

(1999) 05 PAT CK 0020
In the Patna High Court
Case No : C.W.J.C. No. 1497 of 1997 (R)

Kameshwar Upadhyay

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 17-05-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107

Citation : (1999) 2 PLJR 759

Hon'ble Judges : S.K. Katriar, J

Bench : Single Bench

Advocate : V.P. Singh and Ganesh Prasad Singh, for the Appellant; R.K. Marathia, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—This writ petition by the sole Petitioner is for issuance of a writ in the nature of certiorari for quashing the order contained in memo No. 1128 (Legal), dated 30.10.96 (Annexure-11), passed by Respondent No. 2, the Director of Secondary Education, whereby the claim of the Petitioner for recognition of his services as acting Headmaster for purposes of permanent absorption as Headmaster of Project High School, Kasiadih, Palamu, with effect from April, 1984, has been rejected. Further prayer has been made to quash the order contained in memo No. 159, dated 19.12.97 (Annexure-12), passed by Respondent No. 3, Regional Deputy Director of Education, South Chotanagpur Division, whereby the Petitioner has been transferred and posted outside the district of Palamu. During the pendency of the writ petition, the Petitioner was placed under suspension for refusal to carry out the aforesaid order dated 18.2.97 (Annexure- 11), and was, therefore, placed under suspension in view of initiation of departmental proceeding, vide office order contained in Memo No. 358, dated 8.4.97 (Annexure-15). By order dated 7.9.97, passed by this Court, the amendment application of the Petitioner was allowed and the said order of suspension dated 8.4.97 (Annexure-15), has been allowed to be challenged.

2. According to the Petitioner, he had joined a private school as an Assistant Teacher in 1965. A large number of private schools in the State of Bihar were nationalised with effect from 2.10.1980 in terms of the Bihar Non-Government Secondary Schools (Management and Control) Act, 1981 (Act 33 of 1982). The Petitioner further states that the school in which he was appointed and was working was also nationalised and he along with many others became government servants.

3. According to the further case of the Petitioner, the Govt. of Bihar in the Department of Education had issued its letter contained in Memo No. 705, dated 12.10.1982, whereby the State Government promulgated a scheme opening 72 schools (Non-Scheduled Tribe areas) and 78 schools (Scheduled Tribe Areas) with effect from 1.1.1982. A copy of the said letter dated 12.10.1982 is marked Annexure-1 to this writ petition. The State Govt. had decided to open more schools in blocks where there were inadequate number of schools and there were no girls schools at all. The preface of the said letter states that the State Govt. had taken the following decision with respect to the organisation and management of the schools which is stated in the subsequent paragraphs of the letter, para graphs-1 and 9 of which are relevant in the present context and are set out hereinbelow for the facility of quick reference:

1.
2.
3.
4.
5.
6.
7.
8.

4. According to the Petitioner, in view of the decision contained in the aforesaid paragraph-9 of the said letter (Annexure-1), the Respondent-authorities had issued office order contained in memo No. 4740/44, dated 7.9.1982, whereby the Petitioner was deputed to work as acting Headmaster of the Kasiadih High School (Manika). He was at that point of time working as Assistant Teacher in the Government aided high school, Manika, Palamu. The order stated that the Petitioner was so deputed until appointment of permanent headmaster in the school and his deputation shall automatically terminate with the posting of a permanent Headmaster. A copy of the said office order dated 7.9.82 is marked Annexure-2 to this writ petition. For undisclosed and unexplained reasons, the Petitioner did not join the Kasiadih High School as acting Headmaster for a long time, whereafter the Respondent authorities had to issue their letter No. 1213 dated 9.4.1984, directing the Petitioner to join the Kasiadih High School without

delay, and was by the same letter called upon to explain the delay in joining the new place of posting. A copy of this order dated 9.4.84 is marked Annexure-3 to the writ petition. According to the averments made in paragraph-16 of the writ petition, the Petitioner had joined as acting Headmaster of the Kasiadih High School in April, 1984. This statement is obviously incorrect, as is manifest from the order dated 8.2.90 (Annexure-8), which states that the Petitioner had joined on 12.9.1984.

