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**(2001) 07 PAT CK 0041**

**In the Patna High Court**

**Case No : Civil Writ Jurn. Case No. 7011 of 2001**

Lakshmi Roy

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

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**Date of Decision : 02-07-2001**

**Acts Referred:**

**Citation : (2002) 4 RCR(Civil) 626**

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## **Judgement**

Sachchidanand Jha, J.—The petitioner is Chairman of the Bihar Public Service Commission. He was appointed on the post on 24-1-1997. On 11-11-2000 he was taken into custody by the CBI in connection with a criminal case. RC 43 (A)/97/Pat, relating to the irregularities in the Engineering Entrance Examination. At the relevant time the petitioner was Principal, Regional Institute of Technology, Jamshedpur. After the Investigating Agency i.e. CBI failed to submit chargesheet within the period of 90 days the petitioner was granted bail in terms of Section 167(2) Cr. P.C. on 12-2-2001. On the next day, he joined the office purporting to "resume his duties" with information to the State Government, the Governor etc. In the meantime, after the petitioner was taken Into custody, respondent No. 4 Raja Ram Prasad had been appointed as Incharge Chairman of the Commission till further orders. A dispute arose between the petitioner and respondent No. 4 as to performance of the duties of the Chairman. According to the petitioner, in terms of Article 316(1A) of the Constitution the appointment of respondent No. 4 as Incharge Chairman came to an end upon his (petitioner) resuming the duties of the post, according to respondent No. 4. since he had been appointed as Incharge Chairman till further orders his such appointment could cease only after issuance of a notification allowing the petitioner to resume his duties. The petitioner. In the circumstances, has come to this Court seeking direction to restrain respondent No. 4 from functioning as Incharge Chairman of the Commission, to declare alt decisions taken by respondent No. 4 on or after 13-2-2001 as null and void and unconstitutional, and to further declare that the notification dated 28-11-2000 has become infructuous and Inoperative with effect from 13-2-2001.

2. The case came up before the Vacation Judge on 30-5-2001 and adjourned to enable the respondents to file counter affidavit. The pendency of the case was not to stand in the way of the respondent/competent authority in passing order. The State Government has filed its counter affidavit. The Commission and respondent No. 4 also have filed their respective counter affidavit.

3. It is not in dispute that a temporary or ad hoc appointment of an Incharge Chairman in the situations envisaged under Clause (1A) of Article 316 of the Constitution can be made as stop-gap arrangement. It is also not in dispute that in the instant case situation had arisen warranting appointment of an Incharge Chairman. The appointment of respondent No. 4 as Incharge Chairman, as such, is not under challenge. The case of the petitioner is that after he resumed his duties, he cannot be obstructed in any manner from performing the duties of Chairman as the temporary appointment of respondent No. 4 came to an end upon his resumption of duties in terms of the provisions of Clause (1A) of Article 316. The case of the State Government is that the acts committed by the petitioner, which are subject matter of investigation in the aforementioned criminal case RC 43(A)/97/Pat constitute "misbehaviour" within the meaning of Article 317 of the Constitution in respect of which report has been submitted to the Government of India. The further case of the Commission is that unless the notification dated 28-11-2000 is cancelled or annulled, the petitioner cannot perform the duties of the Chairman. Since respondent was appointed Incharge Chairman under the orders of the Governor, the matter was reported to the Governor and the decision is awaited.

4. The only point for consideration is whether the petitioner is entitled to perform the duties of Chairman of the Commission upon his resumption of the office.

5. Section 316 of the Constitution provides for appointment of the members and Chairman of the Public Service Commission - by the President in the case of the Union Commission or Joint Commission and by the Governor in the case of a State Commission. Under Clause (2), the members of the Commission have tenure of six years or till they attain the age of 65 years in the case of Union Commission, and 62 years in the case of State Commission /Joint Commission, whichever is earlier. Article 317 provides for removal and suspension of the members of the Commission. Article 318 empowers the President/Governor, as the case may be. to make regulations with respect to conditions of service of members/staff of the Commission.

