

(1990) 11 PAT CK 0031

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 1169 of 1987

Krishna Kishore Singh

APPELLANT

Vs

Bihar Raj Homeopathic Medicine Board and Others

RESPONDENT

Date of Decision : 09-11-1990

Acts Referred:

Bihar Development of Homeopathic System of Medicine Act, 1953 — Section 19, 3
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Constitution of India, 1950 — Article 14, 226, 227

Citation : (1992) 1 PLJR 433

Hon'ble Judges : G.C. Bharuka, J

Bench : Single Bench

Advocate : Surendra Kr. Sinha, Subash Kr. Verma and H. Singh, for the Appellant; Kanhaiya Pd. Singh and Awadhesh Pd. Sinha for Respondents Nos. 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

G.C. Bharuka, J.—In this writ application the Petitioner is aggrieved by the orders as contained in Annexure "1" and "3" to the writ application. Annexure "1" is an order of suspension of service of the Petitioner and Annexure "3" spells out the acceptance of the letter of purported resignation written by the Petitioner.

2. It is an admitted fact that the Petitioner was appointed as a clerk in the office of the Respondent Bihar State Board of Homeopathic Medicine, Patna (Respondent No. 1) on 20.6.1961 and had been confirmed as such. The Board has been constituted u/s 3 of the Bihar Development of Homeopathic System of Medicine Act, 1953 (hereinafter referred to as the "Act"), According to the Petitioner on 14.5.1980 he was served with the order bearing office order No. 442 dated 13.5.1980 under the hand of Respondent Registrar of the Board. According to this order he was suspended from service and during the period of suspension he was to get only subsistence allowance. The further case of the Petitioner is that because of this abrupt and uncalled for action taken against

him, he got completely upset and out of disgust he wrote a letter to the Registrar, inter alia, indicating therein that because of the uncalled for action taken against him he feels that it will be against the morals to remain on the post. Treating this to be a letter of resignation the Respondent Registrar by Annexure "3" communicated that the same is accepted. On receiving Annexure "3" the Petitioner on the very next day i.e. on 16.5.1980 communicated to the Registrar that it was wrong to treat the letter Annexure "2" to be a letter of resignation because the same was written out of disgust and as a measure of resentment. He also wrote that there was no occasion on his part to resign. Despite this letter, the Respondent Chairman and the Registrar did not respond and the service of the Petitioner was treated as terminated.

3. The Petitioner thereafter filed a writ application in this Court being C.W.J.C. No. 1478 of 1980 which appears to have been heard on several dates and ultimately on 15.2. 1984 the Petitioner withdrew the writ application, in view of a categorical statement made by the counsel of the Board before the Court that the Respondent Chairman of the Board has assured to sympathetically consider the ease of absorption of the Petitioner's son in service of the Board within three months from the date of the order of this Court. In spite of this categorical assurance given in the Court the son of the Petitioner was not absorbed in the service of the Board. Therefore, another application was filed in the High Court for a direction to absorb the son of the Petitioner as per the assurance given by the Board. This application was disposed of by order dated 25.5.1985. In this order it was, inter alia, observed that "in view of the fact that the Petitioner's son is not eligible (being minor) we modify our order dated 15.2.1984 to the extent that the Board after having been duly notified as constituted may, as soon as possible thereafter, create vacancy for absorption of the Petitioner's son purely on sympathetic ground." Though the son of the Petitioner attained majority in September, 1984, still he was not absorbed in the service of the Board.

4. Mr. Kanhaiya Prasad Singh, Senior Advocate appearing on behalf of the Board, has at the very threshold, raised a preliminary objection. He submits that since the Petitioner had withdrawn the first writ application, therefore the second writ application is not maintainable. The objection cannot be sustained for the simple reason that the Petitioner had withdrawn the first writ application relying on the promise made on behalf of the Board that the son of the Petitioner will be absorbed in service. Admittedly this promise has not been carried out, rather, in the counter affidavit a stand is being taken that the Board is not bound to carry out that promise. Though the principles of res judicata do not apply in writ proceedings but still the principles underlying the said rule has been made applicable by the Supreme Court in the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, . But in that case the Supreme Court has upheld the application of the said principle on the ground of public policy. This principle however cannot be applied as a complete bar because otherwise will be destructive of a more benevolent public policy that au