5. According to the Petitioner, he expected to be absorbed as permanent Headmaster which was not forthcoming. His representation in this behalf also remained pending with the Government for long. He had, therefore, preferred CWJC No. 350 of 1988 (R) Kameshwar Upadhyaya v. State of Bihar and Ors., which was disposed of by this Court by order dated 18.3.88 (Annexure-7), with the observation, "...we direct accordingly that the representation of the Petitioner be disposed of within three months from today and in case it is found that he is qualified to be the Headmaster, such as the one issued vide office order as contained in memo No. 1035-41, dated 17.5.85, of the office of Respondent No. 2, may be issued. In view of the said direction learned Counsel for the Petitioner prays to withdraw this application". In due observance of the directions contained in the aforesaid order dated 18.3.88 of this Court, the Respondent authorities considered the matter and Issued office order contained in memo No. 88 (Legal), dated 8.2.90 (Annexure-8), whereby the claim of the Petitioner to be confirmed as permanent headmaster was rejected on the following grounds:

(i) He was deputed to act as Headmaster until the appointment of a permanent Headmaster, and the temporary appointment was to automatically terminate with the permanent arrangement vide order dated 7.8.92 (Annexure-2);

(ii) The Petitioner's deputation was cancelled vide departmental memo No. 857, dated 25.1.85;

(iii) According to Govt. order No. 852, dated 21.12.82, the principles have been determined for permanent appointment to the post of Headmaster which states that it would not be consistent with wisdom, justice and "samta" to straightway make the acting Assistant Headmaster as permanent Headmaster. This can be done only after determining the inter-se seniority;

(iv) It may also violate the reservation policy of the Government.

6. Aggrieved by the " same, the Petitioner moved this Court for the second time challenging the validity of the said order dated 8.2.90 (Annexure-8), by preferring a writ petition bearing CWJC No. 1776 of 1995(R). The same was disposed off by this Court by order dated 2.11.95, passed in CWJC No. 1776 of 1995(R). A copy of the order is marked Annexure-10 to the writ petition, which is set out hereinbelow for the facility of quick reference:

Mr. Ganesh Prasad Singh, learned Counsel appearing on behalf of the Petitioner submits that law on this subject has already been settled by this Court in CWJC

No. 3099 of 1991, disposed of on 18th May, 1995. Therefore, he prayed for withdrawal of this application to approach the competent authority.

This application is, accordingly, dismissed, as withdrawn.

A copy of the said judgment dated 18.5.95, passed by this Court in CWJC No. 3099 of 1991, is marked Annexure-9 to the writ petition, I shall deal with it at the appropriate stage.

7. It appears that pursuant to the said order dated 2.11.95 of this Court (Annexure-10), the Petitioner moved the Respondent authorities for redressal of his grievance which has been disposed off by order contained in memo No. 1128 (Legal), dated 30.11.96, whereby the Petitioner's claim to be made a permanent Headmaster has once again been rejected by the Respondent authorities and impugned herein. A copy of the impugned order dated 30.11.96 is marked Annexure-11 to the writ petition.

8. Pursuant to the directions in the said order dated 30.11.96 (Annexure-11), and impugned herein, the Respondent authorities have issued office order contained in memo No. 159, dated 18.2.97, whereby the Petitioner's deputation to the project school was terminated with immediate effect, and he was posted on the vacant post of teacher in Economics in the Govt. aided High School at Gudri (District Singbhum). The Petitioner was by the same order directed to join his new place of posting within three days and he shall draw his salary for the month of February, 1997, in the school where he has been transferred. A copy of this order has also been impugned in this writ petition and is marked Annexure-12 thereof.

9. As is manifest from Annexure-8, the Petitioner's deputation as acting Headmaster was cancelled by departmental memo No. 857, dated 25.1.85, which was never carried out. The Petitioner has also refused to carry out the said transfer order dated 18.2.97 (Annexure-12). The Respondent authorities therefore, decided to initiate departmental proceeding against him and was by the same order placed under suspension, vide office order contained in memo No. 358, dated 8.4.97, and marked Annexure-15 hereof This being a pendente lite development the Petitioner filed an amendment application seeking permission to incorporate the same in the writ petition and to challenge its validity, which was allowed by this Court on 17.9.97.