6. The provisions relating to appointment of Incharge Chairman contained in Clause (1A) of Article 316 and those relating to removal and suspension of the members contained in Article 317 so far as relevant, may be quoted as under :

"316(1) ...

316(1A). If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed

under Clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission, may appoint for the purpose. (2) ...

317. Removal and suspension of a member of a Public Service Commission. - (1) Subject to the provisions of Clause (3), the Chairman or any other member of a Public Service Committssion shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under Article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor, in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under Clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in Clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman, or such other member, as the case may be-

(a) is adjudged an insolvent: or

(b) engages during his term of office in any paid employment outside the duties of his office : or

(c) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) ...

7. It is relevant to mention here that the Governor of Bihar has framed regulations with respect to the members and staff of the Bihar Public Service Committssion titled "The Bihar Public Service Commission (Conditions of Service) Regulations. 1960" in exercise of powers under Article 318 referred to above. Regulation 8 of the said Regulations which relates to the seniormost Member of the Commission holding current charge of the administrative duties of the Chairman during period of his absence which too is relevant in context may also be quoted as under :

"When the Chairman is absent on leave or otherwise, the seniormost Member may hold current charge of the administrative duties of the Chairman and be allowed a special pay of Rs. 200 per month during such period."

8. From the aforementioned provisions it would appear that the tenure of a

member of Commission is six years or until he attains the age of 62 years (in the case of State Commission, which ever is earlier) he may at any time resign the office or be removed from the office. Such removal may be on the ground of misbehaviour after the Supreme Court on reference made by the President on inquiry reports that the Chairman /member, as the case may be, ought to be removed on such ground. The removal may also be on the ground of insolvency or accepting at remunerative employment beyond the duties of his office or where in the opinion of the President, he becomes unfit to perform his duties by reason of infirmity of mind or body. There is no other way in which the Chairman/member can be removed from the office. The Chairman or any other member of the Commission may, however, be suspended from office by the President in the case of the Union Commission and by the Governor in the case of State Commission, where reference has been made to the "Supreme Court by the President under Clause (1) of Article 317 until the President passes final orders on receipt of the report of the Supreme Court on such reference.

9. Admittedly, though the facts have been reported to the Central Government, no reference has been made by the President to the Supreme Court. In the notings /minutes of the Department in the relevant file which was produced at the time of hearing of the case, reservations have been expressed about the propriety to permit the petitioner to function as Chairman of the Commission in view of the fact that the criminal case relates to his conduct in selection of candidates for admission in the Engineering colleges. The reservations, if I may say so, are not ill-placed. The argument of the counsel for the petitioner, however, is that the alleged acts of the petitioner, which are subject-matter of the criminal case, have no nexus with the performance of the duties as Chairman of the Commission and, therefore, they do not constitute misbehaviour within the meaning of Article 317. I do not wish to go into that aspect of the case. Expressing opinion in that regard would amount to pre-judging the issue. Whether the alleged acts of the petitioner constitute "misbehaviour" would arise for consideration only after the President makes reference to the Supreme Court and the petitioner is placed under suspension under Article 317(2) or, perhaps, after the final order under Article 317(1) is passed on receipt of the opinion of the Supreme Court.

10. It was submitted by the counsel for the petitioner that not allowing the petitioner to perform the duties of the Chairman virtually amounts to keeping him under suspension. I find merit in this argument. The only situation in which the Chairman or any other member of Commission can be placed under suspension being existence of a reference by the President to the Supreme Court, and there being no such reference, there can hardly be any dispute that no occasion has really arisen to suspend the petitioner from the office of the Chairman. If that is so, I wonder if he can be kept out of office. If the order of suspension cannot be passed at the present juncture, not allowing him to function on the post will virtually amount to suspending him. What cannot be achieved directly cannot be permitted to be indirectly achieved.