instrumentality of the state like the Board can resile from its promises and thereby defeat the rightful claim of citizens. As is evident from the facts of the present case, the withdrawal of the earlier writ application was not unqualified rather, it was inspired by some promises. Moreover in the aforesaid case in paragraph 8 it has been observed by the Supreme Court that "the question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226 and 227 of the Constitution, of India also. It is common knowledge that very often after a writ petition is heard for some time when the Petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the Petitioner or by his counsel to permit the Petitioner to withdraw from the writ petition, without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition." Admittedly this is not the situation here. There is nothing on the record to suggest that the Court at any point of time had shown its unwillingness to admit the writ petition. In this view of the matter, if in a case like the one at hand the principles I underlying Rule 1 of Order XXIII of the CPC is applied in its strict sense than instead of advancing the cause of justice it would lead to miscarriage thereof. Apart from this the approach of the Board, on the face of it, is against fair play which it embodied in Article 14 of the Constitution and is equally applicable to a State instrumentality like the Respondent Board. Accordingly, I hold that the preliminary objection is devoid of any merit and must be rejected.

5. Now, coming to the merit of the case, the first submission, which has been made OH behalf of the Petitioner, is that neither the Respondent Chairman nor the Registrar had any authority to either suspend the Petitioner from his service or to accept the purported letter of resignation. The answer to this question will devolve on an interpretation of the provisions of the Act. The Board has been constituted u/s 3 of this Act. Section 19 of the Act says that it is the Board, which is competent to appoint its officers and servants. The Act does not provide that either the President or the Registrar can exercise any power with regard to the appointment, discharge or dismissal. No rule so far has been framed with regard to the service condition of the employees of the Board. Nothing has been brought on the record to show that the Board has ever delegated its power with regard to the appointments etc. either in favour of the President or the Registrar. It is a matter of record that neither Annexure I i.e. order of suspension was issued nor Annexure 3, the acceptance of the alleged letter of resignation, was accepted by the Board. In these circumstances, it can be safely said that none of these two impugned orders had any legal sanctity and as such these are nullities. Admittedly, on the very next day of communication of Annexure 3, the Petitioner had clarified that he had never intended to resign from his service and his letter (Annexure 2) cannot be interpreted or accepted in that sense. The Respondents have tried to justify the legality of the impugned orders on the ground tint the

said orders have been subsequently ratified by the Board.

6. In paragraph 17 of the counter affidavit, it is said that "the order passed by the then President (Sri Lal Bihari Singh, Respondent No. 2) accepting the resignation of the Petitioner was subsequently confirmed on 4.2.1983 which was ratified by the duly constituted Board on 25.9.1994". The said resolutions have been annexed as Annexure E and F to the Counter Affidavit.

7. Under the aforesaid circumstances, the question which falls for consideration is whether the order which was without jurisdiction and nullity at its inception having been passed by a person unauthorised to pass the same can be legalised by ratification of the competent authority? It is now settled that the ratification cannot make null and void orders legal and valid.

8. In this connection I may usefully refer to the case of *Barnard v. National Dock Labour Board* (1953) 2 Queens Bench 18. In this case some dock workers were suspended from the work and pay, by the Port Manager of the London Dock Labour Board, who had no authority to take any such disciplinary action. The National Dock Labour Board, which was legally competent to take such disciplinary action subsequently ratified the suspension of the said dock workers. While considering the legality of the aforesaid order of suspension, it was held by the court of appeal that since the Port Manager has no authority to suspend the dock workers, therefore, the notices of suspension were a nullity and the subsequent ratification is of no avail.

9. A similar view has been recently taken by the Supreme Court in the case of *Tej Pal Singh v. State of U.P. and Ors.* AIR 1986 SC 604. In this case it was held that the impugned order of premature retirement passed by the Governor without having before him the recommendation of the Administrative Committee or of the Full Court was void and ineffective. The reason for taking this view was that the Governor could have acted only on the recommendation of the Administrative Committee of the High Court. It was held that the deviation in this case was not a mere irregularity which could be cured by the ex-post facto approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed. The error committed in this case was held to be an incurable defect amounting to a nullity. Accordingly, the order of premature retirement was held to be void and ineffective.

10. In the aforesaid premises and the law laid down by the Supreme Court it has to be held that both the order of suspension (Annexure 1) as well as the order of acceptance of purported resignation (Annexure 3) have been passed without any authority and as such are void and inoperative. Accordingly, the impugned orders are quashed. The Petitioner shall be treated as having been in continuous service. He will be entitled to the arrears of salary and other allowances admissible to him under the terms of his service. It is directed that the Respondent Board should pay all the arrears to the Petitioner within four months

from today. Under the circumstances of the case, there will be no order as to cost.