10. In view of the aforesaid facts and circumstances of the case, Mr. Ganesh Prasad Singh, learned Counsel for the Petitioner, submitted that the Petitioner's case to be made a permanent Headmaster is concluded by the aforesaid order dated 18.3.88 (Annexure-7), passed by this Court in CWJC No. 350 of 1988 (R), whereby the Respondent authorities were directed to make a key- hole enquiry only with respect to the. basic qualifications of the Petitioner. In clear disregard of the spirit of the order dated 18.3.88, the Respondent authorities have enlarged the scope of enquiry with view to deprive him of the benefit of becoming a permanent Headmaster. He further submitted that the order dated

8.2.90 (Annexure-8), and order dated 30.11.96 (Annexure-11), travelled beyond the scope of the said order dated 18.3.88 of this Court. According to him, Annexure-7 has attained finality and, therefore, rejection of the Petitioner's case on any ground other than his basic qualifications for the post of permanent Headmaster is unwarranted. He then submitted in the alternative that on merits also, the Petitioner has a very good case and has invited my attention to Clause (1) of Annexure-1, set out in paragraph-3 hereinabove. Therefore, the distinction conceived by the Respondent authorities between teachers of a Govt. school and those of the project school is unwarranted. He has placed reliance on the judgment dated 18.5.95 (Annexure-11), passed by this Court in CWJC No. 3099 of 1991 (R), which fully covers the Petitioner's case. He also relied on the order dated 13.11.84. (Annexure-5), passed by this Court in CWJC No. 4946 of 1984 (R).

11. Mr. R.K. Marathia, learned Govt. Pleader No. II, appearing on behalf of the Respondent authorities, submitted that the aforesaid order dated 8.2.90 (Annexure 8), was really challenged by the Petitioner in this Court by preferring CWJC No. 1719 of 1990 (R) which was withdrawn. The SLP filed before the Supreme Court was also permitted to be withdrawn to enable the Petitioner to move before an appropriate forum, as is manifest from paragraph-31 of the writ petition. Therefore, CWJC No. 1776 of 1995(R), disposed off by this Court by order dated 2.11.95 (Annexure-10), was not maintainable and was gross abuse of the process of the Court. He next submitted that the aforesaid CWJC No. 1776 of 1995(R), which was without a cause of action, and the Petitioner had withdrawn the same, vide aforesaid order dated 2.11.95 (Annexure-10), on his own request and of his own volition. The seal of finality stamped on the Petitioner's case by conclusion of the proceeding in CWJC No. 1719 of 1999 (R), followed by the SLP proceeding, was further reinforced by the aforesaid order dated 2.11.95, in CWJC No. 1776 of 1995(R) (Annexure-10). It is further submitted that the impugned order dated 30.11.96 (Annexure-11) in substance reiterated the aforesaid order dated 8.2.90 (Annexure-3). All proceedings after CWJC No. 1719 of 1990 (R) are, therefore, barred by the principle of constructive res judicata. He relied on the following reported judgments:

(i) Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, ;

(ii) Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, ;

and (iii) 1988 PUR 352 Nandan Maharaj v. Birohjika Central Cooperative Bank.

12. Learned Govt. Pleader further submitted that repeated writ petitions for the same cause of action, which concluded against the Petitioner in its earlier stages, was yet agitated by the Petitioner which is surely misuse of the process of the Court. In other words, the aforesaid order dated 8.2.90 (Annexure-8) had finally concluded matters against the Petitioner and all proceedings after CWJC No.

1719 of 1990 (R), and the following Special Leave Petition, either before the Respondent authorities or before this Court, amount to abuse of the process of the Court. Law is well settled that writ jurisdiction cannot be invoked by a person who misuses the process of the Court.

13. He further submitted that reliance placed by the Petitioner on the orders of this Court dated 13.11.94 (Annexure-5), which relies on another judgment dated 19.9.84, of this Court in CWJC No. 4505 of 1984, is of no avail to the Petitioners, inasmuch as he has not explained parity between the Petitioner's case and the Petitioners of those two writ petitions. The learned Govt; Pleader further submitted that reliance placed by the Petitioner on the judgment dated 18.5.95 of this Court in CWJC No. 3099 of 1991 (R), vide Annexure-9, is also of no avail to the Petitioner, because the issues raised therein were quite different and, in any case, the matter was remitted back to the authorities for order in accordance with law. He further submitted that the Petitioner's submission that his case concluded in his favour with the order dated 18.3.88 (Annexure-7) in CWJC No. 350 of 1988 (R), is also incorrect. The Court had directed the authorities to examine the entire conspectus of the matter relating to the Petitioner's claim to be confirmed as Headmaster of the project school. He further submitted that the reasonings recorded in the order dated 8.2.90 (Annexure-8), as well as the impugned order dated 30.11.96 (Annexure-11), are sound and convincing and, therefore, no interference is called for. He lastly submitted that the order of suspension dated 8.4.97 (Annexure-15) is a misjoined cause of action, provides a separate cause of action to the Petitioner, and should be agitated separately. It is manifest from a plain reading of the said order of suspension dated 8.4.97 that he has been suspended because of the following reason mentioned in the order itself:

A copy of the said report of the Deputy Commissioner, Palamu, is marked Annexure-A to the counter affidavit, which was addressed to the Regional Deputy Director of Education, Ranchi, recommending the Petitioner's suspension because of his attempt to molest a girl student of his own school. This is, therefore, the reason for the order of suspension, and not on account of his refusal to carry out the transfer order.