11. It would appear that the whole dispute in the present case has arisen on account of clause "till further orders" in the impugned notification dated 28-11-2000. In my opinion, Article 316(1A) does not contemplate continuance of the ad hoc appointment "till further orders" in the sense the clause is ordinarily understood. From a close reading of Clause (1A) of Article 316 it would appear that an In-charge Chairman can be appointed, broadly speaking, in two situations--where the office of Chairman becomes vacant, secondly, where the Chairman by reason of his absence or for any other reason is unable to perform the duties of his office. So far as the continuance of the appointment of the In-charge Chairman is concerned, it would appear that while in the former situation, that is, where the office of the Chairman of the Commission becomes vacant, such temporary appointment is to continue "until some person appointed under Clause (1) to the vacant office has entered on the duties thereof : in the other situation, that is where the Chairman by reason of absence or for any other reason is unable to perform his duties, such temporary appointment is to continue "until the Chairman has resumed his duties". The present case is not one of the office of the Chairman of the Commission falling vacant. The office of Chairman may fall vacant on completion of the tenure of the incumbent or on his death, resignation or removal, as the case may be. The present case falls in the second category i.e. where the Chairman is unable to perform his duties because of his absence. In this regard, on behalf of the Commission it was submitted that Clause (1A) of Article 316 contemplates a third situation also where the Chairman is "for "any other reason" unable to perform his duties. I find little relevance in the argument. Whether it is on account of "absence" or "for any other reason" in either situation, the effect is the same, that the person is unable to perform the duties. The absence of the petitioner from the office in the instant case was on account of his incarceration. It came to an end after he was released on bail and reported in the office to resume his duties. The absence having come to an end on 13-2-2001 the continuance of respondent No. 4 cannot be said to be in consonance with Clause (1A) of Article 316. In fact, the clause "till further orders" in notification dated 28-11-2000, in my opinion, does not appear to be in accordance with Article 316(1A) of the Constitution.

12. The above declaration, it must be clarified, however, will be prospective in effect. Firstly, it is well settled that the declaration by Courts cannot be given retrospective effect. See the case of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., . Secondly, respondent No. 4 despite the defect in his appointment, post-13-2-2001, having performed the duties by virtue of the clause "till further orders" in the notification dated 28-11-2000 must be held to be valid on the "de facto" doctrine. In Gokaraju Rangaraju Vs. State of Andhra Pradesh, , the decision of an Additional District Judge was challenged on the ground of defect in his appointment. The Supreme Court repelling the challenge, held that a Judge de facto is one who is not a mere intruder or usurper but one who holds office under colour of lawful authority, though his appointment is defective or may later be found to be defective. Whatever be the defect of his

title to the office, judgments pronounced by him and the acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as Judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief.

13. In the instant case if the validity of the acts done by respondent No. 4 as In-charge Chairman after 12-2-2001 are allowed to be questioned it would give rise to state of uncertainty and confusion. It would have bearing not only on the contending parties i.e. the petitioner and respondent No. 4 but a large number of candidates who hardly have any say or interest in dispute between them. It is unfortunate that the petitioner after "resuming" his duties on 13-2-2001 passed orders and committed certain acts referred to in the counter-affidavit of respondent No. 4 which, to say the least, do not behove well of a holder of the Constitutional post of Chairman of the Public Service Commission. Such acts of the petitioner must be disapproved and it must be clarified that anything done by the petitioner, purporting to undo the acts done by respondent No. 4 as In-charge Chairman--whether before or after 13-2-2001 till date --will be treated as non est.

14. It must also be clarified that the present order of this Court by virtue of which the petitioner will be entitled to function as full-fledged Chairman from today, will be subject to such decision as may be taken by the Governor, should such occasion arises after reference is made by the President to the Supreme Court under Article 317(1). Needless to say, in such a situation it will be open to the petitioner to challenge any such order of the Governor. 15. In the result, this writ petition is allowed. The notification dated 28-11-2000 contained in Annexure-2 is modified by deleting the clause "till further orders" therefrom. Such deletion would have prospective effect from today. The petitioner will thus be allowed to act as Chairman and perform the duties of the office in full-fledged manner, subject to the observations made hereinabove.