executive Board of 4th November 1982 shows, the decision to revert the petitioner and instead appoint Shri Kasinath Barik was not taken on any relative comparison between the two to find out their suitability for the appointment. Annexure-1 is not an order of deputation of the petitioner to the Centre, nor is it an order of transfer. It was an order of provisional appointment as the Administrative Officer. Hence, if opposite party No. 1 was considering the matter of appointment to the post, and it was decided that the post should be manned . by a person selected from amongst the petitioner and Shri Barik, it was essential that the relative merits of the two should have been judged to find out the more suitable among them. It appears as though the decision not to continue the petitioner as the Administrative Officer of the Centre was in reality taken to achieve the objective of appointing Shri Barik. In matters of public employment,

there is no scope of preferring one to the other without there being a rational basis for the same. In 1972 S.L.R. 795 (State of Mysore v. R.R. Kulkarni and Ors.) the Supreme Court observed, upholding the decision of the Mysore High Court that even if certain reversions might not have been made with the object of providing the resultant vacancies to other employees who were junior and had secured lower marks than the petitioners, yet if the impugned orders were based merely on a mis-apprehension of the purposes and the effect of the States Reorganisation Act, 1956 such a mis-apprehension could not be the basis of a reasonable or valid ground for the reversions. The exercise of every power, whatever its nature, lodged in Government authorities, is controlled by the need to confine it to the ambit within which it could justly and reasonably be expected to take place. A power used under the mis-apprehension that it was needed for effectuating a purpose, which was really outside the law or the proper scope of the power, could be said to be an exercise for an extraneous or collateral purpose. "Misuse of power" or misapplication of power or a "Detournement de Puvoir" (as it is called in Branch of Administrative Law), are terms correctly employed to describe the use of a power in this illegal fashion. It is not necessary to go so far as to establish that such misuses took place with the deliberate object of benefiting others at the expense of the aggrieved and it is enough to only prove that the power was used for collateral or legally extraneous purpose. It was decided in 1973(2) C.W.R. 1424 (Kishore Chandra Sahu v. State of Orissa and Ors.) by this Court that the service of a person cannot be terminated merely to accommodate another. From the circumstances of the case, it appears that the appointment of Shri Barik is rather a matter of pick and choose and hence the submission of Mr. Misra is correct that in the matter of such appointment, the petitioner was deprived of equal treatment.

8. An objection had been taken that though the petitioner has challenged the appointment of Shri Barik, yet he has not been impleaded as a party to this case. The fact has been explained by the petitioner in his rejoinder affidavit of Shri Barik as no longer continuing in the post and having left the Academy. An affidavit has also been filed today that the post is yet lying vacant and is in charge of the District Cultural Officer, Baripada, a fact which is also conceded by the learned counsel for opposite party No. 1. In view Of such assertions, we do not find it necessary that Shri Barik should have been impleaded as an opposite party in the case.

9. In view of such facts and circumstances of the case, we hold that the order in Annexures-7 and 11, respectively the orders directing the petitioner to keep himself ready to hand over charge to Shri Barik and the order directing his t reversion to his parent post in the Academy, are to be quashed and the petitioner is to be declared entitled to continue in the post until decision is taken by the Academy whether he is entitled to regular appointment.

10. Admittedly the petitioner has resigned from the Academy since 1987 and it is his stand that he so resigned because of being made to continue in a ministerial

post. It is his case that had he continued to hold the post of Administrative Officer, he would not have resigned. It is also brought to our notice that the petitioner is at present a practising member of the Bar but is willing to go back and join the post. Since admittedly the petitioner had reverted to the head office in 1982 and continued to serve there till 1987 and was receiving his pay, and he has also been earning from the legal profession after his resignation, it would not be proper to allow him to be reinstated with full back wages. Instead, considering the equities of the situation we direct that a lump sum amount of Rs. 7,000/- be paid to the petitioner in lieu of his back wages, within three months of his joining the post. It is further directed that if the petitioner reports for duty before opposite party No. 2, the Secretary of opposite party No. 1, within period of five weeks from today, he shall be allowed to join and hold the post and his pay shall be fixed having regard to the increments he would have earned had he not been reverted.

11. In the result, the writ petition is allowed but without any order as to costs.

A.K. Padhi, J.

I agree.