14. Mr. Ganesh Prasad Singh, in reply, submitted that no finality can be attached to the aforesaid order dated 8.2.90 (Annexure-8), because CWJC No. 1719 of 1990 (R) as well as the following SLP before the Supreme Court were disposed of at the preliminary stage and the subsequent proceedings cannot, therefore, be hit by the principles of res judicata or constructive res judicata. He further submitted that the Petitioner's case is surely at par with that of the Petitioner in CWJC No. 3099 of 1999(R), disposed off by Annexure-9. He next submitted that though the order of suspension was passed way back on 8.4.97 (Annexure 15), no step has so far been taken for initiation of the departmental proceeding. He lastly submitted that the report of the Deputy Commissioner (Annexure-A), has been negated by the police report dated 19.1.97 (Annexure-18), whereby the

police has recommended action u/s 107, Cr.P.C. against the girl's side.

15. Having carefully considered the rival submissions. this Court is of the view that Petitioner's case for confirmation as Headmaster of the project school must come to an end with the present writ petition. He has undoubtedly engaged himself in the luxury of a protracted and never-ending chain of proceedings to the harassment of the Respondent authorities as well this Court. At the Government level, the matter really concluded with the order dated 8.2.90 (annexure-8), which recorded sound reasons for rejecting the Petitioner's case which are summarised in paragraph 5 hereinabove. This Court considers the said reasoning as quite sound and approves of them. The Petitioner had challenged the validity of Annexure-8 in CWJC No. 1719 of 1990(R), and there after in SLP before the Supreme Court and he did not succeed. The matter rested with that and any further proceeding taken by the Petitioner either before the Respondent authorities or before this Court was redundant. This Court is also of the view that the order dated 18.3.88 (Annexure-7), passed by this Court in CWJC No. 350 of 1988(R), had really meant that the Respondent authorities should examine the entire conspectus of the matter with regard to the Petitioner's claim to be confirmed as Headmaster of the project school also taking into account the office order as contained in memo No. 1035-41 Patna, dated 17.5.85 (Annexure-6). The Petitioner has not made any attempt whatsoever before this Court to establish parity with the case of the Headmaster governed by Annexure-6.

16. The Petitioner's alternative submission on merits that he is fit to be made permanent Headmaster is equally unconvincing to this Court. The Petitioner relies on paragraph-1 of the aforesaid scheme dated 12.10.82 (Annexure-1), quoted in paragraph-3 hereinabove, is also misplaced. It has been rightly stated in the impugned order dated 30.11.96 (Annexure-11) that the project schools have not so far been included in the category of Govt. schools, nor have the service conditions of the teachers of the project schools been declared at par with those of the Govt. schools. In any case, no averment has been made in the writ petition, let alone any submission during the course of arguments, basing his claim on seniority. The Petitioner's submission on merit is also hereby rejected.

17. The Petitioner's reliance on the order dated 17.5.85(Annexure-6), of the Respondent authorities is also of no avail to him, because no effort whatsoever has been made before this Court to establish parity with the Headmaster governed by the same. Equally misplaced is the Petitioner's reliance on the judgment dated 18.5.95 (Annexure-9), passed by this Court in CWJC No. 3099 of 1991 (R), inasmuch as the issues raised therein were quite different, as is manifest from paragraph-1 of the judgment which reads as follows:

the present application by which the claim of the Petitioner for his approval and recognition as founder Headmaster of the High School at Bhairoganj, P.S. Chandan, District Bhagalpur, and for the regularisation of his services

Furthermore, this Court had not granted any relief to that Petitioner and only remitted the matter back to the authorities for fresh consideration in accordance with the directions therein.

18. This takes me on to the impugned order dated 30.11.96 (Annexure-11). This Court fully approves of the reasonings recorded therein which are summarised hereinbelow:

(i) Appointment of permanent Headmaster shall be made by the Government at the departmental level, and temporary appointment of acting Headmasters shall be done by the district authorities. Appointment of permanent Headmaster to the project school will be done in accordance with the rules as per the recommendations of School Service Board.

(ii) The project schools have not so far been included in the category of Govt. Schools, nor have the service conditions of the teachers of the project schools been declared to be at par with those of the Govt. schools. The service conditions applicable to the teachers of the Govt. schools have not so far been made applicable to the teachers of the project schools and, therefore, no benefit of the former can be extended to the latter.

(iii) All appointments to the project schools shall be made from amongst the existing employees of the Govt schools on the basis of the recommendation of the School Service Board and a panel of 224 lady candidates have already been received from the School Service Board.

(iv) The Petitioner is governed by the provisions of the Service Condition Rules, 1983, and the benefit of promotion etc. shall be given to him as per the provisions of the said Rules. He was merely deputed to the project school by way of temporary arrangement, and he was not permanently transferred. This arrangement of the project school is absolutely temporary and, therefore, no teacher so deputed can raise any claim to be made permanent on the basis of such officiation.

(v) The Petitioner's claim is rejected, his deputation to the project school is terminated, and he is directed to be transferred out of the district of Palamu.

The impugned order dated 30.11.96 (Annexure-11), rejecting the Petitioner's claim to be confirmed as a permanent Headmaster, is hereby upheld.

19. The facts and circumstances found hereinabove present the Petitioner in dim light. The Petitioner was deputed to act as Headmaster of Kasiadih High School, Manika by way of temporary arrangement by order dated 7.9.82 (Annexure-2), which was carried out only after the order dated 2.4.84 (Annexure-3), was issued and he had joined as such on 12.9.84. He had thus taken exactly two years to carry out the transfer order which he was bound to obey. No effort at all has been made before this Court to explain the delay. Secondly, the Petitioner's deputation had been cancelled vide departmental memo No. 857, dated 25.1.85. Had the Petitioner carried out the same, all subsequent proceedings would have

become impossible. Therefore, this Court blames him no end for the all proceedings ever thereafter which took place only because of his indisciplined and recalcitrant behaviour. Thirdly, the Petitioner's case had really rested with the order dated 8.2.90 (Annexure-8), and the challenge to the same by way of CWJC No. 1719 of 1990 (R), and following SLP before the Supreme Court, having failed, nothing survived thereafter. Yet he continued to agitate the matter to the harassment of the Respondent authorities as well as this Court. Fourthly, as stated above, the Petitioner was reverted by order contained in memo No. 875, dated 25.1.85, as is manifest from Annexure-8, which has not been carried out till date. The same was reiterated by the impugned order dated 30.11.96 (Annexure-11), which has also not so far been carried out. Fifthly, the Petitioner's suspension by order dated 8.4.97 (Annexure-15), for molesting a girl of his own school, adds to his problems. I must at this stage dispose off the Petitioner's submission to the effect that the report dated 9.3.97 (Annexure-A), has been negated by the police report dated 19.1.97 (Annexure-18), is misconceived, inasmuch as this police report relates to a proceeding u/s 107, Cr.P.C., and has nothing to do with the substantive criminal case against the Petitioner.

20. This Court is clearly of the view that the Petitioner's effort to challenge the order of suspension dated 8.4.97 (Annexure-15) must fail on account of misjoined cause of action. This relief has nothing to do with the dominant relief prayed for in the writ petition.

21. In conclusion, the challenge to the impugned order dated 30.11.96 (Annexure-11) fails. The Petitioner's claim to be confirmed as a permanent Headmaster is hereby rejected. By his refusal to carry out the order of reversion dated 25.1.85, he made the protracted proceeding possible which would have otherwise been impossible. The Petitioner has needlessly been pursuing the matter after the dismissal of CWJC No. 1719 of 1990(R), and the SLP before the Supreme Court. The Petitioner has engaged himself in the luxury of protracted and harassing proceedings before the Respondent authorities as well as this Court. This Court disapproves the conduct of the Petitioner from the very inception to the present proceeding. He does not seem to rest till such time he gets the relief. The Petitioner's effort to challenge the validity of the order of suspension dated 8.4.97 (Annexure-15) is also hereby repelled on account of misjoined cause of action. The Respondent authorities would be well advised to initiate departmental proceedings against the Petitioner forth with. They are reminded of the judgment of the Privy Council reported in AIR 1930 PC 118 *Alexandre Bouzourou v. The Ottoman Bank*, wherein it has been held that an employee is bound to obey and carry out a transfer order and his disobedience can justifiably be treated by the employer as a *faute grave* making the servant liable for dismissal.

22. The writ petition is, therefore, dismissed with costs quantified at Rs. 5000/- (live thousand). The Respondent authorities shall deduct the same at the earliest

possible opportunity from the dues of the Petitioner.